IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

UNITED STATES OF AMERICA,

Plaintiff / Appellee

vs. **Criminal Action No. 2:05cr26**

AMANDA J. NICHOLS,

Defendant / Appellant

ON APPEAL FROM THE UNITED STATES MAGISTRATE COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA
AT ELKINS

BRIEF OF APPELLANT

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STATEMENT OF CASE, RELATED CASES AND PROCEEDINGS

This is an appeal of Defendant-Appellant's June 28, 2005 conviction of the misdemeanor offense of use of the National Forest by 75 or more people without a permit, 36 CFR 261.10(k). For purposes of appeal the following matters are consolidated: *United States v. Healy, United States v. Gardner, United States v. Benedict* and *United States v. Nichols*. Related cases on appeal, but not consolidated with this set of Defendant-Appellants include *United States v. Michael, United States v. Keating* and *United States v. Orr.*

STANDARD OF REVIEW

The scope of the appeal is the same as an appeal from a judgment from a District Court to a Court of Appeals. Fed.R.Crim.P. 58(g)(2)(D). On appeal, the record before the Magistrate Judge will be reviewed. See e.g., *United States v. Van Fossan*, 899-F.2d 636, 637 - 38 (7th Cir. 1990).

STATEMENT OF FACTS

Defendant-Appellants are all members of Group 10. Group 10 is a series of Defendants who were charged with the violation of 36 C.F.R. § 261.10(k). Group 10 Defendant-Appellants include Amanda Nichols, Derek Benedict, Virginia Gardner and Jessica Healy.

The proceedings were before the Honorable Magistrate Judge John Kaull.

Prior to the commencement of trial, Magistrate Judge Kaull advised the individual Defendant-Appellants that the allegations of the Government are that "you as part of a non-commercial group used National Forest lands on the dates set forth in the citation within the Northern District of West Virginia and at a time you were using National Forest lands, you were part of a group, either as a participant or as a spectator, in violation of the regulation and that you didn't have a special use authorization permit". (Tr. p. 115) Magistrate Judge Kaull, however, advised that because the Defendant-Appellants were not charged with a violation which would carry a term of incarceration in a jail, they were not entitled to appointment of counsel, if they could not afford counsel (Tr. p. 116).

After reading the citation, Judge Kaull inquired of Group 10 as to anyone who did not understand the charges (Tr. p. 116). Judge Kaull then indicated that five hands were raised as a response to this question. (Tr. p. 117). *At this time, numerous questions were posed to Judge Kaull, but the individuals are not identified in the record (audiotapes) nor can the content of their questions be deciphered in all instances* (Tr. p. 117-120). Presumably, many of the defendants raised constitutional arguments wherein Judge Kaull indicated that the same could be argued at the appropriate time (Tr. p. 117). Wherein an unidentified male defendant of Group 10 said "I don't understand how we can be using government forest land without a permit if we have the right of constitutional use of them." (Tr. p. 117). With another or the same unidentified male

saying "_____________ constitutional rights, but I think this Group pretty much agrees it is infringing on our constitutional rights." Another or the same male defendant also claimed that he was not part of any "group" during his pretrial arguments (Tr. p. 117)[1]

At the commencement of the trial, the Government called various witnesses from the Forest Service and other law enforcement agencies. The Government also introduced various exhibits including Exhibit 3, which was a pamphlet that the Forest Service started to hand out on June 11 and 12, notifying individuals, which they termed as a Group, that as long as the numbers were below 75, they did not need to obtain a special non-commercial group use permit (Tr. p. 128). Exhibit 4 was introduced as a notice that was handed to various individuals on June 12, 2005, advising "them" that they were over the 75 person threshold (Tr. p. 128). The Government then "informed the public that there was, the individuals that were there, that we would give them 24 hours to comply to either submit a permit application or reduce their number below 75 and not fall under the guidelines of the non-commercial use permit (Tr. p. 129). Apparently, the Government used a distance of approximately one and one-half miles to complete their count of the individuals gathered at the National Forest (Tr. p. 129).

