IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIAM G. MOORE, JR., Plaintiff, v. MICHAEL HARTMAN, *et al.*, Defendants.	Civil Action No. 92-2288 (ABJ) (Consolidated with Civil Action No. 93-0324 (ABJ))
WILLIAM G. MOORE, JR., Plaintiff, v. UNITED STATES OF AMERICA, Defendant.	Civil Action No. 93-0324 (ABJ) (Consolidated with Civil Action No. 92-2288 (ABJ))

PLAINTIFF'S OPPOSITION TO DEFENDANTS' MOTION TO STAY PROCEEDINGS AND VACATE THE TRIAL DATE

The D.C. Circuit rejected the Postal Inspectors' appeal ***more than six months ago***. The Inspectors could and should have proceeded expeditiously—especially after this Court set an October trial date—to ensure that any certiorari petition would be resolved during the Supreme Court's recently concluded Term. Instead, by waiting more than six months to file their petition, the Inspectors have guaranteed that the fate of that petition will not be known, at the earliest, until just before trial—and, most likely, not until after trial has commenced or concluded.

Recycling arguments that this Court already rejected last March, Defendants now seek to rely on this uncertainty, and the timing dilemma they created, as an excuse for upsetting the trial date. However, the pendency of a certiorari petition cannot justify a further delay of this already decades-old case. Not only is it entirely speculative that the Supreme Court would grant review,

but, as Defendants fail to acknowledge, the *Bivens* claim must be tried *in any event*, since the only question at issue in the certiorari petition is the standard for the Inspectors' fact-bound defense of qualified immunity (*i.e.*, probable cause versus "arguable probable cause"). The simple expedient of alternative jury instructions can ensure that the case is tried in a way that would obviate a retrial even if the Supreme Court were to grant the petition and rule in favor of the Inspectors on that issue. Accordingly, this Court should now hold that it will adhere to the scheduled trial date unless and until the Supreme Court actually *grants* the certiorari petition (at which point this issue could be revisited). If, however, this Court would refuse to seat a jury while the certiorari petition is pending, Moore respectfully requests that the trial be rescheduled now, before substantial time and expense are incurred for trial preparation.

BACKGROUND

In 2010, this Court denied Defendants' motion for summary judgment on the ground that there are material issues of fact for the jury on the question of probable cause. On appeal, the Inspectors argued that they would be entitled to qualified immunity even absent probable cause, if they can show they reasonably but mistakenly thought there was probable cause—a lower threshold for immunity that the Inspectors called "arguable probable cause." The D.C. Circuit affirmed the denial of summary judgment, holding that merely arguable probable cause to prosecute Moore would not trigger immunity. *Moore v. Hartman*, 644 F. 3d 415, 424–26 (D.C. Cir. 2011). And, after the Supreme Court ordered reconsideration in light of an intervening decision, the D.C. Circuit on January 15, 2013, "reinstated" its prior judgment "remand[ing] for trial on the merits." The Court of Appeals also took the unusual step of directing the Clerk to issue the mandate immediately, which the Clerk did that same day.

On remand, Defendants pointed to the availability of further avenues of discretionary appellate review (*viz.*, a petition for rehearing en banc and a petition for certiorari) as a putative

basis for staying proceedings in this Court. This Court denied Defendants' motion for a stay, explaining that it is "supposed to do what the Court of Appeals tells [it] to do, and . . . they have said in no uncertain terms that the case is back in this court and they'd like us to get moving." Hr'g Tr. at 4 (Mar. 4, 2013). The Court scheduled trial to begin on October 15.

Although Defendants could have sought further appellate review at any time after the D.C. Circuit's January 15 ruling, they inexplicably waited forty-five days (until March 1) to file a motion asking the Court of Appeals to recall the mandate in order to entertain a simultaneously filed petition for rehearing en banc. Then, after the D.C. Circuit denied that relief on April 24, the Inspectors—with full knowledge of the approaching October 15 trial date—waited ninety days, until July 23, to file their petition for certiorari with the Supreme Court. This petition was filed by private counsel, rather than by the Solicitor General and Department of Justice lawyers who have been representing the Inspectors in this Court and in the prior appellate proceedings.

