

1 ETHAN P. DAVIS
Acting Assistant Attorney General
2 BRIGHAM J. BOWEN
Assistant Branch Director
3 KEVIN P. HANCOCK
Trial Attorney
Civil Division, Federal Programs Branch
4 U.S. Department of Justice
1100 L Street NW
5 Washington, D.C. 20005
Telephone: (202) 514-3183
6 Fax: (202) 616-8470
E-mail: kevin.p.hancock@usdoj.gov
7

8 *Attorneys for Defendants*

9 **UNITED STATES DISTRICT COURT**
10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

11 ARIZONA YAGÉ ASSEMBLY, NORTH
12 AMERICAN ASSOCIATION OF
VISIONARY CHURCHES, and CLAY
13 VILLANUEVA,

14 Plaintiffs,

15 v.

16 WILLIAM BARR, Attorney General of the
United States; TIMOTHY J. SHEA, Acting
17 Administrator of the U.S. Drug Enforcement
Administration; CHAD F. WOLF, Acting
18 Secretary of the Department of Homeland
Security; MARK A. MORGAN, Acting
19 Commissioner of the U.S. Customs and Border
Protection; THOMAS PREVOZNIK, Deputy
20 Assistant Administrator of the DEA
Department of Diversion Control, in his
21 personal capacity; the UNITED STATES OF
AMERICA; the STATE OF ARIZONA;
22 MARK BRNOVICH, Arizona Attorney
General; MARICOPA COUNTY, a political
23 subdivision of the State of Arizona; and,
24 MATTHEW SHAY,

25 Defendants.
26
27
28

No. 3:20-cv-3098-WHO

**DECLARATION OF SCOTT A.
BRINKS**

1 I, Scott A. Brinks, declare and say:

2 1. I am an employee of the United States Department of Justice (DOJ), Drug
3 Enforcement Administration (DEA). I entered on duty with DEA in 2001 as a GS-1801
4 Diversion Investigator and was initially assigned to DEA's Cleveland, Ohio Resident Office,
5 where I received normal career-ladder promotions through GS-13. In September 2014, I was
6 promoted to GS-14 and selected to serve as a Diversion Group Supervisor (GS) in DEA's
7 Merrillville, Indiana Resident Office. In September 2017, I was reassigned to the Diversion
8 Control Division in DEA Headquarters in Arlington, Virginia, where I served as a Staff
9 Coordinator in the Policy Section, Import-Export Section, and Unit Chief in the Liaison Section.
10 In July 2019, I was promoted to GS-15 and selected to serve as the Section Chief of the
11 Regulatory Drafting & Policy Support Section (DPW) in the Office of Diversion Control Policy.
12 In this capacity, I report to Deputy Assistant Administrator Thomas Prevoznik.

13 2. Under my supervision, DPW is responsible for, among other functions, drafting
14 and interpreting DEA regulations and policy guidance and coordinating dissemination of that
15 information within DEA and to the regulated community

16 3. I make the statements which follow on the basis of personal knowledge and
17 information available to me in my capacity as DPW Section Chief. If called upon to do so, I
18 could offer competent testimony as to these statements.

19 4. DEA is now in the process of revising and updating portions of its regulations
20 implementing the Controlled Substances Act (CSA), as amended.

21 5. DEA is also actively engaged in updating and revising DEA's existing regulations
22 to incorporate consideration of issues arising under the Religious Freedom Restoration Act
23 (RFRA) and to lay out the procedures by which applications for religious exemptions are to be
24 handled. Revised regulations, when implemented, would supersede the document entitled
25 *Guidance Regarding Petitions for Religious Exemption from the Controlled Substances Act*
26 *Pursuant to the Religious Freedom Restoration Act* (2009 Guidance), which can be found at
27 [https://www.deadiversion.usdoj.gov/GDP/\(DEA-DC-](https://www.deadiversion.usdoj.gov/GDP/(DEA-DC-5)%20Guidance%20Regarding%20Petitions%20for%20Religious%20Exemptions.pdf)
28 [5\)%20Guidance%20Regarding%20Petitions%20for%20Religious%20Exemptions.pdf](https://www.deadiversion.usdoj.gov/GDP/(DEA-DC-5)%20Guidance%20Regarding%20Petitions%20for%20Religious%20Exemptions.pdf).

1 6. Once approved within DEA, draft regulations must be submitted to the DOJ Office of
2 Legal Policy (OLP) and the Office of Management and Budget (OMB). The period for OMB
3 Office of Information and Regulatory Affairs (OIRA) review of a draft regulation is limited
4 under Executive Order 12866 to 90 days; this period is subject to extension under some
5 circumstances.

6 7. Following DOJ and OMB review, DEA expects to publish a Notice of Proposed
7 Rulemaking in the Federal Register to obtain the views of the regulated community and the
8 public. By the NPRM, DEA will open a public comment period, likely of 60 days, in accordance
9 with DEA's typical practice. DEA will consider any comments received, make any needed
10 revisions, and then publish a Final Rule in the Federal Register.

11 I declare under penalty of perjury that the foregoing statements made by me are true and
12 correct to the best of my information and belief.

13
14 Sworn to and subscribed this 14th of July 2020
15 at Bristow, VA.

16
17
18 _____
19 Scott A. Brinks
20
21
22
23
24
25
26
27
28

1 ETHAN P. DAVIS
Acting Assistant Attorney General
2 BRIGHAM J. BOWEN
Assistant Branch Director
3 KEVIN P. HANCOCK
Trial Attorney
Civil Division, Federal Programs Branch
4 U.S. Department of Justice
1100 L Street NW
5 Washington, D.C. 20005
Telephone: (202) 514-3183
6 Fax: (202) 616-8470
E-mail: kevin.p.hancock@usdoj.gov
7

8 *Attorneys for the Federal Agency Defendants*

9 **UNITED STATES DISTRICT COURT**
10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

11 ARIZONA YAGÉ ASSEMBLY, NORTH
12 AMERICAN ASSOCIATION OF
VISIONARY CHURCHES, and CLAY
13 VILLANUEVA,

14 Plaintiffs,

15 v.

16 WILLIAM BARR, Attorney General of the
United States; TIMOTHY J. SHEA, Acting
17 Administrator of the U.S. Drug Enforcement
Administration; CHAD F. WOLF, Acting
18 Secretary of the Department of Homeland
Security; MARK A. MORGAN, Acting
19 Commissioner of the U.S. Customs and Border
Protection; THOMAS PREVOZNIK, Deputy
20 Assistant Administrator of the DEA
Department of Diversion Control, in his
21 personal capacity; the UNITED STATES OF
AMERICA; the STATE OF ARIZONA;
22 MARK BRNOVICH, Arizona Attorney
General; MARICOPA COUNTY, a political
23 subdivision of the State of Arizona; and,
24 MATTHEW SHAY,

25 Defendants.
26
27
28

No. 3:20-cv-3098-WHO

**DECLARATION OF KEVIN P.
HANCOCK**

1
2 1. I am a Trial Attorney at the Department of Justice, Civil Division, Federal
3 Programs Branch and counsel for the Federal Agency Defendants (defined in Paragraph 3,
4 below).

5 2. I have personal knowledge of the contents of this declaration, and I could and
6 would testify competently thereto if called upon to do so.

