Application No. A-_____

IN THE SUPREME COURT OF THE UNITED STATES

No. 07-81

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

---

APPLICATION FOR STAY OF PROCEEDINGS

TABLE OF CONTENTS

Page

ATTACHMENTS

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES
(continued)

Page

Statutes

Supreme Court Rules

Application No. A-_____

IN THE SUPREME COURT OF THE UNITED STATES

No. 07-81

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

---

APPLICATION FOR STAY OF PROCEEDINGS

To the Honorable John G. Roberts, Jr., Chief Justice of the Supreme Court of the United States and Circuit Justice for the District of Columbia Circuit:

Petitioners respectfully move for a stay of proceedings in the district court pending this Court's consideration of petitioners' petition for a writ of certiorari in *Exxon Mobil Corp. v. Doe*, No. 07-81.[1] *See* Rule 23.1; 28 U.S.C. § 2101(f); 28 U.S.C. § 1651(a)-(b). The petition raises the question whether

[1] Pursuant to Rule 29.6, petitioners refer to the Corporate Disclosure Statement contained in their petition for a writ of certiorari. *See* Pet. iii.

defendants may appeal under the collateral order doctrine a ruling denying a motion to dismiss on political question grounds when the State Department has stated that the conduct of further proceedings itself threatens serious harm to the foreign policy interests of the United States. This Court has asked the Solicitor General to express the views of the United States on whether certiorari should be granted.

Rather than await the views of the Solicitor General and this Court's decision on whether to grant certiorari, the district court has authorized continued discovery, including the taking of depositions—and is even prepared to proceed to trial—before this Court has had a chance to make its certiorari determination in light of the Solicitor General's views. That course of action threatens to inflict the very harm to foreign policy interests that is the basis for the petition, and it threatens to undermine this Court's ability to give effective consideration to the petition and prevent those threatened harms from coming to fruition. For those reasons, petitioners seek an immediate stay of the district court proceedings. Such a stay not only would safeguard against the harm that may occur if depositions now scheduled for early January are taken, but also would eliminate the risk that ongoing proceedings over the next several months—while the Court considers the petition—could cumulatively have an adverse effect on the foreign policy interests of the United States.

Petitioners have satisfied the requirements of Supreme Court Rule 23 for seeking a stay from a Circuit Justice. They have sought relief in the district court, and that request was denied by order dated December 19, 2007. And in the present posture, there is no basis for seeking relief in the court of appeals: The district court's denial of a stay is not an appealable order, and the court of appeals has no jurisdiction to issue a stay absent such an appeal because the court of appeals' mandate has issued and the prerequisites for a recall of that court's mandate are not satisfied.

Petitioners have also satisfied the standards for obtaining a stay of proceedings pending this Court's disposition of the petition for certiorari. Petitioners are required to show that there is a reasonable probability that certiorari will be granted; that there is a significant possibility of reversal; and that irreparable harm would otherwise result. Petitioners have readily satisfied each of those requirements. The district court's refusal to grant a stay of proceedings pending this Court's consideration of the certiorari petition was based on the district court's erroneous notion that it should evaluate petitioners' request for a stay of proceedings under the extraordinarily demanding—and wholly inapposite—standard that is reserved for requests for an injunction.

STATEMENT

1. In June 2001, respondents filed suit in the United States District Court for the District of Columbia, based on allegations that Indonesian military officials with responsibility to protect facilities owned by the

Government of Indonesia and operated by petitioners had engaged in human rights abuses against other Indonesians in the province of Aceh, Indonesia, during the course of a civil war. Respondents sought to transform allegations challenging the conduct of Indonesian military officials against their own nationals in their own country into a lawsuit that could be brought in the United States by invoking the Alien Tort Statute (ATS), 28 U.S.C. § 1350, the Torture Victims Protection Act of 1991 (TVPA), 28 U.S.C. § 1350 note, international law, and even the local law of the District of Columbia. Petitioners moved to dismiss the complaint on the ground that it challenged the conduct of the Indonesian military during the Aceh civil war and therefore involved a nonjusticiable political question.

