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6 **IN THE UNITED STATES DISTRICT COURT**  
7 **FOR THE DISTRICT OF ARIZONA**  
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9 Elizabeth Williams,  
10 Plaintiff,

11 v.

12 Levi Khan, et al.,  
13 Defendants.  
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No. CV-17-00029-TUC-EJM

**ORDER**

15 Pending before the Court is Defendant Campas' Motion to Stay the Deadline to File  
16 a Joint Proposed Pretrial Order. (Doc. 141). Defendants Rosebeck and Davis joined in the  
17 motion, while Plaintiff opposed. For the following reasons the Court will grant the  
18 Defendants' motion to stay and not bifurcate any claims.

19 **I. Background**

20 This case was removed from Pima County Superior Court to the Federal District  
21 Court for the District of Arizona on January 18, 2017. (Doc. 1). After discovery, Plaintiff  
22 filed two motions for Partial Summary Judgment: one against Defendant Erika Campas  
23 (Doc. 100) and another against Defendants Rosebeck and Davis. (Doc. 101). Defendant  
24 Campas also filed a Partial Cross-Motion for Summary Judgment regarding the issue of  
25 qualified immunity. (Doc. 106). This Court denied all three motions for summary judgment  
26 on March 26, 2019. (Doc. 140). Defendant Campas subsequently provided notice to the  
27 Court on April 23, 2019 of her interlocutory appeal to the Ninth Circuit Court of Appeals  
28 regarding the denial of her cross-motion for summary judgment. (Doc. 142). Because of

1 that appeal, Defendant Campas filed a Motion to Stay the Deadline to File a Joint Proposed  
2 Pretrial Order (Doc. 141), which Defendants Davis and Rosebeck joined. (Doc. 144).  
3 Plaintiff filed her Response to the Motion to Stay on May 3, 2019, arguing that no stay was  
4 necessary as to the claims against Defendants Davis and Rosebeck and that the Court could  
5 bifurcate the claims against Defendant Campas and proceed to trial. (Doc. 147). Both  
6 Defendants Davis and Rosebeck and Defendant Campas filed Replies on May 10, 2019  
7 (Doc. 149; Doc. 150).

## 8 **II. Law**

9 In this jurisdiction, the filing of an interlocutory appeal regarding qualified  
10 immunity automatically divests a district court of jurisdiction to proceed with trial, unless  
11 the district court finds the claim frivolous or that it has been waived. *Chuman v. Wright*,  
12 960 F.2d 104, 105 (9th Cir. 1992). However, in situations involving interlocutory appeals,  
13 the district court “retains jurisdiction to address aspects of the case that are not the subject  
14 of the appeal.” *United States v. Pitner*, 397 F.3d 1178, 1183 n.5 (9th Cir. 2002). Even  
15 though the district court retains jurisdiction on matters not subject of the appeal, it may  
16 decide, at the district court judge’s discretion, to grant a stay of proceedings after the filing  
17 of an interlocutory appeal. *See* 28 U.S.C. § 1292(b)(2018) (“application for an appeal  
18 hereunder shall not stay proceedings in the district court unless the district judge or the  
19 Court of Appeals or a judge thereof shall so order”).

20 A district court “possesses the inherent power to control its docket and promote  
21 efficient use of judicial resources.” *Dependable Highway Exp., Inc. v. Navigators Ins. Co.*,  
22 498 F.3d 1059, 1066 (9th Cir. 2007) (citing *Landis v. North American Co.*, 299 U.S. 248,  
23 254 (1936) and *Leyva v. Certified Grocers of California, Ltd.*, 593 F.2d 857, 863–64 (9th  
24 Cir. 1979)). However, “case management standing alone is not necessarily a sufficient  
25 ground to stay proceedings.” *Id.* “A stay is an intrusion into the ordinary processes of  
26 administration and judicial review, and accordingly is not a matter of right, even if  
27 irreparable injury might otherwise result to the appellant.” *Nken v. Holder*, 556 U.S. 418,  
28 427 (2009) (citations and internal quotations omitted).

