

Appeal No. 08-3106

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

**TONY NENNINGER,
Plaintiff-Appellant;**

v.

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

**APPEAL FROM
UNITED STATES DISTRICT COURT OF WESTERN ARKANSAS
DISTRICT JUDGE JIMM HENDREN PRESIDING
CASE NO. 07-3028**

APPELLANT'S REPLY BRIEF

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

573-775-5263
tonygoodh2o@yahoo.com

REQUEST FOR ORAL ARGUMENT

Plaintiff suggests the reason Defendants waive their oral argument is because they cannot answer the Court's relevant questions. Because there will be no need for reply argument, Plaintiff requests 20 minutes for oral argument rather than the 30 minutes previously requested. The complex legal and factual issues presented in this appeal are likely to need clarification upon the Court's inquiry. Plaintiff is in a particularly valuable position to explain anything about this case because Plaintiff is not only a pro se party and an attorney but has also conducted a formal sociology study of the relevant issues.

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CASE SUMMARY AND SUMMARY OF ARGUMENT

Defendants' brief erroneously suggests issues regarding Free Exercise and Free Speech, applicability of common law to civil rights claims, and liability of individual Defendants for civil rights violations are not appealed. Defendants mis-state the law and/or mis-apply the law to the facts regarding Free Exercise, Free Speech, Equal Protection, Due Process, Hybrid Rights under the Free Exercise Clause, and standing for injunctive relief. Defendants don't apply the Rule 12(b)(6) standard of review properly by referencing material outside the record and failing to view the record in the light most favorable to Plaintiff.

Defendants don't address the issue of substantial burdens to Plaintiff's religious exercise and expression created by the requirement to designate an agent as a condition of public assembly. Defendants distract from the challenged agent requirement by over-generalizing Plaintiff's claim as challenging the entire permit rule. Defendants conflate and confuse claims challenging policies and claims challenging individuals' actions outside the scope of their employment relating to Fourth and Fifth Amendment violations by erroneously invoking FTCA as the exclusive remedy for civil rights claims and erroneously invoking qualified immunity for civil rights violations.

JURISDICTIONAL STATEMENT

Defendants' "Preliminary Statement" makes sufficient jurisdictional statements to demonstrate the bases of jurisdiction in the District Court and with this Court; and does not conflict with Plaintiff's more detailed jurisdictional statement. (Defendants' Brief, 3; Plaintiff's Brief, 9-10).

ISSUES PRESENTED

Defendants' statement of issues is a reasonable reflection of the general questions posed by the more specific issues articulated by Plaintiff's issues statement. (Defendants' Brief, 4-5; Plaintiff's Brief, 10-12).

STATEMENT OF CASE

Statement of Facts Outside Record

Instead of including a statement of facts section in Defendants' Brief, Defendants' "background" sub-section of their statement of case substitutes unsubstantiated self-serving hearsay from Defendants' own statements in the Federal Register that explain the Forest Service's reasons for implementing special use authorization regulations. This might be evidence of the unchallenged need for permit regulations in general if proven true, but it distracts attention from particular challenged sub-sections of the permit regulations that require designation of agents. Defendants implicitly assert these reasons to mandate principal-agent relationships into the otherwise

spontaneous rainbow gathering culture without affording Plaintiff an evidentiary opportunity to demonstrate these reasons are pretext for religious discrimination and do not in fact serve the asserted interests.

Defendants' first paragraph of this section asserts Plaintiff "is a member of the Rainbow Family" and then parrots another court's 11 year old finding of fact defining "Rainbow Family." Nothing in Defendants' description of a "member" of the "Rainbow Family" is determinative of the issues presented in this case which demands inquiry into the significance of requiring otherwise un-affiliated citizens to form a legal entity capable of designating agents.

Procedural History

Defendants' "Decision Below" sub-section of their statement of the case appropriately summarizes the procedural history—but mis-states Plaintiff's TRO motion to challenge enforcement of the permit rule when it was really narrowly aimed at stopping suspicionless traffic stops. Defendants' Brief, 9; Appendix 1-3.¹ Defendants further confusing generalization of issues beyond relief Plaintiff is seeking by asserting Plaintiff "challenges the constitutionality of the group use permit requirement" when Plaintiff really

¹ Enforcement of the permit was not a TRO issue because Defendant Rey authorized this rainbow gathering without a permit. Appendix 374-375.

is only challenging the agent requirement. Defendants' Brief, 10; Appendix 107-124. Defendants add more confusion by over-generalizing Plaintiff's allegations by saying individually named Defendants violated Plaintiff's rights in "implementing and enforcing the regulations" when Plaintiff really seeks to hold individual Defendants accountable for acts beyond their scope of employment.

STATEMENT OF FACTS

Defendants do not include a statement of facts section and are therefore presumed to be satisfied with the statement of facts in Plaintiff's Brief. FRAP 28(b).

ARGUMENT

Case Summary

Defendants' summary of the case substantially distorts basic premises of Plaintiff's appeal. Clarification of those premises is therefore necessary.

Defendants confuse issues by stating Plaintiff appeals on grounds that "the Forest Service's noncommercial group use permit ***and*** signature requirement" substantially burdens Plaintiff's exercise of religion, due process, and civil rights statutes. Defendants' Brief, 1-2 (emphasis added). This Court should clearly understand Plaintiff does not object to noncommercial group use permit regulations generally, but only the sub-

sections that require citizens to designate an agent whenever 75 or more people are present on National Forest lands. These offensive sub-sections can be severed without compromising legitimate purposes of special use authorization regulations.