7 3. Plaintiffs filed the original complaint on May 5, 2020. Plaintiffs served
8 Defendants William Barr, Attorney General of the United States; Timothy Shea, Acting
9 Administrator of the U.S. Drug Enforcement Administration (“DEA”); Chad Wolf, Acting
10 Secretary of the Department of Homeland Security (“DHS”); Mark A. Morgan, Acting
11 Commissioner of U.S. Customs and Border Protection (“CBP”); and the United States of America
12 (the “Federal Agency Defendants”). Plaintiffs served the U.S. Attorney for the Northern District
13 of California on May 22, 2020. *See* ECF 11 at ¶ 6. Accordingly, the responsive pleading deadline
14 for the Federal Agency Defendants is July 21, 2020. Fed. R. Civ. P. 12(a)(2).

15 4. Plaintiffs filed a First Amended and Supplemental Complaint on June 16, 2020.
16 ECF No. 12. The First Amended and Supplemental Complaint added to the case one new
17 plaintiff, Clay Villanueva, and two new claims, which Plaintiffs assert against four new
18 Defendants: the State of Arizona, the Arizona Attorney General, Maricopa County, Arizona, and
19 a Maricopa County detective. *See* ECF No. 12.

20 5. The initial case management orders in this case have set the following deadlines:
21 a July 16, 2020 deadline for the parties to meet and confer and to file an ADR certificate; a July
22 30, 2020 deadline for the parties’ Rule 26(f) report and initial disclosures, *see* ECF No. 8, an
23 August 4, 2020 deadline for the parties’ case management statement, and an August 11, 2020
24 case management conference, *see* ECF No. 10.

25 6. On July 16, 2020, the Federal Agency Defendants will file a Motion to Stay or in
26 the Alternative to Enlarge Time to Respond to the Complaint (“Motion”). *See* ECF No. 18.

27 7. The alternative relief requested by the Federal Agency Defendants’ Motion is an
28 enlargement of time to respond to the amended complaint pursuant to Civil Local Rule 6-3. *See*

1 Mot. at 15-17.

2 8. There is good cause for the enlargement of time requested by the Federal Agency
3 Defendants' Motion, without which the Federal Agency Defendants would suffer substantial
4 harm or prejudice.

5 9. First, the Federal Agency Defendants have moved in good faith for the stay
6 requested by this motion; if that stay is denied, the requested extensions would provide them with
7 sufficient time to prepare a response to the First Amended and Supplemental Complaint and to
8 meet the case management deadlines.

9 10. Second, the requested extension would allow the Federal Agency Defendants
10 sufficient time to prepare a response in light of the substantial length of the First Amended and
11 Supplemental Complaint, which is 73-pages long and contains more than 300 paragraphs of
12 allegations. See ECF No. 12.

13 11. Third, the time that the Federal Rules provide for Defendants to respond to the
14 Complaint, *see* Fed. R. Civ. P. 12(a)(2), was effectively shortened when Plaintiffs substantially
15 amended and supplemented their original complaint 21 days after it was served on Defendants,
16 *see* ECF No. 12, which was the last day Plaintiffs could file an amendment without seeking
17 consent or leave, *see* Fed. R. Civ. P. 15(a)(1)(A). Plaintiffs' amendment and supplement added
18 to the original complaint one new plaintiff, two new claims, four new defendants, almost 20
19 pages, and approximately 70 paragraphs of new allegations. *See* ECF No. 12. The requested
20 extension would provide the Federal Agency Defendants with sufficient time to formulate any
21 needed responses to Plaintiffs' lengthy new allegations and claims.

22 12. Fourth, as of today, there is no indication on the case docket that the Federal
23 Agency Defendant's co-defendant, DEA Deputy Assistant Administrator of the DEA Department
24 of Diversion Control, Thomas Prevoznik, who has been sued in his individual capacity, has been
25 served with either complaint. A certificate of service has also yet to be filed on the case docket
26 for the four new non-federal defendants. The requested extension would allow time for Plaintiffs
27 to effect service upon these co-defendants and for Federal Agency Defendants subsequently to
28 consult with their non-federal co-defendants to the extent necessary for their response to the

1 Amended Complaint.

2 13. Fifth and finally, the requested extension would account for undersigned counsel's
3 scheduled time away from work during the latter half of August, which time will include travel
4 and pre-paid accommodations.

5 14. There have been no previous time modifications in this case and the requested
6 modification would not otherwise affect the schedule for this case.

7 15. I asked counsel for Plaintiffs by telephone on July 16, 2020 if Plaintiffs would
8 agree to the extension requested by this alternative motion. Counsel for Plaintiffs responded that
9 Plaintiffs would not oppose an extension of 30 days from the date of any denial of the motion to
10 stay.

11 Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true
12 and correct.

13 Signed on July 16, 2020

14
15 /s/ Kevin P. Hancock
16 Kevin P. Hancock
17
18
19
20
21
22
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

ARIZONA YAGÉ ASSEMBLY, *et al.*,

Plaintiffs,

v.

WILLIAM BARR, *et al.*,

Defendants.

No. 3:20-cv-3098-WHO

**[PROPOSED] ORDER GRANTING
MOTION TO STAY**

The Court, having considered the Federal Agency Defendants’ Motion to Stay or in the Alternative to Enlarge Time to Respond to the Complaint and any opposition thereto, hereby

ORDERS as follows:

- 1) This case shall be stayed, and all proceedings held in abeyance, pending the United States Supreme Court’s review of *Tanvir v. Tanzin*, 889 F.3d 72 (2d Cir. 2018), *cert. granted sub. nom, Tanzin v. Tanvir*, 140 S. Ct. 550 (Nov. 22, 2019) (*Tanvir*); and
- 2) Within two weeks of the Supreme Court’s resolution of *Tanvir*, the Federal Agency Defendants shall file a status report indicating whether this case and all proceedings should continue to be held in abeyance or proposing a schedule for continuing the litigation.

IT IS SO ORDERED.

Dated:

William H. Orrick
United States District Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

ARIZONA YAGÉ ASSEMBLY, *et al.*,

Plaintiffs,

v.

WILLIAM BARR, *et al.*,

Defendants.

No. 3:20-cv-3098-WHO

**[PROPOSED] ORDER GRANTING
FEDERAL AGENCY DEFENDANTS'
MOTION TO ENLARGE TIME TO
RESPOND TO THE COMPLAINT**

The Court, having considered the Federal Agency Defendants' Motion to Stay or in the Alternative to Enlarge Time to Respond to the Complaint and any opposition thereto, hereby

ORDERS as follows:

- 1) The deadline for Defendants to respond to Plaintiffs' Complaint is extended until to 60 days after service of process upon Defendant Thomas Prevoznik, Deputy Assistant Administrator of the DEA Department of Diversion Control, in his personal capacity; and
- 2) All current deadlines, including the July 16, 2020 deadline to meet and confer and file an ADR certificate, the July 30, 2020 deadline for the parties' Rule 26(f) report and initial disclosures, the August 4, 2020 deadline for the parties' case management statement, and the August 11, 2020 case management conference, *see* ECF No. 10, are vacated and shall be reset to be consistent with the Federal Defendants' new responsive pleading deadline.

IT IS SO ORDERED.

Dated:

William H. Orrick
United States District Judge

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA**

ARIZONA YAGÉ ASSEMBLY, *et al.*,

Plaintiffs,

v.

WILLIAM BARR, *et al.*,

Defendants.

