

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

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YASIR AFIFI,)	
)	
	Plaintiff,)	
)	CIVIL ACTION NO.
v.)	1:11-00460 (BAH)
)	
ERIC H. HOLDER et al.)	
)	
	Defendants.)	
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**DEFENDANTS HOLDER AND MUELLER’S OPPOSITION
TO PLAINTIFF’S MOTION FOR STAY**

Defendants Eric Holder and Robert Mueller oppose plaintiff’s motion to stay this case pending the Supreme Court’s disposition of the issue of whether and to what extent GPS monitoring of a vehicle’s movements constitutes a “search” under the Fourth Amendment. The Court should deny plaintiff’s request for a stay because this action is ripe for dismissal for reasons that require no consideration of the Fourth Amendment issue before the Supreme Court and that are already fully set forth in defendants’ pending motion to dismiss and for summary judgment.

On March 2, 2011, plaintiff filed the present suit against Attorney General Holder and Director of the Federal Bureau of Investigation (“FBI”) Robert Mueller in their official capacities and unknown FBI agents in their individual capacities, alleging that defendants’ placement of a GPS tracking device on plaintiff’s car without a warrant and maintenance of records derived from that device violated plaintiff’s rights under the First and Fourth Amendments, the Administrative Procedure Act, and the Privacy Act. On June 16, 2011, defendants Holder and Mueller (hereinafter “defendants”) filed a Motion

to Dismiss and for Summary Judgment (hereinafter “Motion to Dismiss” or “dispositive motion”). On June 27, the Supreme Court granted the United States’ petition for certiorari in *United States v. Maynard*, 615 F.3d 544 (D.C. Cir. 2010), *petition for cert. filed sub nom. United States v. Jones*, No. 10-1259 (Apr. 15, 2011), on the question of “[w]hether the warrantless use of a tracking device on petitioner’s vehicle to monitor its movements on public streets violated the Fourth Amendment.” On July 18, plaintiff filed a motion to stay the case, arguing that “[a] stay will prevent the waste of judicial resources in litigating an issue that the Supreme Court will soon ultimately settle.” Mot. for Stay at 1-2, 3 (¶¶ 1, 4).

As plaintiff has observed, a decision to stay proceedings lies within the discretion of the Court. However, this decision “calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.” *Dellinger v. Mitchell*, 442 F.2d 782, 786 n.7 (D.C. Cir. 1971) (quoting *Landis v. North America Co.*, 299 U.S. 248, 254-55 (1936)). Plaintiff has not shown that the balance of interests favor a stay. First, the Court need not — and indeed should not — reach the merits of plaintiff’s Fourth Amendment claim in order to dispose of this case. Plaintiff has pled his Fourth Amendment claim as a *Bivens* claim, and as discussed in defendants’ dispositive motion, *Bivens* actions cannot lie against federal defendants sued in their official capacities. Motion to Dismiss at 1, 4.¹ All of plaintiff’s other claims should be dismissed for reasons

¹ Indeed, in conferring on the motion for stay, counsel for plaintiff indicated that he did not intend to oppose defendants’ motion as to this point of law.

that also require no consideration of the Fourth Amendment issue raised in *Jones*. See Motion to Dismiss at 5-22.²

Second, plaintiff's contention that defendants will not be harmed by a stay of the proceedings is off point and meritless. There simply is no reason to delay consideration of defendants' motion. As noted, defendants have filed a motion that would (and should) be dispositive of plaintiff's entire Complaint regardless of the status of the case before the Supreme Court. The protracted stay plaintiff seeks would unnecessarily delay consideration of defendants' motion, which does not depend in any way on how the Supreme Court rules in *Jones*, and force defendants to wait far longer than should be necessary to resolve this litigation.

By contrast, it is plaintiff who will not be harmed by allowing the case to proceed, at least to the point of allowing the Court to decide defendants' dispositive motion. It is well established that a party moving for a stay "must make out a clear case of hardship or inequity in being required to go forward, if there is even a fair possibility that the stay for which he prays will work damage to someone else." *Dellinger*, 442 F.2d at 786 (quoting *Landis*, 299 U.S. at 255); see also *McSurely v. McClellan*, 426 F.2d 664, 671 (D.C. Cir. 1970) (district court cannot grant "a stay of indefinite duration in the absence of a pressing need") (quoting *Landis*, 299 U.S. at 255). Plaintiff has made no such case. Only if defendants' pending motion is denied might there be a need to await the Supreme Court's disposition of *Jones*, and then only to the extent that the latter affects claims that

² Plaintiff relies on cases in which the district court granted a stay pending the resolution of an independent lawsuit. Mot. for Stay at 3 (¶ 4). In those cases, however, the outcome of the other lawsuit would have a clear and direct impact on the proceedings at hand. Here, by contrast, the Supreme Court's disposition of the *Jones* case has no bearing on the reasons why plaintiff's Complaint should be dismissed as to defendants Holder and Mueller.

proceed to the merits. Plaintiff appears to contend that absent a stay he will need to conduct “limited discovery” to determine the identity of the “Unknown Agent” defendants. Mot. for Stay at 2 (¶ 3). However, such discovery is irrelevant to whether the motion of the official capacity defendants should be granted. Further, disposition of the issues raised in the pending motion may bear upon whether any discovery is appropriate as to other possible individual capacity defendants. In any event, if the Court does not dismiss plaintiff’s suit in its entirety, it can at that point revisit the question of whether or not a stay is appropriate in light of the pending Supreme Court case. Entry of a stay at this time, however, would be unnecessary and premature.

CONCLUSION

For the foregoing reasons, the Court should deny plaintiff's Motion to Stay Proceedings.

Dated: August 4, 2011

Respectfully submitted,

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