1           The Supreme Court in *Nken v. Holder* reiterated the traditional factors in  
2 determining whether to grant a motion to stay: “(1) whether the stay applicant has made a  
3 strong showing that he is likely to succeed on the merits; (2) whether the applicant will be  
4 irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure  
5 the other parties interested in the proceeding; and (4) where the public interest lies.” *Id.* at  
6 434 (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)). In analyzing these factors,  
7 the first two are the most critical. *Id.* However, each case must be decided upon its own  
8 particular circumstances, *Virginian R. Co. v. United States*, 272 U.S. 658, 672–73 (1926),  
9 and the burden is on the party requesting the stay to show that these particular  
10 circumstances justify a stay. *Nken*, 556 U.S. at 433–34 (citing *Clinton v. Jones*, 520 U.S.  
11 681, 708 (1997) and *Landis*, 299 U.S. at 255).

12           Regarding whether the applicant has made a strong showing of the likelihood of  
13 success of the appeal, it is “not enough that the chance of success on the merits be better  
14 than negligible.” *Id.* at 434 (citation and internal quotation marks omitted). But this does  
15 not mean that an applicant need show that success is “more likely than not.” *Leiva-Perez*  
16 *v. Holder*, 640 F.3d 962, 968 (9th Cir. 2011). Instead, the applicant has to show that there  
17 is a “substantial case for relief on the merits.” *Id.*<sup>1</sup> This has to be the standard because to  
18 require a greater showing would make the Court “attempt[] to predict with accuracy the  
19 resolution of often-thorny legal issues without adequate briefing and argument.” *Id.* at 967.  
20 Concerning the other critical factor, irreparable harm to the applicant, more than a mere  
21 possibility of harm is required. *Nken*, 556 U.S. at 434. However, in many ways it is “easier  
22 to anticipate what would happen as a practical matter following the denial of a stay” than  
23 it is to determine the likelihood of success. *Leiva-Perez*, 640 F.3d at 968.

24           A federal court may bifurcate claims and order a separate trial “for convenience, to  
25 avoid prejudice, or to expedite and economize.” Fed. R. Civ. P. 42(b). However, a court

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26 <sup>1</sup> The Ninth Circuit in *Leiva-Perez* also stated that many of the previously articulated ways  
27 to define the minimum showing of success necessary (“reasonable probability,” “fair  
28 prospect,” “substantial case on the merits,” “serious legal questions are raised”) were  
interchangeable, and regardless of how one articulates the standard a strong showing means  
that a petitioner must demonstrate that there is a “substantial case for relief on the merits.”  
*Id.* at 967–68.

1 may order a separate trial only for *separate* issues, *id.*, and its decision on whether to do so  
2 is within the court’s sound discretion. *Hangarter v. Provident Life & Acc. Ins. Co.*, 373  
3 F.3d 998, 1021 (9th Cir. 2004).

### 4 **III. Analysis**

5 The filing of Defendant Campas’ appeal as to her qualified immunity claim  
6 automatically divests this Court of jurisdiction to proceed to trial on any of Plaintiff’s  
7 claims against Defendant Campas. The qualified immunity claim was not deemed  
8 “frivolous” when this Court denied Defendant Campas’ motion for summary judgment nor  
9 was it waived. Therefore, this Court may not proceed to trial on the claims against  
10 Defendant Campas until the resolution of the appeal. While it is true that the Court *could*  
11 proceed with aspects of the case unrelated to the appeal, Defendant Campas’ involvement  
12 in codefendants Davis and Rosebeck’s case leads this Court to determine that a stay is  
13 warranted as to *all* Defendants given the four factors outlined in *Nken*. To decide otherwise  
14 and bifurcate the claims, as suggested by Plaintiff, would lead to the same issues being  
15 tried twice.<sup>2</sup> This concern also informs the Court’s decision to grant the motion to stay as  
16 to all Defendants.