Defendants make contradictory statements regarding Free Speech and Free Exercise issues raised on appeal in that they first say “Nenninger now appeals from that decision on the following grounds: ... (4) Appellees violated the Free Exercise Clause under the hybrid rights doctrine;” but then assert Plaintiff has not appealed the District Court’s rejection of his claims challenging “the signature requirement under the Free Speech and Free Exercise Clauses...”. Defendants’ Brief, 2.

Nothing in Plaintiff’s opening brief waives any claim raised in Plaintiff’s Second Amended Complaint. The issues raised in the complaint that was erroneously dismissed included burdens to Free Speech and Free Exercise conduct, other First Amendment claims, Fourth and Fifth Amendment violations, violations of RFRA and other civil rights statutes. (Appendix 107,122-124,131-133,136-137). Each of the four argument issues raised in Plaintiff’s opening brief asserts “[t]he District Court erred entering summary judgment and dismissing ...” (Plaintiff’s Brief, 36,44,51,61). Particularly, Plaintiff presents the merits of Free Speech and Free Exercise claims in the

context of his argument issue 4 regarding hybrid rights claims by stating “[t]he most offensive aspect of the agent requirement is its prohibition of the content of particular expressive conduct—cooperative peaceful assembly in the common domain without potentially coercive relationships” (Plaintiff’s Brief, 65) and “the agent requirement is not ‘content-neutral’ at all, and seems ‘narrowly tailored’ mainly to censorial purposes. Where the permit rule facially singles out voluntary assembly by exclusion, it is an unconstitutional prior restraint, chilling First Amendment exercise on public lands.” Plaintiff’s Brief, 69.

Defendants mis-state the law upon which Plaintiff’s common law claims apply by not referring to all the relevant sub-sections of 42 U.S.C. § 1988 in that sub-section (a) is not described. This issue will be addressed elsewhere in this brief in response to Defendants’ specific arguments regarding Plaintiff’s Fourth Amendment claims.

Finally, Defendants’ summary of the case erroneously asserts Plaintiff “has not appealed the district court’s ruling rejecting ... his claims against individual defendants in their personal capacity.” Defendants’ Brief, 2. Despite this assertion, Defendants dedicate five pages of their brief explaining why they think individually named Defendants are not personally liable. Defendants’ Brief, 25-29. As noted, Plaintiff’s Brief does not waive

or abandon any claims set forth in his Second Amended Complaint and all four argument issues presented by Plaintiff on appeal assert the District Court erred entering summary judgment and dismissing. All three counts of Plaintiff's Second Amended Complaint request jury trial for damages, a remedy only applicable to defendants in individual capacities. Plaintiff's Brief, 30-31. Plaintiff specifically asserts claims on appeal against individual defendants: regarding RFRA by stating "[s]ummary judgment is premature prior to discovery of issues related to liability and damages; and, is not in order at all in favor of Defendants because there are substantial controverted facts that state a cause of action under RFRA" (Plaintiff's Brief, 44); regarding Fifth Amendment and statutory conspiracy by stating "[p]laintiff seeks damages for harms caused by individually named Defendants who conspired and acted (and/or neglected to prevent acts) to deprive rainbow gathering participants equal protection of Constitutional and statutory protection of free exercise of religion" (Plaintiff's Brief, 45); regarding Fourth Amendment by stating "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)" (Plaintiff's Brief, 58); and regarding hybrid rights by stating "[t]he doctrine is particularly helpful to protect from those individually named

Defendants who might otherwise escape accountability because of defenses based on policies presuming police are faithful public servants, but who have in fact abused public trust by acting under color of USFS to intentionally deprive rainbow gathering participants of National Forest use.” Plaintiff’s Brief, 63.

Defendants’ assertion that Plaintiff challenges the permit *and* the signature requirement inaccurately broadens Plaintiff’s claims beyond what is actually challenged. Defendants’ assertion that Plaintiff has not appealed issues relating to Free Speech and Free Exercise inaccurately narrows the issues actually presented. Defendants’ assertion Plaintiff has not appealed issues related to state law claims mis-states applicable law. Defendants’ assertion Plaintiff has not appealed issues related to certain Defendants’ individual liability is incorrect.²

Standard of Review

Defendants’ standard of review statement does not conflict with Plaintiff’s more detailed standard of review statement. (Defendants’ Brief, 14; Plaintiff’s Brief, 31-33). However, Defendants’ brief repeatedly ignores the appropriate standard of review by relying on information outside the record and failing to view properly alleged facts in light most favorable to

² Defendants Rey and Kimball are sued only in their official capacities.

Plaintiff. Defendants do not dispute there are controverted facts, but base all their five issues on the argument that Plaintiff fails to state a claim for relief. Reference to Plaintiff's Second Amended Complaint (Appendix 74-138) and the exhibits attached to Plaintiff's memorandum supporting stay of summary judgment and opposing dismissal (annotated index of exhibits at Appendix 216-222) sufficiently demonstrate Plaintiff's factual bases for his causes of action.