Importantly, by delaying their filing until after the late-June conclusion of the Supreme Court's Term, the Inspectors have timed their petition so that it cannot be considered until, at the earliest, the so-called "long conference" of September 30, when the Supreme Court will consider petitions that have accumulated over the summer. *See* U.S. Supreme Court, Case Distribution Schedule, *http://www.supremecourt.gov/casedistribution/casedistributionschedule.aspx*; Eugene Gressman *et al.*, Supreme Court Practice 13 (9th ed. 2007). If the Court at that time decides to grant or deny the petition, it would likely announce its decision on either October 1 or October 7, *see* Gressman, *supra*, at 13—*i.e.*, either one or two weeks before the start of trial.

It is even more likely, however, that the petition will remain pending until the trial is underway, or even concluded. The Supreme Court sometimes delays action on a petition by relisting or holding that petition, which means that the Supreme Court might not act on the

petition for several additional weeks or months. (The Inspectors' prior certiorari petition was held for more than six months while the Supreme Court considered another case that turned out to be irrelevant to this one. *See Moore v. Hartman*, 704 F.3d 1003, 1004 (D.C. Cir. 2013) (per curiam).) Likewise, if Moore were to require and obtain a modest extension of time to file his brief in opposition (now due August 26), then the Supreme Court likely would not act on the petition until November, by which time the trial should be over. *See* Case Distribution Schedule, *supra*. Most troubling, Defendants' sudden, unexplained decision to use private counsel for the petition makes it likely, given the federal governmental interests at stake, that the Supreme Court will call for the views of the Solicitor General ("CVSG"), *see* Gressman, *supra*, at 516–17, a lengthy process that not only guarantees many months of additional delay, but would give the government virtually unfettered, unilateral control over the length of that delay. *See* David C. Thompson & Melanie F. Wachtell, *An Empirical Analysis of Supreme Court Certiorari Petition Procedures: The Call for Response and the Call for the Views of the Solicitor General*, 16 Geo. Mason L. Rev. 237, 290–91 (2009) ("there is no deadline" for the CVSG response, which "takes, on average, over four months," with "[t]he delay … increasing in recent years").

ARGUMENT

With knowledge of the October trial date, the Inspectors could and should have filed their certiorari petition early enough to have it considered before the Supreme Court adjourned in late June. Instead, they delayed their filing such that the petition will likely remain pending at the start of the scheduled trial, and now seek to profit from that gamesmanship and the resulting uncertainty by seeking yet a further delay of the trial. Moore respectfully submits that the trial should occur as scheduled, notwithstanding the pendency of the Inspectors' certiorari petition, unless and until the Supreme Court actually *grants* that petition. But if the Court intends to delay trial if the petition remains pending at its scheduled start date, it should do so now.

I. NEITHER A FORMAL STAY NOR A DISCRETIONARY POSTPONEMENT IS NECESSARY OR APPROPRIATE HERE

A. At the outset, it is clear that the pendency of a certiorari petition does not entitle the Inspectors to a stay or a delay of trial. As already recognized by this Court, the D.C. Circuit, by its decision to issue the mandate, has determined that this case should proceed without delay. *See* Hr'g Tr. at 4, 20 (Mar. 4, 2013). Only that court, or the Supreme Court, has the authority to stay the mandate and halt any trial-court proceedings pending the disposition of the Inspector's certiorari petition. *See* Fed. R. App. P. 41(d)(2); Philip A. Lacovara, *Federal Appellate Practice* 139 (2008); 5 Am. Jur. 2d *Appellate Review* § 401 (2012) (citing cases); 2A Fed. Proc., L. Ed. § 3:309 (West 2012) (same); *Hovater v. Equifax Servs., Inc.*, 669 F. Supp. 392, 393 (N.D. Ala. 1987) ("it is not an appropriate function for [a district court] to pass on the likelihood that the ruling of a higher court will be accepted for review by the Supreme Court").

