

**IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF ARKANSAS**

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TONY NENNINGER, )  
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 )  
 Plaintiff, )  
 )  
 v. )  
 )  
 UNITED STATES FOREST SERVICE, )  
 )  
 Abigail Kimbell, Chief of FS, )  
 )  
 MARK REY, )  
 )  
 in official capacity as Under Secretary )  
 for USDA, )  
 )  
 ELLEN HORNSTEIN, ) Case No. 07-3028  
 )  
 individually and in official capacity as )  
 FS legal counsel, ) **MEMORANDUM IN SUPPORT OF**  
 ) **DEFENDANTS' MOTION TO**  
 JOHN TWISS, ) **DISMISS OR, IN THE**  
 ) **ALTERNATIVE, FOR**  
 individually and in official capacity as FS ) **SUMMARY JUDGMENT**  
 law enforcement chief, )  
 )  
 OFFICER LAMPSHIRE, )  
 )  
 individually and in official capacity in FS )  
 law enforcement, )  
 )  
 OFFICER KROGSTAD, )  
 )  
 individually and in official capacity in FS )  
 law enforcement, )  
 )  
 UNKNOWN JOHN AND JANE DOES, )  
 )  
 individually and/or in official capacities for )  
 FS and/or other government agencies, )  
 )  
 Defendants. )  
 )  

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## INTRODUCTION

The United States of America, represented by Robert C. Balfe, United States Attorney for the Western District of Arkansas, and the undersigned Assistant United States Attorney, on behalf of the United States Department of Agriculture, Forest Service (Forest Service); Abigail Kimbell, Chief of the Forest Service; Mark Rey, Under Secretary, Natural Resources and Environment; Ellen Hornstein in her personal and official capacity as Forest Service legal counsel; John Twiss, in his personal and official capacity as Director of the Forest Service's Law Enforcement and Investigations Staff; Chris Lampshire, in his personal and official capacity as a Forest Service Law Enforcement Officer; and Chad Krogstad, in his personal and official capacity as a Forest Service Law Enforcement Officer, and submits this Memorandum in Support of its Motion to Dismiss or, in the Alternative, for Summary Judgment.

## BACKGROUND AND REGULATORY FRAMEWORK

Plaintiff has brought this lawsuit 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. Count I of the amended complaint challenges the constitutionality of Forest Service regulations 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 Restoration of Religious Freedom 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. 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. Count III of the amended complaint recasts Counts I and II as a conspiracy, based on the same legal standards. This case is one of several disputes between the United States and members of the Rainbow Family, including plaintiff. In disposing of a prior case brought by Rainbow Family members, the District Court for the District of Oregon explained:

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>1</sup> As the district court found in Black, 18 F. Supp. 2d at 1130, "[i]mproperly closed latrines, eroded and compacted soil, destruction of vegetation, and

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<sup>1</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.

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>2</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 safety. See, e.g., Final Rule, 60 Fed. Reg. at 45,281 (describing how a group called “We The People” sought to meet at

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<sup>2</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.

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 noncommercial group use regulation in 1995. See Final Rule, 60 Fed. Reg. at 45,258, 45,262-45,264, 45,278 (describing the public interests the noncommercial group use regulation 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>3</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 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-

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<sup>3</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.

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).

### **PROCEDURAL HISTORY**

In his *pro se* complaint filed June 26, 2007, plaintiff Tony 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. (Docket #3) By order dated June 28, 2007, the Court denied the motion for an emergency temporary restraining order. (Docket #7) On October 23, 2007, plaintiff filed an amended complaint naming the Director of the Forest Service's Law Enforcement and Investigations Staff in his personal and official capacities. (Docket #11)

### **SUMMARY OF ARGUMENT**

The plaintiff's claims against the Forest Service and the other defendants in their official capacities should be dismissed for failure to state a claim for which relief can be granted. The plaintiff's First Amendment claim is barred by the law of the Circuit and collateral estoppel. In addition, the constitutionality of the Final Rule, including the signature requirement, has been upheld by 24 courts. The plaintiff cannot show that he has a cause of action under the Religious Freedom Restoration Act because the Final Rule does not substantially burden his exercise of religious beliefs. The plaintiff lacks standing to seek equitable relief with respect to the checkpoints and other law enforcement activities conducted at the 2006 and 2007 national Rainbow Family gatherings, and these law enforcement activities were constitutional. The plaintiff has no cause of action under 42 U.S.C. §§ 1985, 1986, and 1988. The plaintiff's state

law claims against the Forest Service and the other defendants in their official capacities are barred by sovereign immunity and the plaintiff's failure to exhaust administrative remedies.