I. Defendants' Brief does not address the issue of burdens to the religious conduct of peaceful public assembly without a principal or agent as described in Plaintiff's Opening Brief.

Defendants do not apply the facts in the record in the light most favorable to Plaintiff as required under the standard of review of a FRCP 12(b)(6) dismissal. They do not address facts alleged to constitute a substantial burden to Plaintiff's exercise of religion and they distort the legal definition of "substantial burden" to Free Exercise.

Defendants confuse the definition of "substantial burden" by erroneously claiming "the Supreme Court has categorically rejected the application of the compelling interest test to the government's management of its own land" 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." Defendants' Brief, 16-17.

However, cases upon which Defendants rely all distinguished the definition of “substantial burden” in terms of whose *actions* were being coerced, not whose *property* was involved. “The Free Exercise Clause affords an individual protection from certain forms of governmental compulsion; it does not afford an individual a right to dictate the conduct of the Government's internal procedures.” Lyng v. Northwest Indian Cemetery Protective Association, 485 U.S. 439, 448 (1988) *citing* Bowen v. Roy, 476 U.S. 693, 699-700 (1986). “[T]he Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government.” *Lyng* at 451, *citing* Sherbert v. Verner, 374 U.S. 398, 412 (1963) (Douglas, J., concurring).

Native Americans in *Roy* wanted to coerce Government to alter its means of accountability of welfare programs by not using social security numbers. Native Americans in *Lyng* wanted to coerce the Forest Service into not acting to cut trees and build roads. Similarly, Native Americans in Navajo Nation v. United States Forest Service, 535 F.3d 1058 (9th Cir. 2008) wanted to coerce the Forest Service into not acting to develop a leased ski area with artificial snow made from recycled wastewater.

The facts of this case are distinguished because Plaintiff does not seek to coerce the Forest Service into acting or refraining from acting but rather

seeks protection from being coerced into acting contrary to religious beliefs by pledging allegiance to formation of a principal to designate an agent. Like the Amish in Wisconsin v. Yoder, 406 U.S. 205 (1972), Plaintiff seeks protection from penal statutes that seek to coerce Plaintiff and other rainbow gathering participants into acting contrary to central tenets of religious belief. Like the Seventh Day Adventist in *Sherbert*, Plaintiff seeks protection from having to choose between following precepts of religion and receiving government benefits. Protection from this government coercion to act contrary to religious beliefs is precisely the type of substantial burden prohibited in the cases Defendants cite.

After stating this Circuit's 1996 law defining "substantial burden" under RFRA in In re Young, 82 F.3d 1407 (8th Cir. 1996) to be in accord with Werner v. McCotter, 49 F.3d 1476, 1480 (10th Cir. 1995), Defendants cite dicta from *Werner* suggesting reasonable time, place, and manner restrictions upon religious gatherings may not necessitate a compelling state interest in a significantly limited context. Defendants' Brief, 17. In holding depriving a Native American prisoner of access to a sacred sweat lodge was a substantial burden to religion under RFRA, the *Werner* court was clear that other time, place, or manner restrictions that would be reasonable as generally applicable would also not be reasonable if as applied they

“significantly inhibit or constrain conduct or expression that manifests some central tenet of a prisoner’s individual beliefs”... “meaningfully curtail a prisoner’s ability to express adherence to his or her faith”... “deny a prisoner reasonable opportunities to engage in those activities that are fundamental to a prisoner’s religion.” *Werner at* 1480.

Like the sweat lodge in *Werner*, Plaintiff alleges gathering en masse in the public domain without the potential coercion inherent in the control element of a principal-agent relationship is a central religious tenet; the agent requirement significantly inhibits or constrains Plaintiff’s ability to exercise conduct that expresses that tenet; and National Forests are the only public lands known to provide reasonable opportunities for the needs of the large numbers of people who gather for the annual 4th of July rainbow gatherings. Defendants’ unsupported conclusory assertion that “Rainbow Family members have the option of gathering on non-National Forest lands” and the “permit and signature requirement do not ‘significantly inhibit or constrain,’ ‘meaningfully curtail,’ or ‘deny...reasonable opportunities to engage in’ religious expression” fails to view the record amply supporting Plaintiff’s allegations in the light most favorable to Plaintiff. Defendants’ Brief, 18; Appendix 96(¶¶53-55);432(¶5u).

Defendants’ argument that rainbow gatherings continuing despite the agent requirement demonstrates no substantial burden misses the point of this case. Defendants’ Brief, 18. Defendants ask this Court to turn blind eyes to sworn affidavits and other exhibits demonstrating rainbow gatherings continue because of massive non-violent civil disobedience against the agent requirement in the face of substantial harassment. Plaintiff’s Brief, 16-20.

Defendants’ contention the agent requirement poses no substantial burden to Plaintiff’s exercise of religious beliefs is not consistent with the record. Their footnote 6 assumes *arguendo* the signature requirement is a substantial burden and then asserts *undisputed* compelling interests. Defendants don’t address the *disputed* issues of whether the agent requirement is a substantial burden to Free Exercise and if the agent requirement serves the asserted interests in the least restrictive means.³ Defendants’ brief only asserts citations to their own rulemaking record in the Federal Register to support their contention the free permit is easy to obtain—but this conclusory assertion is not supported by the record because it does not address how a religious culture without a principal can possibly designate an agent.⁴

³ There is no evidence in the record the agent requirement serves asserted governmental interests at all, much less in the least restrictive manner.

