No. 07-81

07A546

IN THE SUPREME COURT OF THE UNITED STATES

EXXON MOBIL CORPORATION, *et al.*, *Petitioners*,

v.

JOHN DOE I, *et al.*, *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals
for the District of Columbia Circuit

RESPONSE TO PETITIONERS' APPLICATION FOR STAY OF PROCEEDINGS

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January 4, 2008

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Petitioners have moved for a stay of proceedings in the district court pending this Court's consideration of their petition for a writ of certiorari. The Chief Justice requested a response to the application for a stay and raised several questions about the status of discovery in the district court. Respondents respond as follows:

Petitioners' fifth motion for a stay of proceedings should be denied. Discovery in this case has almost concluded: over one hundred fifty thousand pages of documents have been produced; interrogatories have been served and answered; and five depositions have been taken. Only three depositions remain prior to the close of discovery on January 14, 2008, all within the same limited scope of discovery as the prior depositions. None of the remaining discovery differs from the discovery that has already been concluded. Petitioners have not filed a single motion relating to the document requests or the interrogatories, nor did they make a single objection relating to foreign policy concerns at any of the depositions taken to date. The United States, which is on the district court service list, has not sought to intervene or object to any of the ongoing discovery or to weigh in on any of the multiple stay applications below.

Both the U.S. Court of Appeals for the District of Columbia Circuit and the district court properly denied Petitioners' four prior motions for a stay.[1] D.C. Cir. Order Den. Mot. for Recons. of Stay Denial, June 30, 2006 (Applic. for Stay, Attach. D); D.C. Cir. Order Den. Stay, Mar. 21, 2006, at 1 (Petitioners "have not satisfied the stringent standards required for a stay") (Applic. for Stay, Attach. E); Dist. Ct. Mem. and Order, Dec. 19, 2007, at 4 ("Dist. Ct. Order Den. Stay II") ("There has been no change in the potential harm to Defendants since the Court of

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[1] Petitioners also filed a separate motion for a "postponement" of proceedings, which was also denied in the district court's December 19, 2007 order. Dist. Ct. Mem. and Order, Dec. 19, 2007 at 5 (Applic. for Stay, Attach. C).

Appeals denied their last of three earlier stay requests . . . .") (Applic. for Stay, Attach. C); Dist. Ct. Order Den. Mot. to Stay Proceedings Pending Appeal, Nov. 17, 2005, at 4 ("Dist. Ct. Order Den. Stay I") (Petitioners "have fallen far short of meeting their burden to justify a stay.") (Applic. for Stay, Attach. F). In support of their fifth stay application, Petitioners repeat the same arguments that the lower courts have already rejected. In fact, the current application for a stay has even less merit than the prior motions, as the conduct of discovery over the past year amply demonstrates that the requirements for a stay are not met. The district court has carefully managed discovery, which is all but concluded. Petitioners have not suffered irreparable (or any) harm, and the dire foreign policy consequences predicted by Petitioners' past stay motions have not in fact occurred. Petitioners themselves do not argue otherwise. Given this record, there is no reason to believe that completing the discovery that has already begun will have any adverse effects.

Petitioners have failed to meet the stringent standard for a stay. Whether the Court applies the standard under the All Writs Act, 28 U.S.C. § 1651, or the standard for stays of final orders under 28 U.S.C. § 2101(f), as Petitioners urge, the result is the same: The application should be denied.

STATEMENT OF THE CASE

A. Procedural History

Exxon Mobil operates a large natural gas facility in the Aceh province of Indonesia. Respondents are eleven Indonesian villagers from Aceh (or their survivors) who suffered murder, sexual assault, battery, false imprisonment, and other wrongs at the hands of Exxon Mobil's security forces. Those security forces were members of the Indonesian military hired by Exxon Mobil for the "sole and specific purpose" of providing security for Exxon Mobil and "not for maintaining general law and order." First Amended Complaint ¶¶ 47, 48 & n. 19. Exxon

Mobil paid a regular monthly fee for these security services, including payments to individuals for their services, and had the ability to, and did, supervise, control, and direct its security personnel at all times. *Id.* ¶¶ 49, 51–54, 57, 134.

