No. 15-56424

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LINDSAY R. COOPER, et al.,

Plaintiffs-Appellees,

v.

TOKYO ELECTRIC POWER COMPANY, INC.,

Defendant-Appellant.

On Appeal from the United States District Court
for the Southern District of California

BRIEF FOR THE UNITED STATES IN SUPPORT OF NEITHER PARTY AND IN SUPPORT OF AFFIRMANCE OF THE ORDER BELOW

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INTRODUCTION AND INTERESTS OF THE UNITED STATES AS *AMICUS CURIAE*

The United States respectfully submits this amicus brief in response to the Court's order of September 26, 2016. In declining to dismiss this litigation, the district court weighed the interests of U.S. military servicemembers in litigating their claims in a U.S. court against the interests of the private defendant and the Government of Japan in having disputes arising out of the nuclear accident at the Fukushima-Daiichi power plant adjudicated in a Japanese forum. This case thus touches upon strong U.S. interests, both because of our Nation's enduring relationship with Japan, a longstanding and essential ally, and because plaintiffs in this action are members of the U.S. military allegedly harmed while deployed on a humanitarian mission, and their family members.

The humanitarian mission at issue in this case, Operation Tomodachi, evinces the strong ties between this country and the country of Japan. Japan is an essential strategic, political, and economic ally and partner of the United States. The United States applauds 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. The United States also applauds Japan's decision to become a party to the Convention on Supplementary Compensation for Nuclear Damage (Convention), pursuant to

which jurisdiction over litigation regarding future nuclear incidents causing nuclear damage in Japan would be exclusive to a Japanese forum.

Nevertheless, as explained further in the Argument section of this brief, the United States does not believe that the district court abused its discretion in declining to dismiss this case under the doctrines of international comity and *forum non conveniens*. In its comity analysis, the district court correctly stated this Circuit's law. The district court weighed the interests of the private defendant and the Government of Japan in having these cases resolved in a Japanese forum, as well as the interests of the U.S. plaintiffs in having their claims heard in a U.S. court. Although the United States recognizes Japan's desire to have these cases decided in a uniform manner, Japan's remedial scheme is not exclusive on its own terms; the United States did not play a role in developing the remedial scheme; and plaintiffs are U.S. citizens rather than Japanese nationals. These differences distinguish this case from cases in which courts have held that international comity requires dismissal of claims brought in a U.S. forum. Nor does the Convention on Supplementary Compensation for Nuclear Damage reflect a policy that the State in which a nuclear incident occurred must be the exclusive forum for adjudicating claims of civil liability when the Convention does not apply to the incident. While the United States strongly values its relationship with Japan, it does not have a

foreign policy interest in the specific subject matter of this litigation that requires dismissal at this time.

For similar reasons, the United States does not believe that the district court abused its discretion in declining to dismiss the claims on *forum non conveniens* grounds. The district court ruled that the interests of U.S. citizens in litigating in a home forum outweighed the interests supporting adjudication of this dispute in a Japanese forum. This was not an abuse of discretion.

The Court's order also invited the United States to address the political question doctrine and the "firefighter's rule." In the view of the United States, however, it is premature for the United States (and this Court) to address the potential application of those doctrines to the claims in this case. Their applicability depends on the law that governs the claims and defenses in this action, but no choice-of-law analysis has yet been conducted by the district court. The United States notes that, to the extent ruling on a plaintiff's claims would require a judicial inquiry into the reasonableness of military commanders' decisions regarding deployment of U.S. troops, which involves balancing risks of a deployment decision against the benefits of mission objectives, those claims would be nonjusticiable under the political question doctrine. However, judicial restraint and constitutional avoidance principles counsel in favor of conducting a choice-of-law analysis prior to deciding whether plaintiffs' claims against the private

defendant are justiciable, or addressing a novel question of first impression under state law.

