CHARLES CARREON

LAW FOR THE DIGITAL AGE

January 8, 2020

William T. McDermott, Assistant Administrator
Diversion Control Division
Attn: Liaison and Policy Section
Drug Enforcement Administration
8701 Morrissette Drive
Springfield, Virginia 22152

Re: *Guidance Regarding Petitions for Religious Exemption from the Controlled Substances Act Pursuant to the Religious Freedom Restoration Act*

Dear Mr. McDermott:

The North American Association of Visionary Churches ("NAAVC") is a non-profit corporation whose Associate Members are churches that use Ayahuasca as their sacrament ("Visionary Churches"). Individual member-churches have standing to object when aggrieved by administrative actions, and delegate that standing to NAAVC to advocate on this issue of shared importance. NAAVC sends this letter on behalf of its members regarding their Constitutional right to engage in religious ceremonies making use of Ayahuasca.

1. The Agency's Guidance Document

Ten years ago, the Drug Enforcement Administration (the "Agency") made a document available on its website entitled *Guidance Regarding Petitions for Religious Exemption from the Controlled Substances Act Pursuant to the Religious Freedom Restoration Act* (the "Guidance"). (Exhibit 1.) The Guidance describes an administrative procedure for submitting Petitions for Religious Exemption ("Petitions") from the Controlled Substances Act ("CSA"). The Guidance was adopted without public notice and comment, and has not been published in the Federal Register.

In the ten years since the Guidance was announced, there is no public record of any Petition being granted. Two Petitions were submitted by groups that were "invited" to submit a Petition by way of letters on the Agency's letterhead.[1]

2. Analysis of the Agency's Guidance Document

There are several levels of legal analysis applicable to the Guidance, all of which support the conclusion that it does not pass constitutional muster or conform to recently-

[1] The DEA's Invitation Letter to Soul Quest is attached as Exhibit 2; the response from Soul Quest's lawyers is attached as Exhibit 3; and, the DEA's response to that letter is attached as Exhibit 4. NAAVC has not obtained a copy of the Invitation Letter to Ayahuasca Healings. The Petition submitted by Ayahuasca Healings is Exhibit 5. Soul Quest submitted a "157 page response" to the DEA, but copies of the same have not been obtained. https://www.clickorlando.com/news/2017/11/16/orlando-church-battles-to-use-hallucinogenic-tea/

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promulgated standards for guidance documents. The presentation of authorities relevant to the Agency's review of the Guidance first sets forth the substance of three Executive Orders. Discussions of First and Fifth Amendment protections follow. The letter applies the requirements of the Executive Orders and Administrative Procedure Act to the Guidance, and suggests the Agency rescind the Guidance within the regulatory deadlines imposed upon the Agency by Executive Order 13892 (Exhibit 10) and the Office of Management and Budget's Implementing Memo (Exhibit 9.).

3. Three Executive Orders Require the Agency to Evaluate the Guidance and Decide Whether to Rescind or Carry On With It

The President has issued three Executive Orders that directly bear upon the manner in which the Agency should review the Guidance. In particular, EO 13891 imposes a deadline of February 28, 2020 for the Agency to rescind or officially affirm the continued viability of the Guidance. To summarize briefly the importance of these three Executive Orders, in the chronological order of their issuance:

***Promoting Free Speech and Religious Liberty,* EO 13798, 82 FR 21675 (May 4, 2017).** This EO commits the Executive Branch and all administrative agencies to protect churches from regulatory entanglement and impingement upon rights of free exercise by structuring future programs and policies, and reviewing existing ones, to ensure that they effectively accommodate the needs of religious communities for exemptions from general law and special accommodations. (EO 13798 is attached as Exhibit 6.) A detailed Memorandum from Attorney General Sessions on the manner in which federal agencies should review and overhaul their practices is attached as Exhibit 7, *Federal Law Protections for Religious Liberty* (the "AG Memo"). The AG Memo devoted the bulk of its policy-formulation to explaining how administrative agencies must act to properly provide RFRA protections to churches and believers, and directed all federal agencies to "proactively consider the burdens on the exercise of religion and possible accommodation of those burdens," when "formulating rules, regulations, and policies."[2] The AG Memo states:

> "Except in the narrowest circumstances, no one should be forced to choose between living out his or her faith and complying with the law. Therefore, to the greatest extent practicable and permitted by law, religious observance and practice should be reasonably accommodated in all government activity…."[3]

This principle applies to "all actions by federal administrative agencies, including rulemaking, adjudication, and other enforcement actions…."[4] A companion document that was circulated to all Asst. US Attorneys, entitled *Implementation of Memorandum on Federal Law Protections for Religious Liberty*, urging all agencies to review their

[2] AG Memo, Exhibit 7, page 7.

[3] AG Memo, Exhibit 7, page 1, "Principles of Religious Liberty."

[4] AG Memo, Exhibit 7, page 3, Principle 10.

regulatory systems for compliance with RFRA with the aid of the Department of Justice's Office of Legal Policy, is attached as Exhibit 11.

***Promoting the Rule of Law Through Improved Agency Guidance Documents*, EO 13891, 84 FR 55235 (Oct. 15, 2019).** This EO establishes "the policy of the executive branch … to require that agencies treat guidance documents as non-binding both in law and in practice,"[5] Pursuant to Section 3 of EO 13891, the Office of Management and Budget issued an Implementing Memorandum (the "OMB Memo") that requires the Agency to decide, by February 28, 2020, whether to rescind the Guidance as Agency doctrine, or to publish it on "a single, searchable, indexed website that contains, or links to, all of the agencies' respective guidance documents currently in effect." (OMB Memo, p.1, attached as Exhibit 9.) Rescinded guidance documents will be citable only "to establish historical facts." (EO 13891, Sec. 3(b); 84 FR 55236; Exhibit 8.)

EO 13891 also directs the Agency, by February 28, 2020, to issue regulations for issuing guidance documents that: (i) require any future guidance document to "clearly state that it does not bind the public, except as authorized by law or as incorporated into a contract;" (ii) establish a procedure "for the public to petition for withdrawal or modification of a particular guidance document," and (iii) require a thirty-day public notice and comment period for all "significant guidance documents."[6] (EO 13891, Sec. 2(c); 84 FR 55236.)

***Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication* EO 13892, 84 FR 55239 (Oct. 15, 2019).** EO 13892, attached as Exhibit 10, provides a number of new procedural protections for parties subject to an assertion of administrative jurisdiction or authority over them. Most relevant to our discussion here, EO 13892 adjured Administrative Agencies to end the practice of using "guidance" [7] documents (1) to "impose new standards of conduct except as expressly authorized by law or contract," or, (2) to establish a regulated party's liability based on "noncompliance with a standard of conduct announced solely in a guidance document." Section 5 of EO 13892 also requires that agencies publish, in the Federal Register, documents supporting an agency's assertion of regulatory jurisdiction over new fields of activity (such as the Agency's declared intent to use the Guidance procedure to adjudicate requests for religious exemptions from the CSA pursuant to RFRA.)[8]

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[5] "[E]xcept as incorporated into a contract." (EO 13891, Sec. 1; 84 FR 55235.)

[6] One definition of a "significant guidance document" is that it raises "novel legal or policy issues arising out of legal mandates." Thus, guidance that seeks to harmonize the Agency's obligations under the CSA with those of RFRA, based on the legal mandate of *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal,* 546 U.S. 418 (2006), would likely be a "significant guidance document." Further regarding the significance of this provision, infra at page 10.

[7] "Guidance document" means an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation," and excludes rules promulgated pursuant to notice and comment under 5 U.S.C § 553. EO 13892, Sec. 2(c); 84 FR 55240.

