No. ___________

In The

Supreme Court of the United States

Tony Nenninger,

Petitioner

v.

United States Forest Service, *et al*

On Petition for Writ of Certiorari
To The United States Court of Appeals
for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the First and Fourth Amendments of the United States Constitution and the Religious Freedom Restoration Act protect Petitioner from suspicionless traffic stops that are selectively targeted at a religious assembly for the purpose of deterring participants or for general crime control under the pretext of traffic safety checks for driver's license and vehicle registration?

2. Do the First and Fifth Amendments of the United States Constitution and the Religious Freedom Restoration Act protect Petitioner from government compulsion of participants in a minority religious assembly to associate in a manner contrary to central tenets of sincere religious belief as a condition for peaceful assembly in the traditional public forum of our National Forests when equally effective less restrictive regulatory alternatives further all compelling government interests?

PARTIES AND CORPORATE DISCLOSURE STATEMENT

PETITIONER/PLAINTIFF: Tony Nenninger, pro se attorney.

RESPONDENTS/DEFENDANTS : By Claude Hawkins, Assistant United States Attorney for the Western District of Arkansas.

United States Forest Service (USFS) is the agency sued.

Mark Rey, in official position as Undersecretary for United States Department of Agriculture (USDA), is now replaced by the new Presidential appointee for that position, Harris D. Sherman. USDA is the federal Department that oversees USFS.

Gayle Kimball, in official capacity as Chief of USFS, is now replaced with the new Presidential appointee for that position Tim Tidwell.

Don Palmer, in official capacity as USFS Special Use Program Manager was named in the initial complaint but is no longer a named party to this action.

John Twiss, individually and in official capacity as Chief of USFS law enforcement remains an individually named defendant but has been replaced in his official capacity for that position by David Ferrell.

Gene Smithson, in official capacity as USFS Incident Commander during Fourth of July rainbow gatherings is no longer a named party in this action.

Ellen Hornstein remains a defendant both individually and in official capacity as legal counsel for USFS.

John and Jane Does remain as unidentified defendants in their individual and official capacities for USFS and/or other government agencies.

Officer Krogstad's name was mis-spelled as Kragstadt in the initial pleadings and remains as a defendant both individually and in official capacity for USFS law enforcement.

Officer Lampshire remains a defendant both individually and in official capacity for USFS law enforcement.

No party to this Petition is a corporation. Rules 14.1(b) and 29.6.

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PETITION FOR WRIT OF CERTIORARI

Comes Now Petitioner Tony Nenninger and requests this Court issue a writ of certiorari directed to the United States Court of Appeals for the Eighth Circuit to review affirmation of the District Court of Western Arkansas dismissal of civil rights complaints about Forest Service law enforcement actions that interfere with Petitioner's religious association and burdens Petitioner's religious exercise.

OPINIONS BELOW

The opinion of the District Court dismissing Petitioner's complaints is not published. The Eighth Circuit affirmation without opinion is not published. All relevant orders and opinions are reproduced in the appendices to this Petition.

JURISDICTIONAL STATEMENT

The judgment sought to be reviewed was entered by the Court of Appeals on November 27, 2009 (App.33-35) and re-hearing by the Court of Appeals was denied on February 10, 2010 (App.36). This Court has jurisdiction over this Petition pursuant to Section 1254(1) of Title 28 of the United States Code.

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS

This Petition's appendices include the full texts of the First, Fourth, and Fifth Amendments of the United States Constitution; relevant provisions of the Religious Freedom Restoration Act requiring strict scrutiny of generally applicable laws when they substantially burden religious exercise; Section 551 of Title 16 of the United States Code authorizing certain administrative regulations governing use of National Forests; relevant excerpts from the Forest Service policy for choosing the location of suspicionless traffic stops; relevant excerpts from the challenged Forest Service regulations that prohibit public assembly of more than 75 individuals in National Forests unless they first organize a collective legal entity that is able to designate an authorized agent to agree to terms for a special use permit; and relevant excerpts from the Federal Register regarding suspicionless traffic stops selectively targeted at rainbow gatherings and burdens to religious exercise created by the agent requirement for peaceful assembly.

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.147-149). On June 28, 2007 the District Court denied the TRO request without responsive pleading or hearing (App.1-6) and denied injunctive relief in the final judgment adopting its dismissal order (App.7-29).

The original complaint filed with the TRO motion was replaced with an amended three-count complaint in the U.S. District Court of Western Arkansas alleging federal subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 1367, 2201, and 2202 (App.152-153). The amended complaint alleges 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 law (App.150-214). Count I seeks damages and injunctive relief from regulatory compulsion to form principal-agent relationships as a pre-condition of assembling en masse in National Forests (App.183-200). Count II seeks damages for violations of clearly established Fourth Amendment law in 2006 and injunctive relief from selectively targeted suspicionless traffic stops in 2007 (App.200-209). Count III seeks damages for conspiracy to deprive civil rights and injunctive relief mandating accommodation of rainbow gathering religious customs with the least restrictive manner of regulation (App.209-213).

Defendants filed a statement alleging un-controverted facts and a motion to dismiss or for summary judgment (including 8 exhibits); Petitioner responded with a statement of controverted facts and a motion for stay of summary judgment until completion of discovery (including 31 exhibits); Defendants responded to Plaintiff's motion for stay (App.229-232). On July 11, 2008 the District Court entered judgment adopting its July 3, 2008 dismissal order (App.7-29). After Petitioner filed a motion to amend judgment and Defendants responded, the

District Court supplemented its July 3, 2008 dismissal order, but denied any substantive relief to Petitioner (App.30-32). There were no hearings and no discovery whatsoever was allowed (App.226-233). The Eighth Circuit Court of Appeals affirmed the District Court's dismissal without issuing an opinion addressing the questions raised on appeal (App.33-35).

