Appeal No. 08-3106

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGTH CIRCUIT

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Tony Nenninger,

Plaintiff-Appellant;

v.

United States Forest Service; Mark Rey, in official capacity as Under-Secretary for USDA; Gayle Kimball, in official capacity as Chief of Forest Service; Don Palmer, in official capacity as FS Special Use Program Manager; John Twiss, individually and in official capacity as FS Chief of Law Enforcement; Gene Smithson, in official capacity as FS Incident Commander during Fourth of July rainbow gatherings; Ellen Hornstein, individually and in official capacity as FS legal counsel; John/Jane Does, individually and in official capacities for FS and/or other government agencies; Officer Kragstadt, individually and in official capacity in FS law enforcement; Officer Lampshire, individually and in official capacity in FS law enforcement;

Defendants-Appellees.
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Appeal from United States District Court of Western Arkansas, District Judge Jimm Hendren Presiding in Case No. 07-3028

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APPELLANT'S OPENING BRIEF

CASE SUMMARY

This case is about individual harms caused by discriminatory government entanglement with a minority religion. At issue are administrative regulations and police actions that pose substantial burdens to exercise of religious expressive conduct and assembly through violation of individual rights protected by the Religious Freedom Restoration Act; Fifth Amendment Due Process and Equal Protection Clauses; Fourth Amendment Search and Seizure Clauses; and First Amendment Exercise, Establishment, Speech, Assembly, and Petition Clauses.

Plaintiff alleges harms caused by government attempts to coerce rainbow gathering participants into forming an organization capable of designating representative agents; and, from specific instances of police harassment. This appeal comes after the District Court granted a motion to dismiss converted to motion for summary judgment.

Plaintiff requests thirty minutes of oral argument for each side because of the difficulty understanding the religious significance of maintaining a religious culture dependent on lack of any collective authority able to designate an agent to sign a public forum assembly permit; and, because of the complexity of the numerous issues underlying the allegations of religious discrimination.

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The District Court erred entering summary judgment and dismissing because Defendants' requirement to designate an agent as applied to rainbow gatherings violates the Religious Freedom Restoration Act in that it is a substantial burden to Plaintiff's exercise of religion by coercing Plaintiff into conduct contrary to his sincere religious beliefs as a condition for enjoyment of the public benefit of gathering en masse in National Forests. 36

The District Court erred entering summary judgment and dismissing because Defendants' requirement to designate an agent as applied to rainbow gatherings violates the Fifth Amendment by depriving Plaintiff and other rainbow gathering participants Equal access to National Forests in that Defendants intended rainbow gathering participants to be unable to comply. ……………………………………..……………44

The District Court erred entering summary judgment and dismissing because Defendants violated Plaintiff's Fourth Amendment reasonable expectations of privacy in that:

Defendants stopped Plaintiff at a mandatory traffic stop in Arkansas that was selectively targeted at rainbow gathering participants for generalized law enforcement purposes under the pretext of conducting traffic safety checks; 51

Defendants detained Plaintiff longer than necessary to issue a summons in Colorado so a canine could arrive and then searched Plaintiff's vehicle and person without reason to believe Plaintiff was dangerous or involved with any crime related to the search;…..56

Defendants harassed Plaintiff in retaliation for exercise of religious beliefs by conducting intrusive surveillance of religious encampments of pacifists on public land who had a reasonable expectation of privacy from armed police patrols. ….......................58

The District Court erred entering summary judgment and dismissing because Defendants' conduct discriminates against Plaintiff's free exercise of religion in violation of the First Amendment Hybrid Rights Doctrine in that the agent requirement prohibits the content of religious expressive conduct and deprives Plaintiff of equal access to National Forests through selective law enforcement, unreasonable seizures and searches, interference with assembly, domineering entanglement with religious conduct, and harassment of individuals who petition for redress of grievances. ……………..…………………………..……….. 61

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JURISDICTIONAL STATEMENT

The District Court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 (federal question), 1343 (civil rights), 1367 (supplemental state claims), 2201 (declaratory judgment), and 2202 (further equitable relief) because Plaintiff alleged violation of rights secured by federal laws and the Constitution of the United States pursuant to 42 U.S.C. §§ 1985 (conspiracy to interfere with civil rights), 1986 (neglect to prevent conspiracy), 1988 (common law to supplement federal civil rights law), and 2000bb Religious Freedom Restoration Act (RFRA) (enhanced

free exercise protection); First Amendment (free exercise, establishment, assembly, association, speech, and petition clauses); Fourth Amendment (search and seizure clauses); and Fifth Amendment (due process and equal protection clauses).

This Court has jurisdiction over Plaintiff's appeal pursuant to 28 U.S.C. § 1291 because the District Court entered final judgment on July 11, 2008 adopting its July 3, 2008 dismissal order disposing of all the parties' claims. Plaintiff filed a motion to amend judgment on July 21, 2008 which was denied on August 20, 2008. Notice of appeal was filed on September 9, 2008.

ISSUES PRESENTED

1. **Is Plaintiff's prima facie evidence of substantial burdens to religious exercise sufficient to justify discovery?**

Navajo Nation v. Forest Service, 535 F.3d 1058 (2008)

Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707, 717-718 (1981)

Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002)

Young, In re:, 82 F.3d 1407 (8th Cir. 1996)

42 U.S.C. § 2000bb, Religious Freedom Restoration Act (RFRA)

First Amendment of United States Constitution

2. **Is Plaintiff's prima facie evidence of intentional conspiracy to deprive rainbow gathering participants of equal protection of the law sufficient to justify discovery?**

Andrews v. Fowler, 98 F.3d 1069 (8th Cir. 1996)

Brandon v. Lotter, 157 F.3d 537 (8th Cir. 1998)

Catlette v. United States, 132 F.2d 902 (4th Cir. 1943)

Texas Department of Public Affairs v. Burdine, 450 U.S. 248 (1981)

First Amendment of United States Constitution

Fifth Amendment of United States Constitution

42 U.S.C. § 2000bb, Religious Freedom Restoration Act (RFRA)

42 U.S.C. § 1985

42 U.S.C. § 1986

3. **May police target a minority religious assembly with mandatory suspicion-less traffic stops; detain motorists longer than necessary to issue summonses in order to allow time for a canine to arrive and then conduct non-consensual searches of the vehicle and driver without reasonable suspicion or probable cause; and conduct intrusive campsite surveillance without probable cause?**

City of Indianapolis v. James Edmond, 531 U.S. 32 (2000)

Florida v. Royer, 460 U.S. 491 (1983)

Minnesota v. Dickerson, 508 U.S. 366 (1993)

United States v. Ramon, 86 F. Supp.2d 665 (W.D. Tex. 2000)

First Amendment of United States Constitution

Fourth Amendment of United States Constitution

42 U.S.C. § 2000bb, Religious Freedom Restoration Act (RFRA)

4. Does Plaintiff's Hybrid Rights First Amendment claim warrant strict scrutiny?

Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991)

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990)

Niemotko v. Maryland, 340 U.S. 268 (1951)

Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002)

First Amendment of United States Constitution

60:168 Fed. Reg. 45258-45295 (Aug. 30, 1995); Land Uses and Prohibitions, Final Rule

STATEMENT OF CASE

This case began on June 25, 2007 with a motion for emergency temporary restraining order to prevent mandatory traffic stops selectively targeted at rainbow gathering attendees in Newton County, Arkansas (App.1-60).[1] On June 28, 2008 the District Court denied the TRO request without responsive pleading or hearing and denied injunctive relief in the final judgment adopting its dismissal order

[1] References to the record indicate Appendix page numbers. References to statements of fact are to both the verified complaint and supporting exhibits when applicable. Every paragraph of the complaint is categorically substantiated in Appendix pages 417-458.

(App.61-66;546-548).

The original complaint filed with the TRO motion was subsequently replaced by an amended three-count complaint alleging a pattern of harassment against rainbow gathering attendees, a permit provision that burdens religion, invasion of privacy in vehicles approaching rainbow gatherings and inside religious camps, and conspiracy to deprive equal protection of the law (App.74-138). Defendants filed a statement alleging un-controverted facts and a motion to dismiss or for summary judgment (including 8 exhibits) (App.67-73;139-195). Plaintiff responded with a statement of controverted facts and a motion for stay of summary judgment until completion of discovery (including 31 exhibits) (App.196-516). Defendants responded to Plaintiff's motion for stay (App.517-525).

On July 11, 2008 the District Court entered judgment adopting its July 3, 2008 dismissal order (App.527-549). After Plaintiff filed a motion to amend judgment and Defendants responded, the District Court denied the motion to amend on August 20, 2008 (App.550-599). This appeal follows.

STATEMENT OF FACTS

<u>Religiosity of rainbow gatherings</u>

Plaintiff is one of many individual rainbow gathering participants who embrace a comprehensive set of sincerely held religious beliefs based on principles of non-

violence (App.81-88;426-431).[2] Conduct of Plaintiff and others during rainbow gatherings is commonly based on beliefs typical of religious accoutrements including karma, love as human purpose, propagation of faith by example, written articulation of faith, natural appearance, vegetarian diet, alcohol abstinence, cyclical holidays, ecologically inspired guidance, and visionary communication (App.91-95;431). Plaintiff and others protect a family-oriented peaceful sanctuary during rainbow gatherings through a high degree of inter-gender trust and cooperation based on respectful body acceptance, cooperative support of pregnancy and child care, healthy food and clean water (App.87;426;463-516).

Plaintiff's and others' exercise of religious beliefs during rainbow gatherings often includes peacefully assembling in circles in public places for purposes of meditation, prayer, holiday celebration, honoring altars, doing yoga, sharing food, playing music, telling stories, discovering divine guidance about where to gather and other problem-solving through expressive inspirational counsel, and to petition government for redress of grievances (App.82-83;91-95;426;431;463-516). The largest such circles consist of between 5000 and 20,000 people during the annual silent meditation for world peace from dawn to noon on the 4th of July

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[2] Plaintiff categorically rejects the District Court's findings defining his "membership in a group known as the Rainbow Family" (App.528) and any definitions of that supposed membership that are implied by reference to findings of fact in other cases. The standard of review in this appeal requires the Court to only view the alleged facts in the light most favorable to Plaintiff at this stage.

