Appeal No. 08-3106

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Tony **Nenninger**

Plaintiff-Appellant;

v.

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

Defendants-Appellees.

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

by: Tony Nenninger, pro se
Missouri Bar No. 61002
94 Huzzah Club Road
Bourbon, Missouri
65441

573-775-5263
tonygoodh2o@yahoo.com

PETITION FOR PANEL REHEARING OR REHEARING EN BANC

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Consideration by the full court is necessary to maintain uniformity of decisions because the Panel's affirmation without opinion conflicts with decisions of the United States Supreme Court and this Circuit regarding whether prohibiting Plaintiff from associating with more than 75 people on National Forest land unless they first establish a collective legal entity is a substantial burden to exercise of Plaintiff's sincere religious beliefs. Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton, 536 U.S. 150 (2002); Thomas v. Review Bd. of Ind. Employment Sec. Div., 450 U.S. 707 (1981); In re: Young, 82 F.3d 1407 (8th Cir. 1996).

The affirmation also conflicts with the Supreme Court regarding whether selectively targeting traffic stops at pilgrims to a specific religious assembly for general law enforcement purposes under the pretext of traffic safety checks violates neutrality required for suspicion-less stops—City of Indianapolis v. James Edmond, 531 U.S. 32 (2000); Delaware v. Prouse, 440 U.S. 648 (1979)—and whether police conduct violated rights by detaining Plaintiff longer than necessary to issue a summons—Florida v. Royer, 460 U.S. 491 (1983); conducting a pat down search of Plaintiff without reason to believe he was dangerous—Terry v. Ohio, 392 U.S. 1 (1968); pinching, probing, and squeezing to determine the contents of Plaintiff's pockets during a pat down search—Minnesota v. Dickerson, 508 U.S. 366 (1993).

INTRODUCTION

> Rules prohibiting or restricting the citation of unpublished opinions…are inconsistent with basic principles underlying the rule of law. … they tend to undermine public confidence in the judicial system by leading some litigants…to suspect that unpublished opinions are being used for improper purposes.

2005 Advisory Committee on amending Federal Rules of Appellate Procedure 32.1; Agenda E-18, Rules; September, 2005, pp.2-4.

The Panel's unpublished affirmation without opinion in light of the facts alleged herein fosters the appearance of use of an unpublished opinion to deprive Plaintiff of equal protection of the law to exercise religious beliefs.

STATEMENT OF FACTS

The religiosity of Plaintiff's participation in rainbow gatherings is not disputed. Plaintiff is one of many individual rainbow gathering participants who embrace a comprehensive set of sincerely held religious beliefs based on principles of non-violence (App.81-88;426-431). The unique success of peaceful voluntary cooperation during rainbow gatherings is fostered by a social atmosphere of unstructured egalitarian ministry (App.87-88;426;463-516). There is no authoritative rainbow gathering collective entity able to coerce participants into conforming behavior, enter into collective contracts, or own common property (App.116;197;441-445). "Peaceful voluntary cooperation among individuals who *remain autonomous and free from binding agency relationships*" is an essential component of Plaintiff's

exercise of religious beliefs in non-violence during rainbow gatherings (App.78;81-83;85; 422;426).

Plaintiff has exercised peaceful voluntary cooperation with tens of thousands of rainbow gathering co-participants on National Forest lands during the past fifteen years and intends to continue doing so (App.78;422). "Use of *remote public land* is necessary to protect the socio-political neutrality requisite for peaceful voluntary cooperation during rainbow gatherings" and National Forests are the only known remote public lands suitable for the typical numbers of pilgrims to the annual Fourth of July rainbow gatherings (App.96,¶¶53-55;432).

In 1995, USFS implemented revised regulations requiring "groups" to authorize an agent to obtain a permit when 75 or more persons occupy National Forests for non-commercial uses (App.75-79;417-422). Prior versions of the permit regulations were declared unconstitutional in 1986 by Arizona District Judge Bilby because of selective targeting of expressive activities (App.342) and in 1988 by Texas District Judge Justice because of improper procedural enactment and overbroad administrative discretion. U.S. v. Rainbow Family, 695 F. Supp. 294, 313 (E.D.Tex.1988) (*RainbowI*). Judge Justice's 1988 final judgment stated adoption of the permit regulations was "directed specifically" at rainbow gatherings and that the agent

requirement in particular appeared to be "uniquely applicable to the Rainbow Family" as part of a pattern of hostility and animosity (App.225;308-309). Defendants knew rainbow gathering participants could not comply because of Judge Justice's Judgment and from the dozens of public comments submitted in response to the proposed regulations (App.135,¶179;147;225-228;454-455;550-551).