STATEMENT OF FACTS

Religiosity of Rainbow Gatherings

The District Court found "[I]n the present case, it would appear that gathering en masse on National Forest lands for Fourth of July celebrations is a religiously motivated practice—but not a compelled one" (App.18). The religiosity of Petitioner's participation in rainbow gatherings is not disputed in the record.

Petitioner 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.157-164). Petitioner'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, yoga, sharing food, music, 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.158-159;167-171). 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 (App.170).

Rainbow gatherings cooperatively manifest historical religious prophesies from diverse faiths including Catholic, Buddhist, Hindu, Goddess, Sufi, Gypsy, Native American, Rastafarian, Jewish, and early Christian (App.164-166). The unique success of peaceful voluntary cooperation during rainbow gatherings is fostered by a social atmosphere of unstructured egalitarian ministry (App.163-164). There is no rainbow gathering aggregate entity able to own common property, coerce participants into conforming behavior, or enter into collective contracts (App.192). "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.172).

"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 Petitioner's exercise of religious beliefs in non-violence during rainbow gatherings (App.154;157-159;161). In the course of these religious experiences, Petitioner 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.154). Rainbow gatherings have continued to inspire Petitioner with volunteerism since his participation for the

first time in 1985 in his home state of Missouri (App.172). Petitioner has particularly worked to enhance camp safety and sanitation by developing hot and cold running spring water for food preparation, cleaning, filtering, and first aid (App.173).

Selectively Targeted Traffic Stops

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*). Florida District Judge Schlesinger and Missouri District Judge Clark found suspicionless traffic stops selectively targeted at rainbow gatherings in 1996 and 1998 to be unconstitutional (App.114-146). The Eighth Circuit did not rule on the issue in Missouri because of dismissal based on lack of that plaintiff's standing. Park v. Forest Service, 205 F.3d 1034, 1037 (8th Cir. 2000).

As part of its response to public comments that the 1995 permit regulations were targeted against rainbow gatherings, Defendants included a policy statement that it was not necessary or appropriate to stop vehicles approaching rainbow gatherings for license checks (App.51). In 1996, Defendant Hornstein advised police to ignore that policy and continue the 1996 suspicionless traffic stop in Missouri that was later declared unconstitutional by District Judge Clark for being selectively targeted and pretextual subterfuge (App.118-146;220-221,Exh.16). In 1998 Defendants wrote policies allowing police to locate suspicionless traffic

stops selectively targeted at special events (App.42-43,126,115-146). Defendants targeted mandatory traffic stops at rainbow gatherings in at least 1993, 1995, 1996, 1997, 1998, 1999, 2002, 2005, 2006, and 2007 regardless of whether a permit had been issued (App.51,118-146,174,200-207). In particular, Defendant Twiss allowed selectively targeted roving profile traffic stops and stationary roadblocks on remote gravel roads in Arkansas in 2007 to stop vehicles approaching the rainbow gathering that USDA Undersecretary Rey had agreed to permit without a designated agent, after Twiss had promised rainbow gathering participants there would be no such selectively targeted traffic stops (App. 221-224Exh.19-27). Petitioner 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 traffic stops (App.207).

Petitioner's anxiety about his suspicionless stop in 2007 in Arkansas was contextualized by his distress from the seizure and searches in 2006 in Colorado when Defendants Lampshire and Krogstad detained him longer than necessary to issue infraction summonses so that a canine could arrive and provide a falsified reason to conduct a vehicle search; Lampshire searched Petitioner's person without reasonable suspicion to believe he was dangerous and "pinched, probed, and squeezed" Petitioner's clothing in an attempt to discover non-weapon contraband without probable cause; Krogstad became physically threatening because Petitioner refused to consent to a vehicle search; Lampshire and Krogstad searched Petitioner's vehicle without probable cause to believe a crime had

occurred and found no contraband (App.203-206). On another day, Krogstad entered Petitioner's personal campsite in a religious encampment and became verbally abusive and physically threatening because Petitioner was massaging a woman (App.197-198).

Forest Service police currently have a reputation for animosity toward rainbow gathering attendees because of continuing intrusive camp surveillance (App.221 Exh.19). 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.81).

Agency Requirement for Peaceful Assembly

In 1995, USFS implemented regulations requiring a permit when 75 or more persons occupy National Forests for non-commercial group uses (App.44-60). Defendants state the purposes of these regulations are to protect resources, address health and safety, and allocate space among competing uses (App.59). Defendants state the rule does not substantially burden religion and therefore the compelling interest standard is not applicable (App.53). Prior versions of the permit regulations were declared unconstitutional in 1986 by Arizona District Judge Bilby because of selective targeting of expressive activities (App.61) and in 1988 by Texas District Judge Justice because of improper procedural enactment, overbroad administrative discretion, and selective targeting of expressive conduct. U.S. v. Rainbow Family, 695 F. Supp. 294, 313 (E.D.Tex.1988) (*Rainbow I*).

Petitioner alleges 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. They knew rainbow gathering participants could not comply because of Judge Justice's final Judgment statements (App.185¶84;90-91) and from the public comments submitted in response to the proposed regulations (App.49-60). 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.140;171-172¶50-52;219-224Exh.7-13,19,26,28).

In spite of police hostility and regardless of whether Defendants obtain a signed 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.193-194¶129-131). Local health departments typically meet with rainbow gathering volunteers to mitigate health and safety concerns (App.219,223Exh.7,26). Rainbow gathering volunteers typically meet with other National Forest users and local citizens to implement strategies to minimize any potential conflicts of interest (App.222Exh.22). Resource managers typically publish restoration approval letters after being satisfied with site rehabilitation following annual Fourth of July rainbow

gatherings (App.219Exh.10). When law enforcement assistance was occasionally needed, rainbow gathering participants cooperated with law enforcement officials (App.192-193¶128).