(App.92;94;431).

Religious exercise during rainbow gatherings is based not only on ceremonies and ritual, but also a social atmosphere characterized by healing, charitable philanthropy, and a unique ability for inter-faith peaceful and voluntary cooperation among diverse religious sects (App.412). The unique success of peaceful voluntary cooperation during rainbow gatherings is fostered by a social atmosphere of unstructured egalitarian ministry (App.87-88;426;463-516). Rainbow gatherings manifest historical religious prophesies from diverse faiths including Catholic, Buddhist, Hindu, Goddess, Sufi, Gypsy, Native American, Rastafarian, Jewish, and early Christian (App.88-90;431).

There is no authoritative rainbow gathering aggregate entity able to coerce participants into conforming behavior, enter into collective contracts, or own common property (App.116;197;441-445). "Use of remote public land is necessary to protect the socio-political neutrality requisite for peaceful voluntary cooperation during rainbow gatherings" and National Forests are the only known remote public lands suitable for the typical numbers of pilgrims to the annual Fourth of July rainbow gatherings (App.96,¶¶53-55;432). "Peaceful voluntary cooperation among individuals who remain autonomous and free from binding agency relationships" and which is "motivated by love without actual or potential coercion" and based upon assumption of personal responsibility and use of

autonomous intuition for determining what "Good Samaritan" acts of voluntary peaceful cooperation to do are essential components of Plaintiff's exercise of religious beliefs in non-violence during rainbow gatherings (App.78;81-83;85; 422;426).

Based on Plaintiff's scientifically controlled sociology study of consensus-building during rainbow gatherings (App.463-516), an atmosphere conducive to individual autonomy facilitates internalization of collective agreements more than socially coercive relationships (App.503-505). According to Willie Zep, M.D., there is a biological basis in fact for belief that religious experience is enhanced by a safe and supportive environment and that psychological stress produces neurohormones that are opposed to the physiology of some religious experiences (App.410-412).

Defendants have caused a great deal of unjust stress to Plaintiff and other rainbow gathering participants "because of the fear of harassment and the overall distress and distraction from loving kindness caused by hostile law enforcement presence within religious assemblies" (App.87,¶40;430) such as: blasting sirens late at night in front of the "kid village" camp without legitimate reason; riding horses into the crowded "kid village" camp without legitimate reason; targeting Plaintiff for prosecution in retaliation for cooperating with USFS resource managers and acting to protect public health, thus causing Plaintiff to go into

hiding during numerous annual rainbow gatherings and at least four Ozark regional rainbow gatherings (App.98-101,¶¶64-71;432). "Plaintiff is 50 years old with arthritis and is sick and tired of running from law enforcement as a condition to exercise my sincerely held religious beliefs" (App.101,¶72;432).

Plaintiff's "peaceful association for religious purposes is harmed by the chilling effects on the willingness and comfort of other individuals to associate" including: "routine forest users" who could spontaneously associate freely if not for the agent requirement; "tens of thousands to over a million persons globally" who desire to attend rainbow gatherings in the United States who are deterred by fear of police actions; rainbow culture political, legal, ecological, public health, safety, and peace advocates who were selectively targeted and/or maliciously prosecuted; "the inestimable numbers of persons who have suffered harms from law enforcement mandatory traffic stops" and from invasion of privacy in camps and prayer assemblies (App.7;102-106;¶¶75;76;432-439). Some rainbow gathering attendees have been induced by duress into fraudulently signing permits as an agent for rainbow gathering attendees (App.110-112,¶¶91,96,100;440). Defendants' libelous press releases caused stress to Plaintiff and other rainbow gathering participants who had to rehabilitate reputations (App.114,¶112-113;441). Plaintiff has suffered "substantial financial, physical, and emotional distress" worth one hundred ten thousand dollars relating to legal costs, meetings with officials, office

supplies, arthritis wear, and the indignities suffered as a condition of religious exercise in the face of the agent requirement (App.122;¶¶135,137;445-446;574-575). In 2006, Plaintiff was "emotionally and physically harmed" in the amount of fifty thousand dollars by the indignities of a prolonged detention and search, having to re-organize his intruded-upon effects, severe headaches from prolonged sun exposure, and fear of arrest (App.129-130, ¶166;447-448). In 2007, Plaintiff suffered harms worth sixty thousand dollars when he and others experienced extreme personal and social anxiety with the prospects of having to non-consensually be confronted by a police force with a history of hostility and animosity at mandatory traffic stops targeted at rainbow gatherings (App.131,¶172;449). Plaintiff suffered one million dollars worth of "extreme indignities of being victimized by the extreme danger of joint enterprise to deprive civil rights inherent in the abuse of the extreme power of extremely evil actors disguised under the color of federal law" (App.136-137,¶187; 458). Plaintiff's stress and stress observed in other rainbow gathering participants has "severely burdened my ability to have religious experiences and to share religious experiences on many occasions" (App.459).

Confrontation of injustice with non-violent truth-seeking acts (satygraha) such as praying for miracles, political lobbying, publication of diverse ideologies, civil disobedience, and litigation is also an important part of religious expression of

rainbow gathering participants (App.84;426;463-516). Occasionally, non-violent confrontation has been civil disobedience in the face of life-threatening police acts (App.112-114;397-400;429). Plaintiff seeks safer satygraha through civil courts with prayers for relief in his Complaint (App.74-138) and does not seek any measures that would grant religious accommodation for any rainbow gathering attendees who abandon principles of non-violence in any manner (App.106-107; 439).

Plaintiff's rainbow gathering participation

In the course of religious experience described above, Plaintiff has exercised peaceful voluntary cooperation with tens of thousands of rainbow gathering co-participants on National Forest lands during the past fifteen years and intends to continue doing so (App.78;422). Rainbow gatherings have continued to inspire Plaintiff with volunteerism since his participation for the first time in 1985 in his home state of Missouri (App.96-97;432). Plaintiff has worked to enhance camp safety and sanitation by developing hot and cold running spring water for food preparation, cleaning, filtering, and first aid (App.97;100;415;430). Plaintiff has worked to create a hospitable comfort zone for parents and children (App.421; 430). Plaintiff has nurtured pregnant, birthing, and post-partum women and provided sacred massages for women (App.121-122;416;422;430;439;445). Plaintiff has helped scout for potential rainbow gathering sites (App.427;432). In

2004, Plaintiff conducted a nine-week sociology field study of consensus-building during rainbow gatherings (App.413-415;426;433;463-516). Plaintiff has been willing to cooperate with diverse National Forest users such as ranchers and Native Americans, health department officials, Forest Service resource managers, and police officers who act in good faith; and lobbied the Forest Service to change its management of rainbow gatherings when necessary, but is willing to tenaciously litigate issues upon which no mediated agreement can be reached (App.76;98; 100;106;115;201;352;417;428;434;441-444).

Official Defendants[3]

In 1995, USFS implemented regulations requiring a permit when 75 or more persons occupy National Forests for non-commercial group uses (App.75-79;417-422). Defendants state the purposes of these regulations are to protect resources, address health and safety, and allocate space among competing uses (App.180). Defendants state application of these regulations need not be the least restrictive of religion manner of regulating rainbow gatherings (App.610). Prior versions of the permit regulations were declared unconstitutional in 1986 by Arizona District Judge Bilby because of selective targeting of expressive activities (App.342) and in

[3] The misspelled naming of "Gayle Kimball" designated in this appeal's caption reflects an abandoned pleading and Abigail Kimbell is properly named as a defendant only in her official capacity as Chief of the United State Forest Service (USFS) (App.74). The pleadings against Don Palmer and Gene Smithson in their official capacities with USFS are abandoned (App.74).

1988 by Texas District Judge Justice because of improper procedural enactment, overbroad administrative discretion, and selective targeting of expressive activities. U.S. v. Rainbow Family, 695 F. Supp. 294, 313 (E.D.Tex.1988) (*Rainbow I*).

In 1988, when Judge Justice denied USFS' petition for a restraining order to prohibit the rainbow gathering unless someone signed a permit he also ordered USFS to assure unobstructed ingress and egress to the assembly U.S. v. Rainbow Family, 695 F. Supp. 314, 332 (E.D.Tex. 1988) (*Rainbow II*). Missouri District Judge Clark and Florida District Judge Schlesinger found mandatory traffic stops selectively targeted at rainbow gatherings in 1996 and 1998 to be unconstitutional (App.30-58). This Court did not rule on the issue in Missouri because of dismissal based on lack of that plaintiff's standing (App.21-29).

In 1988, Judge Justice ordered USFS to cease law enforcement activities inside the rainbow gathering because of USFS animosity and hostility; and directed U.S. Marshalls to monitor the gathering instead (App.299). In 1998 USFS had policies authorizing routine armed police patrols of rainbow gathering religious encampments of non-violent pacifists without probable cause (App.383). USFS police currently have a reputation for animosity toward rainbow gathering attendees because of continuing intrusive camp surveillance (App.8;398).

Regardless of whether Defendants demand a permit, USFS resource managers typically meet with rainbow gathering participants and cooperatively develop site-

specific operating plans to address the stated purposes of the regulations (App.11-12;117;353-355;443). Local health departments typically meet with rainbow gathering volunteers to mitigate health and safety concerns (App.344;349;350-352;443). Rainbow gathering volunteers typically meet with other National Forest users and local citizens to implement strategies to minimize any potential conflicts of interest (App.443; also see audiovisual DVD exhibit to Doc.44-23 from the District Court for a particularly disruptive town hall meeting). Resource managers typically publish restoration approval letters after being satisfied with site rehabilitation following annual Fourth of July rainbow gatherings (App.117;358-368;444). When law enforcement assistance was occasionally needed, rainbow gathering participants cooperated with law enforcement officials (App.117;443).