⁴ Unless agreeing to fraudulently sign a permit without being a designated agent for any principal in order to minimize police harassment is “easy to obtain.” Appendix 110-112(¶¶88-101).

Defendants suggest Watchtower Bible and Tract Society of New York, Inc. v. City of Stratton, 536 U.S. 150 (2002) does not support Plaintiff's RFRA claim because "the Final Rule does not apply to canvassing" and unlike *Watchtower Bible*, "numerous courts have held that the Final Rule is not overbroad and narrowly tailored." Defendants' Brief, 18-19. The cases Defendants cite were not RFRA cases and do not contribute to the RFRA analysis herein because overbreadth and narrow tailoring are free speech standards of intermediate scrutiny. Overbreadth and narrow tailoring are not the same analysis as substantial burden analysis under RFRA.⁵ However, *Watchtower Bible* is relevant to the RFRA determination herein because in the course of balancing the Village's asserted interests with the effect of the ordinance on First Amendment rights the Supreme Court articulated guidance on the "substantial burden" prong of the RFRA analysis when it detailed the "pernicious effect of such a permit requirement." *Watchtower Bible* at 166-168; Plaintiff's Brief, 38-39.

Watchtower Bible also provides sound guidance because numerous close similarities of fact and law involved in both cases were determined. Like door-to-door canvassing, peacefully gathering en masse in public without principal/agency relationships is expressive conduct. "Even the act of

⁵ These cases are discussed regarding Plaintiff's hybrid rights claim.

camping in the National Forests may have political connotations and qualify as protected symbolic activity.” U.S. v. Rainbow Family, 695 F. Supp. 294, 308 (1988). The historical importance of both canvassing and assembling in public forums has been judicially recognized. “It also cannot be reasonably disputed that the public Forest Service lands are the type of forum in which expressive activity has historically occurred, and in which public expression of views must be tolerated to a maximal extent.” *Id.* (internal citations omitted); *Watchtower Bible* at 161-163. Both cases arose in a history of litigation of “petty offenses that raised constitutional questions of the most serious magnitude.” *Watchtower Bible* at 161. Like the Jehovah’s Witnesses’ history of resistance to speech regulation, the struggle of rainbow gathering participants to freely assemble is not a struggle for their rights alone. *Watchtower Bible* at 163. Like application of the *Watchtower Bible* ordinance, application of the agent requirement to Plaintiff and other rainbow gathering participants results in: **surrender of valuable anonymity** by requiring formation of an aggregate legal entity capable of designating agents; **silence rather than speech** because persons with “religious scruples” and “other patriotic citizens, who have such firm convictions about their constitutional right to engage in uninhibited” free association in the context of National Forests that they would prefer avoiding rainbow

gatherings to assembling “licensed by a petty official;” **spontaneous speech banned** by prohibiting Plaintiff and others from associating with citizens who decide whether, where, and when to gather on a moment to moment basis through a continuity of conversation and individual autonomy.

Watchtower Bible at 151; 166-168; Plaintiff’s Brief, 38-39. Like the result of the facial analysis in *Watchtower Bible*, the record in light most favorable to Plaintiff supports the fact that rainbow gatherings are largely the result of spontaneity among citizens who are mostly anonymous to each other and that some citizens are deterred from attending because of harassment associated with the agent requirement.

Like application of the Village’s permit ordinance identification requirements only to “commercial activities or the solicitation of funds,” *Watchtower Bible* at 151, the Forest Service’s principal and agent identification requirements might be narrowly tailored if they were construed to only apply to groups with agents. However, Defendants’ assertion the agent requirement is content neutral because it “merely” requires a permit is misplaced because attempting to impose agents on rainbow gatherings substantially burdens exercise of religion under RFRA in that it totally prohibits the manner of religiously motivated assembly that is central to Plaintiff’s religious beliefs. Thus, Defendants’ cursory treatment

of *Watchtower Bible* does not address the substantial burden issue presented by Plaintiff's RFRA claim.

Defendants' conclusory implicit assertion the agent requirement part of the "Final Rule" does not compel a person to refrain from religiously motivated conduct by threat of penal or other sanctions "in contrast to the governmental actions in *O Centro Espirita* and *Young*" is not consistent with the record. Defendants' Brief, 20. The record amply demonstrates if a fact finder believes the sincerity of Plaintiff's asserted religious beliefs, the agent requirement is a substantial burden to Plaintiff's exercise of those beliefs.

II. Defendants' Brief does not recognize the record of discriminatory effects and purpose of Defendants' acts in light most favorable to Plaintiff as required under the standard of review of a 12(b)(6) motion to dismiss or for summary judgment.