Supporting Evidence

In addition to his verified complaint, Petitioner offers affidavits and exhibits opposing dismissal (App.218-224, *hereinafter* Exh.1-31).

Evidence suggests unbridled discretion and lack of supervision both in policy and application of selectively targeted suspicionless traffic stops. Written policy allows police to "base the selection of sites on … any special activities in the area" (Exh.3)(App.43). The discovery responses and District Court findings in *Park v. Forest Service* in 1999 demonstrate a history of using suspicionless traffic stops targeted at rainbow gatherings under the subterfuge of traffic safety as a pretext for general crime control (Exh.14,15) (App.135-142). Defendant Hornstein advised police to disregard prior policy declared in the Federal Register to not target rainbow gatherings with such stops (Exh.16)(App.51,141). Others' affidavits substantiate Petitioner's claim of selectively targeted suspicionless traffic stops in 2007 in Arkansas (Exh.19,20,21,27). The three District Court opinions addressing police stops of rainbow gathering participants have all declared the practices unconstitutional because they were selectively targeted (Exh.4,5) (App.115-146) and/or were part of an improper attempt to prohibit an unpermitted rainbow gathering. *Rainbow II* at 332.

Evidence suggests a pattern of animosity by police. The *U.S. v. Israel* order in

1986 found the permit regulation impermissibly singled out exercise of First Amendment rights when it dismissed trespassing charges against attendees at an un-permitted rainbow gathering (Exh.6)(App.61). The *Rainbow Family* final judgment in 1989 found hostility inherent to the agent requirement as well as by a supervisory official in the field (Exh.2)(App.90-91;185). The District Court in *Park v. Forest Service* found in 1999 there was "clear evidence" of a schism between Forest Service resource personnel and police about using cooperative or confrontational approaches (App.140-142). Police have a policy of conducting unwelcome foot patrols of sacred camps without probable cause and currently have a reputation for hostility during those patrols (Exh.17,19). Police use rainbow gatherings for crowd control training (Exh.1). A health department report suggests police harassment interferes with efforts to protect public health (Exh.7). Police would not allow medicine, water, or food into an unpermitted rainbow gathering in 2002 (Exh.22). Police selectively targeted subsequently dismissed criminal prosecutions in 2006 against an attorney, minister, and an emergency medical technician in retaliation for their services to rainbow gathering participants (Exh.19,26). Police used unnecessary force in 2006 during detention of a handcuffed suspect and unsuccessfully attempted to prosecute a person for videotaping the incident (Exh.23). Police pointed guns at non-violent protestors at a roadblock to prohibit an unpermitted rainbow gathering in 2006 (Exh.25).

Evidence suggests sincere religious belief in the necessity of not appointing agents for rainbow gatherings. Successful participant cooperation with resource

personnel and health officials continues simultaneous with police confrontation (Exh.8,9,10,12,13,19,26,28). Non-violent protestors were fearless and loving when confronted by armed police attempting to prevent entry to the un-permitted 2006 rainbow gathering (Exh.25). A minister returned in 2007 after being selectively targeted for agent requirement non-compliance prosecution in 2006 (Exh.27). An M.D. statement declares coercive relationships would physiologically burden religious experience during rainbow gatherings (Exh.29). Petitioner's sociology field study reports objective scientific evidence regarding the voluntary dynamics of cooperation during rainbow gatherings (Exh.31).

There is evidence of discriminatory effect and intent of the agent requirement. The plain meaning of the regulations and the required content of the permit application form demonstrate the impossibility of assembly en masse by individuals who choose to associate without principal-agent relationships (Exh.18)(App.44-48). Both the *Israel* and *Rainbow Family* cases suggest improper selective targeting of the permit regulations (Exh.2,6)(App.61,90-91,185). Police are trained to arrest perceived leaders of assemblies who cannot comply with the agent requirement (Exh.11). Defendant Hornstein's direction to ignore the Federal Register policy declaration that it is inappropriate to conduct license checks demonstrates bad faith in declaring the permit requirement is not intended to disrupt rainbow gatherings (Exh.16)(App.15,141). Interference with delivery of water, medicine, and food to enforce the agent requirement demonstrates bad faith suggesting purposes include health and safety (Exh.22).

Finally, Petitioner offers his own affidavits to both report sociological study findings about consensus building in rainbow gathering culture and to illuminate the evidentiary bases for each of the paragraphs in his complaint (Exh.30,31).

REASONS FOR GRANTING THE PETITION

1. **Do the First and Fourth Amendments of the United States Constitution and the Religious Freedom Restoration Act protect Petitioner from suspicionless traffic stops that are selectively targeted at a religious assembly for the purpose of deterring participants or for general crime control under the pretext of traffic safety checks for driver's license and vehicle registration?**

Standard of Review

The District Court dismissed for failure to state a claim (App.13). This Court must accept all factual allegations in the complaint as true and determine whether the allegations state a claim sufficient to survive a motion to dismiss. United States v. Gaubert, 499 U.S. 315, 327 (1991).

I. The Eighth Circuit Judgment Conflicts with this Court, Federal Circuits and Several State Courts of Last Resort Regarding the Unreasonableness of Selectively Targeting a Particular Class of Citizens with Suspicionless Traffic Stops.

This Court requires trial courts to determine the primary programmatic purposes of suspicionless traffic stops.

> [C]ases dealing with intrusions that occur pursuant to a general scheme absent individualized suspicion have often required an inquiry into purpose at the programmatic level. … 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.

