No. 20-730

IN THE

Supreme Court of the United States

LINDSAY R. COOPER, ET AL.,

Petitioners,

v.

TOKYO ELECTRIC POWER COMPANY HOLDINGS, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners allege they were exposed to radiation off the coast of Japan after a devastating tsunami struck Respondent TEPCO's Fukushima Nuclear Power Plant. Despite where the incident occurred, despite TEPCO being a Japanese company, and despite the availability of a comprehensive compensation framework in Japan, petitioners sued in federal court in California. Following the Japanese government's "unequivocal objection to the exercise of jurisdiction in U.S. courts," Pet. App. 38a, the district court dismissed under principles of international comity and the Ninth Circuit affirmed.

Throughout two rounds of briefing in the district court and two appeals, petitioners consistently urged the district court and Ninth Circuit to apply a settled standard for whether this case should be dismissed under principles of international comity. Petitioners argued that the district court's application of that standard was an abuse of discretion based on fact-bound reasons arising from the "circumstances of this unique case." *E.g.*, P.F.R.E.B. 13. Petitioners now ask this Court to review under an alternative comity approach not pressed or passed upon below.

The question presented is:

Whether the Ninth Circuit erred in ruling that the district court had not abused its discretion in its fact-bound application of a settled standard governing dismissal on international comity grounds, a standard that petitioners affirmatively urged below.

CORPORATE DISCLOSURE STATEMENT

Tokyo Electric Power Company Holdings, Inc. (formerly known as Tokyo Electric Power Company, Inc.) ("TEPCO") is a publicly traded Japanese corporation. A majority of its shares are owned by the Nuclear Damage Liability and Decommissioning Facilitation Corporation, which is an agency or instrumentality of the Government of Japan. No publicly traded corporation owns more than 10% of TEPCO's stock.

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INTRODUCTION

Invoking a series of inapposite doctrines never pressed below, petitioners seek review of what actually amounts to the fact-bound application of "traditional adjudicatory comity analysis," Pet. 14, which petitioners themselves invoked in this case and which they acknowledge is "long … accepted," Pet. 1. The decision below is correct, and neither the district court's application of an unchallenged, settled standard to the "circumstances of this unique case," P.F.R.E.B. 13, nor the Ninth Circuit's affirmance of that discretionary decision warrants review.

After natural disasters damaged TEPCO's Fukushima Nuclear Power Plant ("FNPP"), the Japanese government established an ongoing, "comprehensive" compensation program for those affected, committing more than 1% of Japan's GDP to the program. Pet. App. 4a; C.A.E.R. 743. Despite the program's multiple avenues for claims in Japan, petitioners "chose to sue [TEPCO] in the Southern District of California." Pet. App. 4a. After TEPCO's initial motion to dismiss, the Japanese government lodged an "unequivocal objection to the exercise of jurisdiction [over this case] in U.S. courts." Pet. App. 38a. Japan warned that the very "viability of [its] carefully wrought claims-resolution and compensation system ... is threatened if Fukushima-related damage claims, like those in this case, are adjudicated outside of Japan." C.A.E.R. 742. The United States filed a "measured response" that "expressed no objection that Japan be permitted to adjudicate these claims in its own courts." Pet. App. 37a–38a.

TEPCO again moved to dismiss on various bases, including lack of personal jurisdiction, *forum non conveniens*, and—at issue in the petition—international comity. As petitioners themselves

urged, *e.g.*, C.A.E.R. 188, the district court applied the international comity framework set forth in *Mujica v. AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014), *cert. denied*, 577 U.S. 1049 (2015). Petitioners explained to the district court that "[c]omity is … a discretionary act of deference by a national court to decline to exercise jurisdiction in a case properly adjudicated in a foreign state," and argued that "the *Mujica* factors for weighing concerns of international comity … do not counsel in favor of dismissal." C.A.E.R. 188. The district court weighed the factors differently and dismissed. It found that the balance of governmental interests favored adjudication in Japan, given (i) the Japanese government's explicit objection to this case going forward in the United States, (ii) the Japanese government's commitment of more than *$76 billion* to resolve FNPP-related claims, (iii) the fact that Japanese law would govern key aspects of this case, and (iv) the United States government's relative neutrality regarding where this case should proceed. Pet. App. 72a–77a.

The Ninth Circuit (in an opinion by Judge Bybee, joined by Judges Wardlaw and Tashima) unanimously affirmed, applying abuse-of-discretion review (as urged by petitioners, C.A.O.B. 9) and considering the *Mujica* factors (as also urged by petitioners, C.A.O.B. 34–35). *See* Pet. App. 30a–38a. Petitioners then sought rehearing en banc. Petitioners did not dispute the standard of review or legal standard, but disagreed with the panel's "weigh[ing]" of the *Mujica* factors given the "unique circumstances" of their case. P.F.R.E.B. 12. No judge even requested a vote on whether to grant rehearing en banc. Pet. App. 80a.

This case does not warrant review.

First, the petition's novel and legally unsupported approach to international comity was never "pressed

or passed upon below," and therefore this Court's "traditional rule … precludes a grant of certiorari." *United States v. Williams*, 504 U.S. 36, 41 (1992). Petitioners ask the Court to hold that "U.S. military servicemembers undertaking a diplomatic mission must be afforded the right to prosecute their claims in a United States tribunal," Pet. 8, because such servicemembers ostensibly are "firmly imbued with vestiges of both 'diplomatic' as well as invitee status that more than justifiably trigger[] application of the public authority doctrine and diplomatic immunity privilege as they pertain to and determine jurisdictional designation," Pet. 12–13. Petitioners claim not just diplomatic immunity but also "jurisdictional rights and protections that parallel those afforded … sovereigns," Pet. 10, and argue that, under "the doctrine that a foreign army is permitted to march through a friendly country," petitioners were "exempt from [Japan's] civil and criminal jurisdiction," Pet. 12. Therefore, the petition concludes, petitioners' "claims should rightfully remain in the jurisdiction of the United States." Pet. 13–14.

This approach was not pressed or passed upon below. Instead, as noted, petitioners repeatedly urged that the district court and Ninth Circuit apply the *Mujica* framework, and those courts did so.