In June 2001, Respondents sued Exxon Mobil. In October 2001, Exxon Mobil moved to dismiss the case. While the motion to dismiss was pending, District Judge Oberdorfer solicited the U.S. State Department's opinion regarding whether adjudication of Respondents' claims would adversely affect U.S. foreign policy interests. Pet. App. 5a, 64a–65a. On October 14, 2005, after hearing the United States' views (*see* Resp. Brief in Opp. at 9–10, discussing United States' views), the district court granted in part and denied in part Exxon Mobil's motion to dismiss. Pet. App. 46a–63a. Consistent with Judge Oberdorfer's declaration early in the case that he would "be very deferential to the State Department on this kind of a matter at this time in our history," Deferred Appendix ("DA") 148 (Apr. 9, 2002 Hrg.), the court gave serious weight to the concerns expressed by the State Department, Pet. App. 50a–52a, and tailored its order to address those concerns. First, the district court dismissed Respondents' claims under the Alien Tort Statute ("ATS"), as the United States had requested. Second, the court dismissed Respondents' Torture Victim Protection Act ("TVPA") claim, in part because it would "impermissibly require[] adjudication of another country's actions." *Id.* at 60a. The court allowed Respondents' tort claims to proceed "with the proviso that the parties are to tread cautiously. Discovery should be conducted in such a manner so as to avoid intrusion into Indonesian sovereignty." *Id.* at 61a.

Exxon Mobil appealed the district court's October 2005 order, challenging the court's refusal to dismiss Respondents' tort claims. Exxon Mobil did not ask the district court to certify its order for interlocutory appeal under 28 U.S.C. § 1292(b), but argued in the court of appeals

that the interlocutory order was immediately appealable under the collateral order doctrine and asked, in the alternative, for a writ of mandamus. Exxon Mobil moved in the district court for a stay of proceedings pending the disposition of its appeal, which the court denied. DA 276–80. The court rejected, among other things, Exxon Mobil's assertions that discovery would inevitably violate Indonesian sovereignty and that the State Department wholly opposed discovery and litigation of this case. DA 277–78. The court also reiterated that, in contrast to the ATS and TVPA claims, "whether Defendants committed various torts . . . in securing their pipeline [would] not require the court to reach any conclusions regarding Indonesia's policies." DA 277.

Exxon Mobil likewise sought a stay from the D.C. Circuit, which the court denied, and then filed a motion for reconsideration of that denial, which the court also denied. The D.C. Circuit did not reach the merits of Exxon Mobil's appeal, however, because it found, in an opinion written by Judge Sentelle, that it had no jurisdiction over the appeal. Pet. App. 4a. The court of appeals emphasized that Exxon Mobil had not cited—and the court had not found—"a single case in which a federal appeals court held that denial of a motion to dismiss on political question grounds is an immediately appealable collateral order." *Id.* at 14a. A majority of the court of appeals also rejected Exxon Mobil's alternative petition for a writ of mandamus.

Exxon Mobil timely filed a petition for certiorari on July 20, 2007. On November 13, 2007, this Court invited the Solicitor General to file a brief expressing the views of the United States. Exxon Mobil now seeks a stay from this Court.

B. Discovery

Discovery began in May 2006 and is nearly completed. The district court strictly limited discovery: Documents located in Indonesia responsive to Plaintiffs' merits requests are ***excluded*** from discovery, and the subject matter is limited to:

> (1) whether the court has personal jurisdiction over defendant Exxon Mobil Oil Indonesia Inc. ("EMOI"); and
>
> (2) whether there are "acts or omissions in the United States by the U.S. Exxon defendants which may be a proximate cause of plaintiffs' alleged injuries, or regarding knowledge on the part of U.S. Exxon defendants of tortious conduct by any defendant in Indonesia . . . ."

Dist. Ct. Order, May 3, 2006 (DA 441–42); Dist. Ct. Mem. Order, May 26, 2006 (DA 454). Not only did Petitioners agree to these discovery provisions in the May 1, 2006 conference preceding the court's issuance of its discovery order, *see, e.g.*, DA 420–23, 436–38, but Petitioners' counsel represented that he understood both the Indonesian government and the State Department to be "comfortable" with the discovery contemplated by the court. DA 425–26; *see also* Pet. App. 87a.