STATEMENT

A. Japan is one of the United States' most important economic partners and strategic allies. It hosts approximately 50,000 U.S. servicemembers at bases in Japan under bilateral arrangements, including the 1960 Treaty of Mutual Cooperation and Security. In the context of complex security threats to both countries, the strength of the U.S.–Japan alliance is central to U.S. foreign policy objectives in the Asia-Pacific region. Our two countries also share essential values, including a commitment to democracy and the rule of law. Operation Tomodachi, involving humanitarian support by U.S. troops in the midst of a dire emergency, was a tangible example of the strength and the benefits of the U.S.–Japan alliance.

Japan is also a valuable economic partner to the United States, and represents the United States' fourth-largest export market and its fourth-largest source of imports. In 2014, our two-way goods and services trade exceeded $279 billion. The United States is the largest foreign investor in Japan, accounting for 29% of Japan's total inbound stock of foreign direct investment, and Japan consistently provides a large volume of foreign direct investment to the United States. Japan was the largest source of foreign direct investment in the United

States in 2013 and 2014, and the second largest in 2015. Japanese firms employ an estimated 839,000 personnel in the United States, and U.S. companies employ an additional 600,000 people whose jobs are directly tied to exports to Japan.

The United States and Japan also cooperate broadly on nuclear energy issues, encompassing both close commercial ties among our companies and bilateral government-to-government engagement. On issues relating to Fukushima, for example, the U.S. Department of Energy leads an interagency Bilateral Commission on Civil Nuclear Cooperation. Both the United States and Japan are parties to the Convention on Supplementary Compensation for Nuclear Damage, a multilateral treaty regime designed to address compensation for nuclear damage from nuclear incidents.

B. The United States took a leading role in the creation of the Convention on Supplementary Compensation for Nuclear Damage, in order to establish a global framework for providing for compensation for nuclear damage from nuclear incidents.

The Convention operates to ensure an effective recovery mechanism for victims of nuclear damage from nuclear incidents, while simultaneously protecting U.S. suppliers of nuclear technology from potentially unlimited liability arising from their activities in foreign markets. *See* S. Exec. Rep. No. 109-15, at 2, 8 (2006). The Convention channels liability to the operator of a nuclear facility in

the State Party where the incident occurred. *See id.* at 2; Int'l Atomic Energy Agency, Convention on Supplementary Compensation for Nuclear Damage, IAEA Doc. INFCIRC/567, art. XIII (July 22, 1998). The Convention also helps ensure the availability of prompt and adequate compensation for victims, including U.S. nationals who might be affected by an incident outside the United States. *See* S. Exec. Rep. No. 109-15, at 2. The Convention accomplishes these goals by (1) providing for strict liability for nuclear accidents, *see* Convention art. II(1)(a), (b); *id.* annex, art. 3; (2) requiring a State Party in whose territory an incident takes place to provide at least a minimum amount of funds to compensate victims without regard for their nationality, domicile, or residence, *id.* art. III(1), (2); and (3) making a multilateral supplemental compensation fund available where damage exceeds that amount, to be funded by the States Parties to the Convention, *id.* arts. III(1)(b), IV.

These provisions work together to create an interlocking "system." Convention art. II(2). For U.S. interests in the Convention to be fulfilled, the regime established by the treaty must be viewed in its entirety. The exclusive jurisdiction provision forms part of a bargain in exchange for robust, more certain and less vexatious (*e.g.*, the application of strict liability without need to establish fault) compensation for victims of a potential incident. United States policy does

not call for advancing one element of this system in isolation from the other elements of the Convention's system.

For these two inextricably interrelated interests to be fully realized, it is essential that the Convention be as widely adhered to internationally as possible. Thus, broad international adherence to the Convention is the ultimate U.S. policy goal. *See* S. Treaty Doc. No. 107-21, at III-IV (2002). The United States led the effort to negotiate the Convention and has been the leading proponent of the treaty regime. *Treaties: Hearing Before the S. Comm. on Foreign Relations*, 109th Cong. 20-22, 26 (2005) (2005 Hearing). From the perspective of the United States, the Convention is preferable to other international treaty regimes aimed at addressing nuclear incidents, which would require sweeping changes to U.S. tort law. *See* S. Exec. Rep. No. 109-15, at 2.

