

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

TONY NENNINGER,)
)
)
 Plaintiff-Appellant,)
)
 v.)
)
 UNITED STATES FOREST SERVICE,)
)
 Abigail Kimbell, Chief of FS,)
)
 MARK REY,)
)
 in official capacity as)
 Under Secretary for USDA)
)
 ELLEN HORNSTEIN,) **Case No. 08-3106**
)
 individually and in official capacity)
 as FS legal counsel,)
)
 JOHN TWISS,) **DEFENDANTS-APPELLEES' RESPONSE**
) **TO PLAINTIFF-APPELLANT'S**
 individually and in official capacity) **PETITION FOR REHEARING EN BANC**
 as FS law enforcement chief,)
)
 OFFICER LAMPSHIRE,)
)
 individually and in official capacity)
 in FS law enforcement,)
)
 OFFICER KROGSTAD,)
)
 individually and in official capacity)
 in FS law enforcement,)
)
 UNKNOWN JOHN AND JANE DOES,)
)
 individually and/or in official)
 capacities for FS and/or other)
 government agencies,)
)
 Defendants-Appellees.)

STATEMENT OF THE CASE

Plaintiff-Appellant Tony R. Nenninger is a member of the Rainbow Family, an unincorporated, loosely structured group of individuals that regularly gathers in undeveloped sites on National Forest System lands to pray for peace, discuss environmental and other contemporary political and social issues, and exchange, develop, express, and demonstrate their ideas and views. Annual national gatherings have occurred in different National Forests around July 4 since 1972. These gatherings draw more than 20,000 participants and last for a month or more. Black v. Arthur, 18 F. Supp. 2d 1127, 1130 (D. Or. 1998) (citations and internal quotes omitted), aff'd, 201 F.3d 1120 (9th Cir. 2000).

Problems associated with loosely organized conglomerations of 20,000 or more persons in remote areas of the forests are inevitable. In the past, the Forest Service has encountered difficulties stemming from the increasing use of the National Forest System by large groups, including public health and safety concerns, conflicts with other uses, and environmental impacts. See 60 Fed. Reg. 45,258 (Aug. 30, 1995) (codified at 36 C.F.R. Part 251, Subparts B and C, and 36 C.F.R. Part 261, Subpart A) (hereinafter “the rule”).

The rule requires those wishing to use or occupy National Forest System lands in noncommercial groups of 75 or more to obtain a permit to do so. Persons wishing to obtain a permit must provide minimal information in a short application form, 36 C.F.R. § 251.54(d)(1) and (d)(2)(i), including the name of the person or persons 21 years of age or older who will sign the permit on behalf of the applicant. 36 C.F.R. § 251.54(d)(2)(i)(E). The rule directs potential applicants to contact the Forest Service as early as possible in advance of the proposed use, 36 C.F.R. § 251.54(a), and requires applicants to apply at least 72 hours before the proposed event

begins, 36 C.F.R. § 251.54(g)(2)(iv). A permit issues automatically 48 hours after delivery unless the Forest Service denies it in writing, giving reasons for the denial. 36 C.F.R. § 251.54(g)(3)(i). The Forest Service may reject an application only if it fails to meet one of eight narrow, content-neutral criteria. See 36 C.F.R. § 251.54(g)(3)(ii). These criteria are narrowly tailored to the three rationales for the rule: protection of National Forest System resources, public health and safety concerns, and allocating space among competing uses. If some alternative time, place, or manner of use would allow the applicant to meet all the criteria, the Forest Service must offer this alternative. See 36 C.F.R. § 251.54(g)(3)(iii).

In this case, Nenninger sued the Forest Service and various Departmental officials, asserting that the rule violates the Religious Freedom Restoration Act (RFRA), that the rule and checkpoints conducted at Rainbow Family gatherings violate the Fifth Amendment and civil rights laws, and that his free exercise claim is subject to strict scrutiny under the hybrid rights doctrine. The district court dismissed Nenninger's claims. A panel of this Court affirmed in a per curiam unpublished opinion.