The parties have exchanged initial disclosures pursuant to Fed. R. Civ. P. 26. Over one hundred fifty thousand pages of documents have been produced. As the parties reported to the district court on August 10, 2007, although isolated disputes remain, each party believes it has completed its document discovery obligations. Joint Status Report on the Progress of Discovery ¶ 1 ("Joint Status Report," attached hereto as Exhibit A). Petitioners did not raise any concerns about any possible harm, to foreign policy or otherwise, from the remaining discovery in the Joint Status Report. *Id.* No discovery of documents in Indonesia ever occurred. Interrogatories have been served and answered by both Respondents and Petitioners. No motions were filed by Petitioners with respect to any alleged harm resulting from the document requests or interrogatories. Five depositions have already been taken including the depositions of Michael Farmer, who during the relevant period was Mobil's Global Security Manager and then International Security Manager of Exxon Mobil Corporation, and of Robert Haines, who was the Manager of International Government Affairs for Exxon Mobil Corporation during the relevant

time period. Petitioners did not make a single objection relating to foreign policy concerns at any of the depositions already taken. The absence of any objections is significant in light of Magistrate Judge Alan Kay's invitation that, to the extent that the response to an inquiry posed at a deposition implicated sensitive information, "counsel should state their objection on the record to preserve it for a future ruling by this Court." Dist. Ct. Mem. Order, Nov. 27, 2007. A strict protective order is in place, and all of the testimony has been designated, without objection from Respondents, as confidential under the protective order.

Three depositions remain to be taken prior to the close of discovery on January 14, 2008.[2] The remaining depositions, like the depositions already taken, fall within the narrow scope of discovery permitted by the district court. Joint Status Report ¶ 3. These three remaining depositions are all of Petitioners' former employees, United States citizens living in the United States: on January 8, 2008, Ronald Wilson, former President and General Manager of EMOI; on January 11, 2008, Lance Johnson, a former Vice President for the Asia/Pacific region of Exxon Mobil Corporation; and on January 14, 2008, John Connor, a former Security Advisor of EMOI. These depositions do not differ in scope or substance from the prior five depositions. For example, while Mr. Connor's deposition remains to be taken, the deposition of a higher ranking security employee has already been taken without incident.

After discovery closes, Petitioner EMOI may file a motion to dismiss for lack of personal jurisdiction, and the parties may file other dispositive motions on or before January 28, 2008 with oppositions to be filed on or before March 21, 2008. As Petitioners noted, the shape of subsequent proceedings, if any, "is as-yet indeterminate." Applic. for Stay at 22.

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[2] One additional deposition has been noticed, but postponed until after summary judgment, as the parties could not agree on whether the corporate witness should be made available.

REASONS FOR DENYING THE APPLICATION

A stay is granted by a Justice of this Court "only under extraordinary circumstances." *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1316 (1983); *Whalen v. Roe*, 423 U.S. 1313, 1316 (1975); *Graves v. Barnes*, 405 U.S. 1201, 1203 (1972). An applicant for a stay must meet a heavy burden to show that the factors warranting a stay are met. *Clinton v. Jones*, 520 U.S. 681, 708 (1997); *Ruckelshaus*, 463 U.S. at 1315; *Whalen*, 423 U.S. at 1316; *Graves*, 405 U.S. at 1203.

In addition, where the lower courts have denied an application for a stay, relief from a single justice "is appropriate only in those extraordinary cases where the applicant is able to rebut the presumption that the decisions below—both on the merits and on the proper interim disposition of the case—are correct." *Rostker v. Goldberg*, 448 U.S. 1306, 1308 (1980); *see also Whalen*, 423 U.S at 1316 ("Certainly the judgment of the lower court, which has considered the matter at length and close at hand, and has found against the applicant on both the merits and on the need for a stay, is presumptively correct."); *Graves*, 405 U.S. at 1203 (a lower court judgment, entered by a tribunal that was closer to the facts, "is entitled to a presumption of validity"). Furthermore, Petitioners failed to seek review when the court of appeals first denied their request for a stay, failed to seek a stay of the court of appeals mandate, and failed to seek a stay immediately upon filing their petition for certiorari. "That they did not do so is somewhat inconsistent with the urgency they now assert." *Brown v. Gilmore*, 533 U.S. 1301, 1305 (2001).