Defendants confuse the standard necessary to ultimately prevail on a selective prosecution claim with the standard necessary to entitle a plaintiff to discovery regarding a selective prosecution claim by asserting "[a] plaintiff must present 'clear evidence' that a decision to prosecute was based on an unjustifiable standard ..." Defendants' Brief, 21. The dicta in United States v. Armstrong, 517 U.S. 456, 465 (1996) upon which Defendants rely in asserting that "clear evidence" is required was based on cases deciding what is necessary to prevail after an evidentiary hearing. Oyler v. Boles,

368 U.S. 448, 456 (1962); United States v. Chemical Foundation, 272 U.S. 1 (1926).

The *Armstrong* Court was determining the same threshold question as this Court. “Having reviewed the requirements to prove a selective-prosecution claim, we turn to the showing necessary to obtain discovery in support of such a claim. ... The Courts of Appeals ‘require *some evidence* tending to show the existence of the essential elements of the defense,’ discriminatory effect and discriminatory intent. ... The vast majority of the Courts of Appeals require the defendant to produce *some evidence* that similarly situated defendants of other races could have been prosecuted, but were not, and this requirement is consistent with our equal protection case law.” *Armstrong* at 468-469 (internal citations omitted) (emphasis added).

The record herein presents “some evidence” of discriminatory effect in that Plaintiff’s affidavit reports observing over 75 pilgrims per day to Mt. Shasta in National Forests without being compelled to designate an agent to obtain a permit; observing sworn testimony from a Forest Service official that over 75 people gather at certain places in National Forests during holiday weekends without being compelled to designate an agent to obtain a permit; and unconfirmed reports that Plaintiff in good faith believes are reliable that over 75 college students on spring break swarm Forest Service

areas without being compelled to designate agents to obtain permits. Defendants have not rebutted these details of the record. Defendants' conclusory assertion the regulations have been fairly and consistently enforced does not refer to the record in light most favorable to Plaintiff as required under the applicable standard of review. Defendants' Brief, 22. Plaintiff asserts credible evidence the agent requirement is not always enforced against similarly situated sets of 75 or more citizens. This is sufficient to establish a prima facie selective enforcement claim. At this stage, summary judgment is premature prior to discovery. After discovery, any party may move for summary judgment if subsequently developed evidence demonstrates uncontroverted facts.

Defendants mis-characterize the significance of common law torts to this litigation by failing to recognize that 42 U.S.C. § 1988(a) provides for application of common law to civil rights actions. This issue will be discussed in relation to Fourth Amendment claims hereinafter because it is related to Defendants' erroneous invocation of FTCA.

Footnote 7 in Defendants' brief mis-characterizes the record regarding success of Defendant Rey's authorization of the Arkansas gathering without a formal permit. Defendants' Brief, 22; Appendix 374-375. The record demonstrates rainbow gathering volunteers gave the Forest Service

reasonable advance notice of probable gathering sites (Appendix 11-12), a mutually agreeable operating plan was implemented (Appendix 353-355), and Forest Service resource managers were fundamentally satisfied with the site cleanup (Appendix 366-368). Contrary to Defendants' illogical assertion that failure of the operating plan strategy triggered this lawsuit, the record shows this suit began because Defendant Twiss promised rainbow gathering attendees there would be no selectively targeted traffic stops (Appendix 13-14) and that Defendants nonetheless conducted roving profiled traffic stops in the area and established a stationary traffic stop on a remote road that was detaining every vehicle entering or leaving the rainbow gathering. Appendix 5-10,13-20,460-462.

III. Defendants' Brief ignores the record alleging violation of clearly established Fourth Amendment rights.

By ignoring Plaintiff's sworn affidavit that he was subjected to seizure and search conduct violating clearly established rights and asserting the account of events given in the sworn affidavits of the officers is true, Defendants demonstrate summary judgment is not appropriate because there are controverted facts. Defendants' Brief, 26-27. By arguing dismissal is appropriate, Defendants suggest this Court should ignore the applicable standard of review by not viewing the record in light most favorable to Plaintiff.

Defendants' brief confuses issues by mis-characterizing Plaintiff's Fourth Amendment claims as tort claims and by conflating Plaintiff's claims for injunctive relief from official policy with Plaintiff's claims for damages from seizure and search conduct that was beyond the limits of official policy. To be clear, Plaintiff does not seek monetary damages from the federal government for any torts. Plaintiff does seek injunctive relief from official policy that allows unfettered discretion to target traffic stops at citizens attending specific events without individualized cause. Plaintiff does seek monetary damages from individually named Defendants for their roles in subjecting Plaintiff to seizure and search conduct that violated clearly established Fourth Amendment law.

Plaintiff's seizure and search claims are not properly characterized as tort claims subject to the Federal Tort Claims Act because civil rights claims are specifically exempted from its exclusive remedy provisions. 28 U.S.C. § 2679(b)(2)(A-B). Defendants do not address this section of FTCA.

However, elements of common law torts are applicable to civil rights actions pursuant to 42 U.S.C. § 1988(a) insofar as they help facilitate remedies for violation of civil rights statutes. In this case, allowing a jury to consider the heartfelt offense associated with violation of elements of

common law torts will assist the fair assessment of damages pursuant to Plaintiff's civil rights claims.⁶

Defendants' attempt to shield themselves from individual liability with qualified immunity is not applicable to the facts of record. To be clear, Plaintiff does not allege individual defendants violated rights by implementing policies, but rather by acting beyond the scope of their duties with acts violating clearly established rights. Qualified immunity does not shield Defendants for acting beyond the scope of their duties. It is never within the scope of officials' duties to violate citizens' civil rights.⁷ Illinois Migrant Council v. Pilliod, 540 F.2d 1062, 1068 (7th Cir. 1976), *modified en banc* 548 F.2d 715 (1977).