The Convention was ratified by Japan in January 2015, and entered into force in April 2015.[1] Because the Convention was not in force at the time of events underlying plaintiff's claims, those events are not covered under the Convention.

C. In March 2011, a devastating earthquake and tsunami struck Japan. In keeping with the strong ties between the United States and Japan, U.S. troops

[1] *See* https://www.iaea.org/Publications/Documents/Conventions/supcomp_status.pdf.

provided immediate humanitarian aid to victims of this natural disaster. Plaintiffs are members of the U.S. military who assert that they were deployed in the vicinity of Fukushima to provide humanitarian aid to the victims of the earthquake and tsunami, and their families. ER 804, 816 (Second Am. Comp.).

The earthquake and tsunami ultimately led to the meltdown of three reactors at the Fukushima-Daiichi nuclear power plant, which was operated by the private defendant. Plaintiffs allege that they were exposed to radiation during the humanitarian operation and, as a result, are at risk for various radiation-related illnesses. *See, e.g*, ER 804, 845-46 (Second Am. Compl.).

Plaintiffs filed this tort suit against the Tokyo Electric Power Company, Inc. (TEPCO) and other defendants in the United States District Court for the Southern District of California. TEPCO moved to dismiss plaintiffs' second amended complaint on the basis of international comity, *forum non conveniens*, the political question doctrine, and a doctrine of California law known as the "firefighter's rule." The district court denied the motion to dismiss, and this Court accepted TEPCO's interlocutory appeal.

Following oral argument, this Court called for the views of the United States on the issues in this appeal. Specifically, this Court requested the views of the United States on the application of the doctrine of international comity, *forum non conveniens*, the political question doctrine, and the "firefighter's rule."

ARGUMENT

I. The district court did not abuse its discretion in declining to dismiss this case on the basis of international comity.

A. Comity is "the recognition which one nation allows within its territory to the legislative, executive, or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens, or of other persons who are under the protection of its laws." *Hilton v. Guyot*, 159 U.S. 113, 164 (1895). One strand of comity is "adjudicatory comity," pursuant to which a U.S. court "'as a discretionary act of deference'" declines to exercise jurisdiction over a case on the basis that it is more properly decided in a foreign forum. *Mujica v. AirScan Inc.*, 771 F.3d 580, 599 (9th Cir. 2014), *cert. denied* 136 S. Ct. 690 (2015) (quoting *In re Maxwell Commc'n Corp. ex rel. Homan*, 93 F.3d 1036, 1047 (2d Cir. 1996)).

Under governing Ninth Circuit law, a court addressing adjudicatory comity weighs "several factors, including [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." *Mujica*, 771 F.3d at 603 (brackets in original). This Court has set out the following nonexclusive list of factors relevant to ascertaining U.S. and foreign interests: "(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 United States, and (5) any public

policy interests." *Id*. at 604; *see also id*. at 607 (indicating that "[t]he proper analysis of foreign interests essentially mirrors the consideration of U.S. interests"). The Executive Branch's view of its interests is also entitled to "serious weight" and due deference. *Id*. at 610. This Court reviews the district court's decision for abuse of discretion. *Id*. at 589.[2]

In the view of the United States, the district court did not abuse its discretion in declining to dismiss this case under this test. The district court accurately identified *Mujica* as a recent statement of the governing law in this circuit and applied the relevant factors to the facts of this case. As the district court acknowledged, TEPCO is a Japanese corporation and its actions took place in Japan. Japan therefore has an interest in this litigation. Plaintiffs are U.S. citizens,