Individual defendants

Defendants **Hornstein** and unknown **Defendant Does** intentionally coordinated drafting the permit regulations in a way that would exclude rainbow gathering attendees from National Forests by insisting on a requirement that only people who are members of organizations capable of appointing agents may assemble en masse in National Forests in that they knew rainbow gathering participants could not comply because of Judge Justice's Judgment and from the public comments submitted in response to the proposed regulations (App.135,¶179;147;225-228; 454-455;550-551).

Rainbow gathering attendees' inability to comply with Defendants' demand that they only gather as members of an organization capable of appointing agents has resulted in displacement of cooperative resource managers and control of the National Incident Management Team (NIMT) with hostile police (App.95-96;75-76;417;431-432). Unlike USFS resource managers who coordinated management of rainbow gatherings prior to the agent requirement (App.95-96¶¶50-52;431-432; 380;572), hostile NIMT officers attempted to coerce Plaintiff and others similarly situated to: avoid communicating, associating, or peacefully assembling with 75 or more individuals unless we first abandon our exercise of an egalitarian ministerial atmosphere by pledging allegiance to an aggregate principal to appoint an agent—at risk of fine and imprisonment (App.82-84,¶¶25,28,31; 88¶43;427-428;430-431; 569); avoid administrative lobbying, using public media, petitioning the courts, or publicly protesting by disrupting prayer circles, ignoring lobbying, pointing high powered weapons at peaceful protestors, and selectively targeting internet publishers, attorneys, legal assistants, medical volunteers, citizens' band radio operators, water and kitchen sanitation workers, and ministers for prosecution (App.84-85,¶¶33-34;428-430;570); be distracted from a social atmosphere of loving kindness conducive to inter-gender cooperation and the second coming of Christ by pervasive armed patrols and threats to punish exemplary loving conduct (App.87-88,¶¶40,44;430-431;570); abandon the personal autonomy necessary for

the inter-faith cooperation characteristic of rainbow gatherings by methods historically typical of police repression of religious liberty such as: coercion to institutionalize interpersonal relationships; threatening use of deadly weapons against non-violent protestors; domineering police presence amidst religious assembly; marginalization of individual religious experience; prohibiting autonomous religious conduct of egalitarian communalism in the public domain that potentiates voluntary sharing of the world's resources; selective targeting of nomads; seizures and searches for sacramental plants (App.89-91,¶¶45-46; 431;571). Participants are also coerced to ignore the legal significance of religious exercise by acquiescing to regulation that is not the least restrictive equally effective means in that it requires abandonment of either the necessary doctrine of using remote public land or the fundamental doctrine of no agency relationships (App.95,¶49;96,¶¶53-55;431;432). Plaintiff has been coerced by Defendants to run, hide, and compromise enjoyment of religious exercise because of: "distraction from spiritual practices by specific instances of apprehension from selectively targeted mandatory traffic stops; muddying waterways used for immersion in defiance of health department directives; activating emergency lights and siren late at night in front of a children's oriented camp without cause; verbal abuse in retaliation for use of public process; horse patrols of crowded children's areas without reason; selective targeting in retaliation for cooperative communications

with Forest Service resource management personnel and for facilitating safe water supplies to protect public health; ordering rainbow gathering attendees to move to a different site from that agreed to through customary religious practices; intimidating armed patrols of religious camps without cause; intentional or grossly negligent law enforcement acquiescence to the actions of individuals who genuinely breach the peace during rainbow gatherings; unreasonable photography of naked or topless women within the privacy of religious camps; creating anxiety and terror with low flying military helicopters and jets; and face to face sexual harassment in the intimate privacy of Plaintiff's religious camp while sharing sacred massage with a naked woman (App.98-101,¶¶61-72;118-122,¶¶;132-134; 127-131,¶¶149-172;572-573). Participants are coerced to disavow religious beliefs by acquiescing to Defendants' fraudulent inducement of other participants to act as agents and to deal with the fruits of Defendants' libelous press releases (App.110-114,¶¶88-113).

Hornstein admitted to acting "individually and beyond the scope of her authority under color of federal law with malice toward and/or reckless disregard of the federally protected rights of Plaintiff Nenninger and others similarly situated; and/or without malice in her official capacity as Legal Counsel for the Forest Service when she acted as an architect of the non-commercial group use permit regulations at issue" and claims those acts were within the scope of her

employment (App.79,¶12;146-147;423).

Hornstein also advised USFS NIMT police to ignore USFS policy declarations that it is not necessary or appropriate to stop traffic approaching rainbow gatherings and advised them to continue the 1996 traffic stop in Missouri that was later declared unconstitutional by Judge Clark (App.30-55;381-382). As part of its response to public comments that the new 1995 regulations were targeted against rainbow gatherings, USFS had included a policy statement that it was not necessary or appropriate to stop vehicles approaching rainbow gatherings (App.608-609). Nonetheless, in 1998 USFS developed policies allowing police to locate mandatory traffic stops selectively targeted at special events (App.25;335). Defendants have targeted mandatory traffic stops at rainbow gatherings in at least 1993, 1995, 1998, 2002, 2003, 2004, 2005, 2006, and 2007 regardless of whether a permit has been issued (App.8-9;13-20;59-60;112-113,¶¶102-109;127-131,¶¶149, 172;261-262;376-382;390-400;419;423-424;436-438;440-441;447-449;453;460-462).

Defendant **Twiss** was chief of USFS police during the 2006 Colorado and 2007 Arkansas rainbow gatherings (App.79-80;148-149;423). In 2006 and 2007 Twiss allowed unknown Defendant Does to terrorize rainbow gathering participants with low flying military jets and military helicopters for no legitimate reason, causing fear in mothers and children of "kid village" and flashbacks in Vietnam Veterans

that caused Plaintiff anxiety by the need to counsel the veteran; and disturbing Plaintiff on another occasion by the hovering aircraft's invasion of privacy while sharing a massage with a naked woman near the river; and causing loss of association with others who were deterred from attending because of police invasions of privacy (App.131;398;420-422;439;445;449).

Twiss allowed NIMT roadblocks in 2006 in an unsuccessful attempt to completely prohibit the rainbow gathering which resulted in heavily armed police threatening peaceful protestors libelously characterized in a NIMT press release as having thrown sticks and stones at the NIMT and later established mandatory traffic stops to issue hundreds of citations to Plaintiff and other people who approached the site without a permit authorized by an agent's signature (App.113-114,¶¶110-113;127-130,¶¶149-166;393-400;440-441). Charges against Plaintiff were dismissed after trial before a Colorado federal magistrate (App.114;441). In 2006, Twiss also disrupted Plaintiff's association rights by allowing selective targeting of pro bono lawyers and medical, environmental, communications, sanitation, feeding, and ministerial volunteers for enforcement of the agent requirement (App.5-10;102-105,¶76;136,¶186;406-407;435-436).

Twiss allowed selectively targeted roving profile traffic stops and stationary roadblocks on remote gravel roads in Arkansas to be established in 2007 to stop vehicles approaching the rainbow gathering that Defendant Rey had agreed to

permit without a designated agent, after promising rainbow gathering participants that there would be no such selectively targeted traffic stops (App.8-9;13-20;77-78,¶8;130-131,¶¶167-172;374-375;418-422;436-437;448-450;456-457). Plaintiff was very anxious about being forced to stop at one of these selectively targeted check points and was unable to associate with people who did not attend in 2007 because of the NIMT traffic stops (App.131,¶172;449). In 2007, Twiss allowed: impediments to disabled persons' parking; interference with water supplies and latrine digging for sanitation; NIMT orders for Plaintiff and others to abandon the rainbow gathering site and follow some leaders NIMT had appointed and follow their directions as posted on a website to go to another location; searches of persons without reasonable suspicion or probable cause; dangerous blocking of steep roads to search stopped vehicles; deterrence of local citizens from attendance by earning a reputation for invasive police tactics; grossly negligent oversight of alcoholic provocateurs' violence who displaced medical and legal volunteers and other rainbow gathering participants while instead sending armed police patrols into pacifist religious camps without probable cause; low-flying military helicopters and a jet; and photography of at least one topless woman for non-law enforcement purposes (App.77-78,¶8;374-375;418-422). Twiss acted with hostility and/or gross negligence in his supervisory duties of hiring, training, disciplining, and firing NIMT officers who committed these acts (App.79-80,¶13;

135,¶¶180-182;455-457).

Twiss admitted to every allegation made in Plaintiff's complaint, but claimed it was all within the scope of his employment (App.148-149).

During the 2006 rainbow gathering in Colorado, Defendants Lampshire and Krogstad[4] detained Plaintiff longer than necessary to issue infraction summonses so that a canine could arrive and provide a falsified reason to conduct a vehicle search (App.80,¶¶14-15;127-130,¶¶149-166;423-424;447-448). Lampshire searched Plaintiff's person without reasonable suspicion to believe Plaintiff was dangerous and "pinched, probed, and squeezed" Plaintiff's clothing in an attempt to discover non-weapon contraband without probable cause (App.447). Krogstad became physically threatening because Plaintiff refused to consent to a vehicle search; then, Lampshire and Krogstad searched Plaintiff's vehicle without probable cause to believe a crime had occurred and found no contraband (App.128-130, ¶¶154-166;447-448). On another day, Krogstad entered Plaintiff's personal campsite in a religious encampment and became verbally abusive and physically threatening because Plaintiff was massaging a woman (App.121-122,¶¶133-134; 445).

[4] The misspelled name "Kragstadt" in this appeal's caption reflects an abandoned pleading (App.74).

