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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

YASIR AFIFI

Plaintiff

v.

ERIC H. HOLDER, et al

Defendants

CASE NO.:1:11-00460

HON.: Judge Howell

PLAINTIFF'S REPLY IN SUPPORT OF HIS MOTION TO STAY PROCEEDINGS
PENDING THE SUPREME COURT'S REVIEW OF A
MATERIALLY IDENTICAL LEGAL ISSUE

Defendants argue that this Court may address their Motion to Dismiss without reaching the issue before the Supreme Court in *US v. Jones*. But this is simply not the case. The legality of the warrantless use of GPS tracking devices is the single core issue before this Court. To resolve the Bivens action against Unknown Defendants, the Administrative Procedures Act claim against Defendants Mueller and Holder, and the Privacy Act claim against Defendants Mueller and Holder requires this Court to apply case law currently in flux that the Supreme Court will definitively fix in *US v. Jones*. In the absence of an identifiable burden that a stay in proceedings would impose on Defendants, basic tenets of judicial economy justify this Court's grant of Plaintiff's stay.

I. Privacy Act Claim

Whether Defendants Holder and Mueller continue to violate the Privacy Act by maintaining records of Plaintiff's first amendment activities that are not "pertinent to and within the scope of an authorized law enforcement activity" requires this Court to determine whether Defendants have surpassed their capacity to "authorize[e]" certain law enforcement activities. 5 U.S.C. § 552a(e)(7). Defendants Holder and Mueller—in their official capacity—lack the authority to "authorize" unconstitutional law enforcement activities. Thus, if *US v. Jones* determines that the warrantless use of GPS tracking devices violates the Fourth Amendment, then any records Defendants Holder and Mueller maintain derived from such unconstitutional activities would violate the Privacy Act. This is because such records would not be "within the scope of an **authorized** law enforcement activity." *Id.* The dispositive effect *US v. Jones* will have on Plaintiff's case before this Court justify a grant of Plaintiff's motion to stay proceedings.

II. Administrative Procedures Act Claim

The Administrative Procedures Act claim is properly against Defendant Holder and Mueller for furnishing Unknown Defendants "approval . . . or [an]other form of permission" to place a tracking device under Plaintiff's vehicle. 5 U.S.C. § 551(8). Because Plaintiff has alleged that Defendants Holder and Mueller did affirmatively grant their approval to place the tracking device under Plaintiff's vehicle, this Court must decide whether that approval itself was contrary to the law. The resolution then of whether the approval was contrary to law turns on what the Supreme Court decides in *US v. Jones*. Again, the dispositive effect of *US v. Jones* on Plaintiff's case is apparent and warrants a stay in the proceedings.

III. Bivens Action

Defendants attempt to obscure the propriety of a stay by emphasizing that a Bivens action is not available against Defendants acting in their official capacity. This argument, however, misses the point because to litigate Plaintiff's Bivens action against Unknown Defendants—irrespective of whether this claim is ultimately tenable against Defendants Holder and Mueller in their official capacity—would require a not negligible outlay of discovery efforts to file a motion to conduct limited discover, to retrieve documents from Defendants to establish the identity of Unknown Defendants, and to solicit testimony determining whether the jurisdictional contacts of Unknown Defendants are sufficient to allow this Court to exercise personal jurisdiction over them and maintain proper venue. A Supreme Court decision—whatever its content--in *US v. Jones* may absolve this Court of the need to oversee these intensive tasks. Thus, because the Supreme Court's decision will bear significantly on the need to proceed through discovery at this initial stage of the litigation, judicial economy is best served by granting Plaintiff's stay.

CONCLUSION

For the foregoing reasons, Plaintiff Afifi respectfully requests that the Court grant his motion to stay proceedings pending the Supreme Court's decision in *US v. Jones*.

Dated: August 15, 2011

Respectfully submitted,

By: ___/s/___Nadhira Al-Khalili_____

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CERTIFICATE OF SERVICE

I hereby certify that on August 15, 2011, a true and correct copy of the foregoing was served electronically by the U.S. District Court for the District of Columbia Electronic Case Filing System (ECF) and that the documents are available on the ECF system.

By: /s/ Nadhira Al-Khalili

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