Shortly after the complaint was filed, the district court sought the "opinion (non-binding) as to whether adjudication of this case at this time would impact adversely on the interests of the United States, and, if so, the nature and significance of that impact." Pet. App. 64a-65a. In response, the United States submitted a letter from the Department of State, together with a letter from the Indonesian Ambassador to the United States. The Indonesian Ambassador's letter stated that the Indonesian government "cannot accept the extra territorial jurisdiction of a United States Court over an allegation against an Indonesian government institution [that is] the Indonesian military, for operations taking place in Indonesia." *Id.* at 139a. The Department of State concluded that "adjudication of this lawsuit at this

time would in fact risk a potentially serious adverse impact on significant interests of the United States, including interests related directly to the on-going struggle against international terrorism." *Id.* at 133a. Over the next three years, the United States and the Government of Indonesia repeatedly reaffirmed their objections to the continuation of proceedings. *See id.* at 141a-163a (July 2003 Statement of Interest by the State Department); *id.* at 184a (June 2005 diplomatic note from the Indonesian Embassy); *id.* at 183a (July 2005 Statement of Interest by the State Department).

On October 14, 2005, the district court dismissed respondents' claims under the ATS, the TVPA, and international law. Pet. App. 52a-61a. The court explained, *inter alia*, that the "State Department warns of untoward consequences of endangering [the] United States' relations with Indonesia," *id.* at 57a, that respondents' claims would "be an impermissible intrusion in Indonesia's internal affairs," *id.* at 55a, and that "determining whether [petitioners] engaged in joint action with the Indonesian military" would "cut[] too close to adjudicating the actions of the Indonesian government," *id.* at 58a. The district court nonetheless denied the motion to dismiss respondents' claims under District of Columbia law, even though those claims are grounded in precisely the same factual allegations. *See id.* at 36a (Kavanaugh, J., dissenting) (explaining that the "same justiciability concerns that the District Court identified with respect to the *federal*-law claims also apply to the *state*-law claims"). The result is that the district court is now

poised to resolve claims alleging mistreatment of Indonesians by other Indonesians in Indonesia under the *local* law of the District of Columbia. The result also is that the court is prepared to maintain ongoing proceedings despite the State Department's statement that such proceedings create a serious risk of adverse foreign policy consequences, and in the face of a strong diplomatic note from the Government of Indonesia to the effect that continuation of the court's proceedings would constitute an affront to Indonesia's sovereignty and would put at risk the recently negotiated Aceh Peace Accord.

Petitioners immediately appealed the refusal to dismiss respondents' claims under District of Columbia law, and in the alternative sought a writ of mandamus. Petitioners also moved in the district court for a stay pending appeal, and that motion was denied. Attach. F, *infra*, 1-5. Petitioners then twice moved in the court of appeals for a stay pending appeal, and the court of appeals denied those motions. Attach. E, *infra*, 1; Attach. D, *infra*, 1.

2. The court of appeals dismissed the appeal for lack of appellate jurisdiction, rejecting petitioners' argument that the district court's order was an appealable collateral order, and the court of appeals also denied petitioners' alternative request for a writ of mandamus. Pet. App. 3a-45a (reprinted as Attach. B, *infra*). Judge Kavanaugh dissented, *id.* at 23a-45a, explaining that "allowing this lawsuit to proceed is inconsistent with bedrock principles of judicial restraint that the Supreme Court and this Court have

articulated in cases touching on the foreign policy and foreign relations of the United States," *id.* at 23a. Judge Kavanaugh specifically faulted the majority for failing to defer to the State Department's "reasonable explanation of how this litigation would harm U.S. foreign policy interests." *Id.* at 35a. He emphasized that "the U.S. foreign policy interest here is not simply in avoiding the effects of a final judgment, but is in avoiding the repercussions of *the litigation itself*." *Id.* at 44a (emphasis in original).