No. 3:20-cv-3098-WHO

**[PROPOSED] ORDER GRANTING
FEDERAL AGENCY DEFENDANTS'
MOTION TO ENLARGE TIME TO
RESPOND TO THE COMPLAINT**

The Court, having considered the Federal Agency Defendants' Motion to Stay or in the Alternative to Enlarge Time to Respond to the Complaint and any opposition thereto, and having granted Defendant Prevoznik's Motion to Stay Proceedings Pending the Supreme Court's Decision in *Tanvir v. Tanzin*, ECF No. 17, hereby **ORDERS** as follows:

- 1) The deadline for Defendants to respond to Plaintiffs' Complaint is extended to the later of September 30, 2020 or 60 days from the date of this ORDER; and
- 2) All current deadlines, including the July 16, 2020 deadline to meet and confer and file an ADR certificate, the July 30, 2020 deadline for the parties' Rule 26(f) report and initial disclosures, the August 4, 2020 deadline for the parties' case management statement, and the August 11, 2020 case management conference are vacated and shall be reset to be consistent with the Federal Defendants' new responsive pleading deadline.

IT IS SO ORDERED.

Dated:

William H. Orrick
United States District Judge

1 ETHAN P. DAVIS
Acting Assistant Attorney General
2 BRIGHAM J. BOWEN
Assistant Branch Director
3 KEVIN P. HANCOCK
Trial Attorney
Civil Division, Federal Programs Branch
4 U.S. Department of Justice
1100 L Street NW
5 Washington, D.C. 20005
Telephone: (202) 514-3183
6 Fax: (202) 616-8470
E-mail: kevin.p.hancock@usdoj.gov
7

8 *Attorneys for the Federal Agency Defendants*

9 **UNITED STATES DISTRICT COURT**
10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

11 ARIZONA YAGÉ ASSEMBLY, NORTH
12 AMERICAN ASSOCIATION OF
VISIONARY CHURCHES, and CLAY
13 VILLANUEVA,

14 Plaintiffs,

15 v.

16 WILLIAM BARR, Attorney General of the
United States; TIMOTHY J. SHEA, Acting
17 Administrator of the U.S. Drug Enforcement
Administration; CHAD F. WOLF, Acting
18 Secretary of the Department of Homeland
Security; MARK A. MORGAN, Acting
19 Commissioner of the U.S. Customs and Border
Protection; THOMAS PREVOZNIK, Deputy
20 Assistant Administrator of the DEA
Department of Diversion Control, in his
21 personal capacity; the UNITED STATES OF
AMERICA; the STATE OF ARIZONA;
22 MARK BRNOVICH, Arizona Attorney
General; MARICOPA COUNTY, a political
23 subdivision of the State of Arizona; and,
24 MATTHEW SHAY,

25 Defendants.
26
27
28

No. 3:20-cv-3098-WHO

**FEDERAL AGENCY DEFENDANTS’
MOTION TO STAY OR IN THE
ALTERNATIVE TO ENLARGE TIME
TO RESPOND TO THE COMPLAINT**

Date: September 9, 2020
Time: 2:00 pm
Place: Courtroom 2, 17th Floor
Honorable William H. Orrick

NOTICE OF MOTION

PLEASE TAKE NOTICE that on September 9, 2020, at 2:00 p.m. before the Honorable William H. Orrick, in Courtroom 2 of the 17th Floor of the Philip E. Burton Courthouse and Federal Building, 450 Golden Gate Avenue, San Francisco, California, 94102, Defendants William Barr, Attorney General of the United States; Timothy Shea,¹ Acting Administrator of the U.S. Drug Enforcement Administration (“DEA”); Chad Wolf, Acting Secretary of the Department of Homeland Security (“DHS”); Mark A. Morgan, Acting Commissioner of U.S. Customs and Border Protection (“CBP”); and the United States of America (collectively, the “Federal Agency Defendants”), by and through undersigned counsel, will move the Court to stay further proceedings in this case against the Federal Agency Defendants pending the Supreme Court’s review of *Tanvir v. Tanzin*, 889 F.3d 72 (2d Cir. 2018), *cert. granted sub. nom. Tanzin v. Tanvir*, 140 S. Ct. 550 (Nov. 22, 2019), or in the alternative, to enlarge the Federal Agency Defendants’ time to file a responsive pleading. The Federal Agency Defendants respectfully request that the Court decide this motion on the papers submitted, without oral argument, pursuant to Civil L.R. 7-1(b).

MOTION TO STAY OR IN THE ALTERNATIVE TO ENLARGE TIME TO RESPOND TO THE COMPLAINT

The Federal Agency Defendants hereby move to stay further proceedings against them in this case pending the Supreme Court’s review of *Tanvir*, or in the alternative to enlarge the Federal Agency Defendants’ time to file a responsive pleading.² Should the Court grant the Federal Agency Defendants’ requested stay, the Federal Agency Defendants further respectfully request that they be permitted, within two weeks of the Supreme Court’s resolution of *Tanvir*, to file a status report indicating whether this case and all proceedings should continue to be held in

¹ Plaintiffs named the DEA’s former Acting Administrator Uttam Dhillon in his official capacity as a defendant, *see* ECF No. 1, but Dhillon was succeeded by Timothy J. Shea on May 19, 2020. *See* <https://www.dea.gov/press-releases/2020/05/19/attorney-general-barr-announces-timothy-j-shea-new-acting-administrator>. Under Federal Rule of Civil Procedure 25(d), Shea in his official capacity is “automatically substituted as a party” for Dhillon.

² The Federal Agency Defendants further request that a stay in their favor be granted without prejudice to their ability, after the conclusion of a stay, to assert any available defenses under Federal Rule of Civil Procedure 12(b), including but not limited to lack of subject-matter jurisdiction, improper venue, and failure to state a claim upon which relief can be granted.

1 abeyance or proposing a schedule for continuing the litigation. The reasons for this Motion are
2 set forth in the following Memorandum of Points and Authorities.

3 **MEMORANDUM OF POINTS AND AUTHORITIES**

4 Plaintiffs' complaint asserts claims under the Religious Freedom Restoration Act of 1993
5 ("RFRA") and the Administrative Procedure Act ("APA") against the United States and, in their
6 official capacities, the most senior officials at DOJ, DEA, DHS, and CBP. Those claims allege
7 that the DEA has maintained an illegal policy of denying applications for religious exemptions
8 under RFRA to the Controlled Substances Act ("CSA") filed by groups such as Plaintiffs, which
9 allege that their members drink a tea containing a Schedule I controlled substance as part of their
10 religious activities.

11 On the basis of closely related legal and factual allegations, Plaintiffs also assert a RFRA
12 claim seeking monetary damages from Thomas Prevoznik ("DAA Prevoznik"), a Deputy
13 Assistant Administrator of DEA's Diversion Control Division, in his individual capacity. On
14 July 15, 2020, DAA Prevoznik separately moved this Court for a stay of the RFRA claim against
15 him pending the Supreme Court's review of *Tanvir*, which is scheduled for argument on October
16 6, 2020 and which squarely presents the issue of whether RFRA authorizes suits seeking money
17 damages against individual federal employees.

18 If the Court stays the RFRA claim against DAA Prevoznik pending the Supreme Court's
19 ruling in *Tanvir*, the Court should also extend that stay to all claims against the Federal Agency
20 Defendants. Four reasons support that conclusion.