City of Indianapolis v. Edmond, 531 U.S. 32, 46-47 (2000).

"The Fourth Amendment requires that searches and seizures be reasonable. A search or seizure is ordinarily unreasonable in the absence of individualized suspicion of wrongdoing." *Id.* at 37, *citing* Chandler v. Miller, 520 U. S. 305, 308 (1997). "It is well established that a vehicle stop at a highway checkpoint effectuates a seizure within the meaning of the Fourth Amendment." *Edmond* at 40, *citing* Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 450 (1990). Reasonableness of seizures that are less intrusive than arrests depends "on a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers" and is determined by weighing the gravity of the public interest, the degree the seizure serves those interests, and the severity of interference with individual liberty. Brown v. Texas, 443 U.S. 47, 50-51 (1979).

This Court invalidated a discretionary, suspicionless stop for a spot check of a motorist's driver's license and vehicle registration, but acknowledged the States' "vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles, that these vehicles are fit for safe operation, and hence that licensing, registration, and vehicle inspection requirements are being observed." Delaware v. Prouse, 440 U.S. 648, 658 (1979). Accordingly, this Court suggested that "[q]uestioning of all oncoming traffic at roadblock-type stops is one possible alternative." *Id.* at 663. Since *Prouse*, this Court suggested a license checkpoint could not be used if there was "suggestion that the roadblock was a pretext

whereby evidence of narcotics violation might be uncovered in 'plain view' in the course of a check for drivers' licenses." Texas v. Brown, 460 U.S. 730, 743 (1982); *accord* United States v. Morales-Zamora, 974 F.2d 149, 152-153 (10th Cir. 1992) (canine sniff at license checkpoint suggests pretext); *accord Edmond* 531 U.S. *at* 46: "Petitioners argue that the Indianapolis checkpoint program is justified by its lawful secondary purposes of keeping impaired motorists off the road and verifying licenses and registrations. … If this were the case, however, law enforcement authorities would be able to establish checkpoints for virtually any purpose so long as they also included a license or sobriety check."

In evaluating the reasonableness of locations for suspicionless traffic stops to intercept illegal aliens near the Mexican border, this Court stated "[W]e may assume such officials will be unlikely to locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. … Moreover, a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop judicial review. Martinez-Fuerte v. United States, 428 U.S. 543, 559 (1976).

State courts have uniformly required narrow tailoring to serve legitimate interests for locations of suspicionless stops since *Edmond*. [A] trial court may not "simply accept the State's invocation" of a proper purpose, but instead must "carr[y] out a close review of the scheme at issue." State v. Rose, 612 S.E.2d 336, 339 (N.C. App. 2005) *citing* Ferguson v. City of Charlestown, 532 U.S. 67 (2001). "[N]o evidence was presented to show why that road was picked or why they

chose that particular stretch of road. This evidence, or lack thereof, raises serious questions whether the checkpoint was sufficiently tailored." *Rose* at 342-43. Similarly, "the peculiar time of this 'drivers' license' checkpoint and its seemingly remote location could be factors that give rise to a finding that its primary purpose was not to detect unlicensed drivers." State v. Hicks, 55 S.W.3d 515, fn.7 (Tenn. 2001) (holding preponderance of evidence suggested subterfuge and pretext). By contrast, a license checkpoint location was found reasonable when police testified there was a significant problem of unlicensed drivers in a rural county and they offered proof the location was on the route most travelled through that county. Lookingbill v. State, 157 P.3d 130, 135 (OK App. 2007). However, a checkpoint reasonably located to serve an improper purpose in that it was "the main thoroughfare for cars leaving" a high crime neighborhood could not withstand *Edmond*. People v. Jackson, 782 N.E.2d 67, 71-72 (N.Y. 2002).

State courts have similarly required narrow and neutral tailoring of the location of suspicionless sobriety checkpoints. "The location's selection casts further doubt on whether this roadblock was sufficiently related to the public danger of drunk driving." State v. Gerschoffer, 763 N.E.2d 960 (Ind. 2002). In upholding reasonably located sobriety checkpoints prior to *Edmond* and *Sitz*, the New Mexico Court of Appeals held: "Obviously, a location chosen with the actual intent of stopping and searching only a particular group of people, i.e., hispanics, blacks, etc., would not be tolerated." City of Las Cruces v. Betancourt, 735 P.2d 1161, 1165 (N.M.App. 1987).

A sister Circuit came to the polar opposite conclusion from the Eighth Circuit herein when presented with almost identical facts. In support of its holding allowing a claim for civil rights damages to proceed, that court stated: "taking Plaintiff's summary judgment evidence as true, the record indicates that Sheriff Ainsworth was pursuing the programmatic purpose of discouraging the Concert from taking place when he set up and conducted the checkpoints on OPG Road leading to Collins Field." Collins v. Ainsworth, 382 F.3d 529, 543 (5th Cir. 2004). That court held although individual officers conducting traffic stops were shielded by qualified immunity, the Sheriff who authorized the location of the traffic stops was subject to a §1983 claim for damages. The court reasoned the concert was an expressive activity protected by the First Amendment and locating the traffic stops to target the concert patrons was not for a legitimate programmatic purpose as required by this Court's holding in *Edmond*.

A. The Judgment Allows Defendants to Locate Traffic Stops to Affect Only Rainbow Gathering Attendees For the Improper Purpose of Deterring Religious Assembly.