After the court of appeals' decision, the Government of Indonesia again reiterated its objection to the proceedings, this time warning, in a diplomatic note to the State Department, that the peace process in Aceh was imperiled by the continuation of the litigation. Pet. App. 185a-186a. The court of appeals denied a petition for rehearing. *Id.* at 90a.

3. Petitioners filed a petition for writ of certiorari, contending that the denial of the motion to dismiss was immediately appealable under the collateral order doctrine. On November 13, 2007, this Court invited the Solicitor General to file a brief in this case expressing the views of the United States. Petitioners then promptly filed a motion in the district court for a stay of proceedings and a postponement of the first scheduled deposition, arguing that there is a "reasonable probability" that this Court would grant the petition, a "significant possibility" that the Court will reverse the decision of the court of appeals, and "a likelihood of irreparable harm (assuming the correctness of the applicant's position)" to the foreign policy interests of the

United States in the absence of a stay. *See Barnes v. E-Systems, Inc.*, 501 U.S. 1301, 1302 (1991) (Scalia, J., in chambers). The district court denied the request to postpone the deposition, but held the motion to stay in abeyance pending full briefing by the parties. On December 19, 2007, the district court denied the motion, Attach. C, *infra*, 5, clearing the way for respondents, *inter alia*, to take three depositions of fact witnesses that are scheduled between January 8 and January 14, 2008. In denying a stay, the district court also confirmed a trial date of June 27, 2008. *See id.*

4. In light of the serious risk of harm created by the district court's continuation of proceedings, petitioners now request a stay of district court proceedings from the Circuit Justice. Because the district court has finally denied relief, and relief is not available in the court of appeals, "the relief sought is not available from any other court or judge." Rule 23.3.

In particular, both potential routes to relief in the court of appeals are closed. Because the denial of a stay by a district court is not an appealable order, petitioners cannot appeal the district court's latest action to the court of appeals. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 275 (1988). Nor can petitioners go directly to the court of appeals for relief, because the court of appeals, having already issued its mandate, lacks jurisdiction to stay proceedings in the district court. *See Deering Milliken, Inc. v. FTC*, 647 F.2d 1124, 1129 (D.C. Cir. 1978) (jurisdiction is proper only "as long as the appellate court retains its mandate"). Although the court of

appeals has the inherent power to recall its mandate in extraordinary circumstances, *see Haw. Housing Auth. v. Midkiff*, 463 U.S. 1323, 1324 (1983) (Rehnquist, J., in chambers), it may do so only to remedy "grave, unforeseen contingencies," *Calderon v. Thompson*, 523 U.S. 538, 550 (1998), and petitioners do not contend that such an event has occurred here.

Having exhausted available avenues for relief from other courts, petitioners have addressed this application to the Circuit Justice for the District of Columbia Circuit. *See* Rules 22.3, 23.1.

REASONS FOR GRANTING THE APPLICATION

A. The Requirements for a Stay of Proceedings Pending Certiorari Are Satisfied in This Case

This Court "has settled upon three conditions that must be met" before a Circuit Justice may issue a stay pending the disposition of a petition for a writ of certiorari: "[t]here must be a reasonable probability that certiorari will be granted (or probable jurisdiction noted), a significant possibility that the judgment below will be reversed, and a likelihood of irreparable harm (assuming the correctness of the applicant's position) if the judgment is not stayed." *Barnes*, 501 U.S. at 1302 (citing *Times-Picayune Pub'g Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (1974) (Powell, J., in chambers)); *see Stroup v. Willcox*, 127 S. Ct. 851, 851 (2006) (Roberts, C.J., in chambers) (citing *Barnes* as articulating "our standard for such relief"). That standard is applicable to requests for a stay of district court proceedings pending certiorari. *See Deaver v. United States*, 483 U.S. 1301 (1987) (Rehnquist,

C.J., in chambers); *see also Claiborne v. United States*, 465 U.S. 1305 (1984) (Rehnquist, C.J., in chambers). Because petitioners have satisfied each of the prerequisites, a stay of proceedings is warranted.