Defendants confuse issues by erroneously characterizing Plaintiff's detention in 2006 as a "checkpoint" when in fact Plaintiff was stopped for not having a permit to gather. Defendants' Brief, 26; Appendix 157(¶4).

⁶ Likewise, consideration of common law applies to claims for damages from discrimination related to RFRA, Due Process, Equal Protection, and Free Exercise.

⁷ Defendants' footnote 9 fails to cite case law or respond to case law presented in the record regarding limits of legislative immunity for executive officials. Defendants' Brief, 25; Appendix 232-235. Legislative immunity does not shield Defendant Hornstein from individual liability for intentionally conspiring to deprive civil rights when she crafted the agent requirement into the permit rule in order to exclude rainbow gatherings under the pretextual disguise of legitimate government interests. Whether she did so conspire is a fact question that is not ripe for summary judgment.

Defendants assertion they had “every reason to believe that *any actions* they took” relating to the “Final Rule” or conducting law enforcement activities were constitutional is too broad a statement to credibly make (emphasis added). Defendants’ Brief 26.

Regarding specific Fourth Amendment violations, Defendants do not dispute the alleged conduct of detaining a citizen longer than necessary for the reason to initially detain him so that a canine can arrive; searching a person and his vehicle without reason to believe he was dangerous or involved with a crime; and pinching, probing, or squeezing to determine the contents of a person’s clothing during a *Terry* frisk were violations of clearly established rights, if proven true. Nor do Defendants dispute that targeting citizens with traffic stops for general law enforcement purposes under the pretext of safety checks; conspiring to deprive citizens of equal protection of the laws through traffic stops selectively targeted because of religious animus; and preferential enforcement of laws that are not uniformly enforced because of religious animus were violations of clearly established rights, if proven true. Defendants simply dispute these alleged facts occurred, but do not want Plaintiff to have an opportunity to show a fact-finder they did occur.

Defendants argue this Court lacks personal jurisdiction over individually named Defendants because their acts outside Arkansas did not constitute sufficient minimal contacts that they could reasonably be expected to be haled into court there; but do not suggest a remedy. Defendants' Brief, 27-28. Plaintiff alleges a continuous course of conduct relating to the agent requirement, selectively targeted traffic stops, and conspiracy to deprive civil rights. Appendix 81-82;95;129;133-135(¶¶22,49,164-165,175,179-182). Plaintiff argues this course of conduct as well as Defendant Krogstad's Arkansas residency and FRCP 4(k)(2) are sufficient to invoke personal jurisdiction over individually named Defendants. Appendix 241-243.

28 U.S.C. § 1631 requires a court to transfer a civil action or appeal whenever there is a want of jurisdiction if transfer is in the interest of justice. If there is any potential jurisdictional problem over individual Defendants, it will serve the interests of justice in resolving the merits of this case to transfer this case to the District Court in Denver, Colorado. That court surely has personal jurisdiction over Defendants Krogstad and Lampshire because of their acts in the field. If there is any such potential jurisdictional problem, transfer will also be judicially efficient consistent with 28 U.S.C.

§§ 1404(a) and 1406(a) because major sources of evidence and witnesses are located in Colorado.

This case was filed in Arkansas because of the need for prompt judicial review of selectively targeted traffic stops Plaintiff alleges were part of a continuing course of conduct that transgressed State boundaries. However, it is possible a jury could find the seizure and search conduct of Defendants Krogstad and Lampshire did violate Plaintiff's rights, but was not part of the same course of conduct as the other issues raised. Transfer to Colorado District Court would protect against this potential jurisdictional problem.

Colorado's jurisdiction over Defendant's Twiss and Hornstein is equal to that of the Arkansas District Court. Colorado Revised Statutes, 13-1-124; Cleverock Energy Corp. v. Trepel, 609 F.2d 1358 (10th Cir. 1979), cert. denied, 446 U.S. 909 (1980). To allow Defendants Hornstein and Twiss to evade personal jurisdiction because their acts occurred in Washington, D.C. would leave them unaccountable to the conscience of affected juror pools for the fruits of any conspiratorial acts that caused harms in any states with National Forests. Their authorizations for others to act contrary to clearly established rights and/or failure to prevent others from so acting would be improperly mooted because they would be capable of repetition yet evading

judicial review if courts in jurisdictions experiencing the effects of their acts could not reach them. Roe v. Wade, 410 U.S. 113, 125 (1973).

Although Defendants correctly identify the issue to be whether Plaintiff is entitled to discovery (Defendants' Brief, 29), they ignore the record of allegations that individually named Defendants have violated clearly established rights by avoiding addressing the specific issues and cases raised in Plaintiff's brief. Defendants' denial the record establishes at least a prima facie showing of a historical pattern of animosity, unlawful traffic stops, and other unlawful conduct asks this Court to put on blinders to the voluminous record, including findings of other courts. Defendants' Brief, 28; Appendix 21-58;108-109(¶¶80-84);124-127(¶¶139-148);134(¶¶176-178);225;260-262.