The plaintiff's claims brought against Mr. Twiss, Ms. Hornstein, Mr. Lampshire, and Mr. Krogstad in their personal capacities also should be dismissed for failure to state a claim for which relief can be granted. The United States is the proper party with respect to any claims arising under state law. The plaintiff is not entitled to a Bivens remedy because he and others similarly situated have had ample opportunity to litigate the constitutionality of the Final Rule and its enforcement. This Court lacks jurisdiction over these four defendants, and they are entitled to qualified immunity. In addition, Ms. Hornstein is entitled to legislative immunity from suit.

The defendants are entitled to dismissal of the plaintiff's claims at this stage of the litigation. An official's entitlement to qualified immunity must be resolved at the earliest possible stage of the litigation and that "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.

## ARGUMENT

### I. STANDARD OF REVIEW

In considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted, the complaint should be liberally construed in the light most favorable to the plaintiff. Fusco v. Xerox Corp., 676 F.2d 332, 334 (8th Cir. 1982). All inferences which may be drawn from the facts alleged should be in favor of the plaintiff. Parkview Heights Corp. v. City of Black Jack, 467 F.2d 1208, 1212 (8th Cir. 1972). The complaint should not be dismissed unless it appears without a doubt that the plaintiff can prove no set of facts which would entitle him to relief. Osborne v. United States, 918 F.2d 724, 728 (8th Cir. 1990); Price v. Moody, 677 F.2d 676, 677 (8th Cir. 1982). The issue is whether the claimant is entitled to offer evidence to support his claims. American Civil Liberties Union Foundation of Southern California v. Brown, 952 F.2d 457, 467 (D.C. Cir. 1991). A motion filed under Federal Rule of Civil Procedure 12(b)(6) raising matters outside the pleadings is converted into a motion for summary judgment under Federal Rule of Civil Procedure 56. Lane v. Dollar, 330 U.S. 731, 735 (1947).

Summary judgment is appropriate when the facts, viewed in the light most favorable to the opposing party, show no controversy as to any genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); Langley v. Allstate Ins. Co., 995 F.2d 841, 844 (8th Cir. 1993). Only disputes over facts that may affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Anderson, 477 U.S. at 248. To create a question of fact, the adverse party responding to a properly made and supported motion for summary judgment must

set forth specific facts showing that there is a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

**I. THE CLAIMS BROUGHT AGAINST THE FOREST SERVICE AND THE OTHER DEFENDANTS IN THEIR OFFICIAL CAPACITIES SHOULD BE DISMISSED FOR FAILURE TO STATE A CLAIM FOR WHICH RELIEF CAN BE GRANTED OR, IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT.**

**A. The Plaintiff's First Amendment Claim Is Barred By Law Of The Circuit And Collateral Estoppel.**

In his prosecution for failure to obtain the required permit in connection with the 1998 national Rainbow Family gathering in the Mark Twain National Forest, this same plaintiff unsuccessfully challenged the constitutionality of the Final Rule under the First Amendment. United States v. Nenninger, 71 F. Supp. 2d 962 (W.D. Mo. 1999). He was tried, convicted of failing to obtain the required permit under the Final Rule and a water line permit, and was fined \$50.00. On appeal, the district court judge affirmed the magistrate judge's ruling. On appeal, the Eighth Circuit affirmed the constitutionality of the Final Rule. United States v. Nenninger, 351 F.3d 340 (8th Cir. 2003).<sup>4</sup>

In addition to being the controlling law in this jurisdiction, the Eighth Circuit's decision in Nenninger is binding upon the plaintiff pursuant to the principle of collateral estoppel. Collateral estoppel is appropriate when there was a full and fair opportunity to litigate the issue in the previous action; the issue was actually litigated in the previous action; the issue was lost as

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<sup>4</sup> Like the Eighth Circuit, courts around the country have upheld the constitutionality of the permit requirement as a whole and the signature requirement in particular. See United States v. Kalb, 234 F.3d 827, 832 (3d Cir. 2000) ("By now there is a body of case law addressing the constitutionality of the signature requirement; this requirement has been upheld uniformly and we will uphold it here."), cert. denied sub nom. Sedlacko v. United States and Beck v. United States, 534 U.S. 1113 (2002); 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).

a result of a final judgment in that action; and the person against whom collateral estoppel is asserted in the present action was a party or in privity with a party in the previous action. Under the doctrine of collateral estoppel, Mr. Nenninger is precluded from challenging the constitutionality of the Final Rule because he was a party in a prior action where he had a full and fair opportunity to litigate the constitutionality of the Final Rule and where a final judgment on the merits was entered against him on that issue.