[8] Neither the CSA nor RFRA authorize the Drug Enforcement Agency to establish an administrative procedure of the sort the Guidance purports to create; accordingly, the Agency is required to carry the

4. Under EO 13892, Before Asserting Jurisdiction Under the Guidance, The Agency Must Articulate and Publish a Jurisdictional Basis for the Regulatory Activity

The Guidance does not state the basis for the Agency's assertion of jurisdiction over the activities of Visionary Churches. The only reason that the Agency has ever been involved in regulating a religious group's importation, manufacturing, distribution, or possession of controlled substances stems from settlement agreements reached with the UDV and Santo Daime churches. Those settlement agreements would not sustain an assertion of jurisdiction over unrelated, third-party Visionary Churches, under EO 13892.

> "No person should be subjected to a civil administrative enforcement action or adjudication absent prior public notice of both the enforcing agency's jurisdiction over particular conduct and the legal standards applicable to that conduct."[9]

There is no statutory basis for the Agency to assert administrative jurisdiction over Visionary Churches. The CSA contains no provision for granting religious exemptions from its proscriptions, and gives the Agency no authority to administer such a system. RFRA authorizes the District Courts to issue injunctions, and to adjudicate claims of religious exemption from civil and criminal general laws; however, it accords no role to any administrative agency.

Under the new requirements of EO 13892, if the Agency intends to use private contractual agreements as precedent for the assertion of jurisdiction over churches and believers who were not parties to those cases, it must publish both the agreements and the rationale for extending jurisdiction to prospective regulatory subjects who had no connection with the prior litigation.[10] If the DEA cannot assert and publish a valid jurisdictional basis for the Guidance, it must rescind it.

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burden of showing that it has jurisdiction over the field, and has provided notice of the same to the potentially regulated parties.

[9] (EO 13892, Section 1; 84 FR 55239; Exhibit 10.)

[10] "If an agency intends to rely on a document arising out of litigation (other than a published opinion of an adjudicator), such as a brief, a consent decree, or a settlement agreement, to establish jurisdiction in future administrative enforcement actions or adjudications involving persons who were not parties to the litigation, it must publish that document, either in full or by citation if publicly available, in the Federal Register (or on the portion of the agency's website that contains a single, searchable, indexed database of all guidance documents in effect) and provide an explanation of its jurisdictional implications."
EO 13892, Section 5.

5. The Guidance's Requirement That Petitioners Stop Taking Controlled Substances While Their Petition is Pending Imposes an Unconstitutional Prior Restraint on the Free Exercise Rights of Visionary Churches

a. The Guidance Requires Petitioners to Stop Taking Sacramental Controlled Substances Until the Agency Grants the Requested Certificate of Exemption

Paragraph 7 of the Guidance contains its most significant feature. Paragraph 7 requires every Petitioner to promise that its members will refrain from consuming controlled substances until the DEA issues a Certificate of Exemption.

b. The First Amendment Bars Prior Restraints on Free Expression

The First Amendment provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

In *Near v. Minnesota,*[11] the seminal case on prior restraints on secular speech, the Supreme Court invalidated a Minnesota statute that established a judicial procedure to enjoin the publication of scandalous newspapers. The Court explained that it had to protect the "preliminary freedom" to speak that "does not depend … on proof of truth." Subjecting a publisher to a duty to "produce proof of the truth of his publication, or of what he intended to publish, and of his motives, or stand enjoined" leaves "but a step to a complete system of censorship."[12]

c. Religious Practices are Protected From Prior Restraints, Like Secular Speech

In *Cantwell v. Connecticut*,[13] the Court invalidated a statute that required religious groups to prove their legitimacy in order to obtain a license, by an administrative procedure similar to the Guidance. The law at issue in *Cantwell* made it unlawful to "solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause … unless such cause shall have been approved by the secretary of the public welfare council."[14] Reversing the Connecticut courts, the Supreme Court explained that the First Amendment forbids governments from gate-keeping the right of free exercise:

> "It will be noted … that the Act requires an application to the secretary of the public welfare council of the State; that

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[11] *Near v. Minnesota*, 283 U.S. 697 (1931).

[12] *Near v. Minnesota*, 283 U.S. 697, 721, *citing Patterson v. Colorado*, 205 U.S. 454, 462 (1907).

