

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

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**No. 08-3106**

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**TONY NENNINGER, Appellant**

**v.**

**UNITED STATES FOREST SERVICE, *et al.*, Appellees**

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**APPEAL FROM  
UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF ARKANSAS  
FAYETTEVILLE DIVISION**

**Honorable Jimm Larry Hendren  
Chief United States District Judge**

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**BRIEF FOR THE APPELLEES**

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## STATEMENT CONCERNING ORAL ARGUMENT

The United States does not believe the issues presented by this appeal require oral argument. The decisional process would not be significantly aided by oral argument because the facts and legal arguments are adequately presented in the briefs and record. The United States, therefore, waives oral argument.

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## SUMMARY OF THE CASE

This is an appeal from the district court's order and judgment granting the defendants' motion to dismiss or, in the alternative, for summary judgment and dismissing the complaint and amended complaint with prejudice.

Specifically, the district court dismissed Nenninger's free speech and free exercise claims; his claims under the Religious Freedom Restoration Act (RFRA), 42 U.S.C. § 2000bb *et seq.*; his Fifth Amendment due process claim; his civil rights claims; his tort claims against the individually named defendants in their official capacity; and his claims against the individual defendants named in their personal capacity. In addition; the district court dismissed Nenninger's complaint on the grounds that he lacked standing to seek injunctive relief. (Appellant's Appendix<sup>1</sup>, pp. 527-48)

Nenninger now appeals from that decision on the following grounds: he contends that (1) Appellees violated the Fourth Amendment of the United States Constitution in connection with various law enforcement activities associated with Rainbow Family gatherings on National Forest System lands and that he has standing to pursue those claims; (2) the Forest Service's noncommercial group use

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<sup>1</sup>Pursuant to Rule 30A(a)(2), Local Rules of the Eighth Circuit Court of Appeals, the entire record is available for review since the appellant filed this appeal *pro se*. However, references will be made to Appellant's Appendix, and shall be referred to as "Appendix."

permit and signature requirement constitute a substantial burden on his exercise of religion and therefore violate RFRA; (3) the noncommercial group use permit and signature requirement violate the Due Process Clause of the Fifth Amendment to the United States Constitution and certain federal civil rights laws codified at 42 U.S.C. §§ 1985, 1986, and 1988; and (4) Appellees violated the Free Exercise Clause of the First Amendment to the United States Constitution under the hybrid rights doctrine.

Nenninger has not appealed the district court's ruling rejecting his claims challenging the noncommercial group use permit and signature requirement under the Free Speech and Free Exercise Clauses of the First Amendment of the United States Constitution; his state law claims against the Government and individual defendants in their official capacity; and his claims against individual defendants in their personal capacity. *See* Appellant's Opening Brief (App. Brief).<sup>2</sup>

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<sup>2</sup>The declarations of the individual defendants sued in their personal capacity speak for themselves. (Appendix 146-47, 150-63) Contrary to Nenninger's assertions (App. Br. at 25), Ms. Hornstein has not 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 . . ." Likewise, Mr. Twiss has not admitted to "every allegation made in Plaintiff's complaint," as stated in Nenninger's opening brief (App. Br. at 29).

## **PRELIMINARY STATEMENT**

Nenninger invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1343, 1367, 2201, and 2202. (Appendix, p. 76) The district court entered judgment on July 11, 2008, in accordance with the court's order dated July 3, 2008, granting the defendants' motion to dismiss or, in the alternative, for summary judgment. (Appendix, pp. 527-49) The district court's order denying Nenninger's motion to amend judgment was entered August 20, 2008. (Appendix, pp. 597-99) The notice of appeal, which was filed September 9, 2008, was timely under 28 U.S.C. § 2107(b) and Federal Rule of Appellate Procedure 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

## STATEMENT OF THE ISSUES

**I. Whether the district court was correct when it concluded that Nennerger failed to state a claim under the Religious Freedom Restoration Act (RFRA).**

42 U.S.C. § 2000bb-1(a)

*Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990)

*Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439 (1988)

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

**II. Whether the district court was correct when it dismissed Nennerger's Fifth Amendment and Civil Rights claims because he failed to show that the noncommercial group use permit and signature requirement have a discriminatory effect and were motivated by a discriminatory purpose and the facts pled in the complaint do not support a cause of action under 42 U.S.C. § 1988.**

*Freeman v. City of Santa Anna*, 68 F.3d 1180 (9th Cir. 1995)

*Oyler v. Boles*, 368 U.S. 448 (1962)

*United States v. Armstrong*, 517 U.S. 456 (1996)

*Wayte v. United States*, 470 U.S. 598 (1985)

**III. Whether the district court properly dismissed Nenninger's Fourth Amendment claims.**

*Anderson v. Creighton*, 483 U.S. 635 (1987)

*Harlow v. Fitzgerald*, 457 U.S. 800 (1982)

*Malley v. Briggs*, 475 U.S. 335 (1986)

*Wilson v. Layne*, 526 U.S. 603 (1999)

**IV. Whether the district court was correct when it dismissed the free exercise claims despite Nenninger's position that the hybrid rights doctrine required strict scrutiny.**

*Black v. Arthur*, 201 F.3d 1120 (9th Cir. 2000)

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

*Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990)

*Miller v. Reed*, 176 F.3d 1202 (9th Cir. 1999)

**V. Whether Nenninger lacks standing to seek injunctive relief.**

*Boyle v. Anderson*, 68 F.3d 1093 (8th Cir. 1995)

*City of Los Angeles v. Lyons*, 461 U.S. 95 (1983)

*Park v. Forest Service*, 205 F.3d 1034 (8th Cir. 2000)

*O'Shea v. Littleton*, 414 U.S. 488 (1974)

## STATEMENT OF THE CASE

### I. Background.

Plaintiff-Appellant Tony R. Nenninger is a member of the Rainbow Family.