1. There Is A Reasonable Probability That This Court Will Grant Certiorari And A Significant Possibility Of Reversal

a. There is a reasonable probability that this Court will grant certiorari. Indeed, the Court's invitation to the Solicitor General itself reflects that this case is, at the very least, a serious candidate for certiorari. The petition thoroughly explains why certiorari is warranted, and petitioners will not repeat that entire discussion here. One consideration is particularly relevant to the instant application for a stay, however, and therefore bears reemphasis.

As Judge Kavanaugh noted in his dissent below, there has been a significant increase in the number of suits filed in the courts of the United States that name corporations as defendants, but that in fact challenge "human rights violations committed by foreign government officials against foreign citizens in foreign countries." Pet. App. 30a. As Judge Kavanaugh further explained, in such cases, the very fact of the litigation "can adversely affect U.S. foreign policy interests." *Id.* at 31a; *see, e.g.*, *id.* at 194a (State Department statement in *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004, *aff'd in part and vacated in part*, 2007 WL 4180152 (2d Cir. Nov. 27, 2007): "[I]t is our view that continued adjudication of the above-referenced matters risks potentially serious adverse

consequences for significant interests of the United States."). And where, as here, the State Department expresses that the litigation risks serious adverse consequences for the United States' foreign policy interests, Pet. App. 133a, "federal courts should give serious weight to the Executive Branch's view of the case's impact on foreign policy," *Sosa v. Alvarez-Machain*, 542 U.S. 692, 733 n.21 (2004). Unless the denial of a motion to dismiss in such circumstances can be appealed immediately under the collateral order doctrine, there is a serious risk that irreparable damage will be done to the foreign policy interests of the United States. The question whether the denial of a motion to dismiss in such circumstances may be appealed as a collateral order thus is one of exceptional significance warranting this Court's review.

b. There is also a significant possibility that this Court would reverse the decision below and hold that an immediate appeal is available under the collateral order doctrine in the circumstances of this case. As the court below acknowledged, the district court's order declining to grant a dismissal satisfies two of the three elements for taking a collateral order appeal: the order finally resolved the issue of whether the suit should be dismissed on the ground that it threatens serious harm to the United States' foreign policy interests, and that issue is separate from the underlying merits of the litigation. Pet. App. 9a-10a. The court of appeals concluded, however, that the third element of the collateral order doctrine was unsatisfied because the

foreign policy interests of the United States could be effectively vindicated in an appeal from a final judgment. *See id.* at 12a. That conclusion is seriously mistaken. As Judge Kavanaugh explained in his dissent, "the U.S. foreign policy interest here is not simply in avoiding the effects of a final judgment, [it] is in avoiding the repercussions of the *litigation itself*." Pet. App. 44a. There is at least a significant possibility that this Court would conclude that, in such circumstances, a district court's denial of a motion to dismiss is an appealable collateral order.

There is also a significant possibility of reversal because it is well-settled that orders denying qualified immunity and sovereign immunity are immediately appealable under the collateral order doctrine, and the category of orders at issue here closely parallels those two categories. In particular, in each of those contexts, the denial of a motion to dismiss is appealable under the collateral order doctrine because the conduct of litigation itself causes the very harms against which those doctrines are designed to protect. Those protections, in other words, confer "an entitlement not to stand trial" that would be "effectively lost if a case is erroneously permitted to go to trial." *See Mitchell v. Forsyth*, 472 U.S. 511, 525-29 (1985) (qualified immunity); *see, e.g.*, *Kirkham v. Societe Air France*, 429 F.3d 288, 294 (D.C. Cir. 2005) (foreign sovereign immunity). The situation is the same here. In the context of this case, the political question doctrine is intended to protect not only against an adverse judgment, but also against the conduct of the litigation

itself. *See* Pet. App. 44a (Kavanaugh, J., dissenting). Accordingly, in this context, the political question doctrine confers on petitioners "an entitlement not to stand trial" that would be "effectively lost if a case is erroneously permitted to go to trial." *Forsyth*, 472 U.S. at 525-29. There is at least a significant possibility that this Court would reach that conclusion and reverse the court of appeals.

