

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*

**REPLY BRIEF IN SUPPORT OF PETITION FOR
WRIT OF CERTIORARI**

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QUESTIONS PRESENTED FOR REVIEW:

Whether United States Military personnel, while deployed on U.S. Naval vessels undertaking a U.S. diplomatic humanitarian assistance mission, can rightfully rely on jurisdiction in a United States court when incurring harms by a private, foreign corporation for conduct occurring on foreign soil;

Whether a Statement of Interest from the United States should be afforded dispositive weight when considering dismissal on international comity grounds where Petitioners are U.S. Military Personnel 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;

Whether the lower courts had erroneously ascribed dispositive weight to their choice-of-law findings when analyzing and ultimately dismissing Petitioners' claims on the basis of international comity.

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INTRODUCTION

While the injustice of permitting a foreign for-profit corporation to evade liability for its reprehensibly negligent conduct that caused untold bodily, property and ecological devastation has hovered over Petitioners' heads for the past ten years, Petitioners persist in remaining hopeful that the physical and emotional toil they have endured will not have been for naught; that their military service to the United States of America would justly afford them reciprocity such that they could rely upon a United States tribunal to redress their harms against a foreign, grievously negligent corporation. While the lower courts ruled that such reciprocity is unavailing, Petitioners remain hopeful that the particularity of their servicemember status and the circumstances under which they were harmed will provide this Court with an opportunity to fine tune and remediate the otherwise amorphous isthmus of international comity so they and future American litigants can emphatically rely on a just resolution of their claims within a tribunal located on American soil.

It is with that intention that Petitioners submit the following responses to points raised in Respondents' Oppositions.

ARGUMENT

I. Petitioners Rely on Traditional Adjudicatory Comity Analysis for Positing that Their Status as Representatives of the United States Requires a Weight that went Unacknowledged by the Lower Courts

Respondents' assertion that Petitioners are positing an alternative comity approach is belied by the express arguments made in Petitioners' opening briefs. Rather than an alternative to comity, Petitioners merely spotlight a glaring incongruity that has galloped alongside the court's comity discussion during the entirety of the proceedings. To wit: How is it possible that Petitioners, as U.S. Servicemembers undertaking a diplomatic humanitarian relief mission requested by a U.S. ally, are unable to rely upon a U.S. tribunal to redress the harms they incurred on account of well documented negligent conduct by a foreign, for-profit corporation? How is it possible that in an otherwise close call on whether to relinquish U.S. jurisdiction as a show of diplomatic deference to a sovereign nation's interests, that the lower courts failed to fully consider the requisite weight to ascribe Petitioners' status as agents of the United States government.

As their opening brief makes plain, Petitioners are by no measure advancing an alternative, first impression comity analysis. Rather, Petitioners are pointing out that, given the rationale for the very existence of comity that underlies 'traditional adjudicatory comity analysis,' i.e., as a means of

"maintaining amicable working relationships between nations," and as a "shorthand for good neighborliness, common courtesy and mutual respect between those who labor in adjoining judicial vineyards," the existing comity considerations utilized by lower courts, as well as those alternatives that exists in other Circuits, do not account for the circumstances that exist here. In this case, one party to the action is in fact a representative of the United States Government's Executive Branch, whose very claims derive explicitly from having carried out a United States governmental function. The otherwise Executive function inherent in a comity determination is particularly underscored where like here, Petitioners themselves hail from the Executive branch.

Petitioners are by no means seeking 'error correction' but rather highlight a need for this Court to address the impact that government actors, as a class of litigants, should have on a comity determination. Thus, as a case of first impression, and a lack of any uniform standards or factors for comity determinations across the Circuits, the issues before this Court render Petitioners' claims a proper vehicle for addressing and clarifying the law of international comity.

Similarly, Respondents' argument that Petitioners' 'new' and 'novel' comity analysis had not been previously pressed below is unavailing. Petitioners' comity analysis is indeed not a new or novel approach, but rather one that builds upon the well-established rationale underlying comity that the parties and the lower courts have relied upon throughout the pendency of this ongoing ten-year

proceeding. Respondents misunderstand that Petitioners' assertion of immunity statutes are offered as an analogy, meant to emphasize the imperativeness that Petitioners' status as representatives of the United States Government must be given great weight when courts are charged with deciding comity. In this regard, as immunity statutes serve a similar function as comity, Petitioners' reliance on such analogies are fundamentally sound.