As explained by another court:

The Rainbow Family is an unincorporated, loosely-structured group of individuals that regularly gathers in undeveloped sites in National Forests to pray for peace, discuss environmental and other contemporary political and social issues, and exchange, develop, express and demonstrate their ideas and views. Annual gatherings have occurred in different National Forests on and around July 4 since 1972. These gatherings draw more than 20,000 participants and last for a month or more. Smaller regional gatherings take place throughout the year in National Forests across the country.

*Black v. Arthur*, 18 F. Supp. 2d 1127, 1130 (D. Or. 1998) (citations and internal quotation marks omitted), *aff'd*, 201 F.3d 1120 (9th Cir. 2000).

Although the Rainbow Family often displays an admirable concern for the preservation of the National Forest System, 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. *See* USDA, Final Rule, Land Uses & Prohibitions, 60 Fed. Reg. 45,258 (Aug. 30, 1995) (hereinafter “Final Rule”).<sup>3</sup> As the district court found in *Black*, 18 F. Supp. 2d at

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<sup>3</sup>The preamble to the Final Rule includes an exhaustive review of applicable First Amendment case law, demonstrating the Forest Service's awareness of its constitutional duties and its attempt to conform the regulatory scheme to First Amendment strictures.

1130, “[i]mproperly closed latrines, eroded and compacted soil, destruction of vegetation, and litter have been problems at previous gatherings.”

Problems associated with national Rainbow Family gatherings have on occasion been more serious. For example, in the 1987 national Rainbow Family gathering in North Carolina, inadequate sanitation resulted in an outbreak of shigellosis, a form of bacterial dysentery transmitted by contamination from human waste. The contamination resulted from the scattering of uncovered human waste. Flies, bare human feet, and other vectors spread the shigellosis bacteria. Two physicians from the Centers for Disease Control in Atlanta visited the 1987 national gathering from July 4–11 and estimated that 65 percent of those remaining suffered from shigellosis. By the middle of August, twenty-five states reported outbreaks of the disease traced to persons attending the gathering. Similarly, in the 1991 national gathering in Vermont, uncovered human waste was left scattered throughout the forest, and in the 1992 national gathering in Colorado, latrines were dug too close to open water. *See* Final Rule, 60 Fed. Reg. at 45, 263-45, 264.<sup>4</sup>

In addition, competing or inappropriate proposed uses of the National Forest System by groups other than the Rainbow Family have posed threats to physical

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<sup>4</sup>The 1987, 1991, and 1992 national Rainbow Family gatherings resulted in soil compaction, destruction of vegetation, and exposed tree roots. Gatherers left filled garbage bags, cigarette butts, and plastic twist ties throughout the sites. *See* Final Rule, 60 Fed. Reg. at 45, 263-45, 264. Eroded soil from paths leading down to sources of fresh water threatens the quality of stream banks and, thus, the long-term quality of the water.

safety. *See, e.g.*, Final Rule, 60 Fed. Reg. at 45, 281 (describing how a group called “We The People” sought to meet at sites where previous Mississippi National Guard military training had resulted in leftover unexploded ordnance and where the National Guard had scheduled ongoing tank maneuvers).

To preserve National Forest System resources, to address concerns of health and safety, and to allocate space among competing users, the Forest Service promulgated the Final Rule in 1995. *See* Final Rule, 60 Fed. Reg. at 45, 258, 45, 262-45, 264, 45, 278 (describing the public interests the Final Rule was designed to protect). In brief, the Forest Service regulation codified at 36 C.F.R. Part 251, Subparts B and C, and 36 C.F.R. Part 261, Subpart A, requires those wishing to use or occupy National Forest System lands in noncommercial groups of 75 or more to obtain a special use authorization or permit to do so.<sup>5</sup> Persons wishing to obtain an authorization must provide minimal information in a short application form. *See* 36 C.F.R. § 251.54(d)(1) and (d)(2)(i). One of the pieces of information the applicant must provide is “[t]he name of the person or persons 21 years of age or older who will sign a special use authorization on behalf of the proponent.” 36 C.F.R. § 251.54(d)(2)(i)(E). The regulation directs potential applicants “to contact the Forest

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<sup>5</sup>The Forest Service regulations have recently been re-codified, so that the subsections referred to by certain courts considering challenges to these regulations may be different from those referred to by the parties in this litigation. No relevant substantive changes were made to the regulations.

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, *See* 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. *See* 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). 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).