**B. The Plaintiff's First Amendment Claim is Barred by the Rule of Heck v. Humphrey.**

In light of Nenninger's conviction for violating the Final Rule, his First Amendment claim is barred by the rule of Heck v. Humphrey, 512 U.S. 477 (1994). Invoking "the hoary principle that civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments," Id. at 486, the Supreme Court in Heck held "that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a [42 U.S.C.] § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254." id. at 486-87 (footnote omitted). Although Heck involved a § 1983 suit against state officials, its holding necessarily applies to similar suits against federal officials and their agencies. Cf. Christian v. Crawford, 907 F.2d 808, 810 (8th Cir.1990) (per curiam) ("An action under Bivens is almost identical to an action under section 1983, except that the former is maintained against federal officials, while the latter is against state officials."); Duffy v. Wolle, 123 F.3d 1026, 1037 (8th Cir. 1997) (same); see also Martin v. Sias, 88 F.3d 774, 774

(9th Cir.1996) (collecting cases from other circuits applying Heck to suits against federal officials).

The requirement that the plaintiff first obtain relief from his conviction is not merely an exhaustion requirement, moreover, but rather an essential element of his civil case. See Heck, 512 U.S. at 489 (“We do not engraft an exhaustion requirement upon § 1983, but rather deny the existence of a cause of action.”); see also Edwards v. Balisok, 520 U.S. 641, 649 (1997). Thus, for example, “[e]ven a prisoner who has fully exhausted available state remedies has no cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus.” Heck;512 U.S. at 489; see, e.g., Moore v. Novak, 146 F.3d 531, 536 (8th Cir. 1998) (“We agree with the district court that, because Moore did not prove that his state conviction had been independently invalidated, his § 1983 claim for damages is barred by Heck”). Because Heck rests on the principle that civil suits (other than habeas proceedings) may not be used to collaterally attack criminal judgments, moreover, it is irrelevant whether the plaintiff is incarcerated. Entzi v. Redmann, 485 F.3d 998, 1003 (8th Cir. 2007).

In this case, Nenninger revives in the form of a Bivens-type action his claim this “that his conviction violated his First Amendment rights” because of the asserted invalidity of the Final Rule. Nenninger, 351 F.3d at 342. Putting aside for the moment the collateral estoppel problems with Nenninger’s claim, Heck plainly bars it for the obvious reason that success in litigating the constitutionality of the Final Rule necessarily would imply the invalidity of Nenninger’s conviction for violating that rule. Nenninger does not allege the essential condition precedent to

suit that he has obtained relief from his conviction, and therefore Heck bars his First Amendment claim. See Entzi, 485 F.3d at 1003.

**C. Any Challenge To The Constitutionality Of The Final Rule Is, In Any Event, Meritless.**

The Forest Service regulation requires those wishing to obtain a noncommercial group use permit to provide “[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 plaintiff refers to this requirement as the “agent requirement.” To the extent that the plaintiff is suggesting that an alternative regulatory scheme that does not contain a signature requirement be thrust upon the Forest Service, his contention flies in the face of Supreme Court precedent.

In Ward v. Rock Against Racism, 491 U.S. 781, 789-90 (1989), the Supreme Court ruled that time, place and manner restrictions need not be the “least restrictive means” of achieving the government's interests to survive constitutional attack. Rather, the test for narrow tailoring in this context is whether the government “could reasonably have determined that its interests would be served less effectively without [the regulation] than with it.” Id. at 801.

Clearly, that test is met here. The agent requirement serves an important role in the overall framework of the noncommercial group use regulation by serving at least two interests. First, “[b]y signing a special use authorization on behalf of a group, the agent or representative gives the authorization legal effect and subjects the group to the authorization's terms and conditions.” Final Rule, 60 Fed. Reg. at 45,286. The Forest Service's attempts to protect the governmental interests articulated above have been frustrated in the past in part by the Rainbow Family's diffuse organizational structure. “[I]nformal agreements made with one individual or subgroup have not been respected by other group members. It has thus been difficult for the

agency to obtain commitments from the Rainbow Family on issues pertaining to the Gatherings.” Id. at 45,267. The agent requirement resolves this difficulty. By signing the permit, the agent or representative, as a matter of federal law and regardless of the law of any particular state, binds the group and its individual members as a whole to the terms and conditions of the permit and gives the permit legal effects. The Third Circuit endorsed this rationale quite succinctly in United States v. Kalb: “The special use authorization process will enhance the agency's ability to achieve its objectives by allowing the agency to obtain commitments from the Rainbow Family that apply to the group as a whole.” Kalb, 234 F. 3d 827, 833, cert. denied, 534 U.S. 1113 (2002).

Second, the agent requirement deters intentional false statements to the Forest Service which might cause an erroneous denial or grant of an authorization application. An applicant for a noncommercial group use authorization must submit basic information sufficient to allow the Forest Service to make an informal time, place and manner decision. See 36 C.F.R. § 251.54. 18 U.S.C. § 1001(a) criminalizes the making of any “materially false, fictitious, or fraudulent statement or representation” as to “any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States.” The agent requirement this helps assure that the Forest Service's permitting decision is made with accurate information. Thus, even if the challenge to the agent requirement were not barred by the law of the Circuit, it would, of necessity, fail.