Petitioners have not met their heavy burden. Petitioners fail to cite a single case granting a stay under like circumstances. As the district court found, Petitioners cannot demonstrate that a stay is warranted, no matter what standard this Court employs. The district court found that Petitioners "fall far short" of the requirements for a stay under the All Writs Act, 28 U.S.C. § 1651, and that Petitioners further "fail to meet even the more-lenient *Barnes* standard that they

invoke." Dist. Ct. Order Den. Stay II at 4.[3]

Petitioners rely heavily here—and relied solely, below—on *Barnes v. E-Systems Inc.*, 501 U.S. 1301 (1991), which construes 28 U.S.C. § 2101(f). But "it is only the execution or enforcement of *final* orders that is stayable under § 2101(f)." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312 (1986); Eugene Gressman et al., *Supreme Court Practice* 857 (9th ed. 2007). Here, Petitioners seek a stay of proceedings, not a stay of a final order. *Barnes* is therefore inapposite. *Twentieth Century Airlines v. Ryan*, 74 S. Ct. 8, 10 (1953) (cases involving final orders are not on point where the order at issue is not a final order).

The All Writs Act, 28 U.S.C. § 1651, supplies the governing authority to issue writs of injunction, including stays of non-final orders. *Ohio Citizens*, 479 U.S. at 1312; Gressman, *supra*, at 858. The standard applied by this Court under the All Writs Act requires "a significantly higher justification than that described in the § 2101(f) stay cases," and relief is "to be used 'sparingly and only in the most critical and exigent circumstances'" and "only where the legal rights at issue are 'indisputably clear.'" *Ohio Citizens*, 479 U.S. at 1312; *Brown v. Gilmore*, 533 U.S. at 1302; Gressman, *supra*, at 852–53. That standard is not met here and Petitioners do not contend otherwise.

Petitioners' attempt to distinguish the All Writs Act cases relied upon by the district court on the grounds that they concern injunctive relief is unavailing. First, a stay is, in fact, a form of temporary injunction. *E.g., United States v. Holland*, 1 F.3d 454, 456 (7th Cir. 1993); Gressman, *supra*, at 871 (a stay is a form of temporary injunction and in general is governed by the same

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[3] Petitioners' argument that the district court's holding is not entitled to deference, Applic. for Stay at 17, is without merit, as the district court plainly considered and found Petitioners' showing lacking under both the All Writs Act standard and the standard advocated by Petitioners.

principles, modified to some extent because the application is made after the case has already been lost in at least one court). Petitioners' contrary argument, Applic. for Stay at 19, misreads *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279 (1988). There, this Court held that an order by a federal court relating to the progress of litigation "before that court" was not considered an injunction, *id.*, not that an order staying proceedings in another, lower court was not an injunction. Second, Petitioners here do not seek the restoration of the status quo through the stay of the enforcement of a lower court's order, but affirmative relief in the form of a stay of proceedings. *See Ohio Citizens*, 479 U.S. at 1312 (where applicant seeks more than preservation of the status quo, a higher justification than that described in § 2101(f) is demanded); *cf. Communist Party of Indiana v. Whitcomb*, 409 U.S. 1235 (1972) (finding applicants do not seek a stay of a district court order, but summary reversal of that order, and for that relief to be available, "the applicants' right to relief must be indisputably clear").

But even if the All Writs Act requires no more than the § 2101(f) standard advocated by Petitioners, that standard is not met here. Petitioners have not demonstrated that irreparable harm is likely to result from the denial of stay or that there is a "reasonable probability" four justices will grant certiorari. *Rostker*, 448 U.S. at 1308. Nor can they demonstrate that a majority of the Court is likely to conclude that the decision below was erroneous and that a balancing of the equities, including the interests of the public at large, favors a stay. *Id.*

A. Petitioners Fail to Demonstrate that Irreparable Harm Would Result From Permitting the Conclusion of What Limited Discovery Remains.