[13] *Cantwell v. Connecticut*, 310 U.S. 296 (1940).

[14] *Id.*, 310 U.S. at 301-302.

> he is empowered to determine whether the cause is a religious one, and that the issue of a certificate depends upon his affirmative action. … He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth."[15]

Such a system cannot survive constitutional scrutiny, because "to condition aid for the solicitation of religious views or systems upon a license, the grant of which rests in the determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty forbidden by the Constitution."[16]

The Agency's use of the Guidance to exert a prior restraint on free exercise is evident from the text of the letter the Agency sent to Soul Quest:

> "We encourage you to file a petition and obtain a response to your request for an exemption *before* engaging in the distribution of DMT under the assumption that this conduct qualifies as an exempt religious exercise."[17]

Like the ordinance in *Cantwell*, the Guidance empowers an official to determine whether a Petitioner will be allowed to engage in the free exercise of religion. Not long after *Cantwell*, in *Follett v. Town of McCormick*,[18] the Supreme Court held that Jehovah's Witnesses had properly refused to pay dollar-a-day city tax on bookselling where it operated as a prior restraint on free exercise and proselytizing and expressly stated in familiar language what was implicit in *Cantwell*: "Religious freedom, *i.e.*, free exercise, must not be subject to prior restraint."[19]

d. The Guidance Imposes an Unconstitutional Prior Restraint by Compelling Abstention From Religious Sacraments

Paragraph 7 of the Guidance requires that Petitioner's entire congregation voluntarily abstain from taking any sacrament that is a controlled substance while the Agency evaluates their Petition over an undefined time period. The chilling effect of this requirement is evident in the response from Soul Quest's attorney to the DEA's invitation to submit a Petition: "[T]he correspondence has effectively shuttered the ability of the Church to tend to its members."[20] Because a Petitioner's congregation must wait to engage in free exercise until the Agency issues a Certificate of Exemption, the Guidance bans a Petitioner from engaging in religious practice during the pendency of its Petition.

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[15] *Cantwell v. Connecticut*, 310 U.S. at 305 (emphasis added).

[16] *Cantwell v. Connecticut*, 310 U.S. at 307.

[17] (Exhibit 2, DEA Invitation Letter to Soul Quest, page 1, emphasis added.)

[18] *Follett v. Town of McCormick*, 321 U.S. 573 (1944).

[19] *Id.*, 321 U.S. at 576 (emphasis added).

[20] (Exhibit 3, page 1.)

Such a ban substantially burdens the free exercise of an important religious practice by Visionary Church members.

> "In general, a government action that bans an aspect of an adherent's religious observance or practice, compels an act inconsistent with that observance or practice, or substantially pressures the adherent to modify such observance or practice, will qualify as a substantial burden on the exercise of religion."[21]

Nothing in the Guidance indicates how long the Agency will take to review a Petition. Ayahuasca Healings submitted a Petition in April 2016,[22] and as of the date of this correspondence in January 2020, it has neither been approved nor denied.

e. Visionary Churches Should Not be Required to Surrender Their Free Exercise Rights to Apply For an Exemption From the CSA

> "[I]ndividuals and organizations do not give up their religious-liberty protections by … interacting with federal, state, or local governments."[23]

The Agency's failure to act on petitions submitted under the Guidance stands in marked contrast to the manner in which the Agency administers requests for licensure from physicians, pharmacies, and pharmaceutical manufacturers. After holding the Guidance forth as the sole avenue for seeking exemption from the CSA, the Agency's failure to act on the pending Petitions provides dispositive evidence that the Guidance imposes a substandard process on applications for religious exemptions from the CSA. Long delay, or an indefinite term for processing applications for licensure, is an important factor in establishing the unconstitutionality of a non-judicial system of prior restraint.

> "Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent branch of government—to the constitutionally protected interests in free expression. And if it is made unduly onerous, by reason of delay or otherwise, to seek judicial review, the censor's determination may in practice be final."[24]

The Agency's inaction has left the only known actual Petitioners in suspense and legal peril for an extended period of time. The Agency's failure to timely process their Petitions shows that the Guidance process interferes with free exercise in violation of RFRA.[25] Finally, unreasonable processing delay is inconsistent with AG Sessions'

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[21] AG Memo, page 4, Principle 13.