2. There Is a Likelihood of Irreparable Harm If Proceedings in the District Court Are Not Stayed

a. As discussed above, the central argument in the petition for a writ of certiorari is that petitioners are entitled to an immediate appeal of the district court's denial of dismissal because the very existence of the litigation threatens to harm the United States' foreign relations. For purposes of assessing the question of irreparable injury, a Circuit Justice "assume[s] the correctness of the applicant's position" on the merits. *Barnes*, 501 U.S. at 1302. Once that assumption is made here, the existence of irreparable harm is apparent. Continued proceedings in the district court would result in irreparable harm by creating serious risks to the foreign policy interests of the United States. That is especially clear in light of the district court's express intention to proceed to trial in June 2008, regardless of whether this Court has by then received the Solicitor General's views or has reached a disposition of the petition for a writ of certiorari. In light of the interests at stake, it does not seem proper to proceed to trial before this Court has even had an opportunity to consider and act on the views of the Solicitor General.

Continued proceedings also would cause irreparable harm by denying to petitioners the very entitlement to avoid proceedings that—for purposes of this application—they are assumed to own. Just as the continuation of proceedings in a case involving the denial of a meritorious claim of qualified immunity or foreign sovereign immunity would cause irreparable harm, the continuation of proceedings in this case, "assuming the correctness" of petitioners' position, *Barnes*, 501 U.S. at 1302, would likewise cause irreparable harm.

b. Continuation of the proceedings in the district court not only would threaten to inflict the very harm to foreign policy interests that is the basis for the petition, it also would threaten to preempt this Court's ability to give effective consideration to the petition and to prevent those threatened harms from coming to fruition. Indeed, because the district court's scheduled trial date of June 27, 2008, may arrive before the Court receives the Solicitor General's views and acts on the certiorari petition, a failure to stay proceedings might entirely deprive the Court of its power to entertain the petition and consider the case on the merits. Granting a stay of proceedings therefore is warranted to assure this Court's ability to give effective consideration to the petition. *See Garrison v. Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers) (granting stay of district court order scheduling retrial because conduct of retrial "would effectively deprive this Court" of ability to consider petition for certiorari); *N.Y. Natural Res. Def.*

Council, Inc. v. Kleppe, 429 U.S. 1307, 1310 (1976) (Marshall, J., in chambers) ("Perhaps the most compelling justification" for the exercise of the stay power "would be to protect this Court's power to entertain a petition for certiorari before or after the final judgment of the Court of Appeals."); *see also Kimble v. Swackhamer*, 439 U.S. 1385, 1385 (1978) (Rehnquist, J., in chambers) (noting authority of Circuit Justice "to grant interim relief in order to preserve the jurisdiction of the full court to consider an applicant's claim on the merits").

c. The existence of irreparable harm, and the justification for a stay, is apparent for another reason as well. If one "assum[es] the correctness", *Barnes*, 501 U.S. at 1302, of petitioner's position that an appeal is available under the collateral order doctrine in the circumstances of this case, the necessary consequence is that the district court would be barred from proceeding with discovery, let alone trial. That is because, if petitioners are correct on the availability of a collateral-order appeal, petitioners' appeal would have *divested the district court of jurisdiction* to proceed with discovery, and of course, trial.

As this Court has explained, the "filing of a notice of appeal is an event of jurisdictional significance—it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal." *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) (per curiam). Accordingly, when a defendant appeals from a