The plaintiff argues that application of the Forest Service's agent requirement forces him to abandon sincerely held religious beliefs and does not allow the free exercise of religion. This claim is without merit. “The Supreme Court has made clear that a non-discriminatory statute

that does not affirmatively compel, by threat of penal sanctions, a person to refrain from otherwise lawful religiously motivated conduct or to engage in conduct he finds objectionable for religious reasons does not violate the Free Exercise clause.” United States v. Masei, 54 F. Supp. 2d 903, 921 (W.D. Wis. 1999), aff’d, No. 98-10014-X-01 (W.D. Wis. Mar. 16, 2000) (citing Bowen v. Roy, 476 U.S. 693, 706 (1986); Employment Div., Dep’t of Human Resources v. Smith, 494 U.S. 872, 878-79 (1990)). Thus, the First Amendment is not violated even when a regulation, such as the Final Rule, forces an individual to choose between obtaining a benefit offered by the government or strict adherence to his beliefs, as long as the regulation is a reasonable means of promoting a legitimate public interest. Roy, 476 U.S. at 708. The Final Rule meets this requirement by protecting National Forest System lands and resources; addressing concerns of public health and safety; and allocating space among competing uses.

No personal belief system, no matter how deeply and sincerely held, whether religious or political or otherwise, can justify his refusal to comply with an otherwise valid, generally applicable law such as the noncommercial group use regulation, including its signature requirement. See Cox v. New Hampshire, 312 U.S. 569, 574 (1941) (“One would not be justified in ignoring the familiar red traffic light because he thought it his religious to disobey the municipal command or sought by that mean to direct public attention to an announcement of his opinions.”); Smith, 494 U.S. at 878-80 (“We have never held that an individual’s religious beliefs excuse him from compliance with an otherwise valid law prohibiting conduct that the State is free to regulate.”). The plaintiff’s assertion that he need only comply with the laws he finds consistent with the fundamental tenets of their political or religious creed would turn each

person into a “law unto himself.” Smith, 494 U.S. at 879 (quoting Reynolds v. United States, 98 U.S. 145, 166-67 (1879)). This is not the law. See Masei, 54 F. Supp 2d at 903 (“[T]o credit defendant's argument would allow the Rainbow Family or any other group to avoid the permit requirement simply by maintaining that it had no leaders or agents that could sign the permit, thereby gutting the entire special use authorization scheme.”).

The final rule provides that if an authorized officer denies a permit application and an alternative time, place, and manner will allow the applicant to meet the eight evaluation criteria in the Final Rule, the authorized officer must offer that alternative. 36 C.F.R. § 251.54(g)(3)(iii). Based on this provision, the plaintiff also argues that he should be offered the alternative of being issued a permit without having to sign it. In effect, the plaintiff is arguing that the Forest Service must waive the signature requirement.

This contention turns the Final Rule on its head. Under the explicit wording of the Final Rule, the Forest Service is required to offer an alternative only if it will allow the applicant to meet all the evaluation criteria in the Final Rule, including the signature requirement. Thus, if the Forest Service issued the plaintiff a permit without requiring him to sign it, the agency would be in violation of the Final Rule. Masei, 54 F. Supp. 2d 903, 921 (W.D. Wis. 1999), aff'd, No. 98-10014-X-01 (W.D. Wis. Mar. 16, 2000).<sup>5</sup>

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<sup>5</sup> The plaintiff alleges in ¶ 130 of his amended complaint that the defendants implicitly waived the signature requirement for the 2007 national Rainbow Family gathering by accepting an operating plan without a permit or designation of an agent for the gathering. The plaintiff misstates the defendants’ approach to the 2007 national Rainbow Family gathering. The defendants neither implicitly nor explicitly waived the signature requirement in the Final Rule. Rather, they exercised their discretion with respect to enforcement of the Final Rule. As acknowledged in ¶¶ 119-123 of plaintiff’s amended complaint, the defendants stated that they had discretion with respect to enforcement of the Final Rule and, in the interests of reaching an understanding with the Rainbow Family, offered to refrain from enforcement of the permit

(continued...)

**D. Plaintiff Has Failed To State A Claim Under The Religious Freedom Restoration Act.**

The plaintiff alleges that the United States substantially burdened his right to the free exercise of his religion under the Religious Freedom Restoration Act (RFRA), 42 U.S.C.

§ 2000bb et seq. This allegation is meritless.

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(b).

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”

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(...continued)

requirement at the national 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. 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.