In order to show the irreparable harm required to support a stay, a party must show a clear indication that a deprivation is imminent. *Wagner v. Taylor*, 836 F.2d 566, 576 (D.C. Cir. 1987); *Cuomo v. U.S. Nuclear Regulatory Comm'n*, 772 F.2d 972, 976 (D.C. Cir. 1985) (moving party "is required to demonstrate that the injury claimed is 'both certain and great'").

Speculative allegations of possible future harm are not enough: "The movant must provide proof that the harm has occurred in the past and is likely to occur again, or proof indicating that the harm is certain to occur in the near future." *Wisconsin Gas Co. v. F.E.R.C.*, 758 F.2d 669, 674 (D.C. Cir. 1985).

The absence of irreparable harm is sufficient grounds for denying the application. *Rubin v. United States*, 524 U.S. 1301, 1301 (1998) ("An applicant for stay first must show irreparable harm if a stay is denied."); *Ruckelshaus*, 463 U.S. at 1317 ("An applicant's likelihood of success on the merits need not be considered, however, if the applicant fails to show irreparable injury from the denial of the stay."); *Whalen*, 423 U.S. at 1317–18; *United States v. Microsoft Corp.*, Nos. 00-5212, 00-5213, 2001 WL 931170, at *1 (D.C. Cir. Aug. 17, 2001) (court need not decide if Supreme Court review was likely, because Microsoft failed to demonstrate harm from proceeding in district court during pendency of petition for certiorari).

Petitioners' claims of irreparable harm have even less merit now than when their prior stay motions were denied. Discovery is almost completed. The parties have exchanged documents and interrogatory answers. The depositions are almost concluded. Three depositions remain to be taken, all within the same scope of discovery as the prior depositions.

The discovery completed so far has not caused the dire consequences predicted in Petitioners' prior stay motions. In fact, the most Petitioners are able to assert in support of their application for a stay is that "there of course can be no guarantee" that the testimony of the three future deponents "will steer clear of matters" that could harm foreign policy. Applic. for Stay at 21. This statement does not amount to a showing that irreparable harm is, as required for a stay, "likely." *Rostker*, 448 U.S. at 1308.

As a result of careful management by the district court, there has been no discernable intrusion upon Indonesian sovereignty or impact on the interests of the United States. Petitioners cannot, as they must, provide proof "that the harm is certain to occur in the near future." *See Wisconsin Gas Co.*, 758 F.2d at 674.

Furthermore, not only did the court of appeals and the district court each twice deny Petitioners' prior stay motions, but both lower courts specifically disagreed with Exxon Mobil's characterization of the foreign policy effects of this case. *See, e.g.*, Pet. App. 17a (noting that the district court had taken steps to limit the scope of the litigation and concluding that "[w]e disagree with Exxon's contention that there is a conflict between the views of the State Department and those of the district court"); Dist. Ct. Order Den. Stay I at 2, 4 (DA 277, 279) (Exxon Mobil's arguments regarding the impact of discovery on the foreign relations of the United States were "not an accurate summary of the State Department's position").

In fact, Petitioners themselves previously represented to the district court that the State Department and the Indonesian government were "***comfortable***" with the scope of discovery:

> [M]y understanding is that ***both the Indonesian government and the State Department are comfortable with*** what the court said in December 2005, which is discovery limited to personal jurisdiction regarding EMOI and the conduct, if any, by non-EMOI defendants which took place in the United States which may be a proximate cause of conduct which took place in Indonesia.