Defendants state the purposes of the regulations are to protect resources, address health and safety, and allocate space among competing uses (App.180). Defendants state application of the regulations need not be the least restrictive of religion manner of regulating rainbow gatherings (App.610). There is demonstrated history of the effectiveness of the less restrictive special use authorization alternative of operating plans cooperatively developed without agents implemented for seven years after the previous version of the non-commercial group use permit regulation was declared unconstitutional (App.353-355). Statements from USFS resource managers indicate satisfaction with restoration of 4th of July rainbow gathering sites during years there was no agent requirement (App.358-368). Health Department reports reflect similar voluntary cooperation with rainbow gathering participants (App.343-352). There is evidence that Defendants' asserted interests in allocating space among National Forest

users is also furthered by the rainbow gathering religious custom of voluntary peaceful cooperation (App.116-117,¶128;442). When law enforcement assistance was occasionally needed, rainbow gathering participants cooperated with law enforcement officials (App.117;443).

After a 2006 incident in Colorado in which police pointed guns at non-violent protestors shouting the pledge of allegiance and chanting "we love you" at the site of a roadblock attempting to completely prohibit the rainbow gathering because no one had signed a permit (App. 397-400), USDA Undersecretary Mark Rey authorized the 2007 gathering without a designated agent to sign a permit (App. 374). Despite the 2007 Arkansas gathering being *a legally authorized event*, police ordered Plaintiff and others to abandon the rainbow gathering site and follow some leaders they had appointed and follow their directions as posted on a website to go to another location, interfered with water supplies and latrine digging for sanitation, created impediments to disabled persons' parking, searched persons without reasonable suspicion or probable cause, blocked steep roads in a dangerous manner to search stopped vehicles, deterred local citizens from attendance by earning a reputation for invasive police tactics, grossly overlooked alcoholic provocateurs' violence who displaced medical and legal volunteers and other rainbow gathering participants while instead

sending armed police patrols into pacifist religious camps without probable cause, flew military helicopters and a jet at low altitude over the gathering, photographed at least one topless woman for non-law enforcement purposes, and established mandatory traffic stops (App.1-20;59-60;77-78,¶8;374-375;418-422).

As part of its response to public comments that the new 1995 regulations were targeted against rainbow gatherings, USFS included a policy statement that it was not necessary or appropriate to stop vehicles approaching rainbow gatherings (App.608-609). Nonetheless, in 1998 USFS developed policies allowing police to locate mandatory traffic stops selectively targeted at special events (App.25;335). Defendants have targeted mandatory traffic stops at rainbow gatherings in at least 1993, 1995, 1998, 2002, 2003, 2004, 2005, 2006, and 2007 regardless of whether a permit has been issued or not (App.8-9;13-20;59-60;77-78¶8;112-113,¶¶102-109;127-131,¶¶149;167-172;261-262;374-382;390-400;418-424;436-438;440-441;447-450;453;456-457;460-462). Plaintiff was very anxious about being forced to stop at one of these selectively targeted traffic stops in Arkansas and was unable to associate with people who did not attend in 2007 because of the traffic stops (App.131,¶172;449).

During the 2006 rainbow gathering in Colorado, Defendants Lampshire and Krogstad detained Plaintiff longer than necessary to issue infraction summonses so that a canine could arrive and provide a pre-textual reason to conduct a vehicle search (App.80,¶¶14-15;127-130,¶¶149-166;423-424;447-448). Lampshire searched Plaintiff's person without reasonable suspicion to believe Plaintiff was dangerous and "pinched, probed, and squeezed" Plaintiff's clothing in an attempt to discover non-weapon contraband without probable cause (App.447). Krogstad became physically threatening because Plaintiff refused to consent to a vehicle search; then, Lampshire and Krogstad searched Plaintiff's vehicle without probable cause to believe a crime occurred and found no contraband (App.128-130,¶¶154-166;447-448).

ARGUMENT

Religious Freedom Restoration Act. The District Court correctly concluded assembling on the Fourth of July for rainbow gatherings is religious conduct, but erred in concluding Plaintiff does not allege Defendants substantially burdened religious exercise.