Relief requested

Count I requests judgment after jury trial for damages from civil rights violations related to the agent requirement and other methods of discriminatory harassment targeted at rainbow gatherings that has harmed Plaintiff; after jury trial, declaratory and injunctive relief: a)finding the agent requirement for assembly content-based, overbroad, and/or vague in violation of Fifth and First Amendment protections in that unbridled discretion is vested with Defendants to determine what degree of similarity is sufficient to require individuals to appoint agents to obtain a permit; b)commanding Defendants to use the least restrictive equally effective alternative to the agent requirement; c)declaring a rebuttable presumption that annual 4th of July rainbow gatherings are religious assemblies entitled to strict scrutiny RFRA and First Amendment protection; d)restraining Defendants from coercing formation of agency relationships for rainbow gathering participants; e)costs, fees, and further relief deemed proper (App.122-124,446).

Count II requests judgment after jury trial for damages from civil rights violations related to mandatory traffic stops and invasion of religious camp privacy targeted at rainbow gathering participants that have harmed Plaintiff; after jury trial, declaratory and injunctive relief: a)commanding Defendants to use the least restrictive equally effective alternative to mandatory traffic stops that affect religious assembly; b)declaring a rebuttable presumption that annual 4th of July

rainbow gatherings are religious assemblies entitled to strict scrutiny RFRA and First Amendment protection; c)restraining Defendants from interfering with ingress and egress of rainbow gathering attendees and commanding them to prevent others from such interference; d)prohibiting Defendants from making traffic stops for criminal purposes without individualized articulable reasonable suspicion or probable cause; e)prohibiting Defendants from unnecessarily prolonging traffic stops; f)costs, fees, and further relief deemed proper (App.131-133,449-450).

Count III requests judgment after jury trial for damages from civil rights violations related to conspiracy to deprive equal protection of the law; after jury trial, injunctive and declaratory relief: a)declaring a rebuttable presumption that annual 4th of July rainbow gatherings are religious assemblies entitled to strict scrutiny RFRA and First Amendment protection; b)commanding Defendants to accommodate free exercise of sincerely held religious beliefs during annual Fourth of July rainbow gatherings with the least restrictive means of furthering compelling governmental interests; c)costs, fees, and further relief deemed appropriate (App.136-137,458).

STANDARD OF REVIEW

"We review the district court's grant of summary judgment de novo, applying the same standard as the district court and examining the record in the light most

favorable to the nonmoving party." Barge v. Anheuser-Busch, Inc., 87 F.3d 256, 258 (8th Cir.1996). In considering a motion to dismiss pursuant to FRCP 12(b)(6) for failure to state a claim, the complaint should be liberally construed in the light most favorable to plaintiff. Fusco v. Xerox Corp., 676 F.2d 332, 334 (8th Cir. 1982). All inferences which may be drawn from facts alleged should be in favor of plaintiff. Parkview Heights Corp. v. City of Black Jack, 467 F.2d 1208, 1212 (8th Cir. 1972). The complaint should not be dismissed unless it appears without a doubt that plaintiff can prove no set of facts which would entitle him to relief. Osborne v. United States, 918 F.2d 724, 728 (8th Cir. 1990). A Rule 12(b)(6) motion raising matters outside the pleadings is converted into a motion for summary judgment under FRCP 56. Lane v. Dollar, 330 U.S. 731, 735 (1947). The standard for granting a motion for summary judgment is similar to that of a directed verdict in that the evidence must be such that a reasonable jury could not return a verdict for the non-moving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 251 (1986); Western Agricultural Chemicals Inc. v. Ford Motor Co., 990 F.2d 426 (8th Cir. 1993). Because summary judgment is drastic, it should not be granted unless the moving party has established the right to a judgment with such clarity that there is not room for controversy. Umpleby v. United States, 806 F.2d 812, 814 (8th Cir. 1986). Such a motion is to be viewed in the light most favorable to the opposing party who also must receive the benefit of all reasonable inferences

to be drawn from the underlying facts. Johnson v. Minnesota Historical Society, 931 F.2d 1239, 1244 (8th Cir. 1991). At the summary judgment stage, the court's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for trial. *Anderson at* 249.

SUMMARY OF ARGUMENT

Permitting Defendants' conduct to continue would devolve the progress of Western Civilization to times before our founders' liberation from England when minority religions were exterminated through surveillance, detention, and coercion of practitioners to only associate on terms dictated by government. This discriminatory entanglement is precisely what the District Court would allow.

Two distinct but related basic issues are raised: the substantial burden to religion of coercing rainbow gathering attendees to organize principal-agent relationships; and the illegality of specific police misconduct. They are related because both stem from a pattern of conduct that deprives rainbow gathering attendees of equal access to National Forests. They are distinct because both stand on their own merits.

The District Court correctly concluded that assembling on the Fourth of July for rainbow gatherings is religious conduct, but erred in concluding Plaintiff does not allege Defendants substantially burdened religious exercise. Since implementation of the agent requirement in 1995, Plaintiff has been continuously harmed by an

array of harassment causing him to go into hiding with fear and depriving him of freedom to associate with others who did not attend rainbow gatherings because of fear. Because Defendants substantially burdened Plaintiff's exercise of sincere religious beliefs, they must demonstrate evidence their conduct is the least restrictive means of furthering compelling government interests.

Participation in rainbow gatherings is central to exercise of Plaintiff's religious beliefs. Assembly in a public forum and lack of collective authority are fundamental to the religious nature of rainbow gatherings. Defendants' regulations deprive Plaintiff of the otherwise available public benefit of choosing who to associate with in National Forests by requiring Plaintiff to only associate with people who have a vested aggregate authority.

The District Court erred in concluding the agent designation requisite for public assembly does not deprive Plaintiff of due process and equal protection by intentionally targeting a minority religion. Defendants intended the agent requirement to discriminate against rainbow gatherings. The agent requirement completely prohibits Plaintiff from exercising sincere religious beliefs by requiring formation of a collective authority to act as a principal capable of designating an agent as a pre-condition for assembly in National Forests. There is demonstrated history of the more effective special use authorization alternative of cooperatively developed operating plans implemented for seven years after the previous version

of the non-commercial group use permit regulation was declared unconstitutional.

The District Court erred in concluding police protocols may include mandatory traffic stops selectively targeted at a minority religion, detention of motorists to allow time for a canine to arrive, search of persons and vehicles without reasonable suspicion or probable cause, and invasive surveillance of religious encampments without probable cause. The practice of targeting traffic seizures and searches at a particular religion destroys the neutrality upon which suspicion-less stops are justified. Defendants' conduct exceeds clearly established limits on police traffic stops and canine sniffs. Breaches of privacy motivated by hostility to a minority religion trigger strict scrutiny. Absent probable cause, Plaintiff has a reasonable expectation of privacy from armed police surveillance within pacifist religious campsites in remote areas of National Forests.

In addition to interfering with Plaintiff's associational rights by chilling others' willingness to participate in rainbow gatherings through the agent requirement and an array of harassment, Plaintiff suffered harms at the 2007 rainbow gathering in Colorado when personally detained on the road longer than necessary to issue a summons for the infraction of gathering without a permit and then subjected to an unreasonable search of vehicle and person—and again within his religious campsite when personally harassed by police for massaging a woman. At the 2008 rainbow gathering in Arkansas, Plaintiff was harmed when personally subjected to

selectively targeted traffic stops that burdened his religious experience and interfered with his religious association rights by chilling others' willingness to participate.

The District Court erred in concluding none of Plaintiff's constitutional claims have merit and Plaintiff's hybrid rights free exercise claims should therefore not be reviewed with strict scrutiny. Plaintiff's free exercise was harmed by: chilling others' willingness to *assemble* for religious purposes; *seizures and searches* selectively targeted at rainbow gatherings; attempts to prevent rainbow gatherings because no *due process* alternative to the agent requirement provided *equal protection* for assemblies without agents; prohibiting *expressive* conduct central to *exercise* of religious beliefs in cooperation without collective authority; attempts to *establish* government control of religious conduct by appointing leaders; and punishing for *petitioning* courts by selectively targeting legal workers with harassment.

ARGUMENT

1. Is Plaintiff's prima facie evidence of substantial burdens to religious exercise sufficient to justify discovery?

The District Court erred entering summary judgment and dismissing because Defendants' requirement to designate an agent as applied to rainbow gatherings violates the Religious Freedom Restoration Act in that it is a substantial burden to Plaintiff's exercise of religion by coercing Plaintiff into conduct violative of his sincere religious beliefs as a condition for enjoyment of the public benefit of gathering en masse in National Forests.

The Supreme Court recently clarified the elements of a claim pursuant to 42 U.S.C. § 2000bb, Religious Freedom Restoration Act (RFRA): "Under RFRA, the Federal Government may not, as a statutory matter, substantially burden a person's exercise of religion, 'even if the burden results from a rule of general applicability' § 2000bb-1(a). The only exception recognized by the statute requires the government to satisfy the compelling interest test—to 'demonstrate[e] that application of the burden to the person—(1) is in furtherance of a compelling government interest; and (2) is the least restrictive means of furthering that compelling government interest.' § 2000bb-1(b)." Gonzales v. O Centro Espirita Beneficente, 126 S.Ct. 1211, 1217 (2006) (UDV). *UDV* was decided on the basis that the government failed to demonstrate enforcement of controlled substance laws was the least restrictive means of furthering compelling government interests *Id. at* 1225; *also see* Christians v. Crystal Evangelical Free Church, 82 F.3d 1407, 1417 (8th Cir. 1996) (holding RFRA assigns strict scrutiny versus a form of intermediate scrutiny).

At issue in this appeal is whether Plaintiff alleges harms constituting a substantial burden. In *UDV*, the undisputed substantial burden was U.S. Customs' seizure of imported plants containing DMT, a powerful controlled substance with no accepted medical use in the U.S. *UDV at* 1222. This Court found a substantial burden for RFRA analysis if a dead man's estate would have to return a tithe given

to his church within a year prior to death pursuant to the generally applicable bankruptcy laws. In re: Young, 82 F.3d 1407 (8th Cir. 1996). Unlike *UDV* and *Young*, the District Court herein concluded Plaintiff does not allege substantial burdens to exercise of religious beliefs (App.538-539).