21 First, a stay would allow the DEA to make substantial progress on, if not conclude, a
22 rulemaking currently underway that would moot Plaintiffs' RFRA and APA claims by replacing
23 the religious-exemption application process being challenged here.

24 Second, the requested stay would also allow the parties and the Court to avoid piecemeal
25 litigation of the intertwined RFRA and APA claims in this case, preventing the duplication of
26 effort and waste of resources that would result if two rounds of discovery and dispositive
27 briefing were required for these substantially identical claims.

1 Third, the stay would prevent hardship and injury to DAA Prevoznik by ensuring that,
2 during the pendency of any stay he might be granted, he would not be burdened by litigation
3 against the Federal Agency Defendants that might affect his interests, as he is entitled to seek
4 qualified immunity, which is designed to shield government officials from such burdens.

5 Finally, the requested stay would cause no harm to Plaintiffs, especially given that they
6 have never filed a petition for a religious-exemption with the DEA and thus have not been
7 affected by the process they challenge as violating RFRA and the APA.

8 Counsel for Plaintiffs has stated that Plaintiffs will oppose this motion to stay.

9 **BACKGROUND**

10 **I. Statutory and Regulatory Background**

11 The Controlled Substances Act (“CSA”), regulates the importation, manufacture,
12 distribution, and use of psychotropic substances. 21 U.S.C. § 801 *et seq.* (2000 ed. and Suppl. I).
13 “Schedule I” substances under the CSA are those that have the highest potential for abuse and
14 which are therefore subject to the most comprehensive restrictions, including a ban on nearly all
15 importation and use. The CSA grants the Attorney General the power to register an applicant to
16 import, distribute, or manufacture a Schedule I controlled substance so long as doing so is
17 consistent with the public interest. *Id.* § 823(b). The Attorney General has delegated its
18 registration authority to the DEA, whose Office of Diversion Control reviews registration
19 applications. *See* 21 C.F.R. § 1301.31.

20 RFRA provides that the federal government may not substantially burden a person’s
21 sincere exercise of religion, unless doing so is the least restrictive means of advancing a
22 compelling interest. 42 U.S.C. § 2000bb–1(b). To establish a *prima facie* violation of RFRA, a
23 plaintiff must present sufficient evidence to allow a trier of fact to rationally find that the
24 plaintiff’s activities are a sincere “exercise of religion” and that the Government action
25 “substantially burdens” the plaintiff’s exercise of religion. *Navajo Nation v. United States*
26 *Forest Serv.*, 535 F.3d 1058, 1068-69 (9th Cir. 2008).

27 In 2006, the Supreme Court held that government action taken pursuant to the CSA is
28 subject to RFRA. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418,

1 432-33 (2006). After a subsequent increase in requests for religious exemptions from the CSA,
2 the DEA publicly issued guidelines in 2009 to serve as an “interim measure intended to provide
3 guidance to parties who wish to petition [the DEA] for a religious exemption to the CSA” (the
4 “2009 Guidance”).³ The 2009 Guidance directs a petitioner to provide information
5 demonstrating that the application of the CSA to its activities would “(1) be a substantial burden
6 on (2) his/her sincere (3) religious exercise,” and information detailing the petitioner’s planned
7 use and handling of the controlled substance. *Id.* Following review of a religious exemption
8 petition, the DEA’s Deputy Assistant Administrator of Diversion Control Division (currently,
9 DAA Prevoznik) issues a written final determination granting or denying the petition. *Id.* That
10 determination is a final agency decision subject to judicial review in a United States Court of
11 Appeals. 21 U.S.C. § 877.

12 The DEA is currently updating and revising its regulations implementing the CSA for the
13 purpose of describing the procedures by which the DEA will evaluate applications for religious
14 exemptions under RFRA. *See* Ex. A (Decl. of Scott A. Brinks (“Brinks Decl.”) ¶¶ 4-6). When
15 implemented, these revised regulations would supersede the 2009 Guidance. *Id.* ¶ 5. Once a
16 draft regulation replacing the 2009 Guidance is approved by the DEA, the agency must then
17 submit that draft to the Department of Justice’s Office of Legal Policy and the Office of
18 Management and Budget for regulatory review. *Id.* ¶ 6. While subject to extension under some
19 circumstances, the period for OMB Office of Information and Regulatory Affairs (OIRA) review
20 of a draft regulation is limited under Executive Order 12866 to 90 days. *Id.* Following DOJ and
21 OMB review, the DEA expects to publish a Notice of Proposed Rulemaking (“NPRM”) in the
22 Federal Register to obtain the views of the regulated community and the public at large. *Id.* ¶ 7.
23 By the NPRM, DEA will open a public comment period, likely of 60 days, in accordance with
24 DEA’s typical practice. *Id.* DEA will consider any comments received, make any needed
25 revisions, and then publish a Final Rule in the Federal Register. *Id.*

26
27 ³ *See* Guidance Regarding Petitions for Religious Exemption from the Controlled
28 Substances Act Pursuant to the Religious Freedom Restoration Act, at [https://www.deadiversion.usdoj.gov/GDP/\(DEA-DC-5\)%20Guidance%20Regarding%20Petitions%20for%20Religious%20Exemptions.pdf](https://www.deadiversion.usdoj.gov/GDP/(DEA-DC-5)%20Guidance%20Regarding%20Petitions%20for%20Religious%20Exemptions.pdf).

II. Plaintiffs' Allegations

Plaintiff Arizona Yagé Assembly (“Arizona Yagé”) alleges that it is a “religious nonprofit corporation[,]” First Am. and Suppl. Compl. (“Compl.”) ¶ 6 (Jun. 15, 2020), ECF No. 12, that was established “as a visionary church in 2015,” and which uses “Ayahuasca” as its communion sacrament, *id.* ¶ 47. Ayahuasca is a tea that contains the hallucinogen dimethyltryptamine (“DMT”), a Schedule I controlled substance under the CSA. *Id.* ¶ 6. Ayahuasca is made “by brewing leaves from DMT-containing plants jointly with slices of *Banisteropsis Caapi*, the ‘yagé’ vine.” *Id.* ¶ 43. Arizona Yagé does not allege that it has stopped using ayahuasca or that it is not currently using ayahuasca in its activities by virtue of the CSA’s prohibitions on ayahuasca. Plaintiff North American Association of Visionary Churches (“NAAVC”) describes itself an “interdenominational association of visionary churches.” Compl. ¶ 62. NAAVC claims that its “central act of Free Exercise is initiating a lawful system for importing and sharing sacramentally-prepared Ayahuasca with visionary churches at reasonable cost[.]” *Id.* ¶ 64. Plaintiff Clay Villaneuva is a member of NAAVC’s board of directors. *Id.* ¶ 7.

On May 5, 2020, Arizona Yagé and NAAVC filed the original complaint, which contains three claims. ECF No. 1. On June 16, 2020, Plaintiffs filed a First Amended and Supplemental Complaint (“Complaint”), adding two new claims based on events allegedly occurring on May 17, 2020, without moving the Court to do so. ECF No. 12 (“Compl.”); *see* Fed. R. Civ. P. 15(d) (requiring a “motion and reasonable notice” for a “supplemental pleading setting out any” alleged fact “that happened after the date of the pleading to be supplemented”).