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, 484 U.S. 439, 453 (1988). The Final Rule, which requires 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, the plaintiff’s alleged spiritual injury from the permit 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). 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.

Heck also bars the plaintiff's RFRA claims to the extent based on the 1998 Rainbow Family gathering giving rise to his conviction. RFRA provides a potential defense to criminal proceedings. See 42 U.S.C. § 2000bb-1(c). To the extent, therefore that Nenner asserts that the Final Rule as applied to his 1998 conduct also violates RFRA, that claim also necessarily implies the invalidity of his conviction and is barred.

**E. The Plaintiff Lacks Standing to Seek Equitable Relief With Respect To Law Enforcement Activities At The 2006 And 2007 National Rainbow Family Gatherings.**

Equitable relief on the basis of alleged past law enforcement misdeeds is inappropriate, given the speculative nature of any claim that a plaintiff will be injured by these alleged misdeeds in the future. Los Angeles v. Lyons, 461 U.S. 95 (1983). Lyons involved a plaintiff who alleged that he had been injured during an arrest by the use of an illegal chokehold. The Supreme Court held that the requirements for standing to seek equitable relief in this context closely track the standards for actual award of equitable relief and that the plaintiff could not meet these standards given the speculative nature of any claim that he again would be arrested by the police and subjected to a chokehold. Likewise, in this case, the plaintiff cannot establish standing to seek equitable relief in connection with his claims concerning the law enforcement

activities at the 2006 and 2007 national Rainbow Family gatherings. His claims that these alleged misdeeds will occur in the future are too speculative to warrant injunctive relief.

**F. The Checkpoints And Other Law Enforcement Activities At The 2006 And 2007 National Rainbow Family Gatherings Were Constitutional.**

The plaintiff's equal protection claim, tantamount to a selective prosecution claim, Wayte v. United States, 470 U.S. 598, 608 (1985), fails as a matter of law. 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 United States v. Armstrong, 517 U.S. 456 (1996); 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)).

The plaintiff has not pled and cannot establish 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. Carpenter Declaration, Ex. 4.<sup>6</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

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<sup>6</sup> Ironically, as discussed in footnote 5, the Forest Service has made an extra effort to accommodate the Rainbow Family with respect to the signature requirement.

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.

In addition, the Forest Service's national vehicle checkpoint policy, which incorporates Fourth Amendment requirements (see Forest Service Handbook 5309.11,sec.51.13), 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). In the only other case involving a Forest Service checkpoint, which predated the agency's national vehicle checkpoint policy, the court dismissed the plaintiff's claims for lack of standing. Park v. Forest Service, 205 F.3d 1034 (8th Cir. 2000). In his discussion of the legality of the Forest Service's vehicle checkpoint policy, the plaintiff neglects to mention the favorable outcome of these cases for the government. The checkpoints at the 2006 and 2007 national Rainbow Family gatherings were constitutional because they were conducted in compliance with the Forest Service's national vehicle checkpoint policy. See Lynn Declaration, Ex. 5; Smithson Declaration, Ex. 6.

In addition, the plaintiff grossly misrepresents the actions of Law Enforcement Officers Lampshire and Krogstad at the 2006 and 2007 national Rainbow Family gatherings. As shown by their declarations, these officers conducted themselves in accordance with applicable law and agency policy and in no way violated the plaintiff's Fourth Amendment rights. See Lampshire Declaration, Ex. 7; Krogstad Declaration, Ex. 8.

Therefore, the Forest Service and the other defendants in their official capacities are entitled to summary judgment on the plaintiff's claims involving the checkpoints and other law enforcement activities at the 2006 and 2007 national Rainbow Family gatherings.

**G. The Plaintiff Has No Cause of Action Under 42 U.S.C. §§ 1985, 1986, or 1988.**

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, the plaintiff has failed to state and 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 the plaintiff has not and cannot state a claim under 42 U.S.C. § 1985, it follows that he has not and 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, the plaintiff cannot state a claim under 42 U.S.C. § 1988.

**H. The Plaintiff's State Law Claims Against The Government Are Barred By Sovereign Immunity And The Plaintiff's Failure to Exhaust Administrative Remedies.**

The federal government may be sued only to the extent its sovereign immunity is expressly waived. The Federal Tort Claims Act (FTCA) is a partial waiver of the federal government's sovereign immunity in tort. Any tort claims against the United States that are exempted from the partial waiver of sovereign immunity in the FTCA are barred. The FTCA expressly provides that the partial waiver of the government's sovereign immunity in tort does not apply to any claim based upon an act or omission of a federal employee, exercising due care, in the execution of a statute or regulation, whether or not the statute or regulation be valid. 28

U.S.C. § 2680(a). All plaintiff's tort claims against the government, including malicious prosecution, false arrest, assault, invasion of privacy, fraud under duress, and libel, arise out of acts taken by federal employees, exercising due care, in drafting or enforcing the Final Rule. See Twiss Declaration, Ex. 3; Hornstein Declaration, Ex. 2; Lampshire Declaration, Ex. 7; Krogstad Declaration, Ex. 8. Therefore, the federal government remains immune to suit brought on these tort claims, and the plaintiff's state law claims brought against the Forest Service and the other defendants in their official capacities must be dismissed.