## **II. Decision Below.**

Nenninger brought this lawsuit solely on his own behalf against the United States Department of Agriculture (USDA), Forest Service, and several named and unnamed officials in USDA in both their personal and official capacities. In his complaint filed June 25, 2007, Nenninger requested this Court for an emergency temporary restraining order enjoining the Forest Service from enforcing the noncommercial group use rule at the 2007 national Fourth of July Rainbow Family gathering in the Ozark National Forest. (Appendix, pp. 1-60) By order dated June 28, 2007, the Court denied the motion for an emergency temporary restraining order. (Appendix, pp. 61-66) On February 20, 2008, plaintiff filed an amended complaint

naming the Director of the Forest Service's Law Enforcement and Investigations Staff in his personal and official capacities. (Appendix, pp. 74-138)

Count I of the amended complaint challenges the constitutionality of the noncommercial group use permit requirement of the Final Rule at 36 C.F.R. §§ 251.54(d)(1), 251.54(d)(2)(i)(E), and 251.54(g)(3)(ii)(H). Specifically, the amended complaint alleges that these regulations violate plaintiff's First Amendment rights to freedom of speech and freedom of religion; Fifth Amendment rights to due process and equal protection; the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb *et seq.*; and civil rights laws codified at 42 U.S.C. §§ 1985, 1986, and 1988. Count I further alleges that the individually named defendants violated these rights in implementing and enforcing the regulations. (Appendix, pp. 107-24) Count II of the amended complaint alleges that certain law enforcement actions taken by individuals acting in their personal and official capacities violated plaintiff's Fourth Amendment rights and constituted selective enforcement, malicious prosecution, false arrest, assault, invasion of privacy, fraud under duress, and libel. (Appendix, pp. 124-33) Count III of the amended complaint recasts Counts I and II as a conspiracy, based on the same legal standards. (Appendix, pp. 133-36)

On July 3, 2008, the district court dismissed the case in its entirety with prejudice. The district court dismissed Nenninger's free speech claim on the grounds

that it is the law of this Circuit that the Final Rule is not unconstitutionally overly broad or vague and constitute a valid time, place, and manner restriction. (Appendix, p. 535)

The district court also dismissed Nenninger's free exercise claim on the grounds that the Final Rule is a facially neutral regulation of general applicability, which may be applied to religiously motivated conduct without violating the Free Exercise Clause. (Appendix, pp. 536-37)

The district court dismissed Nenninger's RFRA claim because the court found that the noncommercial group use permit and signature requirement do not substantially burden the practice of Nenninger's religion. (Appendix, pp. 537-39)

The district court dismissed Nenninger's Fifth Amendment Due Process claim because the court found that he had failed to show that the noncommercial group use permit and signature requirement have a discriminatory effect and were motivated by a discriminatory purpose. (Appendix, pp. 539-40)

The district court dismissed Nenninger's claims under 42 U.S.C. §§ 1985 and 1986 because those statutes provide a cause of action for damages arising out of a conspiracy to deprive a person or class of persons of the equal protection of laws, and the court ruled that Nenninger had no valid equal protection claim. The district court dismissed Nenninger's claims under 42 U.S.C. § 1988, which addresses

applicability of statutory and common law attorney's fees and expert fees in the context of civil rights cases, as the court held that Nenninger had no valid civil rights claim. (Appendix, pp. 540-41)

The district court found that Nenninger's tort claims against the individual defendants in their official capacity were in effect claims against the Government and dismissed those claims because Nenninger had failed to exhaust his administrative remedies. (Appendix, pp. 541-42)

The district court held that the individual defendants named in their personal capacity were entitled to qualified immunity and therefore dismissed the claims against those defendants in their personal capacity. (Appendix, pp. 543-46)

Finally, the district court ruled that Nenninger lacked standing to seek injunctive relief because he had failed to show the likelihood that he would be subject to improper conduct by the Forest Service at future Rainbow Family gatherings. (Appendix, pp. 546-47)

### **SUMMARY OF ARGUMENT**

This Court should uphold the district court's ruling granting the Government's motion to dismiss or, in the alternative, for summary judgment. Nenninger cannot show that he has a cause of action under RFRA because the Final Rule does not substantially burden his exercise of religious beliefs. Nenninger also cannot show that

he has a cause of action under the Due Process Clause of the Fifth Amendment or under 42 U.S.C. §§ 1985 and 1986 because he cannot show that the noncommercial group use permit and signature requirement have a discriminatory effect or were motivated by a discriminatory purpose. Nenninger does not have a cause of action under 42 U.S.C. § 1988, which addresses the applicability of statutory and common law attorney's fees and expert fees in the context of civil rights cases and which does not apply to this case. Tort claims against the United States and individual defendants acting in their official capacity were properly dismissed based upon Nenninger's failure to exhaust administrative remedies. The Fourth Amendment claim against the individual defendants in their personal capacity were properly dismissed based upon qualified immunity. The hybrid rights doctrine does not apply to this case because Nenninger cannot establish that the noncommercial group use permit and signature requirement violate the First Amendment. Finally, Nenninger lacks standing to seek injunctive relief.