Under closely parallel facts, the Supreme Court struck down an ordinance requiring identification of a permit holder prior to non-commercial door-to-door proselytizing, anonymous political speech, or handbill distribution.

> Three obvious examples illustrate the pernicious effect of such a permit requirement…First,… there are a significant number of persons who support causes anonymously… 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…Third, there is a significant amount of spontaneous speech that is effectively banned by the ordinance.

Watchtower Bible at 166-68.

The District Court and Panel are silent as to why *Watchtower Bible* plaintiffs' religious exercise suffered "pernicious effects" from a permit requiring sacrifice of their anonymity, religious views, and spontaneous expression but Plaintiff herein suffers no substantial burden from coercion to sacrifice the central tenets of not identifying any formal collective authority or agents and maintaining rainbow gatherings in public forums with the spontaneous expressive conduct of Good Samaritans.

The Supreme Court has clearly defined "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 at 717-18; *accord In re: Young*.

Here, the important benefit is access to the traditional public forum of National Forests for religious expressive assembly and Defendants conditioned receipt of this benefit upon the religiously proscribed conduct of forming an aggregate principal capable of designating an agent (App.96,¶¶53-55;432). Defendants attempted to deny this benefit by threat

of incarceration and fine. 36 C.F.R. §§ 261.10(k), 261.1b; 16 U.S.C. § 551. Thus, Plaintiff's free exercise is substantially burdened because Defendants condition a public benefit on Plaintiff foregoing religious exercise by putting substantial pressure on Plaintiff to limit his behavior by assembling for religious expression only with people who form principal and agent relationships while in the traditional public forum of National Forests.

The rule's terms are explicit as to capacities required of a permit holder. Any proponent must identify an "agent who is authorized to receive notice of actions pertaining to the proposal." §251.54(d)(1). 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.

For all commercial special uses, USFS officials are required to confirm the legal capacities of a permit applicant, and the authority of anyone acting as an agent. The rules specify documentation to be provided:

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

36 C.F.R. §251.54(d)(2)(ii)(E).

Defendants' discretion to determine the legal authority of persons acting as agents for commercial special use permits is adequately bridled with objective neutral criteria that protects against discriminatory application. No

such limits are on Defendants' discretion in making the critical agency determination regarding non-commercial special uses.

> [U]nbridled discretion to choose the regulatory standard to apply in a particular instance may allow the decision-maker to discriminate between groups applying for a permit, based upon his or her subjective biases. The 'very possibility of abuse' will invalidate a regulation requiring a permit for expressive activity.

Rainbow I at 323 *citing* Niemotko v. Maryland, 340 U.S. 268, 272 (1951).

The District Court findings of fact that gatherings have continued despite harassment (App.538) misses the point that gatherers have persisted only because of civil disobedience (App.397-400).

Selective Enforcement/Conspiracy to Deprive Equal Rights. The District Court erred in concluding the agent designation requisite for public assembly does not deprive Plaintiff of due process and equal protection by intentionally targeting a minority religion.

The District Court denied Plaintiff's equal protection and conspiracy claims based on the erroneous conclusion that Plaintiff's equal protection comparison classes were both rainbow gathering attendees (App.539; 559;560;576). Plaintiff offers evidence 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; and crowds of individuals who converge in the Padre Island Seashore and other National

Forest areas during the college students' spring break (App.433;577). The Panel's silence does not correct this manifest error.

4th Amendment Injunctive Relief. The District Court erred concluding police may conduct mandatory traffic stops selectively targeted at a minority religion.

Police may not stop individually chosen motorists at suspicion-less traffic stops, but may use non-discretionary methods to reduce immediate traffic hazards such as questioning every oncoming motorist for license and proof of registration. *Prouse at* 663. Police may not conduct suspicion-less traffic stops for the primary purpose of general crime control. *Edmond at* 41-42.

> [P]rogrammatic purposes may be relevant to the validity of Fourth Amendment intrusions undertaken pursuant to a general scheme without individualized suspicion …For this reason, we examine the available evidence to determine the primary purpose of the checkpoint program. While we recognize the challenges inherent in a purpose inquiry, courts routinely engage in this enterprise in many areas of constitutional jurisprudence as a means of sifting abusive governmental conduct from that which is lawful.

Edmond at 46-47.