The first of Plaintiffs’ original three claims alleges that the United States and the DEA violated the APA by maintaining an alleged policy, furthered by the DEA’s 2009 Guidance, of refusing to grant religious exemptions under RFRA to “visionary churches” such as Arizona Yagé (the “Policy”). Compl. ¶¶ 76, 172. Plaintiffs also claim that the DEA violated the APA by failing to replace the 2009 Guidance with “a system of providing regulatory services to visionary churches[.]” *Id.* ¶ 172. None of the Plaintiffs alleges that it has filed a petition for a religious exemption with the DEA.

1 Second, Arizona Yagé and NAAVC allege that they are entitled under RFRA to a blanket
2 exemption from the CSA’s prohibitions on ayahuasca. Compl. ¶¶ 128-52. This claim is asserted
3 against the Federal Agency Defendants and DAA Prevoznik in his personal capacity, and asks
4 the Court to hold DAA Prevoznik liable for damages. *Id.* pp. 36, 70. The Complaint alleges, in
5 a conclusory fashion, that “Prevoznik has been responsible during the last two years for the
6 maintenance of the [DEA’s] Policy, which he has expressed in the DEA’s refusal to review and
7 rescind the Guidance[.]” *Id.* ¶ 151; *see also id.* ¶ 152 (alleging that Plaintiffs “have been
8 damaged by the acts . . . that Thomas Prevoznik took pursuant to the [DEA’s] Policy and in
9 violation of RFRA, to keep the Policy and the Guidance in place, and to continue denying
10 regulatory services to visionary churches”).

11 Third, Plaintiffs claim they are entitled to a declaration “stating the rights and relations of
12 the parties” under the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02. Compl. ¶¶ 234-38.

13 As relief for these three claims, Plaintiffs seek, in addition to damages against DAA
14 Prevoznik, a declaratory judgment and an injunction requiring the Federal Agency Defendants
15 to, among other things, rescind the 2009 Guidance and register Arizona Yagé and NAAVC under
16 the CSA to import, manufacture, dispense, and use ayahuasca. *See* Compl. ¶¶ 65-70.

17 The two claims added to this case by the First Amended and Supplemental Complaint are
18 alleged by Plaintiff Villanueva, against four new Defendants: the State of Arizona, the Arizona
19 Attorney General, Maricopa County, Arizona, and a Maricopa County detective (“Arizona
20 Defendants”). *See* Compl. First, Villanueva and the NAACV assert a claim under 42 U.S.C.
21 § 1983 against the Arizona Defendants, who allegedly conspired to deprive Villanueva and
22 NAAVC of their constitutional rights by directing law enforcement to seize ayahuasca from
23 Villanueva’s home on May 17, 2020. *Id.* ¶¶ 173-222. Plaintiffs also assert a section 1983 claim
24 against “Mark A. Morgan on behalf of the DEA, and unnamed DEA agents.” *Id.* p. 46. Second,
25 Villanueva alleges that he is entitled under Arizona law to an exemption from Arizona state
26 regulations of ayahuasca. *Id.* ¶¶ 223-32.

1 **III. The Supreme Court’s Writ of Certiorari in *Tanvir v. Tanzin***

2 On November 22, 2019, the U.S. Supreme Court granted a petition for writ of *certiorari*
3 to review the U.S. Court of Appeals for the Second Circuit’s ruling in *Tanvir v. Tanzin*, which
4 held that “RFRA permits a plaintiff to recover money damages against federal officials sued in
5 their individual capacities for violations of RFRA’s substantive protections[.]” 894 F.3d at 453.
6 *Tanvir* is scheduled for argument on October 6, 2020 and for decision during its October 2020
7 term.⁴ In light of the question presented in *Tanvir*, DAA Prevoznik has moved this Court to stay
8 Plaintiffs’ RFRA claim against him until the Supreme Court decides *Tanvir*. See Def.
9 Prevoznik’s Notice of Mot. to Stay Proceedings Pending the Supreme Court’s Decision in *Tanvir*
10 v. *Tanzin* and Mem. of Points and Authorities (July 15, 2020) (“Prevoznik Mot.”), ECF No. 17.

11 **STANDARD OF REVIEW**

12 A district court’s “power to stay proceedings is incidental to the power inherent in every
13 court to control the disposition of the causes on its docket with economy of time and effort for
14 itself, for counsel, and for litigants.” *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). To
15 determine whether to exercise its discretion to grant a stay, a district court must consider:
16 (1) “the possible damage which may result from the granting of a stay,” (2) “the hardship or
17 inequity which a party may suffer in being required to go forward,” and (3) “the orderly course
18 of justice measured in terms of the simplifying or complicating of issues, proof, and questions of
19 law which could be expected to result from a stay.” *CMAX, Inc. v. Hall*, 300 F.2d 265, 268 (9th
20 Cir. 1962) (citing *Landis*, 299 U.S. at 254-55).

21
22
23
24
25
26
27
28 ⁴ See https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalOctober2020.pdf.

ARGUMENT

I. THE COURT SHOULD STAY THIS CASE AGAINST THE FEDERAL AGENCY DEFENDANTS UNTIL THE SUPREME COURT’S DECISION IN *TANVIR*

A. The Requested Stay Would Allow the DEA to Make Substantial Progress on, if not Complete, a Rulemaking Already Underway Which Will Likely Moot Plaintiffs’ Claims Against the Federal Agency Defendants

The orderly course of justice would be served if the Court stayed the claims against the Federal Agency Defendants, because the DEA’s ongoing rulemaking will likely moot the claims against them, or at the very least, alter or narrow the issues to be resolved.

The Ninth Circuit has held that, under *Landis*, a district court may, “with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case,” including “administrative” proceedings. *Leyva v. Certified Grocers of Cal., Ltd.*, 593 F.2d 857, 863-64 (9th Cir. 1979) (citing *Landis*, 299 U.S. at 254-55). In particular, courts have stayed cases where the pending administrative proceeding would moot claims by superseding the alleged agency action or policy being challenged. *See Am. Rivers v. Nat’l Marine Fisheries Serv.*, 126 F.3d 1118, 1122-24 (9th Cir. 1997) (explaining that “any challenge to the 1994-1998 Biological Opinion is moot” after it was “superseded by the 1995 Biological Opinion,” which the agency issued after the district court granted a stay); *see also Nat’l Wildlife Fed’n v. EPA*, 925 F.2d 470, 473 (D.C. Cir. 1991) (staying case to allow agency to complete new rulemaking because it “carried the prospect of mootng . . . procedural attacks and of changing the substance to be reviewed”).

Here, the DEA is in the midst of a rulemaking that will replace the 2009 Guidance, *see* Brinks Decl. ¶¶ 4-7, which is directly challenged by Plaintiffs’ RFRA and APA claims. Indeed, no fewer than 79 paragraphs of the Complaint are dedicated to detailing the 2009 Guidance’s alleged deficiencies. *See* Compl. ¶¶ 15, 90-102, 110, 113-15, 117, 119-27, 149-52, 154-56, 159-61, 163-64, 166, 168, 172, 184, 236m-u, 236w, 236y-ee; Prayer for Relief ¶ 1. Findings ¶¶ m-v, x, z-ee; Prayer for Relief ¶ 1. Wherefore ¶ a. For instance, the Complaint’s RFRA claim alleges that Plaintiffs’ religious exercise has been “substantially burdened by the DEA’s use of the

1 Guidance,” Compl. ¶ 150, and establishing a substantial burden is an essential element of
 2 Plaintiffs’ *prima facie* case, *see Navajo Nation*, 535 F.3d at 1068. Similarly, Plaintiffs’ APA
 3 claim alleges that the “DEA agency action and inaction due to the Policy and the Guidance . . .
 4 was arbitrary, capricious, an abuse of discretion, [and] not in accordance with law,” and that the
 5 DEA should be compelled to replace the 2009 Guidance with a new “system of providing
 6 regulatory services.” Compl. ¶ 172.