Even if the Court were not to apply its "traditional rule … preclud[ing] a grant of certiorari," *Williams*, 504 U.S. at 41, the petition's novel approach to international comity would not warrant review. Although petitioners claim that "Circuit courts throughout the country have devised their own individual set of factors in which to guide their circuit's decisions," Pet. 16–17, the cases cited in the petition show circuits freely citing each other's opinions as embodying the same traditional international comity

considerations. Petitioners do not, and cannot, claim that any court has adopted their proposed approach. Nor would any court ever do so, because petitioners' approach rests on a fundamental misunderstanding of how immunity works. Even assuming *arguendo* that petitioners enjoyed diplomatic or sovereign immunity (which they do not), that would govern whether they could *be sued*, not whether they have an absolute right to *bring suit* in the United States. Finally, petitioners' proposed approach is so narrowly tailored to the unique circumstances of this case that it calls for little more than error correction.

Second, petitioners' other fact-bound criticisms of the Ninth Circuit's decision are not merely unworthy of this Court's review, but also incorrect. Petitioners claim certiorari is warranted because the lower courts erred by "fail[ing] to afford any deferential weight" to a U.S. amicus brief, Pet. 19, and by "relegating determinative weight" to whether Japanese or U.S. law would govern petitioners' claims, Pet. 24. Both of these arguments plainly involve "the [asserted] misapplication of a properly stated rule of law," insufficient to warrant certiorari under this Court's Rule 10.

Moreover, these arguments rest on false premises. Both the district court and the Ninth Circuit gave the U.S. amicus brief careful review and "'serious weight,'" Pet. App. 36a—they simply rejected petitioners' misreading of that brief, in which the United States urged *deference to the district court*, rather than advocating for a U.S. forum, s*ee* Pet. App. 230a ("Certainly, a district court could choose to dismiss a case based on international comity for a claim arising overseas. But it is not required to do so ….''). Both courts also properly considered that Japanese law would govern significant issues in the case, but neither

gave that factor "determinative weight." Rather, it was one of several factors weighed in the comity analysis.

Third, review of any issue in this case would be unwise given the vehicle concerns arising from petitioners' limited, inconsistent, muddled, and simply inaccurate briefing of the issues.

The district court rightly found that, under the settled and undisputed framework for analyzing international comity, this case should be dismissed in favor of a Japanese forum. The Ninth Circuit rightly held that the district court's decision was not an abuse of discretion. This Court's review is not warranted.

STATEMENT OF THE CASE

1. On March 11, 2011, an unprecedented magnitude 9.0 earthquake and resulting massive tsunami struck Japan, devastating large swaths of the country and damaging TEPCO's Fukushima Nuclear Power Plant. C.A.E.R. 367, 1824–28. In response to the widespread devastation, the *U.S.S. Ronald Reagan* and other U.S. naval vessels headed to Japan. C.A.E.R. 1811. As a nuclear aircraft carrier, the *Reagan* was equipped with sensitive instruments designed to monitor radiation levels. C.A.E.R. 1867. Petitioners allege that, notwithstanding the Navy's monitoring, the crews of the Navy ships and other Navy personnel "were repeatedly exposed to ionizing radiation" released from the Fukushima plant, C.A.E.R. 1811, and that they suffered adverse health consequences as a result, C.A.E.R. 1821.[1]

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[1] A Department of Defense report commissioned by Congress found that "the radiation exposures to the sailors serving aboard the RONALD REAGAN were very low" and that "it is implausible that these low-level doses are the cause of the health effects

2. This lawsuit was brought on December 21, 2012. C.A.E.R. 2088. The district court dismissed the first amended complaint on political question grounds with leave to amend. C.A.E.R. 2094. TEPCO moved to dismiss the second amended complaint on various grounds, including international comity. C.A.E.R. 2095. TEPCO argued that the Japanese government had "taken extensive steps to provide redress" for Fukushima-related claims "in a coordinated and comprehensive manner," and that "Plaintiffs' claims should be resolved as part of that coordinated process in Japan." Dist. Ct. Dkt. 55-1, at 59–60.

The district court largely denied TEPCO's motion to dismiss and granted further leave to amend. On comity, the district court applied the framework from *Ungaro–Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004), and *Mujica*, 771 F.3d at 599, evaluating "[1] the strength of the United States' interest in using a foreign forum, [2] the strength of the foreign governments' interests, and [3] the adequacy of the alternative forum." Pet. App. 190a. The court emphasized "that neither the Japanese nor the U.S. government ha[d] expressed interest in the location of this litigation." Pet. App. 196a. Based on that consideration and others, the court concluded that, while "both the U.S. and Japan have an interest in having this suit heard within their forum," the "reasons for maintaining jurisdiction of this case are more compelling." Pet. App. 199a. It therefore "decline[d] to exercise its discretion in dismissing this case under the doctrine of international comity." *Id.*

3. The district court then granted TEPCO's request to certify an interlocutory appeal under 28

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reported." C.A.E.R. 347–48. Nevertheless, at the motion-to-dismiss stage, petitioners' allegations are treated as true.

U.S.C. § 1292(b), Pet. App. 205a, and TEPCO appealed.

In answering TEPCO's appeal, petitioners argued that the district court had "identified the correct legal rule" and "applied the correct law" by considering "the three overriding considerations required under *Ungaro-Benanges* [*sic*] and the five factors under *Mujica*" in addressing the international comity issue. Answering Brief at 4, 5, 7, *Cooper v. Tokyo Electric Power Co., Inc.*, No. 15-56424 (9th Cir. Mar. 24, 2016), ECF No. 37. Thus, because—petitioners argued—a "District Court's decision whether to cede its jurisdiction to a foreign tribunal is wholly discretionary," *id.* at 6, "[t]he court's ruling should not be disturbed even if other district courts might have reached differing or opposite conclusions with equal justification," *id.* at 8.

The Japanese government—which had not weighed in before the district court—submitted an amicus brief in the Ninth Circuit that explained the profound harm to Japan's interests that would occur if this lawsuit proceeded in the United States. C.A.E.R. 738–45. The amicus brief detailed the "unprecedented steps" the Japanese government had taken "to ensure that funds will be available to compensate victims" of the Fukushima disaster and the "comprehensive system developed" to process Fukushima-related claims. C.A.E.R. 742–43. The amicus brief also set forth that, as of that time, "2.4 million claims [had] been resolved, with total payments equivalent to more than $58 billion—*an amount exceeding one percent of Japan's GDP*." C.A.E.R. 743 (emphasis added). The brief explained that the Japanese people's willingness to undertake this extraordinary cost "depends upon all victims having confidence that they will be treated fairly and equally." C.A.E.R. 743–44. "The

Government of Japan has serious concerns that this suit, and perhaps others like it, could result in the application of different legal standards to adjudicate Fukushima-related claims and, as a result, disparate outcomes for similarly situated claimants. This could prove highly corrosive to the integrity of the compensation system." C.A.E.R. 744. "[I]n order to maintain the integrity, fairness and equality of the process for compensating those affected by the Fukushima nuclear accident, this suit should be dismissed." C.A.E.R. 745.