district court's denial of dismissal based on grounds of foreign sovereign immunity or qualified immunity, the district court is divested of jurisdiction to continue with discovery or trial proceedings. *See Princz v. Federal Republic of Germany*, 998 F.2d 1, 1 (D.C. Cir. 1993) (per curiam) (denying an "emergency motion for stay of all proceedings in the district court" as "unnecessary" because "an appeal properly pursued from the district court's order [denying a motion to dismiss on foreign sovereign immunity grounds] divests the district court of control over those aspects of the case on appeal"); *May v. Sheahan*, 226 F.3d 876, 880 (7th Cir. 2000) (finding "no doubt that a *Forsyth* appeal [i.e., collateral-order appeal from the denial of dismissal on qualified immunity grounds] divests a district court of the authority to order discovery or conduct other burdensome pretrial proceedings"); *Stewart v. Donges*, 915 F.2d 572, 576 (10th Cir. 1990) ("[A]n interlocutory appeal from an order refusing to dismiss on double jeopardy or qualified immunity grounds relates to the entire action and, therefore, it divests the district court of jurisdiction to proceed with any part of the action against an appealing defendant.").[2]

The same result would follow in this case if petitioners are correct that, as in the contexts of foreign sovereign immunity and qualified immunity, the

---

[2] *Cf. Behrens v. Pelletier*, 516 U.S. 299, 308 (1996) (explaining that "protection afforded by qualified immunity" encompasses "not merely to avoid standing trial, but also to avoid the burdens of such *pretrial* matters as discovery") (citation and internal quotation marks omitted); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("Until this threshold immunity question is resolved, discovery should not be allowed").

district court's denial of dismissal was an appealable collateral order. Consequently, if this Court were to grant certiorari and were to agree with petitioners that the district court's denial of dismissal was appealable under the collateral order doctrine, the continuation of proceedings in the district court would be beyond that court's jurisdiction. That possibility reinforces the need for a stay of the district court proceedings pending this Court's disposition of the petition for certiorari.

B. The District Court's Erroneous Denial Of Petitioners' Request for a Stay Pending Certiorari Does Not Warrant Deference

1. While "due deference" ordinarily may be owed to a lower court's decision declining to issue a stay, *Houchins v. KQED, Inc.*, 429 U.S. 1341, 1345 (1977) (Rehnquist, J., in chambers), no such deference is warranted here because the district court based its decision on a fundamental legal error. *Cf. Koon v. United States*, 518 U.S. 81, 100 (1996) (district court necessarily abuses its discretion when it acts on the basis of an erroneous legal standard). In rejecting petitioners' request, the district court applied the standard for evaluating a request for an *injunction* pending consideration of a certiorari petition. Attach. C, *infra*, 3-4. Such an injunction may be granted only if the legal rights at issue are "indisputably clear" and "in the most critical and exigent circumstances." *Brown v. Gilmore*, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., in chambers); *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., in chambers)). Holding that petitioners have no "indisputably

clear" entitlement to relief, and finding no critical or exigent circumstances that would justify a writ of injunction, the district court denied the motion. Attach. C, *infra*, 3-5. The court, however, plainly erred in applying the heightened standard that would apply to a request for an injunction: Petitioners sought a stay of district court proceedings, not an injunction.

The standard for seeking a stay of proceedings pending certiorari is the *Barnes* standard, not the injunction standard relied on by the district court. Indeed, this Court has applied the stay-pending-certiorari standard, rather than the injunction standard, in evaluating an application for a stay of proceedings in circumstances virtually identical to this case. In *Deaver v. United States*, 483 U.S. 1301 (1987) (Rehnquist, C.J., in chambers), the applicant requested a stay of criminal trial proceedings in the district court pending this Court's disposition of his petition for a writ of certiorari. *Id.* at 1301-02. As in this case, the court of appeals had dismissed his interlocutory appeal for lack of appellate jurisdiction, and the petition sought review of that judgment based on the collateral order doctrine. *Id.* Chief Justice Rehnquist applied the equivalent of the *Barnes* standard. He explained that "[t]he standards for granting a stay pending disposition of a petition for certiorari are well settled," requiring that a Circuit Justice "determine whether four Justices would vote to grant certiorari," "give some consideration as to predicting the final outcome of the case in this Court," and

"balance the so-called 'stay equities.'" *Id.* (quoting *Heckler v. Redbud Hosp. Dist.*, 473 U.S. 1308, 1311-12 (1985) (Rehnquist, J., in chambers)).