[2] In describing the abuse of discretion standard for review of the denial of dismissal on international comity grounds, *Mujica* states that the district court's application of the correct legal rule must be upheld unless the application is "illogical," "implausible," or "without 'support in inferences that may be drawn from the facts in the record.'" 771 F.3d at 589. The United States respectfully suggests that this articulation of the abuse of discretion standard, which was derived from cases reviewing a district court's factual findings under a clearly erroneous standard, *see United States v. Hinkson*, 585 F.3d 1247, 1259, 1262 (9th Cir. 2009) (en banc), sets too high a bar for overturning a district court's resolution of the mixed questions of law and fact underlying a comity determination. However, in this case, the district court did not abuse its discretion under either articulation of the standard.

however, who have chosen to litigate this case in a U.S. forum. This factor weighs against dismissal.

B. The foreign policy and public policy interests here do not require a holding that the district court abused its discretion. As described above, Japan is an important ally and a valuable partner. In addition, the United States applauds Japan's efforts to provide adequate and timely compensation for claims following Fukushima, as detailed in Japan's amicus brief filed with this Court. Japan Br. 2-3. Japan has informed the Court that 2.4 million claims have been resolved under its scheme and that it has paid approximately $58 billion in compensation.[3] Japan Br. 2. These factors, however, are not a sufficient basis to conclude that the district court abused its discretion here.

Japan's remedial scheme differs in critical ways from remedial schemes as to which U.S. courts have applied principles of adjudicatory comity. Most significantly, while the United States acknowledges Japan's concerns that adjudication of claims outside its compensation scheme might undermine that scheme, Japan does not assert that the scheme is exclusive on its own terms. There is no provision of Japanese law foreclosing lawsuits arising out of the Fukushima

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[3] To the government's knowledge, this compensation has been for economic damages, and Japan has not yet had the opportunity to decide a claim for personal injuries arising from radiation exposure under this scheme. However, this is apparently due to the economic nature of the harms suffered, not to the inability of the compensation scheme to address an injury claim if one were brought.

disaster to which a U.S. court is asked to give force and effect. *Cf. Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582, 585-86 (2d Cir. 1993) (dismissing suit brought by Indian mass tort victims for lack of standing where Indian law gave the Indian government the exclusive right to represent victims of the disaster and the Indian government had agreed to a global settlement). Additionally, the United States was not involved in the creation of Japan's compensation system and is not party to any bilateral or multilateral agreement recognizing or seeking recognition for Japan's compensation system as an exclusive remedy. *Cf. Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1231, 1239 (11th Cir. 2004) (dismissing on comity grounds where "the United States agreed to encourage its courts and state governments to respect the Foundation as the exclusive forum for claims from the National Socialist era" and "consistently supported the Foundation as the exclusive forum").

The United States has no clear independent interest in Japan's compensation scheme beyond our general support for Japan's efforts to address the aftermath of Fukushima. Under these circumstances, the district court could have reasonably determined that the interest in providing U.S. service members a U.S. forum for their claims was not outweighed by the interest in having the Japanese system address all claims arising out of the Fukushima nuclear accident.

C. The Convention on Supplementary Compensation for Nuclear Damage does not evince a public policy of the United States or Japan that would render the district court's comity ruling an abuse of discretion. On the contrary, the district court's decision in this case is consistent with U.S. interests in promoting the Convention.

The Convention entered into force after the Fukushima nuclear accident, so it does not apply to this case on its own terms.[4] As a general rule, "[u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party." Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 331, 339, art. 28 (May 23, 1969);[5] *Ehrlich v. Am. Airlines, Inc.*, 360 F.3d 366, 373 (2d Cir. 2004) ("Ordinarily, a particular treaty does not govern conduct that took place before the treaty entered into force."). Some commentators have suggested that jurisdictional provisions may sometimes be interpreted as applying to disputes that arose before the entry into force of the treaty on the theory that, "by

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[4] The district court correctly concluded that the Convention does not apply to this case, although its holding seems to have been based at least in part on the erroneous understanding that the Convention was not in force at the time of its order, rather than at the time of the incident. ER 47.