During cross-examination, Defendant-Appellant Benedict inquired of the Government as to how it defined Group and was told "anyone that was in that area, whether you were there, we didn't make the determination whether you were camping there or visiting, you were part of the group that was there." (Tr. p. 132).

The Government witnesses continued to give testimony about their "head count" of individuals that were in the National Forest. Officer Danielle Rainville testified that he counted a group of people numbering 21 in an area designated as A Camp (Tr. p. 136).

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[1] These arguments are important given the fact that Group 10 was arraigned and tried instantaneously and did not have the benefit of counsel to file motions to dismiss and all other motions to preserve issues for appeal.

*At this juncture, the audio recording used to preserve the record became even more difficult to decipher. Therefore, no additional facts can be offered without the same being deemed as speculation in light of the fact that the undersigned was not trial counsel and that the Defendant-Appellants were pro se.

SUMMARY OF THE ARGUMENT

1. Forest Service regulations requiring authorized signatures on permits and permit applications cannot stand as time, place, and manner restrictions on expression because the regulation does not serve any legitimate governmental objective, is not narrowly tailored to achieve a legitimate objective, is substantially more burdensome than necessary to the Defendants First Amendment rights and does not leave open ample alternate channels of communication.

2. Proof of prior restraint.

3. The regulation compels the formal association of affiliated individuals and requires compliance by fraudulent representation in their capacities.

4. The regulations under which the Defendant-Appellants have been convicted criminalize only conduct by a group and no individual may be convicted under such regulation.

5. If regulations are applied to these Defendant-Appellants, they are both impermissibly vague and overbroad in violation of the First and Fifth Amendment Rights of the Defendant-Appellants.

6. The flawed Trial transcript prejudices the Defendant-Appellants' ability to perfect this appeal.

ARGUMENT

1. Forest Service regulations requiring authorized signatures on permits and permit applications cannot stand as time, place, and manner restrictions on expression because the regulation does not serve any legitimate governmental objective, is not narrowly tailored to achieve a legitimate objective, is substantially more burdensome than necessary to the Defendants First Amendment rights and does not leave open ample alternate channels of communication.

The Defendants have used and seek to use National Forest lands for the purposes of expression and religious exercise, which are presumptively protected by the First Amendment to the United States Constitution. Cf. *Texas v. Johnson*, 491 U.S. 397 (1989) (political demonstration in public park); *Niemotko v. Maryland*, 340 U.S. 268 (1951) (religious gathering in public park). Furthermore, the Government must concede that the National Forest lands constitute a traditional public forum for expression and religious exercise. Cf. *Cornelius v. NAACP Legal* Defense and Education Fund, 473 U.S. 788, 800 (1985); *Perry Education Association v. Perry Local Educators' Association, 460 U.S. 37, 45-46 (1983).* As the Supreme Court observed:

> "Wherever the title of street and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens." *Hague v. C.I.O.*, 307 U.S. 496, 515 (1939) (Roberts, J. joined by Black, J., lead opinion)."

The Government offered no reason, in its final rulemaking, suggesting that the National Forests are any less a traditional public forum for expression and religious exercise than the public park. For these reasons, this Court must review the portions of the Forest Service administrative regulations challenged here under the heightened scrutiny required by the First Amendment. *City of Los Angeles v. Preferred Communications, Inc.*,476 U.S. 488, 496 (1986) ("[w]here a law is subjected to a colorable First Amendment challenge, the rule of rationality which will sustain legislation against other constitutional challenges typically does not have the same controlling force.")