IV. Defendants' Brief mis-states the law of Plaintiff's hybrid rights Free Exercise claim.

Defendants erroneously state "[t]wo circuits have rejected the concept of hybrid rights. The Second Circuit has rejected the doctrine as 'dicta ...not binding on this court.'" Defendants' Brief, 31. More accurately, the Second Circuit rejected the language in *Smith* as non-binding dicta, not the doctrine itself. After acknowledging other courts had recognized the doctrine, that court stated: "we have not yet addressed generally whether hybrid claims require a greater governmental justification than each component of the

hybrid claim taken separately and we need not do so here...” Knight v. State of CT Dept. Public Health, 275 F.3d 156, 167 (2nd Cir. 2000).

The language that spawned recognition of the hybrid rights doctrine in Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 881-882 (1990) recites examples of cases which increased protection for rights of free speech and press, of parents to determine the upbringing of their children, and prohibiting compelled expression because they also affected Free Exercise. All those cases enhanced scrutiny of government regulation of companion rights to a Free Exercise claim from a reasonable relationship analysis (or intermediate scrutiny at most) to strict scrutiny, thereby invalidating a generally applicable law as applied. Likewise, Plaintiff is entitled to enhanced scrutiny of his claims for Free Assembly, Speech, Petition, Establishment, Seizures and Searches, Due Process, and Equal Protection because they all impose burdens to Free Exercise.

Just as Defendants’ argument suggests abolition of RFRA strict scrutiny with the independent viable claim theory, i.e. that violation of a companion right must be determined under lesser scrutiny before strict scrutiny is applied to determine whether Free Exercise has been violated, Defendants seek the same result under the hybrid rights doctrine. This view of hybrid

rights turns the doctrine upside down. Instead of creating a threshold to trigger strict scrutiny, it would destroy any such threshold.

Defendants conflate Plaintiff's hybrid rights claim with Free Speech and Assembly intermediate scrutiny findings in other cases presenting similar but not identical issues that cannot bind determination of the unique Free Exercise issues herein which warrant strict scrutiny because they are part of a hybrid rights claim. Defendants' Brief, 30-31. In reality, the same religious based discrimination affects several Constitutional rights. All those effects must be subjected to strict scrutiny under both RFRA and the hybrid rights doctrine because all those violations burden Free Exercise. Plaintiff's factual bases for alleging infringement of multiple Constitutional rights by operation of the agent requirement, generalized police harassment, selective targeting of legal workers, mandatory traffic stops, and intrusive camp surveillance is summarized in Plaintiff's memorandum opposing dismissal. Appendix 268-275.

Defendants do not directly respond to Plaintiff's argument pursuant to *Watchtower Bible* requesting an injunction declaring the agent requirement facially overbroad in that it allows unfettered discretion to decide which sets of 75 otherwise un-affiliated citizens must designate an agent. Plaintiff's Brief, 66. Defendants' disputed assertion "[t]he government has consistently

and fairly enforced the Final Rule and other laws” (Defendants' Brief, 22), even if true, does not save the agent requirement from facial invalidity.

“The very possibility of abuse will invalidate a regulation requiring a permit for expressive activity.” *Rainbow Family* at 323, citing Niemetko v. Maryland, 340 U.S. 268, 272 (1951).

V. Defendants’ Brief mis-applies the facts regarding standing for injunctive relief.

Plaintiff seeks injunctive relief declaring the agent requirement content-based, facially overbroad and/or vague; requiring Defendants to use the least restrictive of religion alternative to the agent requirement; declaring a rebuttable presumption that annual Fourth of July rainbow gatherings are religious; restraining Defendants from coercing anyone into acting as an agent for rainbow gathering participants; mandating that Defendants assure free and unobstructed access to rainbow gatherings; mandating the least restrictive of religion alternative to mandatory traffic stops; prohibiting traffic stops and/or searches for criminal purposes without individualized reason; prohibiting unnecessarily prolonged traffic stops; and generally mandating accommodation of religious exercise during annual Fourth of July rainbow gatherings. Appendix 123-124,132-133,137.

Defendants make a fair statement of the law regarding standing to seek injunctive relief. Defendants’ Brief, 33-34. However, the record

demonstrates Plaintiff will likely be burdened by future attempts to impose the agent requirement and by selectively targeted traffic stops because Defendants refuse to commit to applying the least restrictive alternative to the agent requirement when it burdens religious exercise (Defendants' Brief, 22fn7; Appendix 227) and because traffic stops have been targeted at rainbow gatherings it *at least* 6 out of the 9 years preceding the filing of this case, including *every* year since 2002. Appendix 581.

Defendants argue Plaintiff lacks standing because he “does not represent other Rainbow Family members who gather on National Forest System lands, since he claims the Rainbow Family consists of cooperative individuals who remain autonomous and free from organized, associated relationships.”⁸ Defendants' Brief, 35. Their point that Plaintiff doesn't represent others is not relevant to the issue of whether Plaintiff is part of a class of people who Defendants are targeting, which is the pivotal determination of whether Plaintiff is likely to personally suffer similar future harms.

⁸ The gist of Plaintiff's argument is there is a lack of coercive control sufficient to invest representative agents for rainbow gathering participants. It is Plaintiff's position that being organized and associated by love without this type of potential coercion is essential to the religious nature of rainbow gatherings. This issue is more relevant to points about the agent requirement that Defendants neglect to discuss in their issue 1 about substantial burdens and not very relevant to Plaintiff's standing for injunctive relief.