7 Replacing the 2009 Guidance is precisely the goal of the DEA’s ongoing rulemaking, *see*
 8 Brinks Decl. ¶ 5, although the agency disputes Plaintiffs’ assertions about the legality of the
 9 process currently in place. The rulemaking aims to implement a regulatory regime governing the
 10 agency’s evaluation of applications for religious exemptions under RFRA. *See id.* ¶¶ 4-5.
 11 Although there are additional layers of review that must be completed before an NPRM can be
 12 published, once complete, the rulemaking will supersede the 2009 Guidance, *id.* ¶¶ 5-7, almost
 13 certainly rendering Plaintiffs’ RFRA and APA claims moot, or at the very least substantially
 14 affecting those claims, *see Leyva*, 593 F.2d at 863-64 (explaining that it is “not require[d] that
 15 the issues in such proceedings [be] necessarily controlling of the action before the court” to
 16 justify a stay under *Landis*).⁵

17 The duration of the requested stay is reasonable. The Federal Agency Defendants request
 18 that the stay end following the Supreme Court’s decision in *Tanvir*, to coincide with any stay that
 19 may be granted in favor of DAA Prevoznik. The Supreme Court’s ruling in *Tanvir* will likely
 20 occur no later than the conclusion of the October 2020 term in the summer of 2021. *Cf.*
 21 *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*, 498 F.3d 1059, 1066-67 (9th Cir. 2007)
 22 (explaining that stays should “last only for a reasonable time” and reversing stay that had already
 23 lasted for two years and that “provide[d] no specific deadline for when the stay will terminate”).
 24 By the time the Court issues a ruling, the DEA will likely either have issued or made significant

25
 26 ⁵ Any stay should also extend to the section 1983 claim that Plaintiffs have asserted against
 27 the DEA and Mark Morgan, since Plaintiffs improperly supplemented the original complaint
 28 with that claim (which is based on alleged facts occurring after the original complaint) without a
 motion, *see Fed. R. Civ. P. 15(d)*, and because that claim patently lacks merit under blackletter
 law. *Buckley v. Meis*, 76 F. App’x 192, 194 (9th Cir. 2003) (stating that “§ 1983 does not apply
 to federal officials”).

1 progress on issuing a Notice of Proposed Rulemaking, and the propriety of continuing the
2 litigation in light of the status of the rulemaking could be reevaluated at that time.

3 It would be inefficient and wasteful to proceed with the claims against the Federal
4 Agency Defendants in light of the DEA's rulemaking. During the rulemaking process, Plaintiffs
5 and other stakeholders will have the opportunity to submit comments regarding whether and how
6 the DEA's procedure for evaluating religious exemptions should be modified and to influence
7 the rule that the DEA ultimately adopts. If this litigation were to proceed in parallel with that
8 process, the parties would be briefing, and the Court judging, the legality of a procedure that is
9 likely to change and may even be influenced by Plaintiffs' comments during the rulemaking.
10 Also, any Court decision during this time would risk prejudging the regulatory options available
11 to the DEA before the agency has a chance to issue an NPRM, consider comments, finalize the
12 rule, and explain its reasons for the course it ultimately chooses. *Cf. Or. Nat. Desert Ass'n v.*
13 *U.S. Forest Serv.*, 465 F.3d 977, 982 (9th Cir. 2006) ("To obtain judicial review under the APA,
14 [a plaintiff] must challenge a final agency action."). Finally, even assuming Plaintiffs'
15 challenges to the DEA's current process could be fully adjudicated before the DEA's rulemaking
16 is complete, any decision likely would be rendered inapplicable once the DEA finalizes its new
17 rule. Thus, the stay requested here is appropriate to mitigate the possibility that the Court and
18 the parties will unnecessarily expend resources litigating claims that are likely to be overtaken by
19 events.

20 **B. The Requested Stay Would Prevent Inefficient and Duplicative Piecemeal**
21 **Litigation of the Closely Related Claims Asserted Against DAA Prevoznik**
22 **and the Federal Agency Defendants**

23 In the event DAA Prevoznik is granted his requested stay, a corresponding stay of the
24 claims against the Federal Agency Defendants would promote the orderly course of justice for an
25 additional reason: it would prevent the closely related claims Plaintiffs have asserted against
26 DAA Prevoznik and the Federal Agency Defendants from proceeding piecemeal, which would
27 result in duplicative litigation and the inefficient use of judicial resources.

28 When determining whether the orderly course of justice weighs in favor of a stay,
"considerations of judicial economy are highly relevant" and such considerations weigh in favor

1 of a stay where “conducting further proceedings” could cause the “unnecessary expenditure of
2 judicial resources.” *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, No. 11-cv-01846-LHK, 2016 WL
3 9021536, at *2 (N.D. Cal. Mar. 22, 2016) (citation omitted). For instance, district courts have
4 ordered broad stays to avoid “piecemealing claims,” which would “require duplication of efforts
5 to resolve closely related issues on separate occasions.” *Ass’n of Irrigated Residents v. Fred
6 Schakel Dairy*, 634 F. Supp. 2d 1081, 1096 (E.D. Cal. 2008); *see, e.g., Calvillo Manriquez v.
7 DeVos*, No. 17-CV-07210-SK, 2018 WL 5316174, at *3 (N.D. Cal. Aug. 30, 2018) (“The Court
8 finds that a stay is appropriate because the Court will be forced to address the summary judgment
9 claims in piecemeal fashion[.]”).

10 Here, if the litigation against DAA Prevoznik is stayed pending the Supreme Court’s
11 consideration of *Tanvir*, but is allowed to proceed against the Federal Agency Defendants, it
12 would likely result in an inefficient and duplicative two rounds of discovery and two rounds of
13 merits briefing on identical or substantially similar issues. Plaintiffs’ RFRA and APA claims
14 against the agencies rest in part upon alleged acts by DAA Prevoznik. *See supra* p. 5. As a
15 result, if only DAA Prevoznik receives a stay, once that stay is complete, and assuming the case
16 against him resumes, additional motions practice and discovery would likely be necessary, *see,*
17 *e.g., Prevoznik Mot.* at 7-8 (stating entitlement to assert qualified immunity if claim against him
18 survives *Tanvir*), even though by that time, the case against the Federal Agency Defendants
19 might have moved on to a different stage of proceedings. The requested stay would limit the
20 possibility of such disjointed and inefficient litigation. Moreover, if the Court granted DAA
21 Prevoznik a stay, but did not stay the case for the Federal Agency Defendants, it would be
22 difficult—if not impossible—to complete discovery without entangling DAA Prevoznik in the
23 process; avoiding such entanglement is essential to “protect[] the substance of the qualified
24 immunity defense.” *Crawford-El v. Britton*, 523 U.S. 574, 597 (1998). *See infra* Section I.C.