## **ARGUMENT**

### **I. The District Court Correctly Concluded That Nenninger Has Failed To State A Claim Under the Religious Freedom Restoration Act (RFRA).**

The district court found that Nenninger failed to show that the Forest Service requirements in question substantially burden the practice of his religion and dismissed his RFRA claim.

## Standard of Review

The Court of Appeals reviews *de novo* the district court's grant of a motion to dismiss for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6). *Taxi Connection v. Dakota, Minnesota & Eastern R.R. Corp.*, 513 F.3d 823, 825 (8th Cir. 2008); *OnePoint Solutions, LLC v. Borchert*, 486 F.3d 342, 347 (8th Cir. 2007). In analyzing a Rule 12(b)(6) motion, the Court of Appeals "assumes all factual allegations in the complaint are true, but 'the complaint must contain sufficient facts, as opposed to mere conclusions, to satisfy the legal requirements of the claim to avoid dismissal.'" *Taxi Connection*, 513 F.3d at 826 (quoting *Levy v. Ohl*, 477 F.3d 988, 991 (8th Cir. 2007)). A motion to dismiss should be granted if "it appears beyond doubt that the plaintiff can prove no set of facts which would entitle him to relief.'" *Id.* (quoting *Koehler v. Brody*, 483 F.3d 590, 596 (8th Cir. 2007), and *Knapp v. Hanson*, 183 F.3d 786, 788 (8th Cir. 1999)).

The Court of Appeals reviews *de novo* the district court's grant of a motion for summary judgment. *General Trading Int'l, Inc. v. Wal-Mart Stores, Inc.*, 320 F.3d 831, 835 (8th Cir. 2003); *Toghiyany v. Amerigas Propane, Inc.*, 309 F.3d 1088, 1091 (8th Cir. 2002). The grant of summary judgment should be affirmed if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law.'" *Id.* (quoting Fed. R. Civ. P. 56(c)).

## Nenninger's Claim Under RFRA

To establish a *prima facie* case under RFRA, a plaintiff must show that the challenged government action imposes a “substantial burden” on religious exercise. Only if the plaintiff first makes such a showing does the statute require a compelling interest and a demonstration of least restrictive means. 42 U.S.C. § 2000bb-1(a); *In re Young*, 82 F.3d 1407, 1418 (8th Cir. 1996).

The Supreme Court has found a substantial burden only when individuals were pressured to act contrary to their religious beliefs or to choose between following tenets of their religion and receiving a government benefit or facing criminal sanctions. *See Sherbert v. Verner*, 374 U.S. 398, 404 (1963) (burden exists when an individual is required to “choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion . . . on the other”); *Wisconsin v. Yoder*, 406 U.S. 205, 218 (1972) (burden exists when government action forces individuals to choose between criminal sanctions and “acts undeniably at odds with fundamental tenets of their religious beliefs”); *Thomas v. Review Bd. of Ind. Emp. Sec. Div.*, 450 U.S. 707, 718 (1981) (burden is “substantial” when government puts “substantial pressure on an adherent to modify his behavior and to violate beliefs”).

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). The provisions of the Final Rule, which require a permit for large group gatherings to protect national forest resources, address public health and safety concerns, and allocate space among competing uses, involves management of federal land to serve legitimate government purposes. Under *Lyng*, Nenner's alleged spiritual injury from the permit and signature requirement cannot therefore constitute a substantial burden for purposes of RFRA. Without a substantial injury, the plaintiff cannot establish a cause of action under RFRA.

RFRA states that its purpose is to "restore the compelling interest test" set out in *Sherbert* and *Yoder* to the extent that test was invalidated in *Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990). See 42 U.S.C. § 2000bb(b)(1). However, Congress expected "that the courts will look to free exercise cases decided prior to [*Employment Div., Dep't of Human Res. of Oregon v. Smith*, 494 U.S. 872 (1990)] for guidance in determining whether the exercise of religion has been substantially burdened." S. Rep. 103-111 at 8-9 (1993). Moreover, Congress

enacted RFRA with the understanding that *Sherbert* and *Yoder* do not trigger the compelling interest test in a case involving the government's management of its own property ("pre-*Smith* case law makes it clear that strict scrutiny does not apply to government actions involving only management of internal Government affairs or the use of the Government's own property or resources."). S. Rep. 103-111 at 9 & n.19 (citing *Roy* and *Lyng*). Thus, *Roy* and *Lyng* remain controlling following enactment of RFRA, and both *Roy* and *Lyng* make clear that *Sherbert* and *Yoder* do not require a compelling interest in a case like this one involving the government's management of its own property.

This Circuit has held that to be considered a substantial burden, the 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) (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 noncommercial group use permit and signature requirement 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 implementation of the Final Rule. 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 Final Rule’s minimal requirements.<sup>6</sup>

The cases cited by Nenninger do not support his RFRA claim. *Watchtower Bible & Tract Soc’y of New York v. Village of Stratton*, 536 U.S. 150 (2002), 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,

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<sup>6</sup>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 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 concerns constitute a compelling government interest for RFRA purposes)), and the permit and signature requirement are the least restrictive means of meeting those objectives (they are minimally burdensome because 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)).

the permit requirement in the Final Rule does not apply to canvassing. In addition, numerous courts have held that the Final Rule is not overbroad and is narrowly tailored. *United States v. Nenninger*, 351 F.3d 340 (8th Cir. 2003); *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); *United States v. McFadden*, 71 F. Supp. 2d 962 (W.D. Mo. 1999); *United States v. Masel*, 54 F. Supp. 2d 903 (W.D. Wis. 1999), aff'd, No. 98-10014-X-01 (W.D. Wis. Mar. 16, 2000).