#### 17 **A. Strong Showing of Likelihood of Success on the Merits**

18 This first factor is neutral. The standard Defendants must meet to satisfy this factor  
19 is that there is a “substantial case for relief based on the merits,” but they need not show  
20 that success is more likely than not. *See Leiva-Perez*, 640 F.3d at 968. The Court stands by  
21 its ruling that Defendant Campas is not entitled to summary judgment on her claim for  
22 qualified immunity. However, the Court also did not deem the claim to be frivolous. The  
23 Court determined that there were genuine issues of material fact that precluded it from  
24 deciding whether warrantless removal of the children was reasonable as a matter of law.  
25 (Doc. 140 at 9:28-10:1). Defendant Campas has claimed that this Court failed to consider  
26 more of the undisputed facts that would have justified warrantless removal (i.e.

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27 <sup>2</sup> The Fourth Amendment violation claimed in Count I of Plaintiff’s First Amended  
28 Complaint is alleged against all three defendants and concerns the same entry into  
Plaintiff’s home. (Doc. 84 at 6 ¶¶ 44-46, 51). The claim in Count II also arises out of that  
same allegedly unconstitutional entry. (*Id.* at 7 ¶ 55).

1 unaccompanied children after arrest of a parent). (Doc. 150 at 2:13-17). Given this claim,  
2 the Court cannot say that Defendant Campas has merely shown a greater than negligible  
3 likelihood of success on appeal. Nor can the Court say that Defendant Campas has provided  
4 enough information that would make success more likely than not. Here, the showing lies  
5 somewhere in the middle, which leads the Court to determine that this factor does not weigh  
6 in favor of or against granting the motion to stay.

7 **B. Irreparable Injury to Applicants Absent a Stay**

8 The second critical factor weighs in favor of a grant of the motion to stay because  
9 the trial testimony in this case cannot be readily divided between testimony relating solely  
10 to the claims against Defendant Campas and testimony relating solely to the claims against  
11 Defendants Davis and Rosebeck. In Plaintiff’s Response, she relies heavily on a  
12 nonbinding 2010 district court case from Hawaii, *Castro v. Melchor*, 760 F.Supp.2d 970  
13 (D. Hawaii 2010), as being instructive to this Court. That case also concerned an  
14 interlocutory appeal by one defendant of a denial of summary judgment as to her claim of  
15 qualified immunity. *Id.* Despite Plaintiff’s contentions otherwise, *Castro* actually  
16 persuades this Court to find in favor of a stay in the instant case.

17 As Plaintiff acknowledges, the court in *Castro* decided that the irreparable harm  
18 factor *avored* a grant of the motion to stay. *Id.* at 1004. This decision was primarily due to  
19 the fact that trial testimony could not be “readily divided between testimony relating solely  
20 to the claims against Defendant Bauman and testimony relating solely to the claims against  
21 the Remaining Defendants.” *Id.* Given the concern that qualified immunity is immunity  
22 from suit, and that it is “effectively lost if a case is erroneously permitted to go to trial,”  
23 the court worried about the conflict that would occur if the appealing defendant was  
24 required to give testimony regarding the claims against the other defendants, even though  
25 the court could not allow that testimony to “become the effective equivalent of a trial of  
26 the claims against” the appealing defendant. *Id.* Thus, the *Castro* court determined that  
27 there would be irreparable harm to the remaining defendants’ defense if they could not use  
28 defendant Bauman’s testimony to help establish the reasonableness of their actions. *Id.*

1 Additionally, if the Court did permit the testimony, defendant Bauman may have been  
2 forced to address the evidence and thus violate the stay of the claims against her and  
3 possibly jeopardize her immunity if the appeal was granted. *Id.*

4 Here, such irreparable harm also exists. For example, if Defendants Davis and  
5 Rosebeck are not allowed to present testimony by Defendant Campas regarding the entry  
6 into Plaintiff's home, that denial could irreparably harm their defense by having a key  
7 witness (and codefendant on the same claim) unable to speak to the reasonableness of the  
8 search. Additionally, if the Court was to allow such testimony, Defendant Campas would  
9 seemingly have to address evidence regarding the claims against her, thus violating any  
10 stay and possibly jeopardizing the appealed claim to qualified immunity. The Court finds  
11 Plaintiff's assertion that Defendants Davis and Rosebeck could "*be tried without any*  
12 *testimony from Campas at all*" unpersuasive.<sup>3</sup> (Doc. 147 at 7:21) (emphasis in original).  
13 All three defendants are being tried as to the illegal search and therefore testimony by any  
14 of the three seems pivotal as to establishing the reasonableness of such a search. Irreparable  
15 harm is not just "merely possible" in this case, but rather quite likely. Therefore, the second  
16 key factor weighs in favor of staying the proceedings.