[22] Exhibit 5.

[23] AG Memo, page 2, Principle 4.

[24] *Freedman v. State of Maryland*, 380 U.S. 51, 57-58 (1965).

[25] "A [legal proscription] burdens the free exercise of religion if it 'put[s] substantial pressure on an adherent to modify his behavior and to violate his beliefs,'" including when, if enforced, it "results in the choice to the individual of either abandoning his religious principle or facing criminal prosecution.'" *Guam*

exhortations to administrative agencies to act with alacrity when addressing the needs of religious organizations for exemptions from the constraints of general law, because even brief interference with the free exercise of religion can be constitutionally offensive.

6. The Guidance Imposes a Disparate Impact on Religious Applications for Exemption as Compared to The Agency's System for Secular Registrants

In the Agency's Guidance-driven system, religious Petitions have the appearance of being abandoned promptly upon filing; whereas, secular applications for licensure or renewal are easily submitted via the DEA website, that allows applicants to establish accounts, update their status, obtain timely issuance of needed credentials, and various other administrative services. Meanwhile, religious Petitioners subject to the Guidance face a daunting system that compromises their Constitutional rights and demands they abstain from religious practice to obtain – nothing! Cast into a legal netherworld, Petitioners are left by the Agency to await a decision that the Agency shows no inclination to render.

Such unfair systems, founded on fundamental disrespect for religious beliefs, were condemned by Justice Samuel Alito, then sitting as a judge for the Third Circuit Court of Appeals, in *Blackhawk v. Pennsylvania*,[26] (affirming District Court injunction compelling Pennsylvania Game Commission to grant religious exemption from license requirements to Native American man who kept two bears for use in religious ceremonies, where licensure exemptions to circuses and researchers were liberally allowed). In *Blackhawk,* Justice Alito drew support from three cases that overturned exemption systems that refused to accommodate exemption requests from religious applicants, while allowing secular requests. The first was *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*,[27] (declaring ordinance unconstitutional that allowed exemption from animal cruelty laws for virtually all reasons except the religious exemption sought by a cult that practices animal sacrifice). Such a system is an unconstitutional "prohibition [because] society is prepared to impose [it] upon [religious outsiders] but not upon itself." This, Justice Alito noted, is the "precise evil" to be condemned as unconstitutional.

The second case was *Fraternal Order of Police v. Newark*,[28] holding unconstitutional a police conduct rule that allowed police to wear beards for "health reasons," but barred wearing a beard for religious reasons. The ban on religious beards was unconstitutional because government agencies may not use government policy to impose "a value judgment that secular (i.e., medical) motivations for wearing a beard are important enough to overcome its general interest in uniformity but that religious motivations are not."

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v. Guerrero, 290 F.3d 1210, 1222 (9th Cir. 2002), *quoting Thomas v. Review Bd. of Ind. Employment Sec. Div*., 450 U.S. 707, 718, 101 S.Ct. 1425, 67 L.Ed.2d 624 (1981) and *Braunfeld v. Brown*, 366 U.S. 599, 605, 81 S.Ct. 1144, 6 L.Ed.2d 563 (1961).

[26] *Blackhawk v. Pennsylvania*, 381 F.3d 202, (3rd Cir. 2004).

[27] *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (3rd Cir. 1993).

[28] *Fraternal Order of Police v. Newark*, 170 F.3d 359 (3rd Cir. 1999).