In *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006), the Government conceded that it was imposing a substantial burden on the exercise of religion by prosecuting members of a church who receive communion by drinking *hoasca*, a tea brewed from plants unique to the Amazon Rainforest that contains dimethyltryptamine, a hallucinogen regulated under Schedule I of the Controlled Substances Act. 546 U.S. at 426. The Supreme Court held that receiving communion through *hoasca* was central to the church's faith. *Id.* at 425. Similarly, in *In re Young*, 82 F.3d at 1407, this Circuit held that requiring a church to relinquish to a bankruptcy trustee contributions that the church had received from its members before they filed their bankruptcy petition substantially burdened the debtors' free

exercise of religion under RFRA. *Id.* at 1417. The Court ruled that the governmental action in question meaningfully curtailed a religious practice, tithing, of more than minimal significance in a way that was not merely incidental. *Id.* at 1418-19.

In contrast to the governmental action in *O Centro Espirita* and *Young*, the Final Rule does not affirmatively compel, by threat of penal or other sanctions, a person to refrain from religiously motivated conduct. The Final Rule is a content-neutral time, place, and manner restriction that merely requires noncommercial groups of 75 or more people to obtain a free permit before they gather on National Forest System lands. Therefore, the district court properly held that the noncommercial group use permit and signature requirement are minimally burdensome. (Appendix, pp. 538-39)

**II. The District Court Properly Dismissed Nenninger's Fifth Amendment and Civil Rights Claims Because He Failed To Show That The Noncommercial Group Use Permit And Signature Requirement Have A Discriminatory Effect And Were Motivated By A Discriminatory Purpose And The Facts Pled In The Complaint Do Not Support A Cause Of Action Under 42 U.S.C. § 1988.**

The district court held that Nenninger failed to plead or otherwise establish the elements to his Fifth Amendment claim, along with his Civil Rights claims. The district court dismissed these claims.

## Standard of Review

The Court of Appeals reviews *de novo* the district court's grant of a motion to dismiss for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6).

### Fifth Amendment and Civil Rights Claims

Nenninger's due process claim is tantamount to a selective prosecution claim. *Wayte v. United States*, 470 U.S. 598, 608 (1985). The requirements for a selective prosecution claim draw on "ordinary equal protection standards." *United States v. Armstrong*, 517 U.S. 456, 466 (1996) (quoting *Wayte*, 470 U.S. at 608). To prevail on such a claim, a plaintiff must prove (1) that the government has not prosecuted similarly situated persons and (2) that race, religion, or 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). This showing is necessary to overcome the presumption of regularity and proper motive afforded law enforcement officials. *See Armstrong*, 517 U.S. at 465. A plaintiff must present "clear evidence" that a decision to prosecute was based on "an unjustifiable standard such as race, religion, or other arbitrary classification." *Id.* at 464-65 (citing *Oyler v. Boles*, 368 U.S. 448, 456 (1962)).

Nenninger has not established either element. The government has consistently and fairly enforced the Final Rule and other laws and regulations in the context of other noncommercial gatherings on National Forest System lands involving 75 or more people. (Appendix, p. 151); *Park v. Forest Service*, 205 F.3d at 1039 (Forest Service checkpoints have routinely been used at much smaller gatherings, such as fraternity parties and large hunting groups).<sup>7</sup> Moreover, enforcement of the Final 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 Final Rule, i.e., protection of national forest resources, public health and safety concerns, and allocating space among competing uses.

A civil rights law aimed at addressing abuses of the Ku Klux Klan during the Reconstruction Era, 42 U.S.C. § 1985 creates a cause of action, among other things, for damages arising out of a conspiracy to deprive a person or class of persons of the equal protection of laws. As explained above, Nenninger has failed to state and

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<sup>7</sup>Ironically, the Forest Service has made an extra effort to accommodate the Rainbow Family with respect to the signature requirement. In the interests of reaching an understanding with the Rainbow Family, the Forest Service offered to refrain from enforcement of the permit requirement at the 2007 national Rainbow Family gathering only, provided that the Rainbow Family identify proposed gathering sites prior to the gathering; collaborate in development of a suitable operating plan prior to the gathering; and follow the operating plan. (Appendix 115-16, 374-75) Unfortunately, this strategy was unsuccessful and resulted in this lawsuit against the Forest Service and other defendants in their personal and official capacities. Defendants are not bound in the future by the approach they took to enforcement of the Final Rule for the 2007 national Rainbow Family gathering.

cannot state an equal protection claim. Therefore, he has failed to state a claim under 42 U.S.C. § 1985.