The district court therefore erred in relying on injunction cases like *Ohio Citizens* and *Brown*. *See* Attach. C, *infra*, 3-4. The relief sought by the applicant in *Ohio Citizens* was a court-ordered shutdown of a nuclear plant pending direct appeal. 479 U.S. at 1312. Accordingly, as Justice Scalia explained in denying the application, the applicant sought not a *stay* but an *injunction*: "[w]hat the applicant would require in order to achieve the substantive relief that it seeks is an original writ of injunction * * * against full-power operation of the powerplant." *Id.* at 1313; *see id.* (distinguishing injunction from stay, which "simply suspend[s] judicial alteration of the status quo"). Similarly, in *Brown*, Chief Justice Rehnquist required a showing of "the most critical and exigent circumstances" and "indisputably clear" entitlement to relief because the applicants sought, "not merely a stay of a lower court judgment, but an injunction against the enforcement of a presumptively valid state statute." 533 U.S. at 1303.

In this case, petitioners do not seek to enjoin respondents from engaging in primary conduct, such as the operation of a power plant. Nor do they seek to enjoin the enforcement of a statute. Rather, petitioners simply seek to stay proceedings in the district court. This Court has made clear that a stay of that kind is categorically distinct from an injunction. *See Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279 (1988)

("An order by a federal court that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction."). Consequently, as the *Deaver* decision makes clear, the *Barnes* framework, rather than the injunction standard, governs petitioners' request. The district court was clearly mistaken in concluding otherwise.

2. The district court also concluded that petitioners failed to demonstrate irreparable injury. That conclusion was based on a fundamental misunderstanding of petitioners' claim of irreparable injury. The district court was of the view that petitioners claimed that "any burden threatened by ongoing discovery and trial proceedings would, 'presto,' escalate to the 'irreparable' category once a party simply moved to stay those proceedings by terming them 'nonjusticiable.'" Attach. C, *infra*, 3-4. But petitioners make no such claim. Rather, petitioners' contention is that discovery and trial cause irreparable injury in circumstances in which the political question claim is that litigation itself would create a serious risk of harm to the foreign policy interests of the United States.

The district court also concluded that the balance of equities favored the denial of a stay in light of "the injuries and deaths of kin allegedly suffered by Plaintiffs (not to mention the long delays already encountered in bringing their claims to issue on their merits)." Attach. C, *infra*, 5. But the lengthy delay before the commencement of discovery in this case is directly attributable to respondents' decision to prosecute this action in an American

court, despite the fact that it challenges alleged abuses by the Indonesian military against Indonesian citizens in Indonesia. The district court has dismissed almost all of respondents' claims, and petitioners continue to challenge the court's personal jurisdiction, as well as its application of the local laws of the District of Columbia (or any U.S. state) to alleged conduct by Indonesian military officers occurring within Indonesia and directed at Indonesian plaintiffs.[3] Although the district court is correct, Attach. C, *infra*, 5, that the proposed stay, depending on the disposition of the petition for certiorari, could last until this Court reaches the merits, that possibility only reinforces the need for a stay. With a trial date set for June 2008 and ongoing discovery in the interim, continued proceedings in the district court pose a significant and increasing risk of serious adverse consequences for the foreign policy interests of the United States.

Finally, the district court observed that it had "developed a discovery plan" that it believed was "carefully tailored to respect Indonesian sovereignty and the U.S. foreign policy concerns about it." Attach. C, *infra*, 1-2. But there of course can be no guarantee that the testimony of future deponents will steer clear of matters that could harm the United States'

[3] The delay in the start of discovery until 2006 resulted from the district court's need to consider (1) the motion to dismiss (filed in October 2001, and resolved in October 2005, *see* Pet. App. 50a); (2) this Court's intervening decision in *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004), which prompted the dismissal of respondents' federal claims; and (3) multiple written warnings about the consequences of the litigation from the United States (2002, 2004, and 2005) and government of Indonesia (2002, 2005).