Under closely parallel facts to those herein, the Supreme Court struck down an ordinance requiring a permit prior to non-commercial door-to-door proselytizing, anonymous political speech, or handbill distribution as facially invalid under First Amendment analysis. Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002). "Three obvious examples illustrate the pernicious effect of such a permit requirement…First,… there are a significant number of persons who support causes anonymously…the requirement that a canvasser must be identified in a permit application…necessarily results in a surrender of that anonymity…The fact that circulators revealed their physical identities did not foreclose our consideration of the circulators' interest in maintaining their anonymity…Second, requiring a permit as a prior condition on the exercise of the right to speak imposes an objective burden on some speech of citizens holding religious or patriotic views…there are a significant number of persons whose religious scruples will prevent them from applying for such a license. There are no doubt other patriotic citizens, who have such firm convictions about their constitutional right to engage in uninhibited debate in the

context of door-to-door advocacy, that they would prefer silence to speech licensed by a petty official…Third, there is a significant amount of spontaneous speech that is effectively banned by the ordinance." *Id at* 166-168.

The 9th Circuit recently published an *en banc* opinion carefully considering the definition of "substantial burden" in Navajo Nation v. Forest Service, 535 F.3d 1058 (2008). That court held use of artificial snow composed of treated municipal wastewater at a ski resort leased from the Forest Service on land sacred to several Indian tribes was not a substantial burden to the tribes' religion. *Id. at* 1067. The holding was based on Supreme Court Free Exercise precedent pre-dating RFRA in Sherbert v. Verner, 374 U.S. 398 (1963) (accommodation of unemployment benefits for practitioner who refused to accept job on Sabbath) and Wisconsin v. Yoder, 406 U.S. 205 (1972) (accommodation of alternative to compulsory education for Amish). *Navajo Nation at* 1069-1070. "Under RFRA, a 'substantial burden' is imposed only when individuals are forced to choose between following the tenets of their religion and receiving a governmental benefit (Sherbert) or coerced to act contrary to their religious beliefs by the threat of civil or criminal sanctions (Yoder)." *Navajo Nation at* 1070.

The *en banc* opinion in *Navajo Nation* rejected the panel and dissent opinions that RFRA expanded the definition of "substantial burden" beyond the scope of Supreme Court Free Exercise jurisprudence prior to RFRA. *Id. at* 1074-1077.

Plaintiff disagrees with the 9th Circuit *en banc* opinion that RFRA does not expand the definition of substantial burden for the same reasons articulated by the panel (App.252) and dissent *Id. at* 1085-1098.

However, this Court need not decide in this appeal whether RFRA expanded the definition of "substantial burden" in order to invalidate and sever the agent requirement because the alleged harms are within the more conservative definition adopted by the 9th Circuit. Unlike the plaintiffs in *Navajo Nation,* Plaintiff herein is not attempting to prohibit USFS land use. Rather, Plaintiff herein seeks freedom from USFS prohibitions to act in accord with religious conscience without civil or criminal penalty. *Supra*. Government requirements that citizens act contrary to their faith as a condition of a public benefit at the peril of fine and imprisonment in this case impose precisely the types of burden defined as substantial in *Navajo Nation* and prohibited in *Yoder* and *Sherbert*.

The Supreme Court clarified the *Sherbert* standard of "substantial burden" more recently: "Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial." <u>Thomas v. Review Bd. of Ind. Employment Sec. Div.</u>, 450 U.S. 707,

717-718 (1981); *also see* Frazee v. Ill. Dep't of Employment Sec., 489 U.S. 829 (1989) (couldn't deny unemployment benefits because personal religious beliefs proscribed production of armaments).

Here, the important benefit is access to the traditional public forum of National Forests for religious expressive assembly and Defendants conditioned receipt of this benefit upon the religiously proscribed conduct of forming an aggregate principal capable of designating an agent (App.96,¶¶53-55;432). "It cannot be reasonably disputed that the public Forest Service lands are the type of forum in which expressive activity has historically occurred, and in which public expression of views must be tolerated to the maximum extent." *Rainbow I at* 308. Defendants attempted to deny this benefit by threat of incarceration and fine. 36 C.F.R. §§ 261.10(k), 261.1b; 16 U.S.C. § 551. Thus, Plaintiff's free exercise is substantially burdened because Defendants condition a public benefit on Plaintiff foregoing religious exercise by putting substantial pressure on Plaintiff to modify his behavior by assembling for religious expression only with people who form principal and agent relationships while in the traditional public forum of National Forests.

Formation of a principal within rainbow gathering culture that would be genuinely capable of appointing an authorized representative agent for any purpose would require Plaintiff and others to act contrary to religious belief as a condition

of enjoying the benefits of the National Forests otherwise publicly available. Neither Defendants nor the District Court disputes the abundant evidence of the sincerity of the religious belief in associating without principal-agent relationships: Judge Justice observed this important custom; numerous public comments to the rule made this doctrine clear; numerous people went to prison rather than betray their conscience by signing a permit; hundreds of people in Colorado accepted citations at risk of fine and imprisonment rather than submit to the agent requirement; over one hundred people faced NIMT officers threatening to use high-powered deadly weapons during non-violent protest of a roadblock to keep people out of the 2006 rainbow gathering because no one could be persuaded to pretend to be an agent for the rainbow gathering participants; Plaintiff's sociology study concluded that autonomy from collective authority is essential to successful consensus-building during rainbow gatherings; Dr. Zep observed that lack of collective authority is fundamental to religious experience during rainbow gatherings; no aggregate authority exists that is capable of entering contracts or owning property; Defendants have resorted to fraudulent inducement under duress for individuals to sign a permit; and gatherers have endured years of harassment regarding the agent requirement. Thus, Plaintiff's affirmation of faith in cooperation without agency relationships is substantiated with additional credible evidence. *Supra*.

The rule's terms are explicit as to capacities required of a permit holder. Any proponent must identify an "agent who is authorized to receive notice of actions pertaining to the proposal." §251.54(d)(1) and name someone "who will sign a special use authorization on behalf of the proponent" §251.54(d)(2)(i)(E). This presupposes an entity with identifiable members and a vested means to authorize agents to act. Where no such entity exists, these capacities are lacking: The ad hoc personal associations among gatherers do not harbor agent powers for the whole. No voluntary forum is legally embodied to make binding decisions or delegations—nor are such powers conjured vicariously by others' *ultra vires* personal claims or agreements, or by government designation. Thus, personal rights to expressive assembly are excluded in this scheme.

The District Court's correct finding that "gathering en masse on National Forest lands for Fourth of July celebrations is a religiously motivated practice" (App.538) is an understatement. Participation in rainbow gatherings and the 4th of July ritual are central to exercise of Plaintiff's comprehensive system of religious beliefs based on the principle of non-violence (App.81-82,¶¶17-24;94¶48(k)(i);426;431). Lack of collective authority is fundamental to these beliefs and the religious nature of rainbow gatherings. *Supra.* Since implementation of the agent requirement in 1995, Plaintiff has been repeatedly harmed by an array of harassment causing him to go into hiding with fear and deprived him of freedom to associate with others

who did not attend rainbow gatherings because of fear. Thus, Defendants' requirement of a designated agent on behalf of people who are un-affiliated and do not otherwise form an aggregate principal capable of appointing representative agents because of sincere religious beliefs is a substantial burden to Plaintiff's exercise of religion. Summary judgment is premature prior to discovery of issues related to liability and damages; and, is not in order at all in favor of Defendants because there are substantial controverted facts that state a cause of action under RFRA (App.67-73;196-210).

2. **Is Plaintiff's prima facie evidence of intentional conspiracy to deprive rainbow gathering participants of equal protection of the law sufficient to justify discovery?**

   The District Court erred entering summary judgment and dismissing because Defendants' requirement to designate an agent as applied to rainbow gatherings violates the Fifth Amendment by depriving Plaintiff and other rainbow gathering participants equal access to National Forests in that Defendants intended rainbow gathering participants to be unable to comply.

To proceed with an equal protection conspiracy claim pursuant to 42 U.S.C. §§ 1985 and 1986, Plaintiff must particularly allege that: Defendants (1) *conspired*; for (2) *purpose* of depriving any person or class of equal protection of laws; one or more Defendants (3) *acted* in furtherance of conspiracy; someone was (4) *deprived* of exercising any right of citizenship. Andrews v. Fowler, 98 F.3d 1069, 1079-1080 (8th Cir. 1996). Plaintiff must

also particularly allege conspiracy is fueled by some class-based invidiously discriminatory (5) *animus*. *Id.* Neglect or refusal to prevent the conspiracy is sufficient to impose liability if the Defendant had actual knowledge of the conspiracy. Brandon v. Lotter, 157 F.3d 537, 539 (8th Cir. 1998).

A wide variety of rights secured by the Constitution and federal statutes have been protected with §§ 1985 and 1986 by courts in this circuit and around the country. *See generally,* 162 A.L.R. 1373, Validity and Construction of Statutes Making Conspiracy to Deprive or Deprivation of Constitutional Right a Federal Offense. Among other bases for invoking such statutes, this Court has found cognizable claims based on housing discrimination U.S. v. Lee, 935 F.2d 952 (8th Cir. 1991), operating a mock abortion clinic Lewis v. Pearson Foundation, Inc., 908 F.2d 318 (8th Cir. 1990), and employment discrimination Garza v. City of Omaha, 814 F.2d 553 (8th Cir. 1987). In Catlette v. United States, 132 F.2d 902 (4th Cir. 1943), that court recognized an equal protection violation from harassment constituting discrimination against the expressive religious conduct of Jehovah's Witnesses in refusing to salute the flag.

The District Court erred in concluding the agent designation requisite for public assembly does not deprive Plaintiff of due process and equal protection because Defendants acted with intention to discriminate against the religious customs of rainbow gathering participants. Plaintiff seeks damages for harms caused by

individually named Defendants who conspired and acted (and/or neglected to prevent acts) to deprive rainbow gathering participants equal protection of Constitutional and statutory protection of free exercise of religion (App.133-138).