Petitioners' immunity contentions do not raise a question of forfeiture for failure to press the issue below because Petitioners' status had consistently been raised before the District court when addressing the comity factors as they are so designated under Ninth Circuit precedent, i.e., *Mujica v. AirScan Inc.*

II. A Judicial Disregard of an Executive Branch's Statement of Interest on Questions of Foreign Policy and Diplomacy Most Definitely Raises a Separation of Powers Concern

Given that both the District court and Ninth Circuit designated their comity determinations as 'close calls,' it is 'reasonably' confounding that despite assurances from the United States government that there were no diplomatic impediments to the District court retaining jurisdiction, such assurances went unheeded when at the least, they should have reasonably tipped the scales in favor of the court retaining jurisdiction. Again, given the 'close call,' it is certainly reasonable to conclude that the District court and the Ninth Circuit effectively afforded

minimal weight to the opinion of the United States government despite the government speaking on matters of its own diplomatic and foreign policy concerns. This is a glaring example of why it is imperative that this Court review comity jurisprudence, where, as a judicially applied quasi-executive function, it raises concerns as to exactly how separation of powers operates within a comity determination.

As set out more fully in Petitioners' opening brief, by abstaining to exercise its rightfully endowed jurisdiction on account of comity concerns, the judiciary is effectively engaging in executive type diplomacy which is decidedly an express function of the Executive branch. As comity clearly invokes a question of separation of powers that has not yet been examined by this Court, and whose murkiness permitted the otherwise unjust result at bar, guidance from this Court is absolutely paramount.

Respondents' arguments reinforce such necessity where merely parsing the content of a statement of interest cannot and should not minimize the Executive branches' bottom line that adjudicating a claim in a United States court would have no diplomatic impact, particularly where like here, Petitioners are in fact, officers of the Executive branch who were harmed while aboard U.S. territory carrying out an executive function. Although in its Statement of Interest, the United States rendered opinions on some of the legal issues before the District court, such opinions were extraneous to the primary comity concern of whether retaining jurisdiction would strain diplomatic relations with Japan and/or impinge upon foreign policy concerns. The United

States answered that question with a negative. Pet. App. 216a-217a, 231a. Given the primary concern underlying comity, the court was arguably bound to afford significant weight to the expressed diplomatic and foreign policy position of the Executive branch. The lower courts however failed to afford the appropriate weight which raises a significant separation of powers question that perhaps until now, has lied dormant within the skeleton of the comity doctrine. It is the resolution of this issue and the resulting lack of judicial clarity that renders Petitioners' claims ripe for review. It is not surprising that Respondents' opposition is silent with respect to Petitioners' separation of powers argument and instead characterizing Petitioners' claim as merely a fact bound error correction.

III. As a Rule of Procedure, Choice-of-Law Cannot be the Determinative Rationale for a Court to Abstain Jurisdiction Under Comity

The lower courts absolutely abused their discretion by unduly relying on the procedural rule of choice-of-law rather than on account of the factors expressly set out by the Ninth Circuit Court of Appeals. Such assertion is firmly buttressed by a simple reading of the District court's order and the Ninth Circuit's affirmance. As the majority of both courts' opinions are devoted to an analysis of the question of choice-of-law, it is readily apparent from their exposition that the two courts overly relied upon their choice-of-law determination as providing the overwhelming basis for dismissing Petitioners' claims and abstaining jurisdiction on comity grounds. Pet. App. 25a-29a, 49a-59a. Essentially, the lower courts

shifted the result of an otherwise procedural rule onto the jurisdictionally substantive rule of international comity. While Petitioners acknowledge that choice-of-law can conceivably serve as a factor under a comity analysis, the abuse of discretion here lies with the inordinate weight that the lower courts ascribed to its choice-of-law finding that arguably overshadowed and eclipsed the otherwise expressly designated comity factors under *Mujica*.

CONCLUSION

Based upon the solid grounds asserted herein for review, this case has no defects preventing the review of the questions presented. The Court should therefore grant this Petition for a Writ of Certiorari.¹

¹ As equity is necessary in many cases to fulfill the law where the law by its nature is general in scope and application, 'aequitas sequitur legem,' this Court has consistently over its history employed its equitable remedial powers to address antecedent rules which "cannot be applied without injustice, or to which they cannot be applied at all." Joseph Story, Commentaries on Equity Jurisprudence 6-7 (13th ed. 1886). As the instant petition makes plain, the Court's equitable lens is more than reasonably justified. See, *Brown v. Board of Education*, 349 U.S. 294, 300(1955). ("traditionally, equity has been characterized by a practical flexibility in shaping its remedies...")

Respectfully submitted,

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