In response, the Ninth Circuit solicited the views of the United States government, which filed an amicus brief. The brief urged affirmance on the ground that U.S. policy favors leaving the question of dismissal to the discretion of the district court. Pet. App. 215a–217a. "In the view of the United States, the district court did not abuse its discretion in declining to dismiss," because "[t]he district court accurately identified *Mujica*" as the applicable standard and "applied the relevant factors to the facts of this case." Pet. App. 224a. The U.S. government explained that, "[c]ertainly, a district court could choose to dismiss a case based on international comity for a claim arising overseas." Pet. App. 230a. And the government "expressed no objection that Japan be permitted to adjudicate these claims in its own courts." Pet. App. 37a. The important point was to preserve the "flexibility" of the district court's discretion. Pet. App. 230a.

A Ninth Circuit panel consisting of Judges Tashima, Wardlaw, and Bybee unanimously affirmed. Pet. App. 81a. The court of appeals agreed with petitioners that "the district court correctly laid out [the] legal standard" from *Mujica*, so the "only question is whether the district court's decision not to

dismiss Plaintiffs' claims was illogical, implausible, or unsupported by the record." Pet. App. 101a. Applying that standard, the Ninth Circuit held that "[a]lthough this is a close case with competing policy interests, … the district court did not abuse its discretion in deciding to maintain jurisdiction." Pet. App. 101a–102a; *see also* Pet. App. 112a ("Though there are strong reasons for dismissing Plaintiffs' claims in favor of a Japanese forum, the district court did not abuse its discretion in maintaining jurisdiction.").

The Ninth Circuit noted, however, that comity is a "fluid doctrine, one that may change in the course of the litigation." Pet. App. 113a. Thus, "further developments in the district court may counsel in favor of dismissing Plaintiffs' lawsuit in favor of a Japanese forum. For example, the district court has yet to determine whether U.S. or Japanese law will govern Plaintiffs' claims. Which country's law applies is relevant to the international comity analysis." Pet. App. 113a n.12.

4. On remand, the district court addressed petitioners' third amended complaint, which had added General Electric as a co-defendant. Petitioners demanded "an amount not less than one BILLION ($1,000,000,000.00) DOLLARS." C.A.E.R. 1890. Petitioners themselves asserted that Japan was "disbursing an amount of compensation that pale[d] in comparison" with that extraordinary demand, C.A.E.R. 191, confirming the Japanese government's serious concerns about "disparate outcomes" that would "prove highly corrosive to the integrity of the compensation system," C.A.E.R. 744.

Both TEPCO and General Electric moved to dismiss, with TEPCO arguing that international comity and *forum non conveniens* favored a Japanese forum, and that the court lacked personal jurisdiction

over TEPCO under this Court's recent decision in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773 (2017). TEPCO argued that the district court should reanalyze international comity based on further developments since the district court had last considered the issue. C.A.E.R. 400–15. In particular, TEPCO explained that Japan's interest in having petitioners' claims adjudicated in Japan had grown, because Japan's compensation system for Fukushima-related claims had by then resolved thousands of additional claims—a total of more than 17,000—and paid out more than $76 billion in compensation. C.A.E.R. 413–14. TEPCO also explained that the amicus briefs filed by the United States and Japan—which were not previously before the district court—reinforced Japan's stronger interest in having this lawsuit go forward in Japan. C.A.E.R. 411–13. And TEPCO argued that Japanese law would govern key aspects of the case, further increasing Japan's interest. C.A.E.R. 411. Petitioners responded by once again invoking *Mujica* as establishing the proper comity framework and arguing that dismissal was not warranted under that framework. C.A.E.R. 187–94.

The district court dismissed the claims against TEPCO on international comity grounds.[2] As the Ninth Circuit had directed, the district court considered the new factual developments bearing on

[2] The district court also dismissed for lack of personal jurisdiction a related action brought by petitioners' counsel, which raised similar claims against TEPCO on behalf of a different group of similarly situated plaintiffs. *Bartel v. Tokyo Electric Power Co., Inc.*, 371 F. Supp. 3d 769 (S.D. Cal. 2019), *appeal dismissed*, 2019 WL 5260743 (9th Cir. July 30, 2019). In this case, the Ninth Circuit did not reach personal jurisdiction because it affirmed the dismissal based on international comity considerations. Pet. App. 38a n.15.

the comity issue, including the two governments' amicus briefs, as well as the fact that Japanese law would govern significant issues in the litigation. Pet. App. 72a–77a.

The court explained that, while it had previously viewed the U.S. government interest as stronger, it now found Japan's interest to be stronger given the degree to which "Japan's foreign and public policy interests would be harmed" if the case went forward in the United States. Pet. App. 75a. Further, the court found that "Japan has an overwhelmingly strong interest in applying its laws in this case, and because [Japan's] interests would be more impaired than California's, … Japanese law applies to the issue of TEPCO's liability." Pet. App. 70a. "After further developments, and with the benefit of the Ninth Circuit's guidance, the Court … reweighed its prior ruling on international comity" and concluded that dismissal was warranted, both because of the balance of government interests and because "Japanese law applies." Pet. App. 77a. The district court dismissed petitioners' claims against General Electric on separate grounds, holding that Japanese law also applied to those claims and "preclude[d] all liability against GE." Pet. App. 62a.

5. Petitioners appealed, focusing primarily on the dismissal of General Electric—a dismissal not raised at all in the instant petition. The international comity section of petitioners' opening brief was less than three pages long, and much of that argument actually addressed *forum non conveniens*. *See* C.A.O.B. 33–35.

Petitioners did not argue that the district court erred by applying the *Mujica* framework, but rather recognized that *Mujica* reflected "the well-established contours of considered international comity." C.A.R.B.

23. Petitioners argued that the district court "abused its discretion" in *weighing* the *Mujica* factors given the particular circumstances of this case, such that its "supporting rationale is explicitly undermined by the factual record." C.A.O.B. 34–35; C.A.R.B. 23–24. In particular, petitioners made various incorrect case-specific arguments, such as that it was premature for the district court to decide any choice-of-law issues and that the district court had ignored the U.S. government's amicus brief.