The District Court denied Plaintiff's equal protection and conspiracy claims based on the erroneous conclusion that the equal protection comparison classes were both rainbow gathering attendees (App.539;559;560;576). Plaintiff offers evidence that Defendants have not enforced the agent requirement against other similarly situated classes of un-affiliated National Forest users such as the over 75: daily pilgrims to Mt. Shasta in California; campers celebrating Fourth of July and Memorial Day weekends at Whitten Access to the Eleven Point River in Missouri; crowds of individuals who converge in the Padre Island Seashore and other National Forest areas during the college students' spring break (App.433;577).

Plaintiff offers sufficient evidence in support of the claim that the decision to insert the agent requirement into the otherwise acceptable special use permit regulations was fueled by religious class-based discriminatory animosity to justify discovery on the issue. On its face, the agent requirement has the discriminatory effect of completely prohibiting Plaintiff from exercising sincere religious beliefs by requiring formation of a collective authority to act as a principal capable of designating an agent. The agent requirement was imposed in the wake of Judge Bilby's 1986 judgment that the permit regulations were unconstitutional selective

enforcement (App.108). Judge Justice's 1988 final judgment stated adoption of the permit regulations was "directed specifically" at rainbow gatherings and that the agent requirement in particular appeared to be "uniquely applicable to the Rainbow Family" as part of a pattern of hostility and animosity (App.225;308-309).[5] Defendants had further clear notice of the impossibility of compliance from dozens of public comments to the rulemaking which Defendants could only respond to with the unsupported self-serving circular assertion that "requiring a special use authorization for all group uses of National Forest System lands does not substantially burden the free exercise of religion" (App.225-228;603). Defendants have prosecuted Plaintiff and other rainbow gathering participants who could not comply for years (App.15-17;100-106,¶¶68-76;111,¶¶94-95;114,¶¶114-115; 136,¶186;432-439;440-441;458). The facial deprivation and harassment directly related to the agent requirement is further contextualized in the litany of Defendants' hostile actions detailed throughout the pleadings.

Defendants argue requiring a designated agent is necessary for a legally effective permit by making its terms binding on "the group and its individual members as a whole" (App.176). However, Defendants offer no evidence that

[5] A search for the term "rainbow" in an electronic version of the Federal Register of the final publication of the "group use" rules (Fed.Register, 60:168, 45257; 8/30/95), there were 195 usages of the term "Rainbow" (App.600-638). One cannot escape the impression the regulations were developed primarily to manage rainbow gatherings.

"binding the group and its individual members as a whole" actually serves the asserted exclusive purposes of the permit regulation to protect resources, protect public health, and allocate space. Such a speculative nexus might be sufficient to justify government actions under rational review analysis, but insufficient under either the intermediate scrutiny of narrow tailoring the District Court used or the strict scrutiny of least restrictive means suggested by Plaintiff.

The regulations themselves appear to require an alternative manner of regulation if National Forest users cannot comply with any of the normal criteria for obtaining non-commercial use special authorization: "If an alternative time, place, or manner will allow the applicant to meet the eight evaluation criteria, an authorized officer shall offer that alternative." 36 C.F.R. 251.54(g)(3)(H)(iii). Defendants Twiss and unknown Does defied authorization of such an alternative by ignoring Defendant Rey's supposed superintending authority when he made clear the 2007 rainbow gathering in Arkansas would be legally authorized without designation of any agent (App.374-375) and then persisting with attempts to relocate and otherwise harass participants. *Supra.*

There is demonstrated history of the more effective special use authorization alternative of cooperatively developed operating plans implemented for seven years after the previous version of the non-commercial group use permit regulation was declared unconstitutional (App.353-355). Statements from USFS resource

managers indicate satisfaction with restoration of 4th of July rainbow gathering sites during years there was no agent requirement (App.358-368). Health Department reports reflect similar voluntary cooperation with rainbow gathering participants (App.343-352). There is evidence that Defendants' asserted interests in allocating space among National Forest users is also furthered by the rainbow gathering religious custom of voluntary peaceful cooperation (App.116-117,¶128; 442).

Following the burden-shifting model for intentional discrimination established under McDonnell-Douglass v. Green, 411 U.S. 411 U.S. 792 (1973) and Texas Department of Public Affairs v. Burdine, 450 U.S. 248 (1981), Plaintiff has made out a sufficient prima facie showing of discriminatory effect and Defendants have asserted some facially neutral explanation for their discriminatory conduct (protect resources, protect public health/safety, and allocate space). The burden is now on Plaintiff to demonstrate by a preponderance of evidence that the asserted reasons are pretext for purposeful discrimination as opposed to merely naive administrators unaware of the discriminatory effect. The District Court's early dismissal foreclosed discovery of critical facts and left the complicity of Defendant Does unknown. Due process requires discovery for the opportunity to confront Defendants' witnesses and develop evidence.

There is already evidence of Defendants' animus in the record. Defendants had

foreknowledge of the discriminatory effects of the agent requirement, yet persisted in attempting to impose this requirement against rainbow gatherings as an apparent pretext for invasive police tactics. It appears from the conduct and testimony of the NIMT Commander for the 2007 Arkansas rainbow gathering and the affidavits of NIMT officers Carpenter and Twiss that Defendants are more oriented toward using rainbow gathering attendees for militaristic training on behalf of the Department of Homeland Security than toward achieving the three stated legitimate USDA/USFS purposes of the regulations (App.148-151;278-279). In addition to the facial deprivation and harassment directly related to the agent requirement, there is a smorgasbord of specific police acts suggesting the individually named Defendants are motivated by animosity. In particular, enforcement of the agent requirement has created a convenient pretext for traffic stops and invasive religious camp surveillance that infringes Plaintiff's reasonable expectations of privacy.

3. **May police target a minority religious assembly with mandatory suspicion-less traffic stops; detain motorists longer than necessary to issue summonses in order to allow time for a canine to arrive and then conduct non-consensual searches of the vehicle and driver without reasonable suspicion or probable cause; and conduct intrusive campsite surveillance without probable cause?**

The District Court erred entering summary judgment and dismissing because Defendants violated Plaintiff's Fourth Amendment reasonable expectations of privacy in that:

A. Defendants stopped Plaintiff at a mandatory traffic stop in Arkansas that was selectively targeted at rainbow gathering participants for generalized law enforcement purposes under the pretext of conducting traffic safety checks;

When motorists are stopped at a checkpoint, they are "seized" for purposes of the Fourth Amendment. United States v. Martinez-Fuerte, 428 U.S. 543, 556 (1976). "The reasonableness of checkpoints …turns on factors such as the location and method of operation of the checkpoint…" *Id. at* 565-566. The Supreme Court has recognized methods and locations of suspicion-less traffic checkpoints that are possibly reasonable only when their purpose is to intercept illegal aliens at permanent locations near the border (*Martinez-Fuerte*) or the method has a clear and obvious connection with reducing immediate traffic hazards. Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990) (random sobriety checkpoints); Delaware v. Prouse, 440 U.S. 648 (1979) (random license and registration checkpoints).

However, police may not conduct suspicion-less traffic stops for the primary purpose of general crime control. City of Indianapolis v. James Edmond, 531 U.S. 32, 41-42 (2000). *Edmond* distinguished the holding in Whren v. United States, 517 U.S. 806 (1996) that "an individual officer's subjective intentions are irrelevant to the validity of a traffic stop that is justified objectively by probable

cause to believe that a traffic violation had occurred" by holding "programmatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion …For this reason, we examine the available evidence to determine the primary purpose of the checkpoint program. While we recognize the challenges inherent in a purpose inquiry, courts routinely engage in this enterprise in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful…" *Edmond at* 46-47. "[O]ur cases dealing with intrusions that occur pursuant to a general scheme absent individualized suspicion have often required an inquiry into purpose at the programmatic level." *Id. at* 46.

Courts allowing police to establish suspicion-less traffic stops for traffic safety purposes have emphasized the neutrality of the decisions of where roadblocks are located and which motorists are stopped. The Supreme Court held police cannot stop individually chosen motorists for license and registration checks, but suggested police could use non-discretionary methods such as questioning every oncoming motorist. *Prouse at* 663. *Also see* United States v. Corral (823 F.2d 1389 1392 (10th Cir. 1987) (roadblock on state highway constitutional when stops not subject to officer discretion).

The Eighth Circuit was presented with the question of the neutrality of police locating a road block to selectively target 1996 rainbow gathering attendees in

Missouri. Park v. Forest Service of the United States, 205 F.3d 1034 (8th Cir. 2000); (App.21-29). This Court did not rule on the issue presented in *Park* because that plaintiff lacked standing to seek injunctive relief in that, unlike Plaintiff herein, the affidavits she submitted to support the likelihood of ongoing harms were accounts of events happening after she had filed her complaint. *Id. at* 1037. The *Park* opinion dicta are not clear about what aspects of the 1996 roadblock were objectionable in that it states on the one hand: "The mere fact that the checkpoint used at the 1996 gathering was unconstitutional cannot alone give Ms. Park standing" *Id.* …

> we are mindful that the Forest Service admitted to using an improper checkpoint in 1996, and that questionable checkpoints may have been used since that time. It is possible that Ms. Park would have standing to seek injunctive relief in an action commenced today, if these more recent checkpoints establish a pattern of wrongdoing by the Forest Service. It is our hope, however, that Ms. Park will not have to resort to legal action again to be free from future violations of her constitutional rights, and that the administrators of the Forest Service will insure that the inappropriate conduct of 1996 is not repeated.

Id. at 1040.

and on the other hand:

> We do not believe that a checkpoint where officers ask for identification is illegal *per se*, nor do we believe that a checkpoint on a forest road is illegal *per* se. …Finally, we do not believe that a checkpoint that targets a uniquely disruptive event, such as the Rainbow Family's annual gathering, is illegal *per se*.

Id.