The statute codified at 42 U.S.C. § 1986 creates a cause of action against anyone who knows of a conspiracy under 42 U.S.C. § 1985 and who is in a position to prevent it, but does nothing. Since Nenninger cannot state a claim under 42 U.S.C. § 1985, it follows that he cannot state a claim under 42 U.S.C. § 1986.

Finally, 42 U.S.C. § 1988 addresses the applicability of statutory and common law, attorney's fees, and expert fees in the context of civil rights cases. This statute does not confer a cause of action. Therefore, Nenninger cannot state a claim under 42 U.S.C. § 1988.

Therefore, the district court properly dismissed Nenninger's Fifth Amendment Due Process claim and civil rights claims.

### **III. The District Court Properly Dismissed Nenninger's Fourth Amendment Claims.**

The district court found that Nenninger failed to allege that individual defendants violated any clearly established right and dismissed those claims based upon "qualified immunity." The district court also dismissed similar claims as against the United States and the individual defendants in their official capacities based upon his failure to exhaust administrative remedies.

## Standard of Review

The Court of Appeals reviews *de novo* the district court's grant of a motion to dismiss for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6).

## Fourth Amendment Claim

Plaintiff made allegations concerning the implementation of Forest Service policies against the United States, and individual defendants in their official and personal capacities. The district court dismissed the tort claims as against the United States based upon lack of jurisdiction for failure to exhaust administrative remedies under the Federal Tort Claim Act (FTCA). (Appellant's Addendum<sup>8</sup>, p. 22) The United States is immune from suit unless it consents. *Riley v. United States*, 486 F. 3d 1030, 1032 (8th Cir. 2007). Under the FTCA, a claimant must present a claim to the appropriate Federal agency before the claimant may bring an action against the United States. 28 U.S.C. § 2675(a). Nenninger failed to make an administrative claim before filing his complaint.

The district court dismissed the individual defendants sued in their official capacity pursuant to 28 U.S.C. § 2679(b)(1). (Addendum, pp. 23-24) Those individual defendants were certified to have been acting within the scope of their employment in enforcing Forest Service regulations, and Nenninger did not satisfy

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<sup>8</sup>References will be made to Appellant's Addendum and shall be referred to as "Addendum."

his burden of presenting evidence to disprove the certification decision. Therefore, the United States was the proper defendant for tort claims against these individual defendants, and those claims were dismissed as against the United States for failure to exhaust administrative remedies.

As to the claims against the individual defendants in their personal capacities, the district court dismissed them based upon the doctrine of "qualified immunity." (Addendum, pp. 24-26)<sup>9</sup> As the district court noted, Nenner alleged that these individual defendants violated his constitutional rights in adopting and enforcing the Forest Service's permit and signature requirement, and the agency's vehicle checkpoint policies.

Qualified immunity shields government officials who perform discretionary governmental functions from civil liability as long as their conduct does not violate any "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In light of pre-existing law, the unlawfulness must be "apparent" to the officer in order to constitute a violation upon which liability may rest. *Anderson v.*

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<sup>9</sup>As to the individual defendant, Hornstein, she is also entitled to legislative immunity. Like a statute, a regulation has the force of law, and in promulgating regulations, the Executive Branch functions in a legislative capacity through authority delegated by the Legislative Branch.

*Creighton*, 483 U.S. 635, 640 (1987) The district court correctly found that this is "clearly an instance where there are no cases of controlling authority which "clearly established the rule" on which Plaintiff seeks to rely, and there is no 'consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful.' *Wilson v. Layne*, 526 U.S. 603, 617 (1999)."

Nenninger argues that rainbow gatherings were illegally targeted for stops at checkpoints. (App. Br., pp. 51-56) As set forth in the declarations attached to defendants' motion to dismiss, checkpoints conducted in 2006 and 2007 at the rainbow gatherings were conducted within the guidelines of the Forest Service's national vehicle checkpoint policy. (Appendix pp. 150-163) The individual defendants had every reason to believe that any actions they took in connection with the Final Rule, including drafting or enforcing it, were constitutional. In addition, Mr. Lampshire and Mr. Krogstad had every reason to believe that the checkpoints established in 2006 and 2007 were constitutional and that any actions they took in implementing those checkpoints and conducting law enforcement activities under the Forest Service's statutory authority at 16 U.S.C. § 551 were constitutional.

Nenninger argues in his brief that he was detained longer than necessary to issue a summons in Colorado which allegedly occurred in 2006. (App. Br., pp. 56-58) As set forth in the declarations attached to defendants' motion to dismiss, there was no constitutional violation by the officers. (Appendix, pp.156-163) The individual officers are not personally liable for enforcing a Forest Service policy. According to Nenninger's arguments, the acts that he complains of occurred in Colorado. As noted in the defendants' motion to dismiss and brief in support thereof, the U.S. District Court for the Western District of Arkansas has no personal jurisdiction over these defendants for acts that occurred outside of the Western District of Arkansas. Thus, this Court can exercise personal jurisdiction over Mr. Twiss, Ms. Hornstein, Mr. Lampshire, and Mr. Krogstad only to the same extent as could an Arkansas state court under Arkansas's long-arm statute. Because Arkansas' long-arm statute, Ark. Code Ann. § 16-4-101(B), allows Arkansas courts to exercise jurisdiction over an out-of-state defendant to the full limit allowed by due process, the inquiry in this case is whether these individuals have "certain minimum contacts with [Arkansas] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940)). These four defendants' contacts with