Allegations and affidavits in the record of the case at bar demonstrate Defendants have repeatedly targeted suspicionless traffic stops at rainbow gatherings. There is abundant evidence Defendants have repeatedly acted to interfere with rainbow gatherings in numerous ways in addition to the inherently chilling effect on attendees who know they will be confronted by a suspicionless traffic stop. Petitioner experienced substantial anxiety in Arkansas when forced to stop without individualized suspicion of wrongdoing. That rainbow gathering was

completely legal because USDA Undersecretary Mark Rey intervened to direct the Forest Service to authorize the 2008 rainbow gathering without a signed permit. Despite authorization from the highest levels of government, police implemented a diverse array of harassment, including the selectively targeted mandatory traffic stops under the pretext of license checks. Some citizens were deterred from attending the 2007 gathering by the police tactics, thus depriving Petitioner of ministerial association opportunities during the rainbow gathering. Like *Ainsworth*, deterring participation in First Amendment protected conduct is not a legitimate purpose. Petitioner has a due process right to proceed with discovery regarding the purposes and motives of the 2007 suspicionless traffic stops; and to proceed to jury trial for damages for conspiring to implement the improper purpose of deterring participants.

B. The Judgment Allows Defendants to Locate Traffic Stops to Affect Only Rainbow Gathering Attendees For the Improper Purpose of General Crime Control.

Evidence in the record also suggests the reason for selectively targeting rainbow gathering attendees with suspicionless traffic stops was for general crime control purposes. This was one of the admitted purposes in *Park* (App.132). Although no canine sniffed Petitioner's vehicle at the 2007 license checkpoint in Arkansas, Petitioner was detained longer than necessary so a canine could arrive and supposedly make a false alert in 2006 (App.203-206¶149-166). Another

affiant reported a false supposed canine alert at a traffic stop in 2006 (App.223 Exh.24). Petitioner observed traffic flow being blocked by vehicles being dog-sniffed, interrogated, and searched in 2007 (App.206-207¶167-162). "We decline to suspend the usual requirement of individualized suspicion where the police seek to employ a checkpoint primarily for the ordinary enterprise of investigating crimes." *Edmond* at 44.

1. This Court Must Determine what Constitutes a Reasonable Location for Suspicionless Traffic Stops.

Edmond's requirement of a carful inquiry of the programmatic purposes as elucidated in *Ferguson* and *Rose* was not undertaken in that no discovery was allowed. The neutrality required of a *Prouse* stop was destroyed by non-compliance with the *Martinez-Fuerte* directive that officials not locate a checkpoint where it bears arbitrarily or oppressively on motorists as a class. Defendants' targeting a particular group of people is precisely the discriminatory manner of locating suspicionless stops disapproved in *Betancourt* and found unconstitutional in *Ainsworth*. Instead of located in a neutral location such as the main thoroughfare for all types of citizens as approved in *Lookingbill* and required by the District Court Opinion in *Park*, the location was tailored to the improper

purpose of selectively targeting a particular class of citizens on the only road to the particular gathering site as prohibited in *Jackson*.

Despite ample evidence the programmatic purpose of locating the suspicionless traffic stops on an isolated road was to deter participation in the rainbow gathering and/or for general crime control, and no showing whatsoever to the contrary by Defendants, the Eighth Circuit judgment affirmed the District Court ruling that Petitioner lacks standing. The determinative distinguishing factor from *Park* is that Petitioner herein supplied documentation of selectively targeted traffic stops during many years prior to initiating the complaint. *Park* at 1037.

> It is possible that Ms. Park would have standing to seek injunctive relief 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.

Park at 1040.

"[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, Sec. of Transportation, 515 U.S. 200, 211 (1995).

Historic patterns demonstrate Petitioner will almost certainly have to hide or be subjected to suspicionless stops in the future if Defendants are not restrained. Not

only are such stops capable and likely of repetition, they are also susceptible to escaping judicial review because of the jurisdictional transience of the gatherings.

Park has been cited in numerous cases for the issues of standing for injunctive relief that actually determined the outcome of that case. However, the District Court TRO denial was based on dicta from the Eighth Circuit opinion in *Park* that, to Petitioner's knowledge, has never before been cited for the proposition that it is acceptable to target suspicionless stops at a specific class of people (App.5). The *Park* dicta are ambiguous regarding what was objectionable and what was acceptable about that roadblock. The *Park* court did not have the guidance of this Court's *Edmond* decision rendered several months later.

The District Court erred dismissing Petitioner's suspicionless traffic stop claims because Petitioner is likely to be subjected to similar stops in the future. The District Court erred basing its TRO denial on *Park* dicta that conflicts with *Edmond* and the other cases cited herein. The *Park* dicta must be re-visited to secure uniformity of the law since *Edmond*. This Court must intervene, lest the Eighth Circuit tolerance of discrimination be inconsistent with *Edmond's* progeny.

2. **This Court Must Determine if Targeting any Particular Assembly Creates a Rebuttable Presumption of Pretext.**

Judge Clark's injunction opinion in *Park* was vacated on grounds of standing, but the underlying reasoning is persuasive as to the specific issues raised:

> No matter what the purpose of the 1996 checkpoint, it was unconstitutional. That 1996 checkpoint was set up in such a location as to specifically target Rainbow Family members. That robs a checkpoint of the very premise under which courts have found them legitimate: neutrality. …the Forest Service may not choose some remote location for its checkpoint, travelled mostly only by those attending the gathering. Logically then, the location must be on a public highway used by all types of citizens. (App.145).

None of the post-*Edmond* cases Petitioner is aware of allow suspicionless stops to be located such as to target a particular class of people absent showing narrow tailoring to a legitimate purpose. Selectively targeting a particular religious class of citizens with suspicionless traffic stops should create a presumption of pretext that can be rebutted with a sufficient showing of necessity to a compelling governmental interest by the least restrictive means. Targeting a secular class should require at least a demonstrable nexus of furthering a significant government interest without undue burdens to individual privacy. No substantial traffic related public interest is served by stopping attendees on isolated roads at the entrance to rainbow gatherings to check for licenses. The intrusion is great in consideration of the overall context of police intimidation. The 2007 suspicionless traffic stops at the entrance to the legally authorized rainbow gathering do not pass the *Brown v. Texas* balancing test. Furthermore, without evidence of narrow tailoring to legitimate interests, they appear pretextual like the findings in

Ainsworth, *Hicks*, and *Gerschoffer*—to deter participants and/or for general crime control as prohibited by *Edmond*.