Petitioners' appeal returned to the same Ninth Circuit panel that had heard TEPCO's prior appeal. The Ninth Circuit again unanimously affirmed. Pet. App. 1a. Once again, the court of appeals agreed with petitioners that the "district court here 'correctly laid out [the] legal standard,' so 'the only question is whether the district court's decision … to dismiss Plaintiffs' claims was illogical, implausible, or unsupported by the record.'" Pet. App. 30a–31a (quoting prior decision, Pet. App. 101a). The Ninth Circuit ruled that the district court had not abused its discretion in "reconsider[ing] its comity analysis based on new developments [and] finding that these developments tilted the scales towards dismissal." Pet. App. 31a.

First, the Ninth Circuit ruled that it "was not an abuse of discretion for the district court to take the applicability of Japanese law into consideration" because "the conclusion that Japanese law applies to the case does affect the comity analysis." Pet. App. 32a. "[I]t was not illogical or implausible for the district court to find that" the applicability of Japanese law gave Japan a "strong interest in being the place where the plaintiffs' claims are litigated." *Id.*

Next, the court concluded that "[i]t was not improper for the district court to reconsider its

previous holding in light of" the Japanese and U.S. governments' amicus briefs. Pet. App. 34a. The Ninth Circuit explained that "[t]he first time the district court considered the comity factors, neither Japan nor the United States had expressed an opinion … about the appropriate venue for the litigation." *Id.*

Further, the Ninth Circuit ruled that the district court had not abused its discretion in finding the Japanese government's interest to be stronger because "[t]he United States' measured response pales in comparison to Japan's unequivocal objection to the exercise of jurisdiction in U.S. courts." Pet. App. 38a. The Ninth Circuit explained that petitioners' lawsuit would "seriously affect the integrity of the [Japanese government's] compensation system" and would risk "different outcomes for similarly situated" claimants. Pet. App. 35a.

The Ninth Circuit rejected as factually untrue petitioners' contention that the district court had not "consider[ed] the United States' amicus brief." Pet. App. 36a. The Ninth Circuit explained that the district court had explicitly "acknowledged the United States' statement and its competing foreign-policy concerns in its order." Pet. App. 36a. The court further admonished petitioners for overstating the nature of the U.S. government's brief, explaining that "the United States issued a careful, cautious statement" that "stopped well short of urging that California was the proper forum" and "expressed no objection that Japan be permitted to adjudicate these claims in its own courts." Pet. App. 37a.

Finally, the court of appeals rejected petitioners' "unsubstantiated claims of bias" regarding the adequacy of Japanese courts as an alternative forum, noting that petitioners had made those charges

"without citation to the record or law" and had misstated Ninth Circuit law. Pet. App. 31a–32a n.13.[3]

Based on these considerations, the Ninth Circuit ruled that, although there were "important policy interests in both countries," "the district court did not abuse its discretion when it dismissed the claims against TEPCO on international-comity grounds." Pet. App. 38a.

6. Petitioners sought rehearing en banc. Their rehearing petition did not ask the Ninth Circuit to revisit *Mujica* or otherwise revise its international comity framework. Instead, petitioners narrowly argued that "the particular context and circumstances of Petitioners claims … reasonably evoke[] the necessity for this Court's equitable consideration." P.F.R.E.B. 7. Petitioners argued—inaccurately—that the panel "simply failed to acknowledge" various facts and failed "to consider and weigh the overarching and unique circumstances" of their case. P.F.R.E.B. 12. According to petitioners, "had the Panel provided the

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[3] In ostensible support of their argument that Japan could not provide an adequate forum for their claims, petitioners had submitted what they identified as an amicus brief from a Japanese lawyer named Yoshitaro Nomura. But Yoshitaro Nomura then emailed the parties and repudiated the amicus brief: "The amicus brief Plaintiffs' attorneys submitted and filed on September 24 was not my writing, nor translation of mine." C.A. Dkt. 27 at 1. After TEPCO and General Electric moved to strike the purported amicus brief, petitioners withdrew it. Acknowledging "Mr. Nomura's recent repudiation of his Amicus Curiae [brief]," petitioners asserted that "Mr. Nomura's irrational conduct and refusal therein to reasonably communicate with Appellants' counsel" meant that "Mr. Nomura's credibility is irrevocably suspect" and that petitioners could "no longer extend efforts in assisting in Mr. Nomura's purported 'service' to Appellants' cause." C.A. Dkt. 28 at 2. The Ninth Circuit accepted the withdrawal. C.A. Dkt. 58.

appropriate weight to such considerations, it would have concluded that the appropriateness of restraint that may have otherwise justified exercising a dismissal based on comity was, in fact, inappropriate under the circumstances of this unique case." P.F.R.E.B. 13.

The Ninth Circuit denied rehearing. "[N]o judge [] requested a vote on whether [to] rehear the matter en banc." Pet. App. 80a.

REASONS FOR DENYING THE PETITION

I. The Petition's Novel Approach to International Comity Was Not Pressed or Passed Upon Below and Is Unworthy of Review

A. Review Is Not Warranted Because the Petition's Novel Approach to International Comity Was Not Pressed or Passed Upon Below

This Court's "traditional rule … precludes a grant of certiorari … when 'the question presented was not pressed or passed upon below.'" *Williams*, 504 U.S. at 41. That rule applies with special force here. Not only did petitioners fail to raise their novel theories below, they repeatedly urged the "traditional adjudicatory comity analysis," Pet. 14, that they now challenge.

The petition's lead argument is that comity analysis should somehow function differently as to petitioners based on their alleged "designated status as U.S. military personnel officially assigned to provide humanitarian relief to a foreign nation," a status that they assert "embod[ies] a parallel kind and quality of United States' representation that elicits and evokes the jurisdictional rights and protections that parallel those afforded diplomats and sovereigns."

Pet. 9–10. Petitioners seem to contend that they possess some form of immunity that, rather than determining whether they can *be sued* in Japan, provides them with an absolute right to *bring suit* in the United States and "rely on jurisdiction in a United States court when incurring harms by a private, foreign corporation for conduct occurring on foreign soil." Pet. i.

This approach to international comity was neither pressed nor passed upon below. "Diplomatic immunity" and the other doctrines that petitioners now invoke went unmentioned in the district court and in the Ninth Circuit. Nor did petitioners ever argue that the district court's decision to perform any "analysis under traditional adjudicatory comity was patently an abuse of discretion." Pet. 14. Instead, they affirmatively invoked that traditional analysis.[4]

Unsurprisingly, neither the district court nor Ninth Circuit *sua sponte* considered the petition's novel alternative approach or passed upon whether to depart from a traditional comity analysis. Indeed, the petition implicitly concedes this point when it argues that the lower courts committed an "oversight" when they "failed to acknowledge" the purportedly self-evident theory now raised in the petition. Pet. 9, 14.