Arkansas must be sufficient to cause them "reasonably [to] anticipate being hauled into court there." *Worldwide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). Whether due process is satisfied depends not only on the quantity of contacts that these defendants have with Arkansas, but also on the "quality and nature" of those contacts. Neither Mr. Twiss, Ms. Hornstein, Mr. Lampshire, nor Mr. Krogstad has sufficient contacts, either in terms of quantity or quality, to subject them to suit in Arkansas courts. As their declarations show, none of these defendants lives or works in Arkansas, nor has any of them lived or worked for any extended period in Arkansas. (Appendix, pp. 146-49, 156-63)<sup>10</sup> The district court had no personal jurisdiction over the individual defendants based upon conduct outside the Western District of Arkansas.

Nenninger argues in his brief that he was harassed in retaliation for exercise of religious beliefs. (App. Br., pp. 58-61) The record does not establish the Forest Service has a 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. The policy of the agency seeks to protect public health and safety,

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<sup>10</sup>The individual defendant, Krogstad, was transferred to Arkansas; however, this occurred after the facts which are alleged against him. (Appendix, pp. 161-63)

preserve National Forest System lands, and allocate space among different groups and uses.

Nenninger also argues that he should be entitled to discovery. However, an official's entitlement to qualified immunity must be resolved at the earliest possible stage of the litigation and "discovery should not be allowed" until it is determined that the plaintiff has properly stated a claim for the violation of a clearly established right. Qualified immunity is an immunity from suit, not simply from liability. *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985). Its purpose is to "avoid 'subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery' in cases where the legal norms the officials are alleged to have violated were not clearly established at the time." *Id.* (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 817–18, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)). Accordingly, "[u]nless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before commencement of discovery." *Mitchell*, 472 U.S. at 526, 105 S.Ct. 2806.

**IV. The District Court was correct when it dismissed the free exercise claims despite Nenninger's position that the hybrid rights doctrine required strict scrutiny.**

The district court dismissed Nenninger's claims and held that he failed to state a claim despite Nenninger's position that the hybrid rights doctrine required strict scrutiny.

**Standard of Review**

The Court of Appeals reviews *de novo* the district court's grant of a motion to dismiss for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6).

**Hybrid Rights Doctrine**

Nenninger contends that his free exercise claims should be subject to strict scrutiny under the hybrid rights doctrine. (App. Br., pp. 62-70) 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); *Boone v. Boozman*, 217 F. Supp. 2d 938, 953 (W.D. Ark. 2002).

Nenninger cannot establish a hybrid rights claim, as numerous courts, including this Court, have upheld the constitutionality of the Final Rule under the Freedom

of Speech and Freedom of Assembly Clauses of the United States Constitution. *United States v. Nenninger*, 351 F.3d 340 (8th Cir. 2003); *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); *United States v. McFadden*, 71 F. Supp. 2d 962 (W.D. Mo. 1999); *United States v. Masel*, 54 F. Supp. 2d 903 (W.D. Wis. 1999), *aff'd*, No. 98-10014-X-01 (W.D. Wis. Mar. 16, 2000).

Nenninger previously attacked the validity of the Final Rule. *United States v. Nenninger*, 71 F.Supp. 2d 962 (W.D. Mo. 1999), *aff'd*, 351 F.3d 340 (2003). In Nenninger's previous case, this Court agreed with the Forest Service that the Final Rule is constitutional and the restrictions imposed thereby are reasonable. *Id.* at 345-46.

Two Circuits have rejected the concept of hybrid rights. The Second Circuit has rejected the doctrine as “dicta ... not binding on this court,” even though that decision put the court at odds with a majority of the other Courts of Appeals. *Knight v. Connecticut Dep't of Pub. Health*, 275 F.3d 156, 167 (2d Cir. 2001) The Sixth Circuit also rejected the hybrid rights theory in *Kissinger v. Bd. of Trs.*, 5 F.3d 177, 180 (6th Cir. 1993). The Eighth Circuit Court of Appeals in

*Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991), reversed a granting of summary judgment because the City of Hastings used legally insufficient affidavits to support their motion for summary judgment. Although the Cornerstone Bible Church advanced the “hybrid rights” theory, that is not the primary basis for the ruling. This Court stated: “Our reversal of the summary judgment breathes life back into the Church’s “hybrid rights” claim; and thus, the district court should consider this claim on remand.” *Id.* at 473

Without another viable constitutional ground, the “hybrid rights” claim does not apply to a “free exercise” claim. The Seventh Circuit rejected a “hybrid rights” claim because the companion claims “individually lack[ed] the merit necessary to withstand summary judgment.” *Civil Liberties for Urban Believers v. City of Chicago*, 342 F.3d 752, 765 (7th Cir. 2003) In *Miller v. Reed*, 176 F.3d 1202 (9th Cir. 1999) the Ninth Circuit required that in order to assert a hybrid-rights claim, “a free exercise plaintiff must make out a ‘colorable claim’ that a companion right has been violated—that is, a ‘fair probability’ or a ‘likelihood,’ but not a certitude, of success on the merits.” The Tenth Circuit in *Swanson v. Guthrie Independent School District No. I-L*, 135 F.3d 694 (10th Cir. 1998), also required a showing of a “colorable claim” in order to invoke the “hybrid rights” doctrine. *See also*,

*Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002). Therefore, Nenner's hybrid rights claim should be dismissed.