relations with Indonesia. And whatever may be the district court's beliefs concerning the effectiveness of its efforts to "tailor" the current phase of discovery, those beliefs have no bearing on the risk that subsequent proceedings whose shape is as-yet indeterminate—including possibly a full-scale trial—would call for intrusive inquiries into sensitive matters involving actions by Indonesian soldiers on Indonesian soil in the midst of an Indonesian civil war. Indeed, the district court specifically identified the approaching June 2008 trial date as a reason to deny a stay, observing that the grant of a stay would entail "wait[ing] for the Supreme Court to decide whether to grant certiorari, and, if it grants certiorari, to consider and issue a decision"—a prospect that the district court deemed unacceptable. Attach. C, *infra*, 5.

Moreover, the risk of harm to the United States' foreign policy interests does not stem solely from a concern that continued discovery and trial proceedings may delve into specific matters that could imperil foreign relations. Rather, a central concern is that Indonesia generally perceives the proceedings "as a U.S. court trying the [Government of Indonesia] for its conduct of a civil war in Aceh," and that the "Indonesian response to such perceived U.S. 'interference' in its internal affairs could impair cooperation with the U.S. across the full spectrum of diplomatic initiatives, including counterterrorism, military and police reform, and economic and judicial reform." Pet. App. 134a-135a. That sort of risk by nature grows over time:

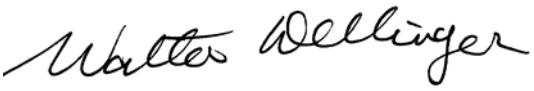
the longer the litigation continues, the greater the likelihood that Indonesia would perceive the proceedings as an affront to the point where it reduces its cooperation with the United States on matters of vital interest to the United States. Indeed, Indonesia again "reaffirm[ed]" its objections to the continuation of the litigation as recently as in the February 2007 diplomatic note. *Id.* at 185a-186a. The fact that the proceedings to date may have possibly avoided causing a critical rift in the relations between the two countries—or at least a rift known to the public—does not diminish the risk that continuation of the litigation would bring about that result.[4]

[4] The district court suggested, based on a comment by defense counsel during a status conference on May 1, 2006, that both the United States and the government of Indonesia are "comfortable" with the court's discovery plan. Attach. C, *infra*, 2. That comment, however, arose in the context of a hearing in which the district court already had decided to press ahead with discovery, and the parties were asked to choose between discovery plans on the understanding that discovery was to go forward. Defense counsel's comment in a status conference endorsing one set of discovery procedures over another should not be interpreted as an admission—let alone an admission on behalf of the United States and Indonesia—that all concerns about discovery had been addressed. Tellingly, the government of Indonesia subsequently made plain its "discomfort" with the district court's discovery plan in the February 2007 diplomatic note warning that continuation of the proceedings threatened the peace process in the Aceh province of Indonesia. Pet. App. 185a-186a.

CONCLUSION

For the foregoing reasons, petitioners respectfully request a stay of proceedings in the district court pending this Court's disposition of the petition for a writ of certiorari in *Exxon Mobil Corp. v. Doe I*, No. 07-81.

Respectfully submitted,



WALTER E. DELLINGER
Counsel of Record
SRI SRINIVASAN
IRVING L. GORNSTEIN
O'MELVENY & MYERS LLP
1625 Eye St., NW
Washington, DC 20006
(202) 383-5300

MARTIN J. WEINSTEIN
ROBERT J. MEYER
WILLKIE FARR & GALLAGHER LLP
1875 K Street, N.W.
Washington, DC 20006
(202) 303-1000

THEODORE V. WELLS, JR.
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064

PAUL W. WRIGHT
PATRICK J. CONLON
EXXON MOBIL CORPORATION
800 Bell Street
Houston, TX 77002

ALEX YOUNG K. OH
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON LLP
1615 L Street, NW, Suite 1300
Washington, DC 20036

Attorneys for Defendants Exxon Mobil Corporation, Mobil Corporation, ExxonMobil Oil Corporation, and ExxonMobil Oil Indonesia Inc.

December 27, 2007