[5] While the United States is not a party to the Vienna Convention on the Law of Treaties, it recognizes Article 28 as reflective of customary international law.

using the word 'disputes' without any qualification, the parties are to be understood as accepting jurisdiction with respect to all disputes existing after the entry into force of the agreement." *Draft Articles on the Law of Treaties, with commentaries*, Yearbook of the Int'l Law Comm'n, 1966, Vol. II, at 212. However, under this theory, "when a jurisdictional clause is attached to the substantive clauses of a treaty as a means of securing their due application, the non-retroactivity principle may operate to limit *ratione temporis* the application of the jurisdictional clause." *Id.*

Rather than using the general term "disputes," the Convention's jurisdictional channeling is limited to "actions concerning nuclear damage from a nuclear incident" and provides that jurisdiction "shall lie only with the courts of the Contracting Party within which the nuclear incident occurs." Convention art. XIII(1). So even under this theory, the Convention's jurisdictional provisions would not be interpreted to apply retroactively. Both "nuclear damage" and "nuclear incident" are defined terms under the Convention, brought into existence only upon the Convention's entry into force. Additionally, the verb "occurs" is in the present tense, not the past tense as would be expected if the treaty applied retroactively. *Id.*

Moreover, retroactive application would significantly undermine the liability regime established by the Convention. For U.S. interests in the Convention to be

fulfilled, it is essential that the treaty regime be widely adhered to internationally. The Convention creates a compensation regime whereby, if an incident occurs for which the baseline compensation is not sufficient, States Parties must pay into a supplementary compensation fund. *See* Convention art. III, IV. If a State were allowed to receive the benefit of the exclusive jurisdiction provisions and perhaps even access to the supplementary compensation fund by becoming a party to the treaty after a nuclear incident has taken place in its territory, there would be no need for any State to join the Convention prior to such an incident occurring. States would likely wait to join the Convention to avoid having to pay into the fund for an incident in the territory of another State Party. Additionally, if States Parties to the treaty were required to contribute to a supplementary compensation fund for incidents that predate the Convention's entry into force, the cost would be a significant disincentive to nations considering ratification.

As indicated above, the policies underlying the Convention do not require dismissal in a case to which the Convention does not apply. The Convention regime promotes U.S. interests both in providing prompt and adequate compensation to victims of nuclear incidents and in simultaneously protecting U.S. nuclear suppliers from potentially unlimited liability arising from their activities in foreign markets. *See* S. Exec. Rep. No. 109-15, at 2, 8. The treaty provisions work together to create an interlocking "system." Convention art. II(2). The

regime must be viewed in its entirety, with the exclusive jurisdiction provision forming part of a bargain in exchange for robust and more likely compensation for victims of a potential incident. Holding that international comity requires dismissal of suits brought in the United States by U.S. citizens for injuries from nuclear incidents abroad would effectively provide for exclusive jurisdiction without the other components of the treaty. United States policy does not call for advancing one element of this system in isolation of the other.

In arguing that U.S. policy requires dismissal, TEPCO mistakenly relies on testimony by the State Department's then-Senior Coordinator for Nuclear Safety, Warren Stern, during 2005 Senate hearings on the Convention. In response to a question from the Chairman of the Senate Foreign Relations Committee regarding whether joining the Convention would "in effect limit the right of U.S. persons to bring suit against entities or companies in the United States courts or against U.S. companies for accidents overseas," Mr. Stern responded in the affirmative, but also noted: "As a practical matter, in today's legal framework, where there is no [Convention], we would expect that if a nuclear incident occurs overseas U.S. courts would assert jurisdiction over a claim only if they concluded that no adequate remedy exists in the court of the country where the accident occurred." 2005 Hearing at 27. This was a factual, predictive statement ("as a practical matter"), not an expression of U.S. policy. 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, and, as explained above, limiting this existing flexibility to hear claims outside the courts of the country where the accident occurred was one of the functions of the treaty. Mr. Stern made this clear in his testimony, explaining that "[o]nce the United States and the state whose nationals are involved are both Parties to the [Convention], liability exposure will be channeled to the operator in the 'installation state,' thus substantially limiting the nuclear liability risk of United States suppliers." *Id.* at 19.