**V. The District Court Correctly Ruled That Nenner Lacks Standing To Seek Injunctive Relief.**

The district court ruled that Nenner's lacks standing to seek injunctive relief.

**Standard of Review**

The Court of Appeals reviews *de novo* the district court's grant of a motion to dismiss for failure to state a claim upon which relief may be granted under Federal Rule of Civil Procedure 12(b)(6).

**Standing to Seek Injunctive Relief**

Standing is a threshold issue in every case. "If a plaintiff lacks standing, he or she cannot invoke [a federal court's] jurisdiction." *Boyle v. Anderson*, 68 F.3d 1093, 1100-01 (8th Cir. 1995). The elements of standing are not mere pleading requirements, but rather an indispensable part of the plaintiff's case. Therefore, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof. *Park v. Forest Service*, 205 F.3d 1034, 1036 (8th Cir. 2000). 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." Specifically, 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). Vague, speculative, and conclusory allegations of harm or threatened harm are insufficient to create standing. *See Butler*, 146 F.3d at 560.

In *Lyons*, the Court stated that “[p]ast exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.” 461 U.S. at 102 (quoting *O’Shea v. Littleton*, 414 U.S. 488, 495-96 (1974)). The Court emphasized that “Lyons’ standing to seek the injunction requested depended on whether he was likely to suffer future injury [from the same conduct]” (461 U.S. at 105), and determined that Lyons had not demonstrated that he would likely suffer such future injury. Hence, the Court held, Lyons had no standing to seek injunctive relief because his claim “that he will again experience injury as the result of [the challenged] practice” was “speculative” (461 U.S. at 109). *See also Park*, 205 F.3d at 1037 (“[I]t is the plaintiff’s burden to establish standing by demonstrating that, if unchecked by the litigation, the defendant’s allegedly wrongful behavior will likely occur or continue, and that the ‘threatened injury [is] ‘certainly impending.’””) (internal citations omitted).

In this case, as Nenninger concedes in his brief on appeal (App. Br., pp. 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, pp. 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, p. 547)

In support of his standing, Nenninger contends that he plans to participate in future Rainbow Family gatherings. (App. Br., pp. 56) However, the Eighth Circuit Court of Appeals 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.*

In particular, citing *Lyons*, the Court noted the importance of statements of future intent and patterns of past practice, and held that there was no indication in the record that the Forest Service maintained an official policy of using unlawful checkpoints against the Rainbow Family, harbored an unofficial animus against the Rainbow Family, or exhibited a pattern of unconstitutional conduct in connection with Rainbow Family gatherings. With regard to alleged animus, the Court noted that there was no evidence of the Forest Service treating similarly situated groups differently because there were no similarly situated groups, given the size of the Rainbow Family's gatherings, and that checkpoints were routinely used at much smaller gatherings. *Id.* at 1038-40.

As in *Park*, 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 Final 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. Final Rule at 45,260, 45,262, 45,265, 45,266; *United States v. Nenninger*, 351 F.3d 340, 345 (8th Cir. 2003), *reh'g and reh'g en banc denied* (2004). In response to comments on the proposed rule from members of the Rainbow Family, the Forest Service stated:

The intent of this rule is not to break up or prohibit any group uses, including Rainbow Family Gatherings. Rather, the intent of this rule is to control or prevent harm to forest resources, address concerns of public safety, and allocate space.

Final Rule at 45,265; *Nenninger*, 351 F.3d at 345.

The Forest Service's national vehicle checkpoint policy, which incorporates Fourth Amendment requirements (Appendix, pp. 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. (Appendix, pp. 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. (Appendix, pp. 156-63)<sup>11</sup>

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

### CONCLUSION

For the foregoing reasons, this Court should uphold the district court's ruling granting the Government's motion to dismiss or, in the alternative, for summary judgment and dismissing all of Nenninger's claims with prejudice.

Respectfully submitted,

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<sup>11</sup>Nenninger is misstating Fourth Amendment law when he claims (App. Br. at 59-60) that Rainbow Family members have an expectation of privacy in the entire area where they gather on National Forest System lands.

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**CERTIFICATE OF SERVICE**

I, Claude S. Hawkins, Jr., Assistant United States Attorney for the Western District of Arkansas, certify that two copies of the foregoing Brief and compact disc were mailed to Tony Nenninger, 94 Huzzah Club Road, Bourbon, Missouri 65441 this 5th day of January, 2009.

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Claude S. Hawkins, Jr.

## CERTIFICATE OF COMPLIANCE

I hereby certify that the compact disc containing brief, enclosed herein, has been scanned for viruses and that to the best of my knowledge the diskette is virus free.

I further certify that WordPerfect X3 software was used to prepare this brief.

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Dated this 5th day of January, 2009.

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Claude S. Hawkins, Jr.