Because petitioners' alternative approach to international comity was neither pressed nor passed upon below, this Court's "traditional rule … *precludes* a grant of certiorari." *Williams*, 504 U.S. at 41 (emphasis added). But even if a grant of certiorari

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[4] The disconnect between what was pressed below and what is raised in the petition is confirmed by comparing the table of authorities in the petition, Pet. vii–ix, with the table of authorities in petitioners' opening brief below, C.A.O.B. iii–v, which share almost no cases in common beyond *Mujica*.

were not *precluded*, "[t]here would be considerable prudential objection to reversing a judgment because of" a method of analysis "that petitioner[s] accepted, and indeed … requested." *City of Springfield, Mass. v. Kibbe*, 480 U.S. 257, 259 (1987). Petitioners repeatedly told the courts below that *Mujica*'s framework was "the correct legal rule" and "the correct law," and that within that framework, the "District Court's decision whether to cede its jurisdiction to a foreign tribunal is wholly discretionary." Answering Brief at 4–7, *Cooper v. Tokyo Electric Power Co., Inc.*, No. 15-56424 (9th Cir. Mar. 24, 2016), ECF No. 37; *see also* C.A.E.R. 187–94; C.A.O.B 34–35; C.A.R.B 23–25; P.F.R.E.B. 12. Given petitioners' advocacy below, the "prudential objection" that led to certiorari being dismissed as improvidently granted in *Kibbe*, 480 U.S. at 259, is a strong reason not to grant certiorari here.

B. The Court's Review Would Be Unwarranted Even If the Petition's Novel, Unsound Approach to International Comity Had Been Pressed and Passed Upon Below

Even if the novel approach to international comity set forth in the petition had been pressed and passed upon below, which it was not, certiorari would be unwarranted.

Petitioners urge a *per se* rule that "United States Military personnel, while deployed on U.S. Naval vessels undertaking a U.S. diplomatic humanitarian assistance mission" are categorically entitled to "jurisdiction in a United States court" when they want to bring suit against a foreign company for conduct occurring on foreign soil. Pet. i; *see also* Pet. 9. The exact contours of this approach are not clear from the petition. At times, petitioners seem to argue for a

categorical exception to "traditional adjudicatory comity analysis." Pet. 14. At other times, petitioners seem to argue for a categorical exception to *any* doctrine (e.g., *forum non conveniens*, personal jurisdiction, etc.) that might lead a U.S. court to decline jurisdiction in a case brought by U.S. military personnel against "a private, foreign corporation for conduct occurring on foreign soil," Pet. i, so that such personnel *always* "must be afforded the right to prosecute their claims in a United States tribunal." Pet. 8; *see also* Pet. 9 ("As with other governmental actors, Plaintiffs are unequivocally cloaked with 'immunity' such that jurisdiction over their claims would not occur in a foreign tribunal but could only rightfully be adjudicated in a United States courtroom."); Pet. 14. Neither of these notions is supported by law, and however framed, this issue does not warrant this Court's review.

1. As an initial matter, petitioners identify no court that has ever applied, or even considered, their new plaintiffs-with-immunity approach in lieu of "traditional adjudicatory comity analysis." Pet. 14. Although petitioners assert that "Circuit courts throughout the country have devised their own individual set of factors ... to guide their circuit's [comity] decisions," Pet. 16–17, petitioners do not claim that any of those courts have adopted anything like petitioners' proposed approach. What is more, the cases cited by petitioners confirm that these circuits all apply what petitioners call "traditional adjudicatory comity." Pet. 14. Even when a novel theory is properly pressed and passed upon below, this Court's "ordinary practice" is to "deny[] petitions insofar as they raise legal issues that have not been considered by *additional* Courts of Appeals." *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct.

1780, 1782 (2019) (per curiam) (emphasis added). Here, because petitioners' novel approach was not even pressed below, the petition "raise[s] legal issues that have not been considered by [*any*] Court[] of Appeals." *Id.*

Petitioners themselves acknowledge that the Ninth Circuit's framework in *Mujica*, 771 F.3d at 603, reflects "traditional adjudicatory comity" analysis. *See* Pet. 14 (criticizing "the lower courts' dispository analysis under traditional adjudicatory comity"); C.A.R.B. 23 (recognizing "the well-established contours of considered international comity"). The *Mujica* framework, explicitly developed from the Eleventh Circuit's decision in *Ungaro–Benages*, considers "[1] the strength of the United States' interest in using a foreign forum, [2] the strength of the foreign governments' interests, and [3] the adequacy of the alternative forum." Pet. App. 30a (quoting *Mujica*, 771 F.3d at 603). In evaluating the government interests, the framework takes into account a nonexclusive list of factors, including "(1) the location of the conduct in question, (2) the nationality of the parties, (3) the character of the conduct in question, (4) the foreign policy interests of the [countries], and (5) any public policy interests." *Id.* (quoting *Mujica*, 771 F.3d at 603).

The other cases cited by petitioners likewise apply the traditional multifactor international comity analysis.

a. In *In re Vitamin C Antitrust Litigation*, 837 F.3d 175, 184–85 (2d Cir. 2016), *vacated and remanded on other grounds*, *Animal Science Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865 (2018), for example, the Second Circuit applied a similar "multi-factor balancing test set out in *Timberlane Lumber Co. v. Bank of Am., N.T. & S.A.*,

549 F.2d 597, 614–15 (9th Cir. 1976) and *Mannington Mills, Inc. v. Congoleum Corp.*, 595 F.2d 1287, 1297–98 (3d Cir. 1979)." That approach took into account, among other things, the "[d]egree of conflict with foreign law or policy," the "[n]ationality of the parties," "the availability of a remedy abroad," the "[p]ossible effect upon foreign relations," and various other policy-based grounds. *Id.* In other words, the Second Circuit expressly agreed with the Ninth and Third Circuits—just as the Ninth Circuit in *Mujica* agreed with the Eleventh Circuit in *Ungaro-Benages*.[5]

b. The *district court* cases cited in the petition by definition cannot establish a *circuit* split, and, moreover, those decisions are not in conflict; rather, they too show harmony. In *J.Y.C.C. v. Doe Run Resources, Corp.*, 403 F. Supp. 3d 737, 746 (E.D. Mo. 2019), the court similarly held that although "the rationales of various international comity doctrines may vary, according respect for the sovereign interest of other nations and the interest of the United States remains paramount." The court went on to apply the comity standard set forth in *Ungaro-Benages*, with the "most important interests [being] the sovereign interest of both the United States and the foreign government." *Id.* at 747–48. Likewise, in *Torres v. Southern Peru Copper Corp.*, 965 F. Supp. 899 (S.D. Tex. 1996), the court looked to a variety of factors

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[5] Petitioners cite *Philadelphia Gear Corp. v. Philadelphia Gear de Mexico, S.A.*, 44 F.3d 187, 191 (3d Cir. 1994), which dealt with "the comity considerations that apply specifically '[i]n the foreign bankruptcy context.'" *Id.* at 193. Even there, the relevant considerations were similar to those taken into account in the cases discussed above. The Third Circuit looked to whether the foreign court would provide an adequate forum to litigate bankruptcy issues and whether the foreign proceedings would respect "this country's policy of equality," i.e., whether comity would be consistent with U.S. interests. *Id.*

encompassing similar considerations to those examined by other courts. The court considered: "the link of the activity to the territory of the regulating state"; "the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity regulated"; "the importance of regulation to the regulating state"; "the importance of the regulation to the international political, legal, or economic system"; and the comparative levels of governmental interest in regulating the underlying activity. *Id.* at 908.