1 **C. The Requested Stay Would Prevent Hardship and Inequity to DAA**
 2 **Prevoznik by Ensuring He Is Not Subject to Burdensome Litigation Pending**
 3 **His Claim of Qualified Immunity**

4 Heeding the Supreme Court’s entanglement concern, many district courts have stayed
 5 discovery against all defendants on all related claims until it could be determined if a subset of
 6 those claims were barred due to a meritorious qualified immunity defense. *See e.g., Skinner v.*
 7 *Ard*, No. CV 19-66-JWD-EWD, 2020 WL 2245179, at *5 (M.D. La. May 7, 2020) (“A stay is
 8 mandated as to the federal claims to which qualified immunity applies,” and, “[b]ecause the
 9 pendent state law claims are factually intertwined with the federal claims, the purpose of staying
 10 discovery when the qualified immunity defense is raised, as well as judicial economy, support a
 11 stay of discovery as to the state law claims as well.”); *M.G. v. Metro. Interpreters & Translators,*
 12 *Inc.*, No. 12CV460-JM (MDD), 2013 WL 690833, at *2 (S.D. Cal. Feb. 26, 2013) (staying all
 13 discovery where the “Federal defendants” asserted qualified immunity, noting their conduct was
 14 “inextricably intertwined with the allegations against the non-Federal defendants[,]” who were
 15 not asserting qualified immunity);⁶ *A.A. ex rel. Archuletta v. Martinez*, No. 12-CV-00732-WYD-
 16 KMT, 2012 WL 5974170, at *2 (D. Colo. Oct. 9, 2012) (stating that “it is very clear[] that the
 17 Supreme Court believes discovery should be stayed in the case as a whole even when only one
 18 defendant is asserting qualified immunity”); *Rainsaw v. United States*, No. 10CV1672, 2011 WL
 19 1752160, at *2 (N.D. Ohio May 5, 2011) (staying discovery on a Federal Tort Claims Act claim
 20 against the United States because, *in a separate case* involving overlapping claims, individual-
 21 capacity defendants had asserted a yet-to-be decided sovereign immunity defense).

22 ⁶ In *Mendia v. Garcia*, a court in this District distinguished *M.G.* and allowed piecemeal
 23 discovery in a case against the United States (which had not asserted sovereign immunity),
 24 despite staying discovery against the federal official co-defendants (who had asserted qualified
 25 immunity), in part because the defendants were all represented by the same attorneys, who would
 26 “be in a position to ensure that the Defendants’ individual positions are not prejudiced, and that
 27 they are not unduly burdened” as the case proceeded against only the United States. No. 10-CV-
 28 03910-MEJ, 2016 WL 3249485, at *5 (N.D. Cal. June 14, 2016). In so holding, the *Mendia*
 court admitted that the Supreme Court’s “concerns about the burdens that discovery proceedings
 can impose on parties asserting qualified immunity” expressed in *Iqbal* were “potentially
 significant,” but nevertheless dismissed those concerns as “dicta.” *Id.* at *3. In any event, this
 case is distinguishable from *Mendia* since DAA Prevoznik and the Federal Agency Defendants
 are represented by separate attorneys, working in different branches of the Department of
 Justice’s Civil Division. *Compare infra* at 17 with Prevoznik Mot. at 10.

1 Here, the Federal Agency Defendants’ co-defendant, DAA Prevoznik, has claimed that
 2 he is entitled to qualified immunity against the RFRA claim against him. Prevoznik Mot. at 7-8.
 3 Even if the Court granted his stay, if the RFRA claim against the Federal Agency Defendants
 4 proceeded to discovery or to trial, DAA Prevoznik would likely be required to participate
 5 directly as a fact witness, despite the claim against him technically being stayed. This would
 6 undermine the effectiveness of DAA Prevoznik’s stay (if granted) and the protections of the
 7 qualified immunity defense.

8 Because summary judgment or a trial on the claims against the Federal Agency
 9 Defendants would also significantly affect DAA Prevoznik’s rights and require his attention
 10 regardless of whether he receives a stay, a stay of all proceedings, and not just discovery, for the
 11 Federal Agency Defendants is necessary to avoid undermining the qualified immunity defense.
 12 *See Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009) (stating that qualified immunity protects an
 13 official from the burdens of all “litigation,” including “trial,” and not just discovery).⁷

14 **D. Plaintiffs Will Suffer No Prejudice or Harm from the Granting of the**
 15 **Requested Stay**

16 Finally, while granting the requested stay would further the orderly course of justice and
 17 prevent hardship or inequity to a party, the stay would result in no prejudice or harm to Plaintiffs.

18 First, the Complaint provides no reason to believe that Plaintiffs, who have not sought
 19 preliminary injunctive relief, are suffering any present or ongoing harm to their ability to practice
 20 their religion that would continue during a stay. Arizona Yagé admits that it has been using
 21 ayahuasca since it was founded five years ago and does not claim that it has stopped using
 22 ayahuasca at any time. *See, e.g.*, Compl. ¶ 47 (“After working with Ayahuasca for six years, the
 23 founder (the “Founder”) established [Arizona Yagé] as a visionary church in 2015, using
 24 Ayahuasca as [Arizona Yagé]’s communion sacrament.”); ¶ 49 (“In [Arizona Yagé], healing

25 ⁷ In many cases, a stay of only discovery and not all proceedings is sufficient to protect a
 26 defendant who has asserted qualified immunity because the qualified immunity question would
 27 be settled in a pending motion to dismiss or interlocutory appeal, *see, e.g., M.G. v. Metro.*
 28 *Interpreters & Translators, Inc.*, No. 12CV460-JM (MDD), 2013 WL 690833, at *1 (S.D. Cal.
 Feb. 26, 2013) (explaining that the federal defendants moved to stay discovery “pending the
 outcome of their motion to dismiss” in which they had asserted sovereign and qualified
 immunity), which would not be the case here if DAA Prevoznik’s motion for a stay is granted.

1 takes place in sacred communion by means of drinking sacramental Ayahuasca.”). Arizona
2 Yagé and NAAVC also admit in the Complaint to attempting to import ayahuasca as recently as
3 April 2020. Compl. ¶ 135.

4 Moreover, even though the Complaint devotes dozens of paragraphs to detailing the
5 alleged deficiencies of the DEA’s 11-year-old guidance and process for evaluating petitions for
6 religious exemption, Plaintiffs themselves have never subjected themselves to that process or had
7 a petition for religious exemption adjudicated by the DEA. It is not true, as Plaintiffs assert, that
8 the DEA “has a policy of denying regulatory services to visionary churches and refusing all
9 requested religious exemptions from the CSA,” Compl. ¶ 76, and Plaintiffs proffer no allegation
10 of even a single such denial. But even if the DEA had such a policy, it could not have harmed
11 Plaintiffs since they have not applied for a religious exemption. *See, e.g., Bova v. City of*
12 *Medford*, 564 F.3d 1093, 1096-97 (9th Cir. 2009) (holding that plaintiff lacked standing to
13 challenge city’s policy of discontinuing post-retirement health-care insurance to city employees
14 because plaintiff had yet to retire or be denied benefits).

15 Second, as discussed above, during the requested stay, the DEA’s rulemaking would
16 proceed and would at some point provide Plaintiffs with an opportunity to raise their apparent
17 generalized grievances with the 2009 Guidance during the comment period for the new rule.
18 Even if that guidance had injured Plaintiffs in some manner, the rulemaking already underway is
19 likely to moot Plaintiffs’ claims before they could be finally resolved, and thus a stay of the case
20 pending that rulemaking would not harm Plaintiffs.