SUMMARY OF ARGUMENT

This Court should deny Nenninger's petition for rehearing en banc per Federal Rule of Appellate Procedure 35(a). The petition does not present questions that are necessary for the full Court to decide. None of the issues raised by Nenninger is a question of exceptional importance, and none of the questions implicates a conflict in circuit precedent.

ARGUMENT

I. Standard of Review.

Rehearing en banc is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions or (2) when the appeal involves a question of exceptional importance. Fed. R. App. P. 35(a). Nenninger's petition does not meet either standard. The Panel's affirmance in this case was amply supported by precedent, including a decision in this Court, and the appeal does not present a question of exceptional importance.

II. The Panel Properly Affirmed The District Court's Ruling That Nenninger Failed To State A Claim Under RFRA.

Nenninger has failed to show that his RFRA claim (Pet. at 7-11) merits en banc consideration. Nor has he shown any conflict between the panel's decision and Watchtower Bible & Tract Society of New York v. Village of Stratton, 536 U.S. 150 (2002).

Nenninger has not shown that the rule imposes a substantial burden on religious exercise, as required to establish a prima facie case under RFRA. 42 U.S.C. § 2000bb-1(a); In re Young, 82 F.3d 1407, 1418 (8th Cir. 1996). The Supreme Court has explicitly rejected the idea that spiritual injury from the government's own actions may constitute a "substantial burden" for purposes of free exercise challenges (and therefore, for purposes of RFRA). Specifically, the Supreme Court has categorically rejected the application of the compelling interest test to the government's management of its own land. Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 453 (1988).

This Circuit has held that to be considered a substantial burden, a governmental action must "significantly inhibit or constrain conduct or expression that manifests some central tenet of

a [person's] individual [religious] beliefs; must meaningfully curtail a [person's] ability to express adherence to his or her faith; or must deny a [person] reasonable opportunities to engage in those activities that are fundamental to a [person's] religion.” Young, 82 F.3d 1418 (quoting Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995)). “Thus, reasonable time, place, or manner restrictions upon communal religious gatherings would often not necessitate the identification of a compelling state interest.” Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995). See also Navajo Nation v. United States Forest Serv., 535 F.3d 1058, 1070 (9th Cir. 2008) (en banc) (use of recycled wastewater on ski area that covers one percent of mountains sacred to Native American tribe does not force tribe to choose between following tenets of their religion and receiving government benefit or to act contrary to their religion under threat of civil or criminal sanctions).

In this case, the requirements in the rule for a free permit that must be granted unless one or more narrowly tailored criteria are met and for signature of the permit by an agent of the group do not “significantly inhibit or constrain,” “meaningfully curtail,” or “deny . . . reasonable opportunities to engage in” religious expression at Rainbow Family gatherings. To the contrary, Rainbow Family gatherings have continued to occur every year since the rule was implemented. In addition, Rainbow Family members have the option of gathering on non-National Forest System lands if they do not wish to comply with the rule’s minimal requirements. The rule involves management of federal land to serve legitimate government purposes, i.e., protection of public health and safety and national forest resources and allocation of space among competing uses. Under Lyng, Nenninger’s alleged spiritual injury from the permit and signature requirement cannot constitute a substantial burden for purposes of RFRA.⁵

⁵ Even assuming that the permit and signature requirement imposed a substantial burden on Nenninger’s religious expression, the Forest Service has a compelling interest in requiring a permit and

Watchtower Bible is not to the contrary. That case involved an ordinance that prohibited canvassing on private property without a permit, which imposed a direct restraint on speech. In addition, the ordinance was overbroad and was not narrowly tailored to the village's interests. 536 U.S. at 167-68. In contrast, the permit requirement in the rule does not apply to canvassing; it applies to large group gatherings on National Forest System lands. Moreover, four federal courts of appeals, including this Court—in a case involving the same plaintiff in which rehearing and rehearing en banc were denied—have held that the rule is not overbroad and is narrowly tailored. United States v. Nenninger, 351 F.3d 340 (8th Cir. 2003), reh'g and reh'g en banc denied; United States v. Adams, 388 F.3d 708 (9th Cir. 2004); United States v. Kalb, 234 F.3d 827, 832 (3d Cir. 2000), cert. denied sub nom. Sedlacko v. United States and Beck v. United States, 534 U.S. 1113 (2002); Black v. Arthur, 201 F.3d 1120 (9th Cir. 2000); United States v. Johnson, 159 F.3d 892 (4th Cir. 1998).