Defendants' reliance on Park v. Forest Service, 205 F.3d 1034, 1038 (8th Cir. 2000) for the proposition that Plaintiff's intention to attend future rainbow gatherings is insufficient to establish standing is weak because *Park* is factually distinguished by filing herein of numerous affidavits and exhibits demonstrating a pattern of selectively targeted conduct. Plaintiff's Brief, 26. This Court stated in *Park*: "It is possible that Ms. Park would have standing to seek injunctive relief in an action commenced today, if these more recent checkpoints establish a pattern of wrongdoing by the Forest Service. It is our hope, however, that Ms. Park will not have to resort to legal action again to be free from future violations of her constitutional rights, and that the administrators of the Forest Service will insure that the inappropriate conduct of 1996 is not repeated." Appendix 29. The record presents evidence that inappropriate conduct of pretextual selectively targeted traffic stops described in detail by the District Court in *Park* has continued. Appendix 30-55. Plaintiff therefore has standing to challenge this conduct.

Defendants' assertion there is "no indication in the record in this case" of an unlawful checkpoint policy, other unlawful conduct, animus, or a pattern of unconstitutional conduct fails to view the pleadings in the light most favorable to Plaintiff under the applicable standard of review. Plaintiff's Second Amended Complaint is replete with citations to judicial findings of

such burdens upon rainbow gathering participants. *Supra.* 33. Defendants' self-serving statements to the contrary and findings of fact from other cases are not determinative under the applicable standard of review.

Defendants' reliance on Addison v. Forest Service, 108 F. Supp.2d 1365 (M.D.Fla. 2000) does not compromise Plaintiff's standing to challenge the particular sub-section of the written policy allowing unfettered discretion to target traffic safety checkpoints at "special activities" (Appendix 228;261-262;335,¶2). *Addison* was a default judgment against an out of state pro se plaintiff and did not litigate the precise issue, but was based instead on a "heavy presumption" of the policy's constitutionality. *Id.* at 1368, fn. 5. The plaintiff had not challenged whether the new written policy would prevent the selectively targeted traffic stops that had been enjoined at the outset of that litigation. Appendix 56-58; *Id.* at 1366; *also see* District Court judgment in *Park* (Appendix 30-55) (holding selectively targeted traffic stops unconstitutional). Furthermore, the *Addison* court, like this Court in *Park*, did not have the guidance of the November 28, 2000 decision in City of Indianapolis v. James Edmond, 531 U.S. 32 (2000) when issuing its July 17, 2000 opinion.

This Court can and must prevent police from using the pretext of selectively targeted checkpoints to justify selectively targeted stops for

generalized criminal law enforcement purposes or any other prohibited purpose—not just for the protection of rainbow gathering pilgrims, but for all citizens who might be targeted because of animosity toward their class on account of appearance, lifestyle, musical preferences, politics, or religion. Plaintiff’s detention at such a stop in the context of a pattern that is likely to recur gives him standing to challenge this police technique that attempts to subvert the purposes of the Supreme Court’s holding in *Edmond*.

Finally, Defendants cite no authority in their footnote 11 to dispute Plaintiff’s argument that RFRA standards affect Fourth Amendment protections of reasonable expectations of privacy from armed patrols in pacifist camps on public land. Defendants’ Brief, 38. Behind all the legal argument is the reality of human beings who peacefully come together in remote reaches of our National Forests being hunted down and harassed by a handful of police who don’t follow official policies or the orders of their superiors. Rainbow gathering camps are sacred to Plaintiff and others. The citizenry needs a safe space to evolve the social fabric of peace. Sacred spaces in the public forum of National Forests are the church and pilgrims are being subjected to military aircraft terror and offensive police surveillance of the most intimate aspects of life. This must stop.

CONCLUSION

Defendants' evasion, generalization, minimization, mis-statements, and mis-applications do not shield them from the piercing truth of Plaintiff's well pled complaint under the applicable standard for a FRCP 12(b)(6) motion to dismiss. Summary judgment is not appropriate because there are substantial controverted facts in the record.

Plaintiff requests this Court remand this case for discovery and jury trial to determine damages for all the harms detailed in Plaintiff's Second Amended Complaint; and thereafter for declaratory judgment finding the agent requirement and selectively targeted traffic stops illegal and unconstitutional in violation of RFRA, the First Amendment, Fourth Amendment and Fifth Amendment; and for consideration of what further and other relief is appropriate in light of the evidence—or alternatively, transfer this case to the District Court of Colorado.

Respectfully submitted,

Tony Nenninger, pro se
Missouri Bar No. 61002

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6932 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief was prepared using Microsoft Word 2003. The original and nine copies are filed herewith. Pursuant to Local Rule 28A(d)(1) counsel certifies filing of a digital version of this reply brief is not practicable at this time because I am unable to convert a Word document to PDF with my computer and I am unable to get to a source for such conversion in time for filing because of vehicle breakdowns. I will arrange for a PDF version to be prepared and mailed to the Court and to counsel for Defendants as soon as practicable.

CERTIFICATE OF SERVICE

Two copies of this brief were mailed on January 23, 2009 to:

Claude S. Hawkins, Jr.
Assistant U.S. Attorney
Western District of Arkansas
P.O. Box 1524
Fort Smith, Arkansas
72902

Tony Nenninger, pro se
Mo. Bar No. 61002
94 Huzzah Club Rd.
Bourbon, Missouri
65441
573-775-5263
tonygoodh2o@yahoo.com