This Court did not have the definitive guidance of the November 28, 2000

Edmond decision when deciding the *Park* case on March 3, 2000. However, District Judge Clark carefully considered the existing case law as applied to findings of fact identical to the alleged facts of general criminal deterrence purpose herein and came to the conclusion later decided in *Edmond* that "the foundation of neutrality is essential to the constitutionality of such checkpoints…even if the Court believed that the checkpoint was established to check driver's licenses and the like, it was used as a subterfuge to allow law enforcement officers to question attendees, do plain view searches, and basically attempt to muster up whatever charges they could find to press against Rainbow Family members" (App.51-52). Judge Clark cited the Sixth Circuit's statement of concerns about pretextual roadblocks (App.52):

> [A] pretextual roadblock has pitfalls that come perilously close to permitting unfettered government intrusion on the privacy interests of all motorists. …We believe that the danger inherent in pretextual roadblocks is the potential for giving police the authority to stop every car on the road, question its driver and passengers under the guise of a legitimate traffic-related purpose, and then claim enough reasonable suspicion through, for example, the driver's expressions or answers, to conduct a more thorough search of the stopped individuals and vehicles for drugs with insufficient limitations on police discretion.

United States v. Huguenin, 154 F.3d 547, 554-555 (6th Cir. 1998).

Plaintiff alleges Defendants perpetrated precisely the dangers warned of in *Huguenin*. Unlike the *Park* plaintiff, numerous affidavits supporting Plaintiff's requests to enjoin mandatory traffic stops selectively targeted at rainbow gathering

attendees attest that Defendants' conduct has consistently continued unabated for years prior to filing Plaintiff's complaint in that Defendants have selectively targeted mandatory traffic stops at rainbow gatherings in at least 1993, 1995, 1998, 2002, 2003, 2004, 2005, 2006, and 2007. *Supra.*

The practice of systematically targeting traffic seizures and searches at a particular class destroys the neutrality upon which suspicionless stops are justified just as surely as allowing discretion to select individual motorists. This selective targeting is prima facie evidence of using traffic safety claims as a pretext to improperly stop motorists for generalized law enforcement purposes because it demonstrates that other nearby motorists were not subjected to the "safety checks" when they could have been. The historical context of Defendants' animosity toward rainbow gathering attendees and the litany of harassment alleged in Plaintiff's complaint and supported with exhibits in the record is additional prima facie evidence of improper motive for the mandatory traffic stops. The context of the traffic stops with evidence of efforts to deprive rainbow gathering participants of National Forest use via the agent requirement is evidence of improper motive. This cumulative prima facie showing is sufficient to justify discovery and trial on the merits to determine the disputed neutrality and primary purpose of the mandatory traffic stops selectively targeted at rainbow gatherings. Upon remand, this Court should direct the District Court to allow discovery and hold hearings on

the merits of preliminary and permanent injunctions consistent with *Edmond* to protect Plaintiff from future selectively targeted roadblocks while this case is pending and in final judgment.

A plaintiff seeking injunctive relief must demonstrate "a real, [and] immediate threat that [she] would again" suffer similar injury in the future. *Park at* 1037. (internal cites deleted). "[A]n upcoming annual event is sufficiently temporally proximate to be considered an "immediate" threat and therefore to support standing for injunctive relief" *Park at* 1038, *citing* Adarand Constructors, Inc., v. Pena, Secretary of Transportation, 515 U.S. 200, 211 (1995). Plaintiff alleges he plans to continue participation with rainbow gatherings in National Forests (App.78,¶9; 422). Historic patterns demonstrate he will almost certainly have to hide or be subjected to mandatory suspicion-less traffic stops in the future. Therefore, the District Court erred in dismissing based on finding Plaintiff does not have standing to seek injunctive relief from the discriminatory purpose and effect of selectively targeted roadblocks (App.546-547).

B. Defendants detained Plaintiff longer than necessary to issue a summons in Colorado so a canine could arrive and then searched Plaintiff's vehicle and person without reason to believe Plaintiff was dangerous or involved with any crime related to the search;

"[A]n investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative

methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time. It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." Florida v. Royer, 460 U.S. 491, 500 (1983).

A pat down search is only justifiable for "the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." Terry v. Ohio, 392 U.S. 1, 29 (1968). If in the course of a Terry search "the officer must manipulate or otherwise further physically explore the concealed object in order to discern its identity, then an unconstitutional search has occurred." Minnesota v. Dickerson, 508 U.S. 366 (1993).

Plaintiff's allegation that Defendants Lampshire and Krogstad detained Plaintiff for longer than necessary so that a canine could arrive and create an untrue reason for illegal searches not based on reasonable suspicion of danger or probable cause of crime is substantiated by his affidavit stating the dog did not signal in the way Krogstad's affidavit says he is trained to signal, the search of Plaintiff's vehicle was without consent, and Plaintiff's person was subjected to "unreasonable

pinching, probing, and squeezing" (App.127-130;¶149-166;162;447-448). Plaintiff's allegations are sharply contradicted by affidavits from Defendants Lampshire and Krogstad (App.156-163). Therefore, summary judgment is not appropriate and Plaintiff's claim for damages should proceed. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

C. Defendants harassed Plaintiff in retaliation for exercise of religious beliefs by conducting intrusive surveillance of religious encampments of pacifists on public land who had a reasonable expectation of privacy from armed police patrols.

The Fourth Amendment "protects people, not places." What a citizen "seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." Katz v. United States, 389 U.S. 347, 351 (1967); United States v. Chadwick, 433 U.S. 1 (1977). "Capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation of privacy in the invaded place." Rakas v. Illinois, 439 U.S. 128, 143 (1978). Determination of whether a warrantless search violates the Fourth Amendment hinges on two questions: First, has the individual manifested a subjective expectation of privacy in the object of the challenged search? Second, is society willing to recognize the expectation as reasonable?" California v. Ciraolo, 476 U.S.

207, 211 (1986) (citing *Katz*, 389 U.S. at 361).

The Ninth Circuit affirmatively decided the question of whether the Fourth Amendment protects a person's privacy interests in a tent located on public land in United States v. Gooch, 6 F.3d 673 (9th Cir. 1993). That court also held "we do not think the reasonableness of Sandoval's expectation of privacy turns on whether he had permission to camp on public land." United States v. Sandoval, 200 F.3d 659, 661 (9th Cir. 2000); *also see* 66 A.L.R. 5th 373, Search and Seizure: Doyle Baker, J.D., Reasonable Expectation of Privacy in Tent or Campsite, *and* Restatement 2d of Torts 652B, Intrusion Upon Seclusion. At least one district court held RFRA and First Amendment Free Exercise rights contextualize Fourth Amendment protections in terms of prohibiting religious symbol profiling as a basis of reasonable suspicion to stop a vehicle. United States v. Ramon, 86 F. Supp.2d 665,677 (W.D. Tex. 2000).

The same reasons RFRA and the First Amendment contextualize limits on seizures of motorists on public roadways support limits on reasonable expectations of privacy within pacifist religious camps on public land. By enacting RFRA, Congress expressed society's determination that individuals' free exercise of sincerely held religious beliefs requires government accommodation. Plaintiff and other rainbow gathering participants have a reasonable expectation of privacy from anyone bearing arms because of the central religious tenet of non-violence

characteristic of rainbow gatherings. Defendants have long known rainbow gathering participants object to unwarranted armed patrols of the religious sanctuary of remote campsites within rainbow gatherings and this expectation of privacy is frequently expressed by shouts of “No guns in the church!” when NIMT police patrol religious encampments (App.264,383). While the boundary of an absolute expectation of privacy may be the zipper on a camper’s tent in the context of a public campground, when a religious assembly is located in remote undeveloped areas of National Forests, the reasonable expectations of privacy are defined by the social expectations of heightened protection for religious customs; in this case, the custom of non-violence. While Plaintiff and other rainbow gathering participants support cooperation with police when there is probable cause to believe a crime has occurred and law enforcement assistance is requested (App.442;443), it is impossible for Plaintiff to exercise religious beliefs in nonviolence when the peace sanctuary of remote religious campsites is continuously invaded by armed police.

Plaintiff’s reasonable expectation of privacy was personally offended on one occasion by the clearly established transgression of police unzipping Plaintiff’s tent without a warrant when Plaintiff was not present (App.438). More threatening however, was when Plaintiff stood face to face through a screened tent with Krogstad (the same officer who lied to Plaintiff about his dog signaling, became

physically threatening when Plaintiff refused consent to a vehicle search, and then left the removed contents of Plaintiff's searched vehicle on the side of the road after an extensive fruitless search) while he again demonstrated threatening body language and uttered indignities about Plaintiff massaging a woman (App.439; 445).

The context of NIMT animosity toward the minority religion pacifist tenets characteristic of rainbow gathering participants makes the violation of reasonable expectations of religious camp privacy particularly egregious and demonstrates the important public policy considerations implicated. Should this Court allow police to target people going to any church they disfavor with terrifying military aircraft, pretextual mandatory traffic stops, conduct unreasonable searches of their vehicles and persons, and enter into the tabernacles of faith with deadly weapons and no probable cause? The District Court may not like Plaintiff's religion—and this Court might not either. But, as Americans we all share the same Constitution and Plaintiff prays this Court will not allow discrimination against his minority religious practices any more than they would tolerate it against their own.

4. Does Plaintiff's Hybrid Rights First Amendment claim warrant strict scrutiny?

The District Court erred entering summary judgment and dismissing because Defendants' conduct discriminates against Plaintiff's free exercise of religion in violation of the First Amendment Hybrid Rights Doctrine in that the agent requirement prohibits the content of religious expressive conduct

> and deprives Plaintiff of equal access to National Forests through selective law enforcement, unreasonable seizures and searches, interference with assembly, domineering entanglement with religious conduct, and harassment of individuals who petition for redress of grievances.