Even assuming that the federal government were not immune to suit brought on the plaintiff's tort claims, these claims would merit dismissal for failure to exhaust administrative remedies. The FTCA requires tort claimants to file an administrative claim with the affected agency before filing suit in court. 28 U.S.C. § 2675(a). The exhaustion requirement is jurisdictional and cannot be waived. Since the plaintiff has not filed an administrative tort claim with USDA, his tort claims against the Forest Service and the other defendants in their official capacities must be dismissed.

## **II. THE CLAIMS BROUGHT AGAINST THE FOUR DEFENDANTS IN THEIR PERSONAL CAPACITIES MUST BE DISMISSED.**

In Bivens v. Six Unknown Named Agents of the Fed. Bur. of Narcotics, 403 U.S. 388 (1971), the Supreme Court created a damages remedy for plaintiffs whose constitutional rights have been violated by federal employees. Therefore, to the extent the plaintiff is alleging claims that do not arise under the United States Constitution against the four defendants sued in their personal capacities, the plaintiff's claims should be dismissed. To the extent the plaintiff is

alleging First, Fourth, and Fifth Amendment violations against these defendants, his claims also should be dismissed.

**A. The United States Of America Is The Proper Party In This Suit With Respect To Any Claims Arising Under State Law.**

Under the FTCA, the exclusive remedy for any state law tort committed by a federal employee within the scope of his or her official duties is a suit against the United States. 28 U.S.C. § 2679(b)(1).<sup>7</sup> If a complaint alleges that a tort has been committed by a federal employee, the Attorney General of the United States may file a certification that the allegedly tortious act or omission was committed by the employee within the scope of his or her employment. 28 U.S.C. § 2679(d)(1). “The Attorney General's decision regarding scope of employment certification is conclusive unless challenged.” Green v. Hall, 8 F.3d 695, 698 (9th Cir. 1993). The court should then substitute the United States for the individual federal employee defendant. 28 U.S.C. § 2679(d)(1).

All four defendants sued in their personal capacities have been certified by the Attorney General as acting within the scope of their employment. See, Declaration of Robert C. Balfe, Ex. 1. Because the FTCA provides that the exclusive remedy for any state law tort committed by a federal employee acting within the scope of his or her official duties is a suit against the United States, the state law claims brought against the four defendants in their personal capacities should be dismissed with prejudice. Id.; see United States v. Smith, 499 U.S. 160, 164-65 (1991).

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<sup>7</sup> The FTCA provides: “The remedy [in the FTCA for injury] arising or resulting from the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment is exclusive of any other civil action or proceeding for money damages by reason of the same subject matter against the employee whose act or omission gave rise to the claim . . . . Any other civil action or proceeding for money damages arising out of or relating to the same subject matter against the employee . . . is precluded without regard to when the act or omission occurred.” 28 U.S.C. § 2679(b)(1).

Dismissal of the state law claims against these four defendants is appropriate even though one or more exceptions to the FTCA require dismissal of the state law claims against the United States. Gutierrez de Martinez v. Lamagno, 115 S. Ct. 2227, 2233 (1995) (“When the United States retains immunity from suit, certification disarms plaintiffs. They may not proceed against the United States, nor may they pursue the employee shielded by the certification.”).

**B. The Plaintiff Is Not Entitled To A Bivens Remedy Because He And Others Who Were Similarly Situated Have Had Ample Opportunity To Litigate The Constitutionality Of The Final Rule And Its Enforcement.**

As explained in Part I A above, Heck v. Humphrey bars the plaintiff’s Bivens claim based on the First Amendment because his successful prosecution of such a claim necessarily would imply the invalidity of his criminal conviction. Even if the plaintiff had not been convicted, however, a Bivens remedy is not available here.