III. The Panel Properly Affirmed The District Court's Dismissal Of Nenninger's Fifth Amendment and Civil Rights Claims.

Nenninger's due process claim (Pet. at 11-14) does not merit en banc consideration either. That claim is tantamount to a selective prosecution claim, which is subject to "ordinary equal protection standards." United States v. Armstrong, 517 U.S. 456, 466 (1996) (quoting Wayte v. United States, 470 U.S. 598, 608 (1985)). To overcome the presumption of regularity and proper motive afforded law enforcement officials, see Armstrong, 517 U.S. at 465, a plaintiff must prove (1) that the government has not prosecuted similarly situated persons and (2) that race, religion, or

signature for noncommercial group uses (i.e., to protect forest resources and public health and safety and to make the permit enforceable, see, e.g., Young, 82 F.3d at 1420 (public safety is a compelling interest under RFRA)), and the permit and signature requirement are the least restrictive means of meeting those objectives (they are minimally burdensome; the permit is free and easy to obtain (see 36 C.F.R. §§ 251.54(d)(1), (d)(2)(i), (g)(2)(iv), and (g)(3)(i)-(iii))).

some other impermissible classification motivated the prosecution. See Armstrong, 517 U.S. at 456; Freeman v. City of Santa Anna, 68 F.3d 1180, 1187 (9th Cir. 1995).

Nenninger has not established either element of a selective prosecution claim. The government has consistently and fairly enforced the rule and other laws and regulations in the context of other noncommercial gatherings on National Forest System lands involving 75 or more people. Appendix 151; Park v. Forest Service, 205 F.3d 1034, 1039 (8th Cir. 2000) (Forest Service checkpoints have routinely been used at much smaller gatherings, such as fraternity parties and large hunting groups). Moreover, enforcement of the rule at Rainbow Family gatherings is not motivated by race, religion, or some other impermissible classification, but rather is based on the content-neutral criterion of a group reaching a size of 75 or more people and the legitimate governmental interests identified in the rule.

IV. The Panel Properly Affirmed The District Court's Conclusion That The Hybrid Rights Doctrine Does Not Apply.

Nenninger's hybrid rights claim (Pet. at 14-15) does not merit en banc review either. Under the hybrid rights doctrine, a court may apply strict scrutiny to neutral laws of general applicability when a free exercise claim is combined with violation of other constitutional protections, such as freedom of speech or the press. Smith, 494 U.S. at 881-82; Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 473 (8th Cir. 1991). Nenninger cannot establish a hybrid rights claim, as numerous courts, including this Court, have upheld the constitutionality of the rule under the Freedom of Speech and Freedom of Assembly Clauses of the United States Constitution. See cases cited supra at 6. Finally, Cornerstone Bible Church v. City of Hastings, 948 F.2d 464 (8th Cir. 1991) (Pet. at 15), presents no conflict with the panel's decision in this case. In Cornerstone, this Court remanded the plaintiff's hybrid rights claim because the Court

reversed the grant of summary judgment against the plaintiff's free speech, freedom of association, equal protection, and due process claims, thereby "breathing life" back into the hybrid rights claim. Id. at 473. Thus, Cornerstone supports the district court's ruling that the hybrid rights doctrine requires combination of other valid constitutional claims with a free exercise claim, which cannot occur here.