Plaintiffs in this case are U.S. servicemembers who have chosen to file claims in U.S. court. The United States has no specific foreign policy interest necessitating dismissal in this particular case. Under these circumstances, while this Court should give due regard to Japan's brief, the United States does not believe the district court abused its discretion in refraining from denying these plaintiffs access to U.S. courts in favor of a Japanese forum.

II. The district court did not abuse its discretion in declining to dismiss this case on the basis of *forum non conveniens*.

Under the doctrine of *forum non conveniens*, a "district court has discretion to decline to exercise jurisdiction in a case where litigation in a foreign forum would be more convenient for the parties." *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142 (9th Cir. 2001). Courts consider the following private interest factors: "(1) the residence of the parties and the witnesses; (2) the forum's convenience to

the litigants; (3) access to physical evidence and other sources of proof; (4) whether unwilling witnesses can be compelled to testify; (5) the cost of bringing witnesses to trial; (6) the enforceability of the judgment; and (7) all other practical problems that make trial of a case easy, expeditious and inexpensive." *Id.* at 1145. The relevant public interest factors are "(1) local interest of lawsuit; (2) the court's familiarity with governing law; (3) burden on local courts and juries; (4) congestion in the court; and (5) the costs of resolving a dispute unrelated to this forum." *Id.* at 1147. This Court has explained that "[w]hen a domestic plaintiff initiates litigation in its home forum, it is presumptively convenient." *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1227 (9th Cir. 2011).

The party moving for dismissal has the burden of demonstrating that dismissal is warranted. *Creative Tech., Ltd. v. Aztech Sys. Pte., Ltd.*, 61 F.3d 696, 699 (9th Cir. 1995). The district court's decision is reviewed for abuse of discretion. *Lueck*, 236 F.3d at 1143.

Although "[t]he presence of American plaintiffs . . . is not in and of itself sufficient to bar a district court from dismissing a case on the ground of *forum non conveniens*," "a showing of convenience by a party who has sued in his home forum will usually outweigh the inconvenience the defendant may have shown." *Contact Lumber Co. v. P.T. Moges Shipping Co.*, 918 F.2d 1446, 1449 (9th Cir. 1990). This Court has upheld district court decisions dismissing cases on the basis

of *forum non conveniens* that were brought by U.S. citizens against foreign defendants regarding conduct that occurred abroad. *See, e.g., Loya v. Starwood Hotels & Resorts Worldwide, Inc.*, 583 F.3d 656, 665–66 (9th Cir. 2009); *Gutierrez v. Advanced Med. Optics, Inc.*, 640 F.3d 1025, 1028, 1032 (9th Cir. 2011). However, a defendant seeking to reverse the denial of a motion to dismiss on this basis faces a "doubly difficult task," given the standard of review on appeal. *See Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1177 (9th Cir. 2006).

The district court did not abuse its discretion here. As the district court explained, relevant evidence is likely present in both countries, and both parties would incur additional costs and be inconvenienced by litigating in the other country. ER 35-40. The district court recognized Japan's interest in adjudicating the lawsuit, ER 41, and the United States sees no basis for concluding that the district court abused its discretion in determining that the balance of factors nevertheless weighed against dismissal.