Indeed, even the *granting* of the certiorari petition would *not* automatically stay the proceedings and judgment below. *See* Gressman, *supra*, at 518. Instead, Defendants would have to seek and obtain a stay of the D.C. Circuit's judgment from either the D.C. Circuit or the Supreme Court. *Id.*; *see also Straight v. Wainwright*, 476 U.S. 1132, 1134–35 (1986) (Brennan, J., dissenting from denial of stay) (explaining that a majority of Justices must vote for a stay after certiorari has been granted in order to prevent the judgment below from being executed).[1]

[1] As shown in prior briefing, Defendants in any event cannot carry their burden of demonstrating that a stay is warranted because they are not likely to succeed on the merits (as it is far from likely that the Supreme Court will grant review and reverse the decision of the D.C. Circuit), they cannot establish that they will suffer irreparable harm in the absence of a stay (because both the FTCA and *Bivens* claims will need to be tried eventually in any case), and the balance of hardships tilts decidedly in Moore's favor (in light of the equities and the decades of delay caused by the government). *See* Opp'n to Mot. for Stay at 6–10 (Feb. 15, 2013). While Defendants bemoan impingement on the Inspectors' immunity defense, they make nary a mention that this Court is bound by the D.C. Circuit's *rejection* of that defense.

B. Of course, this Court retains *discretionary* control over its own calendar. The speculative prospect of certiorari review, however, does not warrant any postponement of the trial date, especially given the equities of this case. The Court should so rule now.

1. The Supreme Court grants only a small fraction of the certiorari petitions that it receives. There are many reasons to doubt that the Court will grant the Inspectors' current petition, including the fact that the petition is untimely given the D.C. Circuit's immediate issuance of its mandate; that the cases cited by the Inspectors as purportedly conflicting with the D.C. Circuit's decision do not actually present any conflict at all; that the issue of "arguable probable cause" in a retaliatory inducement-to-prosecution case appears to have arisen in *no* other cases during the seven years since the Supreme Court decided *Hartman v. Moore*, 547 U.S. 250 (2006); and that this case is a poor vehicle for resolving the question presented given the need for a trial in any event. Those may well be among the reasons why the Solicitor General apparently has refused to represent the Inspectors in their present petition. But this Court need not analyze the strength of the arguments for or against review in order to appreciate that it is entirely speculative whether the Court will choose to grant it. The mere pendency of a petition, consequently, is simply not a sufficient reason to delay the trial date.

2. This is especially true in light of the equities of this case. Moore will not reiterate the obvious prejudice caused by decades of delay, *see* Opp'n to Mot. for Stay at 8–10 (Feb. 15, 2013), except to remind the Court that Moore faces real danger of losing his right to vindicate his interests as evidence grows more stale, more witnesses die or disappear,[2] and memories grow more imprecise, and that the government has already been reprimanded for the

[2] Another important witness, William Hittinger, died on March 17, 2013. *See Obituary*, The Morning Call, *at http://www.legacy.com/obituaries/mcall/obituary.aspx?pid=163743837*; Pl. Stmt ¶ 131 (Docket No. 356) (describing Hittinger's testimony that AUSA Valder admitted in presence of Hittinger and the Inspectors that whether Moore was guilty "did not concern him").

"herculean effort" it has required Moore "to expend simply to get his day in court." *Moore*, 644 F.3d at 427 (Henderson, J., concurring); *see also id.* ("To say that this has not been the government's finest hour is a colossal, and lamentable, understatement."). Defendants' persistent stalling—including the deliberate decision to wait six months to file a certiorari petition—should not be rewarded.

Nor is there any guarantee that the delay Defendants now seek from this Court would be "moderate." Def. Mot. at 7. As noted, their prior certiorari petition was held for more than six months while the Supreme Court decided another case, and it took the Court of Appeals another six months to decide, as Moore had urged all along, that this other case was irrelevant. *See Moore*, 704 F.3d at 1004. And, whether or not it is a deliberate ploy to cause even further delay, Defendants' decision to use private counsel for the Inspectors' petition could result in the Supreme Court seeking the views of the Solicitor General, adding yet more months to the time the petition is pending and allowing the government to take as long as it wants to respond. *See supra* p. 4. Repeated delays, each purportedly moderate when viewed in isolation, have resulted in *pretrial* proceedings lasting more than *two decades*. No wonder "[i]nterlocutory appeals are generally disfavored as disruptive, timeconsuming, and expensive for both the parties and the courts." *In re DC Water & Sewer Auth.*, 561 F.3d 494 (D.C. Cir. 2009) (internal quotation marks omitted). It is beyond time to get this case to trial.