The third case, *Tenafly Eruv Association v. The Borough of Tenafly*,[29] held unconstitutional the City of Tenafly's refusal to allow Orthodox Jews to use power poles to support a network of fibers that create an "eruv," a designated space in which observant Jews are permitted to carry loads or push carts on the Sabbath, without breaking religious vows. Since virtually every other interest group had been allowed to hang papers and objects from power poles, the Borough's denial of the request "violates the neutrality principle … judging [the religious rationale] to be of lesser import than nonreligious reasons," and thus singles out "religiously motivated conduct for discrimination."[30]

7. The Guidance Violates the Establishment Clause, Because it Makes Intrusive Inquiries That Lead to Regulatory Entanglement

Paragraph 2 of the Guidance, entitled *Contents of Petition,* requires every Petition to state, under oath:[31]

> "(1) the nature of the religion (e.g., its history, belief system, structure, practice, membership policies, rituals, holidays, organization, leadership, etc.); (2) each specific religious practice that involves the manufacture, distribution, dispensing, importation, exportation, use or possession of a controlled substance; (3) the specific controlled substance that the party wishes to use; and (4) the amounts, conditions, and locations of its anticipated manufacture, distribution, dispensing, importation, exportation, use or possession."

The Guidance does not define the outermost scope of the Agency's power to investigate Petitioner's activities. Paragraph 5 gives the Agency an unlimited right to ask for more information, that must be provided within 60 days, or the Petition will be deemed "withdrawn."

The Guidance requires disclosures that administrative agencies may not compel from churches, because such informational demands lead to regulatory entanglement that violates the establishment clause of the First Amendment. In *Surinach v. Pequera de Busquets,*[32] a federal appeals court quashed a subpoena from a Puerto Rican government agency that had been served on the Superintendents of the Roman Catholic schools on the island, demanding production of extensive records about how the Catholic schools were being operated. The First Circuit held that the very demand to produce the records chilled free exercise. The Establishment Clause, that forbids the government from becoming "entangled" in the internal affairs of religious groups, was offended by the government's effort to pry into the Church's private affairs. The First Circuit held: "This

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[29] *Tenafly Eruv Association v. The Borough of Tenafly*, 309 F.3d 144 (3rd Cir. 2002).

[30] *Tenafly Eruv Assoc.*, 309 F.3d at 168 (*quoting Lukumi, infra,* 508 U.S. at 537; *Fraternal Order of Police, infra*, 170 F.3d at 364–65).

[31] Paragraph 3 requires a Petition to be submitted under penalty of perjury.

[32] *Surinach v. Pequera de Busquets*, 604 F.2d 73 (1st Cir. 1979).

kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids."[33]

8. The Guidance Demands a Waiver of Fifth Amendment Rights As the Cost of Submitting a Bid to Confirm First Amendment Free Exercise Rights

a. Compliance With the Guidance Requires Petitioners to Self-Incriminate

The Agency is a law enforcement agency, and the Guidance contains no limitations on the extent to which the disclosures required by the Petition could be used by the Agency. The statements in the Petition itself could provide probable cause to arrest the individual who signed the Petition, and to issue search warrants of the places where sacramental controlled substances are kept or distributed. The Petition would provide a roadmap for prosecution of church members for conspiracy to distribute controlled substances. At trial for violating the CSA, the Petition could be admitted to impeach contrary testimony denying guilt by the person who signed the Petition or church members charged as co-conspirators. Accordingly, the Guidance procedure is objectionable as a violation of the Fifth Amendment guarantee of freedom from self-incrimination.[34]

b. The Agency's "Invitations" to Submit Petitions Cross the Line from Promulgating the Guidance on Faulty Grounds to Using the Guidance to Compel Self-Incrimination

On at least two occasions, the DEA has sent an "invitation to submit a Petition," that has been treated by these churches as a *de facto* investigative demand (Ayahuasca Healings and Soul Quest).[35] In each case, these groups submitted Petitions. This was an unsurprising result, because the "invitation" to submit a Petition carries the implied threat of enforcement action if a Petition were not submitted. This threat of enforcement took the Agency from the position of having promulgated a Guidance document on faulty Constitutional grounds to actually seeking to compel individuals to engage in self-incrimination.