TEPCO asserts that a plaintiff's choice of its home forum is irrelevant where a plaintiff would not be required to travel in person to litigate the case abroad. Reply Br. 16. This is incorrect. Plaintiffs may prefer to testify in person, even if this is not legally required, and may wish to do so in front of a tribunal that will hear their testimony in untranslated form. In any event, litigating in plaintiffs'

home forum may be more convenient for many reasons, of which travel is only one. The many costs and hurdles inherent in litigating in a foreign legal system are relevant to the *forum non conveniens* analysis. *See Lueck*, 236 F.3d at 1145 (instructing courts to consider "practical problems that make trial of a case easy, expeditious and inexpensive"). TEPCO erroneously relies on cases addressing whether use of an alternative forum is unreasonable or inadequate, not merely inconvenient. *See, e.g., Argueta v. Banco Mexicano, S.A.*, 87 F.3d 320, 325 (9th Cir. 1996) (addressing enforceability of forum selection clauses in contracts, which are presumed to be valid unless unreasonable under the circumstances); *Mujica*, 771 F.3d at 614 (holding that noncitizen plaintiffs had not made the required "powerful showing" that the alternative forum is "clearly unsatisfactory" for purposes of comity).

As the United States discusses in greater detail below, the district court did err in simply assuming that U.S. law would apply to this suit, without conducting a choice-of-law analysis. ER 42. However, this error does not require reversal of the *forum non conveniens* ruling. While this Court has stated that a choice-of-law analysis must precede a decision on *forum non conveniens*, it did so in the context of cases in which a potentially applicable rule of law mandated venue in U.S. courts. *See Creative Tech.*, 61 F.3d at 700. The United States is not aware of any such statute that could apply in this case. Where no such venue provision is at

issue, "the applicability of United States law to the various causes of action 'should ordinarily not be given conclusive or even substantive weight.'" *Lueck*, 236 F.3d at 1148 (quoting *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 247 (1981)).[6]

III. This Court should refrain from addressing the political question doctrine at this preliminary stage without the benefit of a choice-of-law analysis.

The Court also invited the United States to express its views on the application of the political question doctrine to the claims in this case. The United States notes that, to the extent ruling on a plaintiff's claims would require a judicial inquiry into the reasonableness of military commanders' decisions regarding deployment of U.S. troops, which involves balancing the risks of a deployment decision against the benefits of mission objectives, those claims would be nonjusticiable under the political question doctrine. "The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). Decisions regarding where to locate troops in dangerous and unfolding situations, involving a weighing of the risk to troops against mission objectives, are exactly the type of "complex, subtle, and professional decisions within the military's professional judgment and beyond

[6] Indeed, should this case be decided under Japanese law, the application of Japan's strict-liability regime may reduce the need for evidence located in Japan regarding the maintenance of the power plant.

courts' competence." *Harris v. Kellogg Brown & Root Servs., Inc.*, 724 F.3d 458, 478 (3d Cir. 2013); *see also Wu Tien Li-Shou v. United States*, 777 F.3d 175, 180-81 (4th Cir. 2015); *Saldana v. Occidental Petroleum Corp.*, 774 F.3d 544, 553 (9th Cir. 2014); *El-Shifa Pharm. Indus. Co. v. United States*, 607 F.3d 836, 843-44 (D.C. Cir. 2010) (en banc); *Aktepe v. United States*, 105 F.3d 1400, 1404 (11th Cir. 1997).

At this early stage of the litigation, however, it is premature to decide whether the political question doctrine applies prior to conducting a choice-of-law analysis. The United States accordingly takes no position now on the doctrine's application to the claims in this case.[7]

This Court has explained that, "[a]lthough the political question doctrine often lurks in the shadows of cases involving foreign relations," such cases are often resolved on other legal grounds. *Alperin v. Vatican Bank*, 410 F.3d 532, 538 (9th Cir. 2005). "[I]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Northwest Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 205 (2009) (quoting *Escambia Cty. v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam)).

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[7] Depending on how these proceedings develop, the government may express further views on the applicability of the political question doctrine to the claims in this case.

Although this Court treats the political question doctrine as a jurisdictional bar, *Corrie v. Caterpillar, Inc.*, 503 F.3d 974, 979 (9th Cir. 2007), it can wait for the issues in the litigation to be developed prior to dismissing on that basis, *New York v. United States*, 505 U.S. 144, 185 (1992); *Wong v. Ilchert*, 998 F.2d 661, 662-63 (9th Cir. 1993).