The Supreme Court has recently held that courts should not create a Bivens remedy where the plaintiff and others who are similarly situated have had ample opportunity to litigate the constitutional issues in question. Wilkie v. Robbins, \_\_\_ U.S. \_\_\_, 127 S. Ct. 2588 (2007). In Wilkie, the Supreme Court set out general guidelines for addressing plaintiffs’ requests to extend Bivens into new contexts. “[O]n the assumption that a constitutionally recognized interest is adversely affected by the actions of federal employees, the decision whether to recognize a Bivens remedy may require two steps.” Id. at 2598. First, “there is the question whether any alternative, existing process for protecting the interest amounts to a convincing reason for the Judicial Branch to refrain from providing a new and freestanding remedy in damages.” Id. (citing Bush v. Lucas, 462 U.S. 367, 378 (1982)). That test plainly encompasses remedies provided in statutory schemes such as in Bush v. Lucas, 462 U.S. 367 (1982), and Schweiker v. Chilicky, 487

U.S. 412, 422 (1988), but it also seems to encompass contexts in which tort or even administrative remedies are available for the same official conduct. See id. (citing Correctional Servs. Corp. v. Malesko, 534 U.S. 61, 72-73 (2001)). Second, “even in the absence of an alternative, a Bivens remedy is a subject of judgment: ‘the federal courts must make the kind of remedial determination that is appropriate for a common-law tribunal, paying particular heed, however, to any special factors counselling hesitation before authorizing a new kind of federal litigation.’” Id. (quoting Bush, 462 U.S. at 378). As a result of the Supreme Court’s decisions in this area, “[t]here is a ‘presumption against judicial recognition of direct actions for violations of the Constitution by federal officials or employees . . . .’” Nebraska Beef, Ltd. v. Greening, 398 F.3d 1080, 1084 (8th Cir. 2005) (quoting McIntosh v. Turner, 861 F.2d 524, 524 (8th Cir. 1988)). The plaintiff already had an opportunity to challenge the validity of the Final Rule when it was enforced against him in a criminal proceeding. Even if that were not so, however, nothing in his complaint overcomes the presumption against creating Bivens actions, and that is true with respect to both the adoption of the rule, as well as its enforcement.

**C. This Court Lacks Personal Jurisdiction Over The Four Defendants Who Have Been Sued In Their Personal Capacities.**

A federal court may not bind a defendant to an *in personam* judgment unless there is a basis for the exercise of jurisdiction over the defendant. See, e.g., Insurance Corp. of Ireland v. Compagnie Des Bauxites de Guinee, 456 U.S. 694, 701 (1982). In cases arising under federal law, the Federal Rules of Civil Procedure limit a federal court's exercise of personal jurisdiction to those defendants who are “subject to the jurisdiction of a court of general jurisdiction in the state where the district court is located.” Fed. R. Civ. P. 4(k)(1)(A).

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's 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)).<sup>8</sup> These four defendants’ contacts with Arkansas must be sufficient to cause them “reasonably [to] anticipate being haled 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. See International Shoe, 326 U.S. at 319. In assessing the nature of the contacts between these four defendants and Arkansas, appropriate circumstances to consider include the burden on these defendants of litigating the case in Arkansas, the interests of Arkansas in adjudicating the dispute, the plaintiff’s interests in obtaining convenient and effective relief, the interstate judicial system’s interest in obtaining the most efficient resolution of controversies, and the shared interest of the

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<sup>8</sup> The Arkansas long-arm statute provides in relevant part:

**B. Personal Jurisdiction.** The courts of this state shall have personal jurisdiction of all persons, and all causes of action or claims for relief, to the maximum extent permitted by the due process of law clause of the Fourteenth Amendment of the United States Constitution.

Ark. Code Ann. § 16-4-101(B).

several states in furthering fundamental substantive social policies. See Falkirk Mining Co. v. Japan Steel Works, Ltd., 906 F.2d 369, 374 (8th Cir. 1990).

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, other than Krogstad, none of these defendants lives or works in Arkansas, nor has any of them lived or worked for any extended period in Arkansas. Krogstad has recently moved to Arkansas subsequent to the alleged claims occurred pertaining to him. The defendants had no substantial contacts with Arkansas during the time in question. See Hornstein, Twiss, Lampshire, and Krogstad Declarations, Ex. 2, 3, 7 & 8. Although these defendants have on occasion during their careers been to Arkansas (among many other places), they have never regularly and systematically transacted business in Arkansas. The mere fact that these defendants have on occasion transacted some business in the forum is not enough to establish jurisdiction over them.

In sum, the contacts of Mr. Twiss, Ms. Hornstein, Mr. Lampshire, and Mr. Krogstad<sup>9</sup> with the State of Arkansas were sporadic and not of such a “continuous and systematic” nature that they would justify the exercise of jurisdiction over them by an Arkansas state court. It is the nature and quality of a defendant's contacts with the forum state that matters for purposes of minimum contacts analysis, not their number. See International Shoe, 326 U.S. at 319. These four defendants’ contacts with Arkansas were too random and fortuitous to support the exercise of personal jurisdiction over them by an Arkansas state court, and accordingly, the action against them must be dismissed for lack of personal jurisdiction.

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<sup>9</sup>As noted above, Krogstad moved to Arkansas after the time period in question.

**D. The Four Defendants Who Have Been Sued In Their Personal Capacities Are Entitled To Qualified Immunity.**

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).