As the OMB Memo makes clear, the Agency's coercive issuance of "invitations" to submit a Petition were also a violation of the proper agency use of Guidance documents:

> "[A] *guidance document should never be used to establish new positions that the agency treats as binding*; any such requirements must be issued pursuant to applicable notice-and-comment requirements of the Administrative Procedure Act or other applicable law. *Nor should agencies use guidance documents*-including those that describe themselves as non-binding effectively *to coerce private-party conduct*, for instance by suggesting that a standard in

[33] *Surinach*, 604 F.2d at 78, *quoting Lemon v. Kurtzman*, 403 U.S. 602, 620 (1971).

[34] *Leary v. United States*, 395 U.S. 6 (1969); *Marchetti v. United States*, 390 U.S. 39 (1968).

[35] *See* note 1, *supra*.

> a guidance document is the only acceptable means of complying with statutory requirements, or by threatening enforcement action against all parties that decline to follow the guidance."[36]

c. Compliance With the Guidance Compels Individual Petition Signers to Risk Perjury by Representing Future Compliance by Other Individuals

An individual must sign the Petition under penalty of perjury, because an organization cannot take the oath, and that person would be directly incriminated by making the statements required in the Petition. While it is understandable that the Agency wishes to obtain reliable information in a Petition, without protections from having the Petition used for prosecutorial purposes, the requirement violates the Fifth Amendment rights of the signer. Further, given the implied duty to comply with the provisions of the Guidance while the Petition is pending, perjury charges could be premised on material omissions, or if some members of the church failed to keep the promise required by paragraph 7 to abstain from taking a sacramental controlled substance. Thus, the proscription on sacramental use of the controlled substance under paragraph 7 presents a risk of perjury for the signer. This presents an unacceptable risk posed by the conduct of church members who may feel spiritually compelled to practice their religion by consuming the sacramental controlled substance, notwithstanding the fact that this would place the person who signed the Petition under penalty of perjury at risk of criminal liability.

9. Conclusion: The Guidance Should Be Rescinded

After conducting the review required by Executive Orders 13891 and 13892, and the OMB Memo, the Agency should rescind the Guidance. Under the plain language of these two Executive Orders, guidance documents may not be used to accomplish the purposes for which it was evidently promulgated – to establish new legal responsibilities for Visionary Churches and their congregations. It was prepared by an administration that had not been directed, as the Agency has been by Executive Order 13798 and the AG Memo, to proactively accommodate religious requests from exemption from general laws that infringe upon the right of free exercise. The Guidance suffers from many Constitutional flaws, and is a supreme demonstration of administrative overreach.

The above analysis identifies what NAAVC considers to be the most egregious defects, and they cannot be remedied through small alterations. The Guidance was adopted without sufficient administrative forethought, and has survived this long only because it has never been subjected to judicial testing. It should now be rescinded and relegated to a past period of Agency history.

Finally, if the Agency decides to issue new guidance documents regarding the manner in which it will deal with requests for religious exemption from the CSA, those would be

[36] OMB Memo, Exhibit 9, p. 3, emphasis added.

"significant guidance documents."[37] Accordingly, the Agency would be required to provide a minimum period of thirty days public notice and comment before adoption.[38]

NAAVC respectfully suggests that a thirty-day public comment period would be insufficient, given the amount of interest that such a process would generate, and the large number of persons affected by the Agency's rulemaking in the field of visionary religion. Several peer-reviewed scientific studies establishing the safety and efficacy of Visionary Church practice have been conducted during the ten years since the Guidance was issued, and such materials belong in the Agency rulemaking record. Visionary Churches have grown in number and size, and many of their members have experienced benefits from their practice. These interested parties may wish to engage in the comment process, and could make invaluable contributions to the rulemaking process. Thus, NAAVC requests that the Agency allow at least three months for public comment.

NAAVC and all members of the Visionary Church community thank you for your thoughtful consideration of these matters.

Very truly yours,

Charles Carreon (Cal. Bar # 127139)
Counsel to North American Assn. of Visionary Churches

[37] Sec. 2 of EO 13891; 84 FR 55236; Exhibit 8.
[38] EO 13891, Sec. 4(iii); 84 FR 55237; Exhibit 8