Thus, while different courts may have used slightly different words or broken the considerations into a different number of factors, none of them considered—let alone adopted—petitioners' novel approach. Instead, their analysis of international comity consistently focuses on the same core concerns that animated the Ninth Circuit's decision here: whether there is an adequate alternative forum in which to litigate claims and whether a comparison of the U.S. and foreign governments' interests favors dismissal.

2. Further, while petitioners' proposed approach would constitute a dramatic change in the law, it would apply in such narrow circumstances as to not warrant this Court's review. The petition repeatedly indicates that its approach would be confined to petitioners' "particular status, i.e., military personnel" and the "particular context within which Petitioners' harms were incurred, i.e., while undertaking a diplomatic relief mission while onboard U.S. Naval vessels." Pet. 14. With such a narrow scope, the proposed rule ultimately amounts to no more than case-specific error. *See post* 25–32.[6]

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[6] To the extent petitioners are proposing some "cohesive and consistent standard for deciding when it is proper for a court to

3. Petitioners' proposed approach to international comity is not only novel but unsound. None of the authorities or doctrines invoked by the petition support it. Petitioners' bottom-line position is that they "are unequivocally cloaked with 'immunity.'" Pet. 9. The exact nature of that immunity varies from "diplomatic immunity privilege," to "jurisdictional rights and protections that parallel those afforded … sovereigns," to the protections of "the public authority doctrine." Pet. 10–13. To claim these immunities, petitioners analogize themselves to "diplomatic agents of the United States," Pet. 14, "the government itself," Pet. 11, and "a foreign army … permitted to march through a friendly country," Pet. 12.

The doctrines petitioners invoke govern when and where a party may *be sued*, not when and where that party can *bring suit*. The petition does not cite a single decision, from any court, applying any of these doctrines as a ground on which a party is "unequivocally legally and equitably entitled to" *bring suit* in "the United States jurisdiction." Pet. 14.

An examination of each doctrine demonstrates why no such authority exists. First, the Vienna Convention on Diplomatic Relations, Pet. 10, the source of the "diplomatic immunity" petitioners repeatedly mention, provides that an action "against an individual who is entitled to immunity … shall be dismissed," 22 U.S.C. § 254d; but this case is not an action against petitioners, and they are opposing, not seeking, dismissal. Moreover, petitioners concede they

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abstain" under international comity *other* than the categorical exception for U.S. military personnel on humanitarian missions abroad or the shared approach among the circuits, petitioners do not even suggest what that standard would be. Pet. 1.

"by no means construe themselves as United States 'diplomats.'" Pet. 9.

Second, "government sovereign immunity, as prescribed by the Foreign Sovereign Immunities Act," Pet. 10–11, is a "freedom … from being haled into court as a defendant," *Nat'l City Bank of New York v. Republic of China*, 348 U.S. 356, 358 (1955); *see* 28 U.S.C. § 1604. Petitioners are plaintiffs, not defendants, and they are not being "haled into court" in Japan—they are being told they cannot hale TEPCO into court in the United States. And petitioners are not sovereigns, foreign or otherwise. Further, petitioners did not bring a claim under the Foreign Sovereign Immunities Act, Japan is not a party, TEPCO did not seek dismissal based on foreign sovereign immunity, and sovereign immunity (foreign or otherwise) was not pressed or passed upon below.

Finally, the "public authority doctrine," Pet. 11, provides that "an officer or soldier of an invading army" may not "be tried by his enemy, whose country [he] had invaded." *Dow v. Johnson*, 100 U.S. 158, 165 (1879). The Ninth Circuit and district court did not hold that petitioners could be sued in Japan, but rather that TEPCO should not be sued for these claims in the United States. The U.S. government's amicus brief also made clear that Japan is "a longstanding and essential ally," not an enemy under invasion. Pet. App. 215a. And far from being concerned about claims being resolved through Japan's compensation program, "the United States applaud[ed] the Government of Japan's impressive efforts to provide recovery for damages caused by the nuclear accident at the Fukushima-Daiichi power plant, including through the creation of an administrative compensation scheme that has paid over $58 billion in claims." Pet. App. 215a. The United States "expressed

no objection that Japan be permitted to adjudicate these claims in its own courts." Pet. App. 37a. Moreover, petitioners are suing TEPCO in their capacity as private citizens, not as agents of the Department of Defense, which has rightly deemed their claims not even scientifically plausible. *See* C.A.E.R. 347–69.

Thus, petitioners are not entitled to the immunities they invoke and, in any event, those immunities are patently inapposite here. TEPCO has not sued petitioners in Japan or anywhere else. Petitioners have sued TEPCO. Diplomatic and sovereign immunity and the public authority doctrine have no bearing on the proper forum for that suit.

4. In sum, petitioners propose a case-specific, novel, unsound approach to international comity; identify no disagreement among the lower courts that their proposed approach would resolve; cite no authority addressing—let alone supporting—that approach; and premise their new approach on immunity doctrines with no application here. Even setting aside the fact that petitioners' proposal to adopt a new standard for international comity was not pressed or passed upon below, this Court's review is unwarranted.

II. The Petition's Other Fact-Bound Complaints About the Ninth Circuit's Application of the Traditional Comity Framework Are Unworthy of Review and Contrary to the Record

Petitioners also seek correction of ostensible errors in the Ninth Circuit's application of the traditional comity approach urged by petitioners below. Review of those fact-bound issues is unwarranted, particularly given the unique nature of this case. Further,

petitioners' claims of error misstate the record and lack merit.