Qualified immunity is not merely a defense to liability. It is intended to afford sweeping protection to federal officials from the entirety of the litigation process. “The central purpose of affording public officials qualified immunity from suit is to protect them from undue interference with their duties and from potentially disabling threats of liability.” Dickerson v. McClellan, 101 F.3d 1151, 1157 (6th Cir. 1996) (quoting Elder v. Holloway, 510 U.S. 510, 514 (1994) (internal quotations omitted)). Accordingly, the Supreme Court has repeatedly emphasized that an official’s entitlement to qualified immunity must be resolved at the earliest possible stage of the litigation and that “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. Harlow, 457 U.S. at 818-19; Crawford-El v. Britton, 523 U.S. 574, 598 (1998); Anderson v. Creighton, 483 U.S. 635, 647 n.6 (1987). After a defendant asserts entitlement to qualified immunity, the burden shifts to the plaintiff to show that qualified immunity is not appropriate.

The plaintiff alleges that the defendants violated his federal rights by adopting the Forest Service’s Final Rule. As explained, the federal courts consistently have upheld the rule, see *supra* n.4, and the Eighth Circuit upheld it against the plaintiff’s own challenge in his criminal case. Nenninger,

351 F.3d at 342. If ever there were a case in which there are no “cases of controlling authority” in the circuit “which clearly established the rule” on which the plaintiff “seek[s] to rely,” and 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), it is this one. If anything is “clearly established,” it is that the defendants acted lawfully in adopting the Final Rule and enforcing it with respect to the plaintiff. The defendants are immune because the plaintiff not only fails to allege the violation of any clearly established right; he alleges no violation at all. See Siegert v. Gilley, 500 U.S. 226, 232 (1991).

The plaintiff has alleged only generalized constitutional violations in connection with drafting and enforcement of the Final Rule, implementation of a checkpoint and other law enforcement activities at the 2006 and 2007 national Rainbow Family gatherings. As shown above, these four 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. Lampshire Declaration, Ex. 7; Krogstad Declaration, Ex. 8. Therefore, Mr. Twiss, Ms. Hornstein, Mr. Lampshire, and Mr. Krogstad are entitled to qualified immunity, and the claims brought against them in their personal capacities should be dismissed.

**E. Ms. Hornstein Is Entitled To Legislative Immunity.**

Legislators are granted immunity from suit for what they do or say in legislative proceedings to preserve the integrity of the legislative process. See, e.g., Tenney v. Brandhove, 341 U.S. 367,

372-78 (1951). 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. Therefore, those who promulgate regulations should likewise be granted immunity from suit in connection with their work on issuance of regulations to preserve the integrity of the regulatory process. Ms. Hornstein is thus entitled to legislative immunity for her work in drafting and defending the Final Rule.

### CONCLUSION

For the foregoing reasons, plaintiff's amended complaint should be dismissed for failure to state a claim for which relief can be granted or, in the alternative, for summary judgment.

Respectfully submitted,

ROBERT C. BALFE  
United States Attorney

/s/ Claude S. Hawkins, Jr.

By: \_\_\_\_\_  
CLAUDE S. HAWKINS, JR.  
Assistant United States Attorney  
Arkansas Bar No. 77062  
Western District of Arkansas  
414 Parker Avenue  
P.O. Box 1524  
Fort Smith, Arkansas 72902  
Telephone: (479) 783-5125  
Fax: (479) 785-2442  
E-mail: [claudes.hawkins@usdoj.gov](mailto:claudes.hawkins@usdoj.gov)

OF COUNSEL:

Ellen R. Hornstein  
United States Department of Agriculture  
Office of the General Counsel  
1400 Independence Avenue, S.W.  
Stop 1412  
Washington, D.C. 20250-1412  
(202) 720-9616  
ellen.hornstein@usda.gov

Laurie A. Peterson  
United States Department of Agriculture  
Office of the General Counsel  
3201 Federal Building  
700 West Capitol Avenue  
Little Rock, Arkansas 72201  
(501) 324-5246  
laurie.peterson@usda.gov

**CERTIFICATE OF SERVICE**

I, Claude S. Hawkins, Jr., Assistant United States Attorney for the Western District of Arkansas, certify that on January 17, 2008, I electronically filed the foregoing document with the Clerk of the Court using the ECF system, which sent notification of the filing to the plaintiff:

Tony Nenninger  
27 East Stewart Road  
Columbia, Missouri 65203  
Plaintiff, *Pro Se*

The undersigned further certifies that a true copy of the foregoing document has been mailed, postage prepaid, to the following non-participants in the ECF system:

/s/ Claude S. Hawkins, Jr.

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Claude S. Hawkins, Jr.  
Assistant United States Attorney