In order to assess the political question argument in this case, the Court must understand the elements of the cause of action and relevant defenses under the applicable law. TEPCO asserts that it has a defense based on the U.S. military's supposed recklessness in exposing its troops to radiation, which TEPCO argues is a superseding cause absolving it of liability. TEPCO makes this argument under California law. However, the parties have not yet briefed choice of law and the district court did not address it. Given that the relevant conduct that gave rise to plaintiffs' claims occurred in Japan, there is at least a possibility that Japanese law will apply to this case. *See Downing v. Abercrombie & Fitch*, 265 F.3d 994, 1005 (9th Cir. 2001) (explaining standard for choice of law determinations for cases filed in California). At a minimum, the district court would have to consider the potential bodies of law that apply, whether California's or Japan's; to determine whether there is a true conflict between those two bodies of law; to resolve any conflict by considering each state's interests in having its law applied; and, finally,

to "apply the law of the state whose interest would be more impaired if its law were not applied." *Id.*

Without knowing whether California law will apply or whether a superseding-cause defense exists under Japanese law, it is premature to decide whether this case is nonjusticiable under the political question doctrine. Even if the superseding-cause defense were applicable, as the district court explained, at this early stage of the litigation it is far from clear whether the court would actually be called upon to evaluate the wisdom of military decision making. It is also unclear at this stage whether a need to review military decisions to adjudicate any superseding-cause defense would require dismissal, or whether the military's decisions simply could not qualify as a superseding cause. *See Harris*, 724 F.3d at 469 n.9. To the extent that the superseding-cause defense under governing law requires that the intervening actions be unforeseeable, the court may determine that it was foreseeable that rescue workers, including the U.S. military, would respond to this disaster even if some risk were involved.[8] *See, e.g., USAir Inc. v. U.S.*

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[8] Determining whether there was an unforeseeable intervening action could also require a court to resolve an apparent dispute regarding the distance of the U.S.S. *Ronald Reagan*, the vessel on which the troops were deployed, from the Fukushima plant. Plaintiffs assert that at some point the U.S.S. *Ronald Reagan* was positioned just two miles from the Fukushima plant. ER 357 (Third Am. Compl.); ER 833 (Second Am. Compl.). Significantly, however, the Department of Defense, in conjunction with the National Council on Radiation Protection and Measurements, conducted an official investigation into the Fukushima disaster and

Dep't of Navy, 14 F.3d 1410, 1413 (9th Cir. 1994) ("A superseding cause must be something more than a subsequent act in a chain of causation; it must be an act that was not reasonably foreseeable at the time of the defendant's negligent conduct.") (applying California tort law).

IV. The Court should not reach the "firefighter's rule" absent a choice-of-law analysis.

For reasons similar to those expressed in the prior section, in the view of the United States it is premature to determine whether this case should be dismissed based on the firefighter's doctrine. The firefighter's rule is a doctrine under California tort law. *See, e.g., Lipson v. Superior Court*, 644 P.2d 822, 826-27 (Cal. 1982). Without knowing the applicable body of law that governs this dispute, there is no way to determine whether a California state-law defense would be even potentially available. The United States urges the Court not to rule on the scope of the firefighter's rule before the choice-of-law analysis is completed, particularly as doing so could require an expansion of the doctrine and could have unforeseen repercussions for U.S. troops.

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the deployment to support Operation Tomodachi and determined that the vessel was never closer than 100 miles to the site of the nuclear plant. *See* Dep't of Def., Final Report to the Congressional Defense Committees in Response to the Joint Explanatory Statement Accompanying the Department of Defense Appropriations Act, 2014, page 90, "Radiation Exposure," at B-1 (June 19, 2014), www.health.mil/Reference-Center/Reports/2014/06/19/Radiation-Exposure-Report.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a). This brief contains 6,094 words.

s/ Dana Kaersvang
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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2016, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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