A. The Petition Seeks Fact-Bound Error Correction Based on Circumstances That Petitioners Themselves Describe as Unique

As explained below, petitioners are simply incorrect in their arguments that there was an abuse of discretion in how the traditional international comity factors were weighed in this case. But regardless of whether the lower courts erred, this Court does not grant certiorari to correct such fact-bound errors, and there is even less reason to do so in a case that petitioners themselves describe as unique.

This Court has long recognized that a request for error correction is not a compelling reason for certiorari. *Ross v. Moffitt*, 417 U.S. 600, 617 (1974); *see also, e.g.*, *City & Cnty. of San Francisco, Cal. v. Sheehan*, 575 U.S. 600, 135 S. Ct. 1765, 1780 (2015) (Scalia, J., concurring in part and dissenting in part); *Martin v. Blessing*, 571 U.S. 1040, 1045 (2013) (statement of Alito, J., respecting the denial of certiorari); *Watt v. Alaska*, 451 U.S. 259, 275 (1981) (Stevens, J., concurring). Indeed, the Court's rules explicitly state that petitions are "rarely granted when the asserted error consists of … the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

Error correction is even less warranted here because the asserted errors purportedly arise from circumstances that petitioners themselves have repeatedly characterized as "profoundly unique." P.F.R.E.B. 11.

Petitioners' grievance is that the lower courts purportedly "failed to consider and weigh the …

unique circumstances underlying the United States interest in having its laws apply to its military personnel harmed by private corporations while on international waters." P.F.R.E.B. 12; *see also, e.g.*, *id.* at 12–13 ("The unique status and circumstance of Petitioners as members of the United States military, who were harmed while on relief mission in international waters should have pervaded the entirety of the Panel's analysis."); *id.* at 13 (panel did not weigh the factors properly "under the circumstances of this unique case"). The petition itself expressly seeks error correction in the unique context in which "U.S. Military Personnel [claim to have been] harmed by a private Japanese corporation while onboard U.S. Naval vessels deployed on a U.S. initiated diplomatic and humanitarian relief mission to Japan." Pet. i.

Re-weighing the traditional international comity considerations here would thus provide no guidance for future cases because there are unlikely to *be* any future cases reprising the "profoundly unique" circumstances here.

B. The Petition Identifies No Actual Errors in the Lower Courts' Application of the Framework Urged by Petitioners

1. This Court's review is not warranted to decide the question whether the Ninth Circuit and the district court "failed to afford any deferential weight to the United States' Statement of Interest," and whether "the District court flagrantly barely even mentioned the Government's position." Pet. 19. Such fact-bound error correction is not this Court's role, and petitioners misstate the record. Far from "dismissing outright" the U.S. brief, *id.*, or "rejecting the United States

position," Pet. 24, both courts carefully considered it and gave it significant weight. Petitioners' description of both the procedural history and the U.S. government's amicus brief are incorrect.

As an initial matter, petitioners have already been chided by the Ninth Circuit for inaccurately describing the district court's order. In their appellate briefing, petitioners falsely claimed that "the district court [did] not … consider the United States' amicus brief in its analysis," but the Ninth Circuit explained that "the district court acknowledged the United States' statement and its competing foreign-policy concerns in its order." Pet. App. 36a. Indeed, the two governments' amicus briefs received essentially the same level of discussion. *See* Pet. App. 74a–75a.

Contrary to petitioners' claim that the lower courts failed to afford any weight to the U.S. government's amicus brief, both courts afforded it "'serious weight,'" Pet. App. 36a, as petitioners recognize the Ninth Circuit has long required, *see* Pet. 21 (citing *Mujica* itself for that proposition). The district court acknowledged that "the United States and Japan both have important, competing policy interest here." Pet. App. 75a. The Ninth Circuit agreed that this case "implicates strong, important policy interests in both countries." Pet. App. 38a. Both courts simply found that the U.S. policy interests, though weighty, were nevertheless less weighty than Japan's. Pet. App. 38a, 75a.

Given this record, the petition is really arguing that the Ninth Circuit and district court should have weighed the governmental interests somewhat differently. But that argument is predicated on petitioners' significant overstatement of the U.S. government's amicus brief. As the Ninth Circuit carefully explained, the U.S. government "stopped well

short of urging that California was the proper forum to exercise jurisdiction in this case" and "expressed no objection that Japan be permitted to adjudicate these claims in its own courts." Pet. App. 37a–38a. Ultimately, the U.S. government's position was that the question should be left to the district court's discretion: "'a district court could choose to dismiss a case based on international comity for a claim arising overseas'" but is not required to do so. Pet. App. 37a (quoting U.S. government amicus brief). The Ninth Circuit rightly recognized that this "measured response pales in comparison to Japan's unequivocal objection to the exercise of jurisdiction in U.S. courts." Pet. App. 38a.

Petitioners' claim that there is "an exceptionally important question" as to the lower courts' treatment of the U.S. government's amicus brief, Pet. 18, thus rests on fundamentally incorrect premises. The Ninth Circuit already requires that serious weight be given to the government's position, Pet. App. 36a, so there is nothing to address on that score. And petitioners are simply incorrect in their case-specific claim that the lower courts failed to follow that rule and instead disregarded the U.S. government amicus brief or failed to give it any weight.

2. Review is also unwarranted on petitioners' claim that the Ninth Circuit's decision "was incorrect" because it "relegat[ed] determinative weight to the district court's choice-of-law analysis." Pet. 24. Petitioners claim that the lower courts held that the "choice of law finding eclipsed the entirety of the stated *Mujica* factors." Pet. 28. As with the contention about the amicus briefs, this request for fact-bound error correction misstates the record. To the extent petitioners contend that the question of which country's law will apply is "outside the contours of the

explicit considerations required for a comity determination, i.e., the *Mujica* factors," Pet. 28, they never made that argument below, they are misstating the law, and their contention makes no sense.

From the outset, both the district court and the Ninth Circuit have viewed this as "a 'close case' with competing interests pointing in both directions." Pet. App. 77a. In its first consideration of international comity, the district court found that the scales tilted slightly in favor of retaining jurisdiction. "After further developments," however, the district court concluded that the balance now tilted in favor of dismissal: "[A]fter considering the Japanese and United States governments' views, the Court finds that the foreign and public policy interests weigh toward dismissal. And having conducted a choice-of-law analysis and having determined that Japanese law applies, this factor also weighs in favor of dismissal." *Id.* On no reasonable reading of the record did the "choice of law finding eclipse[] the entirety of the stated *Mujica* factors," as petitioners insist. Pet. 28. Rather, it was one of several factors considered, and the second of two *new developments* that changed the balance of those factors to favor dismissal.