DA 425–26 (statement by Petitioners' Counsel) (emphasis added). Petitioners repeatedly agreed to the discovery provisions at the May 2006 hearing and stated they were prepared to proceed immediately with such discovery. *See* DA 420 ("And I see the court's proposed order, assuming that the subject matter, the concept of the subject matter remains the same, to be largely consistent with our client's interests and what I think the process is that we are prepared to start"); DA 421 (noting discovery was "not a full-blown discovery process" and stating if

discovery was limited as proposed "then I think we're fine"); DA 422–23; DA 427–28; DA 436–38. The district court limited the discovery as requested by Petitioners, and has carefully monitored the conduct of the litigation. Dist. Ct. Order Den. Stay II at 1 ("The court and the parties accordingly developed a discovery plan carefully tailored to respect Indonesian sovereignty and the U.S. foreign policy concerns about it."). Petitioners did not raise any concerns about any possible harm resulting from the discovery process in the status report to the district court. Joint Status Report at 1. Petitioners cannot now demonstrate irreparable harm from the conclusion of this discovery, which has been underway for over a year and half without incident.[4]

Although Petitioners rely on *Barnes*, 501 U.S. at 1302, to demonstrate irreparable harm, not only is *Barnes* inapplicable as it construes § 2101(f), not the All Writs Act (*see* Dist. Ct. Order Denying Stay II at 3–4), but even if *Barnes* did apply it does not compel a determination that irreparable harm exists. It is well established that where lower courts have denied a stay the decision below, not the applicant's view, is presumed correct, a presumption the applicant must rebut. *Rostker*, 448 U.S. at 1308; *Whalen*, 423 U.S. at 1316. In fact, the two cases cited by Petitioners as articulating the standard applicable here—*Deaver v. United States*, 483 U.S. 1301 (1987) and *Claiborne v. United States*, 465 U.S. 1305 (1984)—do not recite the *Barnes* language. Moreover, *Barnes* also holds that "the conditions that are necessary for issuance of a

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[4] To the extent Petitioners' claim of irreparable harm rests on the burden of continued litigation that may, or may not, ultimately be rendered unnecessary by a successful appeal, the costs and burdens of continued litigation are not "irreparable." *Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."); *see also F.T.C. v. Standard Oil Co.*, 449 U.S. 232, 244 (1980) ("[T]he expense and annoyance of litigation is 'part of the social burden of living under government.'"); *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974) ("Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury.").

stay are not necessarily sufficient. Even when they all exist, sound discretion will deny the stay" when balance of equities does not support it. *Barnes*, 501 U.S. at 1304–05.

Petitioners' claim of irreparable harm rests on the possibility of foreign policy consequences from the minimal discovery that remains and from the possibility that the appellate jurisdiction question raised in their petition will become moot in the event that the proceedings continue to a full blown trial on the merits before this Court acts on the petition. Applic. for Stay at 13-15, 20-23. Neither point is persuasive. As to the first, as discussed above, only a small amount of discovery remains to be taken, which will enable Respondents to obtain and preserve key testimony. The actual conduct of the litigation so far demonstrates that the possibility of irreparable harm from what little discovery remains is remote. As to the second, Petitioners themselves concede that the shape of subsequent proceedings, if any, "is as-yet indeterminate." *Id.* at 22. They offer no basis for concluding that this Court must step in now to preemptively manage the District Court proceedings, particularly where the District Court has ably and cautiously managed proceedings so far. It is uncertain at this date whether a full trial on the merits will be held on June 27, 2008. Dispositive motions may be filed by Petitioners, which, if decided in their favor, may obviate any need for them to press their appeal or may affect the shape of future proceedings, if any. A stay to avoid a trial that may never occur is simply premature.

But more importantly, as discussed below in Section C, the equities weigh strongly against a stay, threatening irreparable harm to Respondents, not to Petitioners. There is only a possibility, at best, that the Court will grant certiorari. The Court has yet to hear from the Solicitor General, and the United States did not argue that a stay was required to protect its foreign policy interests in any of the four prior motions for a stay. If the Court is concerned

about the potential foreign policy implications of a trial in this case before the Court has acted on the petition for certiorari, that concern can readily be addressed if the Court sets a reasonable deadline for the Solicitor General to submit his brief expressing the views of the United States—for example, May 1, 2008. That way, the Court will have an opportunity to act on the petition before the scheduled trial date, thereby avoiding any risk that a trial will preempt the Court's ability to consider the petition.