The District Court erred concluding none of Plaintiff's constitutional claims have merit and Plaintiff's free exercise claims should not be reviewed with strict scrutiny because the free exercise claims are hybridized with numerous other constitutional claims. The District Court further erred in ruling the law of the circuit is settled that the agent requirement does not offend the First Amendment because issues of free exercise are raised in this litigation that have not been addressed by this or any other court in the nation.

The Supreme Court first articulated the Hybrid Rights Free Exercise Doctrine in Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990). "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press…". *Id. at* 881. "[I]t is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns." *Id. at* 882. Courts have applied the Hybrid Rights Doctrine in diverse contexts across the country. *See generally* 163 A.L.R. Fed. 493 What Constitutes "Hybrid Rights" Claim Under Employment

Div., Dept. of Human Resources v. Smith. This Court recognized the doctrine when it reversed a summary judgment and directed the district court to consider the otherwise dismissed free exercise claim under the Hybrid Rights doctrine because "[t]he church also bases its free exercise challenge on the fact that the ordinance violates the congregation's free speech and equal protection rights." Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 473 (8th Cir. 1991); *accord* Boone v. Boozman, 217 F. Supp.2d 938 (E.D. Ark. 2002).

This case perfectly illustrates the logic of the First Amendment Free Exercise Hybrid Rights Doctrine. Not only is there a substantial burden to free exercise from the agent requirement under RFRA analysis, but there are substantial burdens to free exercise from a broad spectrum of constitutional violations. When so many constitutional violations are simultaneously at play, government actions can no longer be presumed benign. The doctrine is particularly helpful to protect from those individually named Defendants who might otherwise escape accountability because of defenses based on policies presuming police are faithful public servants, but who have in fact abused public trust by acting under color of USFS to intentionally deprive rainbow gathering participants of National Forest use. The doctrine is also necessary to protect Plaintiff's exercise of religious beliefs from official Defendants' negligent failure to control individual Defendants.

Plaintiff's conduct reflects a composite of the most cherished Constitutional

liberties. Defendants harmed his *free exercise* by chilling others' willingness to *assemble* for religious purposes because of *seizures and searches* selectively targeted at rainbow gatherings; attempts to *establish* government control of religious conduct by appointing leaders; prohibiting *expressive* conduct central to *exercise* of religious beliefs in cooperation without aggregate authority; attempts to prevent rainbow gatherings because no *due process* alternative to the agent requirement provided *equal protection* for assemblies without agents; and punishing for *petitioning* government by selectively targeting legal workers and other exemplary volunteers with harassment.

Substantial burden to free exercise is the core of the hybrid rights claim and rests on the same facts as the RFRA prima facie substantial burden showing. *Supra.* The District Court findings of fact that gatherings have continued despite the harassment (App.538) misses the point in that gatherers have persisted only because: of civil disobedience (App.397-400); Plaintiff and others going into hiding; or participants enduring harassment, fines, and/or incarceration.

Free assembly is an inextricable element of the free exercise claim because it is the manner of cooperative assembly that forms the core of religious expressive conduct. "An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State [if] a correlative freedom to engage in group effort toward

those ends were not also guaranteed." Roberts v. United States Jaycees, 468 U.S. 609, 622 (1984).

Plaintiff's free exercise claim is inextricably linked to Fourth Amendment claims because Defendants invade the reasonable expectations of privacy of pilgrims approaching the rainbow gathering and in religious camps. *Supra.* These analyses are properly analyzed with strict scrutiny under the hybrid rights doctrine (App. 262-265). United States v. Ramon, 86 F.Supp.2d 665, 677 (W.D. Tex. 2000). The District Court did not even address the camp privacy claims.

Plaintiff's free exercise claim is inextricably linked to Establishment Clause claims because Defendants' attempts to coerce Plaintiff and others into following leaders they appointed has the discriminatory purpose of preventing rainbow gathering religion on public land, it has discriminatory effects of coercion to abandon religious customs, and it creates excessive government entanglement with religion by attempting to appoint leaders and disrupt the religious manner of assembly (App.418-419). Lemon et al. v. Kurtzmann, 403 U.S. 602 (1971).

The most offensive aspect of the agent requirement is its prohibition of the content of particular expressive conduct—cooperative peaceful assembly in the common domain without potentially coercive relationships. In striking down an ordinance requiring a permit prior to non-commercial door-to-door proselytizing, anonymous political speech, or handbill distribution as facially invalid under First

Amendment analysis in *Watchtower Bible*, the Supreme Court did not address those Jehovah Witnesses' hybrid rights free exercise claims because "the ordinance covers so much speech"… the ordinance was "not tailored to the Village's stated interests"… and "the availability of less intrusive and more effective measures" to protect the asserted government interests. 536 U.S. *at* 165, 168.

The same result follows from applying the *Watchtower Bible* rules to the facts herein. Like *Watchtower Bible*, this Court need not determine whether the agent requirement poses a substantial burden to Plaintiff's free exercise in order to render declaratory judgment invalidating the agent requirement because it is facially overbroad in that it allows USFS officials unfettered discretion to choose which sets of 75 otherwise un-affiliated persons within National Forests should be coerced to form an aggregate principal to designate an agent. Defendants don't force principal-agent relationships on the college students celebrating spring break by camping in Padre Island National Seashore; nor the campers celebrating Memorial Day and Fourth of July at Whitten Access; nor the daily pilgrims to Mt. Shasta. *Supra.* However, this case demonstrates Defendants use their unbridled discretion to discriminate against rainbow gathering participants by attempting to force principal-agent relationships. The right to remain anonymous recognized in *Watchtower Bible* and Plaintiff's asserted religious belief in associating without forming a principal capable of designating agents reflect similar liberty interests in

autonomy. This intentional disparate treatment demonstrates the facial invalidity of the unfettered authority to impose the agent requirement in that there are no guidelines written into the regulations to prevent Defendants from choosing any disfavored sub-set of individuals using National Forests and forcing them into an unwanted agency relationship. "Agency is the fiduciary relationship that arises when one person ("a principal") manifests assent to another person (an "agent") that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Rest. 3d Agency § 1.01. Defendants cannot arbitrarily define the relationship individuals must have to associate in National Forests any more than police can arbitrarily define individuals associating on public streets as criminal gang members subject to dispersal orders. City of Chicago v. Morales, 527 U.S. 41 (1999).

For all other special use permit applications, USFS officials are required to confirm the legal capacities of a permit applicant, and the authority of anyone acting as an agent on its behalf. 36 C.F.R. §251.54(d)(2)-(d)(5). The rules specify documentation to be provided by various commercial entities, as well as any "partnership, association, or other unincorporated entity."

> (E) If the proponent is a partnership, association, or other unincorporated entity: a certified copy of the partnership agreement or other similar document, if any, creating the entity, or a certificate of good standing under the laws of the State.

36 C.F.R. §251.54(d)(2)(ii)(E).

This review is consistent with administrative and contract law; if no such document exists, a permit cannot be granted to a non-entity unable to act as a permit party.

Yet noncommercial group uses are made singularly exempt. 36 C.F.R. §251.54(d)(2)(i). A consensual assembly "cannot demonstrate... the financial or technical capability... to fully comply with the terms and conditions of the authorization" where it is required to assume 'group liability' and hold the Government harmless. Forest Officers are directed to "reject any proposal... [if] (v) There is no person or entity authorized to sign a special use authorization and/or there is no person or entity willing to accept responsibility for adherence to the terms and conditions of the authorization." 36 C.F.R. §251.54(e)(5)(iv)-(v).

Defendants' discretion to determine the legal authority of persons acting as agents for commercial special use permits is adequately bridled with objective truly neutral criteria that protects against discriminatory application. No such limits are on Defendants' discretion in making the critical determination regarding non-commercial special uses. As applied to rainbow gatherings, no one can produce such proof because there in fact is no agency. Participants in an open consensual assembly cannot meet this test, have no capacities to comply as a group party, and are afforded no legal way to comply personally. Instead, permit enforcement imposes *ex parte* agents and vicarious liabilities by intimidation and

constructive fraud, or otherwise subjects all "participants and spectators" to criminal charges. 36 C.F.R. 251.54(d)(2)(C).

These issues go to core principles of free association as a *personal right* under the First Amendment, regardless of whether free exercise is implicated. As written, the agent requirement explicitly precludes a broad class of unaffiliated speakers from lawful authorization. As applied, it inexorably discriminates against rainbow gathering free exercise, assembly, and the expressive message of consensual cooperation by creating pretext for invasions of reasonable expectations of privacy and entangling government appointees as phony leaders of rainbow gatherings.

In fact the agent requirement is not “content-neutral” at all, and seems “narrowly tailored” mainly to censorial purposes. Where the permit rule facially singles out voluntary assembly by exclusion, it is an unconstitutional prior restraint, chilling First Amendment exercise on public lands. “[U]nbridled discretion to choose the regulatory standard to apply in a particular instance may allow the decision-maker to discriminate between groups applying for a permit, based upon his or her subjective biases. The ‘very possibility of abuse’ will invalidate a regulation requiring a permit for expressive activity.” *Rainbow I at* 323 *citing* Niemotko v. Maryland, 340 U.S. 268, 272 (1951). The extraordinary nature of this restriction, and its profound Fifth Amendment impacts are revealed:

Where else in the law is an individual coerced into a fictional legal association, tort liability, and felony fraud as preconditions of Government-authorized expression?

CONCLUSION

This case is not ripe for summary judgment because there are too many unanswered questions ripe for discovery about who insisted on implementing the known burdens of the agent requirement, the military jet and helicopter flyovers, the nature of the training credit for police actions at rainbow gatherings, the relationship of police actions with homeland security purposes, and a wide array of disputed facts relevant to the issues raised. Plaintiff requests this Court declare the agent unconstitutional and/or in violation of RFRA, remand this case for an answer to complaint, discovery, and *then* summary judgment and/or trial; and recovery of costs.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 13,338 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief was prepared using Microsoft Word 2003. Ten paper copies and one digital version of this brief is filed herewith. The digital version has been converted to a PDF file and copied onto a CD-ROM that has been scanned and certified free of viruses.

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