The D.C. Circuit recently acknowledged standing to seek injunctive relief to challenge the legitimacy of the purpose for suspicionless traffic stops located at entrances to a high crime neighborhood for petitioners who, like Petitioner herein, had been stopped and asked for identification when driving into a selectively targeted neighborhood. Mills v. District of Columbia, 571 F.3d 1304 (D.C.Cir. 2009). Like the petitioners in *Mills*, Petitioner has standing to secure injunctive relief. Like the petitioners in *Ainsworth*, Petitioner has standing to seek damages. The District Court erred in not allowing discovery and trial and in not enjoining selectively targeted traffic stops. This is an issue of national importance in that such selective targeting destroys requisite neutrality and could be used by any police authority against any disfavored class for arbitrary reasons.

2. Do the First and Fifth Amendments of the United States Constitution and the Religious Freedom Restoration Act protect Petitioner from government compulsion of participants in a minority religious assembly to associate in a manner contrary to central tenets of sincere religious belief as a condition for peaceful assembly in the traditional public forum of our National Forests when equally effective less restrictive regulatory alternatives further all compelling government interests?

II. The Religious Freedom Restoration Act, First Amendment, and Fifth Amendment Prohibit the Government from Compelling Petitioner to Associate as a Collective Legal Entity as a Condition of Assembling En Masse in a Traditional Public Forum for Peaceful Religious Purposes.

A. The Agent Requirement Violates the Religious Freedom Restoration Act Because it is Not the Least Restrictive Manner of Regulation.

1. This Court Must Determine if Compelling Petitioner to Associate in a Manner Contrary to Central Tenets of Religious Beliefs as a Condition of Assembly in a Public Forum is a Substantial Burden.

This 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).

The District Court mis-states Petitioner's claims to include a challenge to the constitutionality of requiring a permit for non-commercial uses of National Forest lands (App.9-10). Petitioner's facial challenge to Defendants' regulations is to the unnecessary sub-parts that allow officials unbridled discretion to decide which citizens must organize a legal entity capable of appointing an agent to sign as a legal representative for peacefully assembled citizens (App.151). At issue in this appeal is whether Petitioner alleges harms constituting a substantial burden by being coerced into forming principal/agent relationships as a requirement to peacefully assemble en masse in remote areas of National Forests.

Under closely parallel regulatory burdens as those herein, this 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 the First Amendment:

> 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.

Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150, 166-168 (2002).

"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 v. Forest Service, 535 F.3d 1058,1078 (10th Cir. 2008) *citing* Sherbert v. Verner, 374 U.S. 398 (1963) (accommodation of unemployment benefits for practitioner who refused job on Sabbath) and Wisconsin v. Yoder, 406 U.S. 205 (1972) (allowing

alternative to compulsory education for Amish). In this case, Defendants' requirement that citizens act contrary to faith as a condition of religious assembly at the peril of fine and imprisonment impose precisely the types of burdens *Navajo Nation* defined as substantial and as were prohibited in *Yoder* and *Sherbert*.

This Court clarified the *Sherbert* standard of "substantial burden":

> 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.

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

"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. Here, the important benefit is access to this traditional public forum for religious expressive assembly. Defendants condition receipt of this benefit on the religiously proscribed conduct of forming an aggregate principal capable of designating an agent and attempt to deny this benefit by threat of incarceration and fine (App.42;44-48). Petitioner's free exercise is substantially burdened because Defendants put substantial pressure on Petitioner to modify his behavior by associating for religious purposes only with people who form principal/agent relationships as a condition of assembling in a traditional public forum.

"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. It is necessary to institutionalize some principal in order to designate an agent. The regulation'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). 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). 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. The government may not compel citizens to associate in a manner contrary to their expressive principles. Boy Scouts of America v. Dale, 530 U.S. 40 (2000).

2. This Court Must Determine if the Compelled Manner of Association is the Least Restrictive of Petitioner's Religion Regulatory Means of Furthering Compelling Government Interests.

The District Court erred finding it appears government actions do not curtail religious practices in a meaningful way because the regulations have not prevented rainbow gatherings and that it appears to be obvious that rainbow gatherings can occur on private land (App18-19). These findings disregard the record that gatherings have only continued because of civil disobedience (App188-190¶102-113;223Exh.25) or Defendants' inducement of individuals to fraudulently claim to be agents for rainbow gatherings (App.186-188¶88-101); and are not consistent with the pleadings in the light most favorable to Petitioner as is required in considering a motion to dismiss. Petitioner clearly alleges his practice of a sincere religious belief that use of remote public land is necessary for the socio-political neutrality needed to exercise of the central tenet of sincerely held religious belief in peaceful voluntary cooperation during rainbow gatherings; and that Forest Service lands are the only suitable traditional public forum available to accommodate the numbers of pilgrims to annual 4th of July rainbow gatherings. (App.172¶53-55).

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 special use 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 Rey made clear the 2007 rainbow gathering in Arkansas would be legally authorized without designation of any agent (App.220Exh13;191-192¶121-123) and then persisting with attempts to relocate and otherwise harass participants (App.194-197¶132).