B. Petitioners Fail to Show That They Are Likely to Prevail On the Merits.

Although the Court need not reach this requirement, as no irreparable harm has been shown, Petitioners cannot show that there is a "reasonable probability" that four Justices will grant certiorari and that a majority of the Court will conclude that the decision below was erroneous. *Rostker*, 448 U.S. at 1308. Petitioners provide no basis for departing from the usual rule that, ordinarily, the winning party has the better claim to the law's support. *Rubin*, 524 U.S. at 1302; *Rostker*, 448 U.S. at 1308 (to obtain stay, applicant must rebut presumption that the decisions below are correct); *Whalen*, 423 U.S. at 1316; *Graves*, 405 U.S. at 1204 (denying stay as ultimate success unlikely where case "received careful attention" and "opinions attest to a conscientious application of principles enunciated by this Court").

Exxon Mobil's petition for certiorari asks the Supreme Court to grant review to expand the collateral doctrine to allow it to take an immediate appeal from a denial in part of a motion to dismiss on political question grounds. Not only is there no split in the circuits on this appellate jurisdiction question,[5] but, as the D.C. Circuit noted, not a single case supports Exxon Mobil's position. Pet. App. 14a ("Exxon has not directed us to—nor have we found—a single case in

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[5] The lack of a conflict in the circuits makes the grant of certiorari far less likely. *E.g.*, *Edwards v. Hope Med. Group for Women*, 512 U.S. 1301, 1303 (1994) (denying application for stay because certiorari unlikely "until a conflict in the Circuits appears").

which a federal appeals court held that denial of a motion to dismiss on political question grounds is an immediately appealable collateral order."). Respondents' Brief in Opposition further explains why we believe this case does not merit review by this Court. Petitioners place their hope in the fact that this Court solicited the views of the Solicitor General. But that is not enough to show both that at least four Justices will vote for certiorari and that five Justices will read the Solicitor General's opinion to compel the conclusion that the decision of the D.C. Circuit was erroneous. Indeed, both the lower courts disagreed with Exxon Mobil that the State Department had expressed the view that the litigation was such an affront to U.S. foreign policy interests that the suit must be dismissed in its entirety. Pet. App. 17a; Dist. Ct. Order Den. Stay I at 2, 4 (DA 277, 279). As the D.C. Circuit explained, "We interpret the State Department's letter not as an unqualified opinion that this suit must be dismissed, but rather as a word of caution." Pet. App. 17a.

Because Petitioners have not shown that they are likely to prevail in their effort to pursue their interlocutory appeal under the collateral order doctrine, their motion for a stay must be denied.

C. Respondents Would Be Severely Prejudiced by a Stay.

As the district court found, a balancing of the equities weighs against a stay. Dist. Ct. Order Den. Stay II at 5. A stay now would result in irreparable harm to Respondents, not Petitioners. Respondents filed their complaint in 2001. Discovery began with an exchange of document requests on May 25, 2006 and has almost been completed. But it is inevitable that with the passage of time, "evidence has been lost, memories have faded, and witnesses have disappeared." *Order of R.R. Telegraphers v. Railway Express Agency, Inc.*, 321 U.S. 342, 349 (1944); *see also United States v. Marion*, 404 U.S. 307, 322 (1971) ("prejudice is inherent in any delay" as the passage of time may impair memories, cause evidence to be lost and deprive parties

of witnesses). The delay has already significantly harmed Respondents: Two Plaintiffs have died in the interim, as have at least three eyewitnesses. Petitioners have been unable to locate a former employee who is a key witness and the author of many important documents. In addition, the memories of the remaining witnesses have dimmed. For example, one deponent was unable to recall the vast majority of documents he was shown, including e-mails he had authored.