3. Importantly, the trial can be structured in a way to avoid the need for a retrial in the unlikely event the Supreme Court grants the petition and rules in favor of the Inspectors. The issue in the Inspectors' petition is a narrow one: whether Moore can prevail so long as there was no probable cause, or whether the Inspectors can also defeat his claim by proving that there was "arguable probable cause." Both of these questions—probable cause and

"arguable probable cause"—are disputed issues of fact, based on the same body of evidence, that can be put to the jury through mechanisms like alternative jury interrogatories, which would provide ample opportunity for the Inspectors to challenge the sufficiency of the evidence should the Supreme Court subsequently deem "arguable probable cause" relevant to the outcome.

Indeed, allowing the trial to proceed may well conserve judicial resources by mooting the proceedings before the Supreme Court. Just this Term, for instance, the Supreme Court granted certiorari in *United States Forest Service v. Pacific Rivers Council* without ordering a stay of the proceedings below. The district court then rejected the government's request to hold the matter in abeyance and instead proceeded to adjudicate the remaining issues while the case awaited argument in the Supreme Court. *See* Motion to Vacate Judgment Below and Dismiss as Moot at 1–2, 2013 WL 2424934, *U.S. Forest Serv. v. Pac. Rivers Council*, No. 12–623 (U.S.). As a result of that adjudication, the plaintiff advised the Supreme Court that it was withdrawing its request for relief, *see id.*, and the Supreme Court responded by dismissing the case as moot, *see* 569 U.S. ---, 2013 WL 2922118, at *1 (2013).

As in *U.S. Forest Service*, a trial in this matter could obviate a Supreme Court merits hearing (if, for example, the Inspectors prevail before the jury or Moore elects to take judgment on his FTCA claim instead of his *Bivens* claim, *see* 28 U.S.C. § 2676). Significantly, the converse is not true: whatever the Supreme Court does, there is no dispute that, *at a minimum*, Moore's FTCA claim will eventually go to trial, and it is also clear (for the reasons set forth above) that Moore's *Bivens* case will eventually go to trial as well. *See also* Opp'n to Mot. for Stay at 7–8 (Feb. 15, 2013). For this reason, too, it is entirely sensible and fair to proceed with the scheduled trial regardless of whether the Inspectors' certiorari petition is still pending at the time of trial, as this Court has already indicated it would do. Hr'g Tr. at 20 (Mar. 4, 2013)

("until some other court says, yes, we're looking at this again, I think we ought to get this done"). (Indeed, for these reasons, even a *grant* of the petition would not be a reason to delay the trial, but that issue can safely be set aside until the unlikely event that it arises.)

* * *

For the reasons set forth above, the Court should rule that it will not delay the trial based on the pendency of the Inspectors' certiorari petition. If, however, the Court would refuse to hold the trial in the event the certiorari petition is still pending at the start of trial, then Moore reluctantly requests that the Court at this time reschedule the trial for an available, mutually convenient date in late 2013 or early 2014, and reset all interim deadlines. As explained, it is reasonably likely that the petition will remain pending at the start of the currently scheduled trial, and Moore—given his limited individual resources and need to incur substantial out-of-pocket expenses to prepare for trial—would prefer for the trial to be rescheduled now if the Court would halt it at the eleventh hour in that likely scenario.

CONCLUSION

The Court should clarify its intention to hold the trial regardless of the pendency of the Inspectors' certiorari petition or, if it is unwilling to do so, should confer with counsel for the purpose of rescheduling the trial for an available, mutually convenient date in late 2013 or early 2014, and reset all pending interim deadlines.

Dated: July 26, 2013

Respectfully submitted,

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