History demonstrates the special use authorization alternative of operating plans developed in consultation with concerned citizens—but without designated agents—that was implemented for seven years after the previous version of the non-commercial group use permit regulation was declared unconstitutional is effective in that written reports from USFS resource managers indicate satisfaction with restoration of 4th of July rainbow gathering sites during years there was no agent requirement (App.193-194¶129). Health Department reports reflect similar voluntary cooperation with rainbow gathering participants (App.219 Exh.7).

B. The Agent Requirement Violates the First Amendment Because it is Not the Least Restrictive Manner of Regulation.

1. This Court Must Determine if the Compelled Manner of Association is An Impermissible Prior Restraint on Free Expression Because it is Not a Content Neutral Regulation in that it Prohibits the Fundamental Collective Expressive Religious Message of Rainbow Gatherings.

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. Petitioner alleges

inability to comply with the requirement for an agent to represent rainbow gathering participants because compliance would censor the content of expressive ministerial conduct exercising the sincerely held religious belief that people can voluntarily peacefully associate in public places without forming relationships capable of coercion (App.151¶2), thus justifying strict scrutiny on account of both content based discrimination and on the basis of the Free Exercise claim in conjunction with the Free Speech claim under the hybrid rights doctrine.

The agent requirement is not content neutral (facially as well as applied to Plaintiff in the context of rainbow gatherings) because 75 or more people cannot "engage in the expressive conduct of demonstrating by example that there is a viable alternative social order to the coercive threat of agency type relationships" (App.190¶116).

2. This Court Must Determine if the Compelled Manner of Association is a Facially Invalid Prior Restraint of Free Expression Because it is Impermissibly Broad in that Administrators have Unbridled Discretion to Choose Which Assemblies of 75 or More Persons Must Comply with the Agent Requirement.

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 because of "the

availability of less intrusive and more effective measures" to protect the asserted government interests. 536 U.S. *at* 165, 168. The interests in being anonymous and spontaneous when exercising firm convictions in constitutional rights recognized in *Watchtower Bible* and Plaintiff's asserted religious belief in associating without forming a principal capable of designating agents reflect similar religious beliefs and liberty interests in autonomy.

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 Petitioner'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. Petitioner 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.224Exh.30). However, this case demonstrates Defendants use their unbridled discretion to discriminate against rainbow gathering participants by attempting to force principal-agent relationships. This intentional disparate treatment demonstrates

the facial invalidity of the unfettered authority to impose the agent requirement in that there are no regulatory guidelines to prevent Defendants from choosing any disfavored sub-set of individuals using National Forests and forcing them into unwanted agency relationships.

For all other special use 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 require "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). Yet, Defendants are exempted from confirming the authority of agents for proponents of noncommercial group uses. 251.54(d)(2)(i). The agent requirement is facially over broad and vague because it gives no guidance regarding the requisite degree of similarity among individuals to require an agent. "[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).

Defendants cannot arbitrarily define individuals' relationship when associating in National Forests just as police cannot 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); *also see* Lanzetta v. New Jersey, 306 U.S. 451 (1939) (failure to define "gang" and "membership" rendered statute unconstitutionally vague).

The District Court erred finding issues of over-breadth/vagueness were litigated in prior cases because the issues are not the same. Prior litigation challenged an "otherwise in the public interest" clause that has since been remedied. The current challenge relates to the unbridled discretion of Defendants to determine which assemblies of 75 or more people must form principle and agency relationships. Although the asserted intent of the regulations was described in dicta in prior litigation, the questions of content neutrality and unbridled discretion to choose who must form principal-agent relationships were never litigated issues. The current case raises these questions squarely by demonstrating the legitimate purposes asserted in support of the regulations serve as a pre-text for content based religious discrimination by using the agent requirement to harass and attempt to exclude rainbow gathering participants from National Forests. Furthermore, Petitioner demonstrates unbridled discretion because the regulations have not been uniformly applied. The agent requirement is unconstitutionally broad and vague on its face and should be severed from the otherwise valid noncommercial special use regulations.

3. This Court Must Determine if the Compelled Manner of Association is an Impermissible Burden to Free Exercise of Religion Because it is Hybridized with Other Constitutional Burdens.

Courts have applied the Hybrid Rights Doctrine in diverse contexts. *See generally* 163 A.L.R. Fed. 493 What Constitutes "Hybrid Rights" Claim Under Employment Div., Dept. of Human Resources v. Smith.

> 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… [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.

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 881-882 (1990).

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 infringements. When so many constitutional protections are simultaneously threatened, government actions can no longer be presumed benign because the combination of burdens strikes offense to the essential core of values underlying the Constitution.

Selectively targeted suspicionless traffic stops and intrusive surveillance of pacifist religious camps infringe reasonable expectations of privacy in violation of the Fourth Amendment. The agent requirement compels adherence to a government prescribed form of religion that is contrary to sincere religious beliefs as a condition of peaceful religious assembly in a public forum in violation of the Establishment Clause of the First Amendment; it censors the content of the

expressive conduct of voluntary cooperation in a public forum with no authority to coerce in violation of the Free Speech Clause of the First Amendment; it allows unbridled administrative discretion to choose which unaffiliated assemblies of 75 or more persons must designate an agent based on the content of the persons' expressive message in violation of the Free Speech Clause of the First Amendment; it prohibits the unique opportunity to petition the government for redress of grievances through conduct demonstrating an alternative social order based on peaceful voluntary cooperation in a public forum without coercion in violation of the Petition Clause of the First Amendment.

The combined burdens of unreasonable seizures and searches with the agent requirement deter peaceful association in violation of the Free Assembly Clause of the First Amendment. The traffic stops and agent requirement intentionally deprive rainbow gathering participants of equal protection of the laws allowing access to National Forests for the improper motive of discriminating against practices of a minority religious assembly in violation of the Due Process and Equal Protection Clauses of the Fifth Amendment. The traffic stops and agent requirement substantially burden Petitioner's free exercise of religion under the hybrid rights doctrine and must therefore be subjected to the strict scrutiny of the compelling interest/least restrictive means test.