In affirming, the Ninth Circuit did not "relegat[e] determinative weight to the district court's choice-of-law analysis." Pet. 24. It held only that "the choice-of-law analysis is relevant to comity decisions," Pet. App. 31a–32a—a position petitioners had not disputed—and that "[i]t was not an abuse of discretion for the district court to take the applicability of Japanese law into consideration," Pet. App. 32a. Alongside holding that "the conclusion that Japanese law applies to the case does affect the comity analysis," Pet. App. 32a, the court explained at length that "[t]he United States' measured response pales in comparison to Japan's

unequivocal objection to the exercise of jurisdiction in U.S. courts," Pet. App. 38a, and those briefs constituted "a significant change from the first time the district court engaged in the comity analysis," Pet. App. 34. Again, no reasonable reader of the Ninth Circuit's decision could conclude that the choice-of-law analysis had somehow overridden the respective governmental interests.[7]

Nor did the lower courts "hold[] that an international comity analysis is effectively synonymous with a choice of law analysis." Pet. 25. The district court and the Ninth Circuit both explicitly performed their choice-of-law analysis separately from their analysis of international comity. Pet. App. 25a–29a (Ninth Circuit choice-of-law analysis); Pet. App. 29a–38a (Ninth Circuit comity analysis); Pet. App. 67a–70a (district court choice-of-law analysis); Pet. App. 70a–77a (district court comity analysis).

Finally, to the extent petitioners now claim that choice-of-law considerations are categorically "outside the contours of the explicit considerations required for a comity determination, i.e., the *Mujica* factors," Pet. 28, that position was never raised in the district court

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[7] That the analysis focused on the two *new* developments, rather than all of the factors weighing on both sides, reflected not an error by the Ninth Circuit but a response to petitioners' framing of the issue. Petitioners' principal attack on the district court's ruling was that the court abused its discretion by revisiting its prior comity ruling "because 'nothing has changed except for the court's willingness to revisit the issue of international comity and decide to punt this case to Japan.'" Pet. App. 32a (quoting petitioners' brief). The Ninth Circuit therefore did not focus on factors such as "the location of the conduct in question, nationality of the parties, [or] nature of the conduct" because those factors "remained the same." Pet. App. 31a. The court instead addressed the "developments [that] tilted the scales towards dismissal" in the district court's analysis. *Id.*

and is unworthy of this Court's review. In the district court, petitioners "argue[d] that the choice of law analysis is not ripe for determination and that California law will apply." Pet. App. 66a. Petitioners also argued "that, even if Japanese law applies to all the major issues, [the district court was] 'fully capable' of applying that law in this case." Pet. App. 72a. Petitioners did *not* argue that choice-of-law considerations were categorically irrelevant.

In their opening brief on appeal, the extent of petitioners' discussion as to TEPCO regarding choice-of-law was: "For the reasons already set forth above [regarding GE] and as explained more fully (and in considerable detail) in Plaintiffs' Memorandum in Opposition, the district court erred both by deciding the choice-of-law question at this stage (i.e., without discovery and based on inadequate briefing) and in concluding that Japanese law ought to apply. *See* arguments set forth at pp. 14–23 above and in ER 176-94." C.A.O.B. 33. This is plainly not an argument that choice-of-law considerations are irrelevant to international comity.

Moreover, petitioners' argument that traditional international comity analysis ("i.e., the *Mujica* factors," Pet. 28) excludes choice-of-law considerations is incorrect. As the Ninth Circuit recognized in the first appeal in this case, "which country's law applies is relevant to the international comity analysis" under the *Mujica* framework, as well as the underlying *Ungaro-Benages* factors. Pet. App. 113a n.12; *see Mujica*, 771 F.3d at 602 ("whether there is a conflict between American and foreign law [is] one factor in … the application of comity"). Indeed, it should be beyond serious dispute that a country has a stronger interest in a case when its own laws are being applied.

3. In sum, petitioners' fact-bound claims of error in the weighing of the *Mujica* factors by the lower courts are not merely unworthy of this Court's review, but also dependent upon a misstatement of the record.

III. This Case Has Significant Additional Vehicle Problems

For the reasons stated above, review is not warranted here: the petition's novel approach to international comity was not pressed or passed upon below and petitioners seek extraordinarily fact-bound error correction where no error exists. But even if the petition had identified an international comity issue appropriate for review—which it has not—this case would be the wrong vehicle for considering that issue.

International comity was only one of several grounds on which TEPCO and General Electric sought dismissal, and petitioners' briefing on the issue has been limited, shifting, and muddled. As noted, petitioners devoted less than three pages of their opening brief on appeal to international comity, and their appellate briefing had serious defects. *See, e.g.*, Pet. App. 10a, 12a, 13a, 24a n.7, 26a, 31a–32a n.13, 34a, 36a (Ninth Circuit's discussion of some of those defects). While their petition is lengthy, rather than elaborating on the limited arguments pressed below, it introduces a confusing new immunity-based approach to international comity. As noted, this novel and unfounded theory was not litigated or analyzed below; "immunity" is not even *mentioned* in the Ninth Circuit's opinion.

This procedural background counsels against the Court's review both for the reasons discussed above and because it makes this case an exceedingly poor vehicle for considering *any* issue. When a petitioner has clearly, consistently, and thoroughly briefed below

the issues raised in the petition, the adversarial process and lower courts' analysis flush out any possible impediments to this Court's review of those issues. But that has not happened here. Waiver, forfeiture, invited error, and predicate disputes about the record lurk in the petition. To take just one small example: petitioners passingly suggest that they "never ventured off of United States territory as U.S. Naval vessels legally retain that designation while in international waters," Pet. 13, without mentioning that the Ninth Circuit ruled that "this argument, presented for the first time in the reply, has been forfeited," Pet. App. 24a n.7. That omission is not unique.

These vehicle concerns are another reason to deny review.

CONCLUSION

This case's pendency in the United States threatens "the viability of [Japan's] carefully wrought claims-resolution and compensation system"—a system that has required a massive national commitment in both economic and political terms. C.A.E.R. 742–45. The Japanese government thus asked that this case be dismissed "in order to maintain the integrity, fairness and equality of the process for compensating those affected by the Fukushima nuclear accident." C.A.E.R. 745. The United States "expressed no objection that Japan be permitted to adjudicate these claims in its own courts." Pet. App. 37a. Weighing these factors and others, the district court properly dismissed and the Ninth Circuit rightly affirmed—both courts applying the standard urged below by petitioners themselves. Those decisions do not warrant this Court's review.

The petition for writ of certiorari should be denied.

Respectfully submitted,

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