21 Third, Plaintiffs will suffer no harm from a stay of their section 1983 claim. Plaintiffs
22 improperly supplemented the original complaint with that claim, which is based on events
23 occurring after the date of the original pleading, *see supra* p. 6, without a “motion and reasonable
24 notice,” as required under Rule 15(d). Moreover, the section 1983 claim patently lacks merit to
25 the extent it is asserted against the DEA and “unnamed DEA agents,” Compl. p. 46, given that
26 the Ninth Circuit’s “case law clearly establishes that a § 1983 action is not available to redress
27 actions taken under color of federal law.” *Buckley v. Meis*, 76 F. App’x 192, 194 (9th Cir. 2003)
28 (stating that “§ 1983 does not apply to federal officials”).

1 Finally, and in any event, even if a stay would cause some harm to Plaintiffs, the benefits
2 to judicial economy that the requested stay would confer outweigh any conceivable harm. *See*
3 *Landis*, 299 U.S. at 254-55 (explaining that the Court “must weigh competing interests and
4 maintain an even balance” when determining whether to stay a case); *id.* at 256 (stating that a
5 party “may be required to submit to delay not immoderate in extent and not oppressive in its
6 consequences if . . . convenience will thereby be promoted”). The 2009 Guidance has been in
7 place for 11 years, and Plaintiffs have not filed a petition with the DEA under that guidance. It is
8 sensible to permit the status quo to continue for a reasonable duration while the DEA completes
9 the ongoing rulemaking, at which time Plaintiffs may attempt to challenge any aspects of the
10 final rule to which they object.

11 **II. IN THE ALTERNATIVE, THE FEDERAL AGENCY DEFENDANTS MOVE**
12 **FOR AN ENLARGEMENT OF TIME TO RESPOND TO THE AMENDED AND**
13 **SUPPLEMENTAL COMPLAINT**

14 In the alternative, if the Court declines to grant the stay requested by DAA Prevoznik and
15 the stay requested by this motion, the Federal Agency Defendants respectfully move under Civil
16 Local Rule 6-3 for an extension of their deadline to respond to Plaintiffs’ Complaint to 60 days
17 after service of process upon DAA Prevoznik (who has yet to be served, *see* ECF No. 11, ¶ 12),
18 so that the federal defendants’ responsive pleading deadlines will coincide. *See* Fed. R. Civ. P.
19 12(a)(3). The Federal Agency Defendants also request that the Court vacate the current July 16,
20 2020 deadline to meet and confer and file an ADR certificate, the July 30, 2020 deadline for the
21 parties’ Rule 26(f) report and initial disclosures, *see* ECF No. 8, the August 4, 2020 deadline for
22 the parties’ case management statement, and the August 11, 2020 case management conference,
23 *see* ECF No. 10, and reset those deadlines to coincide with the federal defendants’ new
24 responsive pleading deadline.

25 If the Court grants the stay requested by DAA Prevoznik but denies the stay requested by
26 the Federal Agency Defendants, the Federal Agency Defendants respectfully request that their
27 responsive pleading deadline be extended to the later of September 30, 2020 or 60 days from the
28 Court’s ruling on this motion. The Federal Agency Defendants also request that the Court grant
an extension for a corresponding period of time of the current July 16, 2020 deadline to meet and

1 confer and file an ADR certificate, the July 30 deadline for the parties' Rule 26(f) report and
2 initial disclosures, *see* ECF No. 8, the August 4 deadline for the parties' case management
3 statement, and the August 11 case management conference, *see* ECF No. 10.

4 There is good cause for these requested extensions, without which the Federal Agency
5 Defendants would suffer substantial harm or prejudice. First, the Federal Agency Defendants
6 have moved in good faith for the stay requested by this motion; if that stay is denied, the
7 requested extensions would provide them with sufficient time to prepare a response to the First
8 Amended and Supplemental Complaint and to meet the case management deadlines. *See* Ex. B.
9 (Decl. of Kevin P. Hancock ("Hancock Decl.") ¶¶ 8-9.)

10 Second, the requested extension would allow the Federal Agency Defendants sufficient
11 time to prepare a response in light of the substantial length of the First Amended and
12 Supplemental Complaint, which is 73-pages long and contains more than 300 paragraphs of
13 allegations. *See* Hancock Decl. ¶ 10.

14 Third, the time that the Federal Rules provide for Defendants to respond to the
15 Complaint, *see* Fed. R. Civ. P. 12(a)(2), was effectively shortened when Plaintiffs substantially
16 amended and supplemented their original complaint 21 days after it was served on Defendants,
17 *see* ECF No. 12, which was the last day Plaintiffs could file an amendment without seeking
18 consent or leave, *see* Fed. R. Civ. P. 15(a)(1)(A). The additions to the Complaint included one
19 new plaintiff, two new claims, four new defendants, almost 20 pages, and approximately 70
20 paragraphs of new allegations. The requested extension would provide the Federal Agency
21 Defendants with sufficient time to formulate any needed responses to Plaintiffs' lengthy new
22 allegations and claims. *See* Hancock Decl. ¶ 11.

23 Fourth, as of today, DAA Prevoznik has yet to be served with either complaint, and a
24 certificate of service has yet to be filed on the case docket for the four new non-federal
25 defendants. The requested extension would allow time for Plaintiffs to effect service upon these
26 co-defendants and for Federal Agency Defendants subsequently to consult with their non-federal
27 co-defendants to the extent necessary for their response to the First Amended and Supplemental
28 Complaint. *See* Hancock Decl. ¶ 12.

1 Fifth, and finally, the requested extension would account for undersigned counsel's
2 scheduled time away from work during the latter half of August, which time will include travel
3 and pre-paid accommodations. *See* Hancock Decl. ¶ 13.

4 There have been no previous time modifications in this case and the requested
5 modification would not otherwise affect the schedule for this case. *See* Hancock Decl. ¶ 14.
6 Undersigned counsel asked counsel for Plaintiffs by telephone on July 16, 2020 if Plaintiffs
7 would agree to the extension requested by this alternative motion. Counsel for Plaintiffs
8 responded that Plaintiffs would not oppose an extension of 30 days from the date of any denial of
9 the motion to stay. *See* Hancock Decl. ¶ 15.

10 CONCLUSION

11 For the foregoing reasons, the Federal Agency Defendants request that the Court stay the
12 claims against them concurrently with any stay granted to Defendant DAA Prevoznik pending
13 the Supreme Court's ruling in *Tanvir v. Tanzin*. In the alternative, the Federal Agency
14 Defendants request that the Court extend their deadline to respond to the Amended Complaint.

15
16 DATED: July 16, 2020

Respectfully submitted,

17
18 ETHAN P. DAVIS
Acting Assistant Attorney General

19 BRIGHAM J. BOWEN
Assistant Branch Director

20
21 /s/ Kevin P. Hancock
KEVIN P. HANCOCK
Trial Attorney
U.S. Department of Justice
Civil Division, Federal Programs Branch
1100 L Street NW
Washington, DC 20005
(202) 514-3183 (phone)
(202) 616-8470 (fax)
kevin.p.hancock@usdoj.gov

22
23
24
25
26 *Counsel for the Federal Agency Defendants*