C. The Traffic Stops and Agent Requirement Violate the Fifth Amendment Because the Intended Improper Purpose is to Exclude Rainbow Gatherings from National Forests.

A wide variety of rights secured by the Constitution and federal statutes have been protected with 42 U.S.C. §§ 1985 and 1986 by courts. *See generally,* 162 A.L.R. 1373, Validity and Construction of Statutes Making Conspiracy to Deprive or Deprivation of Constitutional Right a Federal Offense. Similar to Petitioner's religious scruples about not being compelled to express allegiance to principal-agent relationships, Catlette v. United States, 132 F.2d 902 (4th Cir. 1943) recognized an equal protection violation from harassment constituting discrimination against the religious expressive conduct of Jehovah's Witnesses in refusing to salute the flag. This Court has long recognized the right to be free from government compelled expression. West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) (can't compel students to salute flag); Elrod v. Burns, 427 U.S. 347 (1976) (can't compel deputies' political allegiance as condition of employment).

1. This Court Must Determine if Petitioner Alleges Sufficient Prima Facie Evidence to Proceed with Discovery Regarding the Motives of Defendants Hornstein and Unknown Does When They Included the Agent Requirement in the Otherwise Valid Non-Commercial Special Use Authorization Regulations.

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.19). Petitioner's evidence is that 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 (App.224Exh.30).

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 (App.44-48). 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.90-91). 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.53). 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.

2. This Court Must Determine if Petitioner Alleges Sufficient Prima Facie Evidence to Proceed with Discovery Regarding the Motives of Defendants Hornstein and Does When they Modified USFS Policy to Allow Police to Target Special Events with Suspicionless Traffic Stops and then Decided to Target Rainbow Gatherings with Such Seizures.

Petitioner has a reasonable due process need for discovery to discern why in 1996 Defendant Hornstein directed police to ignore the 1995 policy statement in the Federal Register that it is not appropriate to target license checks at rainbow gatherings. There is sufficient evidence Defendants pursued objectives with the suspicionless stops in 2007 that Defendants knew or should have known were improper to proceed with discovery and to trial.

3. This Court Must Determine if Petitioner Alleges Sufficient Prima Facie Evidence to Proceed with Discovery Regarding Motives of Defendants Lampshire and Krogstad When They:

a. Delayed issuance of an infraction summons to allow time for canine arrival, disregarding Florida v. Royer, 460 U.S. 491, 500 (1983);

b. Searched Petitioner's vehicle without probable cause and found no contraband, disregarding Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971);

c. Conducted a pat down search without reason to suspect Petitioner was dangerous and found no weapons, disregarding Terry v. Ohio, 392 U.S. 1, 29 (1968);

d. Pinched, probed, and squeezed to determine the contents of Petitioner's pockets during a pat down search without probable cause Petitioner possessed contraband and found no contraband, disregarding Minnesota v. Dickerson, 508 U.S. 366 (1993).

Defendants deny these events happened in their affidavits. Summary judgment is not appropriate because there are controverted factual allegations.

CONCLUSION

The District Court was only able to rationalize dismissal through a series of errors: using pre-*Edmond* dicta from *Park* to allow targeting of suspicionless stops, ignoring distinguishing facts from *Park* to deny injunctive standing, and ignoring allegations of search and seizure beyond clearly established law; mis-stating Petitioner's claim as challenging a permit requirement instead of the narrow attack on the severable agent requirement; presuming facts from other cases to define Petitioner's relationship to rainbow gatherings; ignoring religious beliefs that prevent ability to appoint agents; concluding there are adequate alternative channels of communication by expressing conduct that people can cooperate on public land by gathering on private land; ignoring demonstrated success of operating plans cooperatively developed with citizens who are not agents; finding overbreadth of discretion to choose which unaffiliated people must institutionalize and designate an agent was previously litigated; assuming the agent requirement is content neutral based on dicta from previous cases; denying conspiracy claims on the erroneous basis that equal protection comparison classes were both rainbow gathering attendees; concluding constitutional violations were tort claims and the tortfeasors were protected by qualified immunity; and in prohibiting discovery of motives for traffic stops and the agent requirement.

Because of the interrelated nature of these two important questions and the disputed nature of the facts at this stage of the case, this Court has a valuable

opportunity to determine the acceptable parameters of government impositions in a broad range of secular to religious contexts.

The Eighth Circuit Judgment allows arbitrary targeting of suspicionless traffic stops at a particular class of citizens in apparent conflict with other courts. This issue is of national importance because suspicionless traffic stops could be used to target any disfavored class of citizens if narrow tailoring is not required.

The agent requirement issue is more nuanced. Its effect as applied is to sacrifice personal rights under the 1st Amendment and RFRA by turning these rights to revocable privileges granted to a fictional entity. That is the evil genius of the agent requirement, and why this is a crucial Constitutional fight for all Americans. It is not just about rainbow gatherings – it is about the future of individual liberty to freely associate in public.

A threat to any religion is a threat to all religious freedom. Our founders and the modern Congress have carved out special protection for religious liberty. When folks practice religion in peace, the government should not interfere. Rainbow gatherings are a blending of the cultural fountainheads of diverse religious traditions into the melting pot of harmonized diversity that is the very essence of the American dream. The effect of the agent requirement would make the founders roll in their graves if the federal government can force people to adhere to directives of government-appointed church spokespersons. A balanced analysis is needed to assess the sharp edge of censorship the agent requirement actually is when applied to rainbow gatherings. This Court should grant the writ.

Respectfully submitted,

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