In 1988, when Judge Justice denied USFS' petition for a restraining order to prohibit the rainbow gathering unless someone signed a permit, he also ordered USFS to assure unobstructed ingress and egress to the assembly U.S. v. Rainbow Family, 695 F. Supp. 314, 332 (E.D.Tex. 1988) (*Rainbow II*). Missouri District Judge Clark and Florida District Judge Schlesinger

found mandatory traffic stops in 1996 and 1998 to be unconstitutional because of selective targeting at rainbow gatherings (App.30-58).

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

> we do not believe that a checkpoint that targets a uniquely disruptive event, such as the Rainbow Family’s annual gathering, is illegal *per se*.

Id.

This Court did not have the definitive guidance of the November 28, 2000 *Edmond* decision when deciding the *Park* case on March 3, 2000. However, District Judge Clark considered the existing case law as applied to

findings of fact identical to the alleged facts of general criminal deterrence purpose herein and came to the conclusion later decided in *Edmond* that

> the foundation of neutrality is essential to the constitutionality of such checkpoints…even if the Court believed that the checkpoint was established to check driver's licenses and the like, it was used as a subterfuge to allow law enforcement officers to question attendees, do plain view searches, and basically attempt to muster up whatever charges they could find to press against Rainbow Family members.

(App.51-52).

The practice of systematically targeting traffic seizures and searches at a particular class destroys the neutrality upon which suspicionless stops are justified just as surely as allowing discretion to select individual motorists. Plaintiff seeks injunctive relief and must demonstrate:

> a real, [and] immediate threat that [she] would again suffer similar injury in the future. …[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 1037-38, *citing* Adarand Constructors, Inc., v. Pena, Secretary of Transportation, 515 U.S. 200, 211 (1995).

Plaintiff plans to continue participation with rainbow gatherings in National Forests (App.78,¶9;422). History demonstrates he will almost certainly have to hide or be subjected to mandatory suspicion-less traffic stops in the future. The District Court erred in dismissing based on finding Plaintiff does not have standing to seek injunctive relief from the selectively targeted roadblocks (App.546-547).

4th Amendment Damages Claim. The District Court erred concluding police may detain motorists to allow time for canine arrival, search persons and vehicles without reasonable suspicion or probable cause, and conduct invasive surveillance of religious encampments without probable cause.

An investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. *Royer at* 500. A pat down search is only justifiable for "the protection of the police officer and others nearby, and it must therefore be confined in scope to an intrusion reasonably designed to discover guns, knives, clubs, or other hidden instruments for the assault of the police officer." *Terry at* 29. If in the course of a *Terry* search the officer must manipulate or otherwise further physically explore the concealed object in order to discern its identity, then an unconstitutional search has occurred." *Dickerson*.

Plaintiff's allegations of misconduct are sharply contradicted by affidavits from Defendants (App.156-163). Summary judgment is not appropriate and Plaintiff's claim for damages should proceed. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

Hybrid Rights. The District Court erred in concluding none of Plaintiff's constitutional claims have merit and Plaintiff's hybrid rights free exercise claims should therefore not be reviewed with strict scrutiny because the free exercise claims are hybridized with numerous other constitutional claims.

This Court enforced the hybrid rights doctrine first recognized in Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 881-882 (1990) when directing a district court to consider the otherwise dismissed free exercise claim under the hybrid rights doctrine because "[t]he church also bases its free exercise challenge on the fact that the ordinance violates the congregation's free speech and equal protection rights." Cornerstone Bible Church v. City of Hastings, 948 F.2d 464, 473 (8th Cir. 1991). "It is easy to envision a case in which a challenge on freedom of association grounds would likewise be reinforced by Free Exercise Clause concerns." *Smith at* 881-82.

Plaintiff's *free exercise* claim is inextricably linked with: *free association* because it is the manner of cooperative assembly that forms the core of religious *expressive conduct* at rainbow gatherings; Fourth Amendment *privacy* claims because Defendants' acts deter rainbow gathering pilgrims; *Establishment* claims because Defendants' attempts to coerce Plaintiff into following leaders they appointed to another site has discriminatory purpose, discriminatory effect, and excess government entanglement with religion (App.418-419). Lemon et al. v. Kurtzmann, 403 U.S. 602 (1971).

CONCLUSION

Appellant prays the Court Brethren grant rehearing and consider the merits detailed in the briefs with opportunity for oral argument.