These problems are only likely to become more acute the longer the case is delayed. *See, e.g., Clinton v. Jones*, 520 U.S. at 707–08 (reversing district court stay of proceedings until President left office because it "takes no account whatever of the respondent's interest in bringing the case to trial. . . . [D]elaying the trial would increase the danger of prejudice resulting from the loss of evidence, including the inability of witnesses to recall specific facts, or the possible death of a party."). Clearly, delay for Respondents has imposed some extremely dear costs. Additional delay would only further allow memories to fade, witnesses to be lost, and rights to expire. Accordingly, as the district court found, the harm to Respondents far outweighs the harm of which Petitioners complain, and thus further supports denying the stay. Dist. Ct. Order Denying Stay II at 5. The district court also found that a stay would not be in the public interest. Dist. Ct. Order Den. Stay II at 5. As Petitioners scarcely mention the other factors to be weighed, including the harm to Respondents and the public interest, they cannot be found to have met their burden here.

CONCLUSION

Because Petitioners have failed to show either likelihood of success in this Court or irreparable harm, and because other factors—such as harm to Respondents and the public interest—weigh in Respondents' favor, Petitioners have wholly failed to meet the "heavy burden" required to justify granting the stay they request. For the foregoing reasons, Respondents respectfully request that the Court deny Petitioners' application for a stay.

Respectfully submitted,

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EXHIBIT A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN DOE I, et al., *Plaintiffs,* v. EXXON MOBIL CORPORATION, et al., Defendants.	Civ. No. 01-1357 (LFO)/(AK)

JOINT STATUS REPORT ON THE PROGRESS OF DISCOVERY

This joint status report is respectfully submitted pursuant to this Court's July 13, 2007 Order. As the Court is aware, pursuant to the Court's orders dated March 2, 2006 and May 3, 2006, discovery in this matter is limited to documents available outside of Indonesia (Docket No. 138), and to the following issues: (i) whether the Court has personal jurisdiction over defendant Exxon Mobil Oil Indonesia Inc. ("EMOI"); and (ii) whether there are "acts or omissions in the United States by the U.S. Exxon defendants which may be a proximate cause of plaintiffs' alleged injuries, or regarding knowledge on the part of U.S. Exxon defendants of tortious conduct by any defendant in Indonesia" (Docket Nos. 138, 158).

Subject to the foregoing, the Parties have met and conferred on the progress of discovery to date and requests for further discovery, and respectfully submit the following joint status report:

Document Requests/Interrogatories

1. The Parties represent that they have substantially completed their responses to the document requests that have been issued to date and have agreed that no additional document requests to the parties will be issued within the original scope of discovery. Defendants' position is that no further document requests or interrogatories are permitted under the Court's July 13, 2007 order. The Parties are continuing to meet and confer on certain issues raised by the current document productions, which issues

may be presented to the Court for resolution if the parties cannot resolve their differences.

2. Plaintiffs represent that they may serve additional interrogatories relating to the issues identified in the Court's orders dated March 2, 2006 and May 3, 2006. Defendants' position is that additional interrogatories are precluded under the Court's July 13, 2007 order and reserve the right to object to such additional interrogatories.

Depositions

3. On August 7, 2006, Plaintiffs orally requested depositions of several witnesses, including the deposition of a 30(b)(6) witness, from Defendants. The parties agree that the scope of the depositions is limited to the issues identified in the Court's orders dated March 2, 2006 and May 3, 2006. Defendants will respond appropriately to the requests once the notices of depositions are issued.

4. Within the scope of discovery that is permitted at this time, Defendants do not have any deposition requests.

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Respectfully Submitted,

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IN THE
SUPREME COURT OF THE UNITED STATES

EXXON MOBIL CORP., *et al.*

Petitioners,

v.

JOHN DOE I, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

No. 07-81

DECLARATION OF SERVICE

Pursuant to 28 U.S.C. § 1746 and Rules 29.3, 29.4 and 29.5 of the rules of this Court, I, Maureen McOwen, declare that on this 4th day of January, 2008, I caused a copy of Respondents' Response to Petitioners' Application for Stay of Proceedings to be delivered by e-mail and by United States mail, first-class, postage prepaid, to the parties and counsel listed below. I further declare that all parties required to be served have been served.

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 4, 2008.

Maureen McOwen

Signature of Notary Public

Stephanie A. Hofinger
Name of Notary Public

District of Columbia: SS
Subscribed and sworn to before me, in my presence,
this 4th day of January, 2008
Notary Public, D.C.
My commission expires May 31, 2011