### 17 **C. Substantial Injury to Other Parties if Stay Issued**

18 This factor does somewhat weigh in favor of denying the motion to stay. Plaintiff  
19 claims that she will suffer substantial injury if the claims against Defendants Davis and  
20 Rosebeck are not permitted to go forward to trial. Notably, Plaintiff reminds the Court that  
21 appeals to the Ninth Circuit take some time to conclude and that this will prolong Plaintiff's  
22 long-awaited trial in this case. (*Id.* at 9:4-7). However, while the Court certainly  
23 understands Plaintiff's frustrations at the further delay of trial, Plaintiff would still be in  
24 the position of not coming to a final resolution of all of her claims regardless of whether  
25 the Court stays proceedings as to Defendants Davis and Rosebeck. As noted above, this  
26 Court is, by law, stripped of its jurisdiction as to claims against Defendant Campas. *See*  
27 *Chuman v. Wright*, 960 F.2d 104, 105 (9th Cir. 1992). Plaintiff not only has her claim as

28 <sup>3</sup> Although they *could* do so does not mean that they would not be irreparably harmed if they are *prevented* from presenting Defendant Campas' testimony.

1 to Count II of her First Amended Complaint against Defendant Campas still outstanding,  
2 but importantly her claim as to Count I on the illegal search and seizure also may not  
3 proceed until resolution of the interlocutory appeal. Therefore, Plaintiff would still need to  
4 try the same issue before this Court a second time and incur even more costs in pursuing  
5 her claims. As to Plaintiff's fear that witnesses may be unavailable should this case not  
6 immediately proceed to trial, Defendant Campas' Reply is telling. Discovery is closed,  
7 video depositions have been taken, and no other motions remain outstanding before this  
8 Court. Plaintiff will suffer some prejudice should someone become unavailable to testify  
9 at trial as a result of this delay, but the possibility of that occurring is largely speculative.  
10 Overall, Plaintiff would suffer some harm if a stay is granted. Therefore, this factor weighs  
11 slightly in favor of a denial of the motion to stay.

12 **D. Public Interest**

13 This final factor is neutral in this case. There is always a public interest in "just,  
14 speedy, and inexpensive" judicial proceedings. *See* Fed. R. Civ. P. 1. Here, that interest  
15 cannot be totally fulfilled regardless of what the Court decides. While a grant of the motion  
16 will further delay the ultimate resolution of the case, a denial would ultimately lead to two  
17 trials on the same issue. This would be even more expensive and less efficient. Given these  
18 competing public interests, this final factor does not weigh in favor of or against a grant of  
19 the motion.

20 **IV. Conclusion**

21 After having considered all four of the *Nken* factors, on balance the Court finds that  
22 they weigh in favor of granting the motion to stay. Although this decision will result in  
23 further delay to the ultimate resolution of Plaintiff's claims, the risk of harm to Defendants  
24 is too great to justify continuing to trial solely on the claims against Defendants Davis and  
25 Rosebeck. Therefore, a stay is necessary to ensure a full and fair trial of all claims.  
26 Accordingly,

27 **IT IS HEREBY ORDERED** granting Defendants' motion to stay. (Doc. 141). This  
28 matter is **STAYED** pending a decision by the Ninth Circuit Court of Appeals as to

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Defendant Campas' interlocutory appeal of the denial of her motion for summary judgment.

Dated this 20th day of June, 2019.



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Eric J. Markovich  
United States Magistrate Judge