V. The Panel Properly Affirmed The District Court's Ruling That Nenninger Lacks Standing To Seek Injunctive Relief.

To invoke the jurisdiction of a federal court, one must have suffered an "injury in fact," and "such an injury must be concrete, particularized, and either actual or imminent." In the case of complaints for injunctive relief, the requisite "injury in fact" element of standing requires a showing that the plaintiff faces a real threat of ongoing or imminent harm. See City of Los Angeles v. Lyons, 461 U.S. 95, 101-05 (1983); Boyle v. Anderson, 68 F.3d 1093, 1100-01 (8th Cir. 1995). Vague, speculative, and conclusory allegations of harm or threatened harm are insufficient to create standing. See Park, 205 F.3d at 1037.

In this case, as Nenninger conceded in his brief on appeal (App. Br. at 15-16, 41-43), he does not represent other Rainbow Family members who gather on National Forest System lands, since he claims that the Rainbow Family consists of cooperative individuals who remain autonomous and free from organized, associated relationships. Therefore, to have standing, Nenninger must show that the threatened harms he alleges in his appeal are real and immediate, and that he himself is the subject of these impending harms. Appendix 546-47. The district court correctly concluded that Nenninger cannot make this showing. Specifically, the district court ruled that Nenninger's alleged past exposure to improper conduct cannot establish the present

likelihood that he will again be subject to similar harms during future Rainbow Family gatherings and held that this type of threat to Nenninger is, at best, speculative. Appendix 547.

In support of his standing, Nenninger contends that he plans to participate in future Rainbow Family gatherings. Pet. at 13. However, this Court in Park held that this showing is insufficient. 205 F.3d at 1038. In Park, the plaintiff challenged the constitutionality of a Forest Service checkpoint established at a national Rainbow Family gathering. This Court concluded that while an upcoming annual event was sufficiently temporally proximate to be considered an immediate threat, the plaintiff lacked standing because she could not establish the probability that the Forest Service would use an unconstitutional checkpoint at the next national gathering. Id.

As in Park, 205 F.3d at 1038-40, there is no indication in the record in this case that the Forest Service has an official policy of using unlawful checkpoints or engaging in any other unlawful conduct against the Rainbow Family, that the Forest Service harbors an unofficial animus against the Rainbow Family, or that the Forest Service has exhibited a pattern of unconstitutional conduct in connection with Rainbow Family gatherings. To the contrary, in promulgating the rule, the Forest Service expressly noted that its regulations were designed to comply with applicable law and that the public interest the agency sought to protect referred only to public health and safety, preserving National Forest System lands, and allocating space among different groups and uses. 60 Fed. Reg. 45,260, 45,262, 45,265, 45,266 (Aug. 30, 1995); Nenninger, 351 F.3d at 345. In addition, there is no evidence of the Forest Service treating similarly situated groups differently because there are no similarly situated groups, given the size of the Rainbow Family's national gatherings, and checkpoints are routinely used at much smaller gatherings.

The Forest Service's national vehicle checkpoint policy, which incorporates Fourth Amendment requirements (see Appendix 333-39), has been upheld by the only court that has addressed its constitutionality. Addison v. Forest Service, 108 F. Supp. 2d 1365 (M.D. Fla. 2000). The checkpoints at the 2006 and 2007 national Rainbow Family gatherings were constitutional because they were conducted in compliance with the Forest Service's national vehicle checkpoint policy. See Appendix 151, 153, 155. In addition, as shown by their declarations, Law Enforcement Officers Lampshire and Krogstad conducted themselves at the 2006 and 2007 national Rainbow Family gatherings in accordance with applicable law and agency policy and in no way violated the plaintiff's Fourth Amendment rights. See Appendix 156-63.

Therefore, like the parties in Lyons and Park, Nenninger lacks standing to seek injunctive relief in this case.

CONCLUSION

For the foregoing reasons, Nenninger's petition for rehearing en banc should be denied.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Claude S. Hawkins, Jr., Assistant United States Attorney for the Western District of Arkansas, certify that on January 25, 2010, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which sent notification of the filing to the Appellant:

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