The challenged regulations are expressly designed to regulate the time, place, and manner of expression and religious exercise on National Forest lands. Statutes, ordinances, and administrative regulations, which restrict the time, place, and manner of expression or religious exercise, are subject to an intermediate form of judicial scrutiny, which is considerably more searching then the rational basis scrutiny which the Courts ordinarily apply to legislation challenged under other *constitutional provisions. See, e.g., Turner Broadcasting Systems, Inc. v. F.C.C.,* 512 U.S. 622, 640-42, 664 (1994). A time, place, and manner regulation will be upheld if, but only if, "the restrictions are content neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication." *United States v. Grace*, 461 U.S. 171, 177 (1983); *see also Turner Broadcasting System, Inc. v. F.C.C., 512 U.S. 622, 642 (1994); Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). As with all regulation of presumptively protected expression and religious exercise, the government bears the burden of establishing each of these elements in order to sustain a time, place, and manner regulation. *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 664 (1994) (government must demonstrate that the harms at which it has aimed its time, place, and

manner regulations "are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way"); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 777 (1986) (citing *City of Renton v. Playtime Theatres, Inc*., 475 U.S. 41 (1986), as a case where government properly bore burden of justifying time, place, and manner regulation); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n. 5,(1984) ("…it is common to place the burden upon the government to justify impingements on First Amendment interests…").

For the purposes of this litigation, these Defendants assume that there is no longer any appreciable difference between the intermediate scrutiny which has traditionally been applied to time, place, and manner regulations and that articulated in *United States v. O'Brien*, 391 U.S. 367, 376 (1968), for review of regulations reaching expressive conduct in a way that incidentally restricts certain forms of expression. See *Ward v. Rock Against Racism*, 491 U.S. 781, 796-802 (1989); but see *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293-94, 299 (1984) (distinguishing between time, place, and manner scrutiny and *O'Brien* scrutiny). Thus while a "regulation of the time, place, and manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests," no analysis properly applying intermediate First Amendment scrutiny includes a requirement that the government adopt that particular time, place, and manner regulation which is the "least restrictive or least intrusive means of doing so," of all possible alternatives. *Ward* at 798. Rather, the requirement of narrow tailoring is satisfied "so long as the…regulation promotes a substantial government interest that would be achieved less effectively absent the regulation. To be sure, this standard does not mean that a time, place, or manner regulation may burden substantially more speech than is necessary to further the government's legitimate interests. Government may not regulate expression in such

a manner that a substantial portion of the burden on speech does not serve to advance its goals. So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because the government's interest could be adequately served by some less-speech-restrictive alternative. *Ward* at 799-800 (internal citations and footnote omitted).

The Supreme Court's formulation that "requirement of narrow tailoring is satisfied so long as the… regulation promotes a substantial government interest that would be achieved less effectively absent the regulation," *Ward* at 799 (internal quotation marks omitted), certainly does not mean that the government may seriously restrict or burden expression in order to make its enforcement of other laws easier. That Court long ago rejected, for instance, a law which prohibited leafleting in order to prevent littering. *Schneider v. State*, 308 U.S. 147 (1939). Given the prohibition's substantial impact upon expression, the First Amendment required that the state be left with the admittedly more difficult requirement of enforcing the littering laws on an individualized basis. *Id.* at 163. Thus while the Government is not required to adopt the *least* restrictive time, place, and manner regulation imaginable, it is not free to adopt an unduly broad or burdensome regulation in the guise of a time, place, and manner regulation. Even where the Government can establish that its regulation is actually aimed merely at the time, place, and manner of expression or religious exercise, its regulation will fail the "narrowly tailored" requirement if the Government has rejected or overlooked alternatives which fully serve its significant interests while imposing *substantially* less burden upon expression or religious exercise.

The specific outcome in *Ward* is not the contrary. In that case, the United States Supreme Court accepted the challenged requirement as narrowly tailored *only* because of the trial court's

finding that the control over music volume by a city designee did *not* meaningfully interfere with or burden the challengers' musical expression. *Id.* at 801-802. "If the city's regulatory scheme had a substantial deleterious effect on the ability of bandshell performers to achieve the quality of sound they desired, respondent's concerns *would have considerable force.*" *Id.* at 801 (emphasis added).

In this case the Forest Service, through its demand for an authorized signature on the permit and permit application, effectively excludes the Defendants and others from gathering for expressive and religious purposes on National Forest land. The unwavering insistence of the Forest Service, through its regulation, that an authorized agent or representative of the group sign the application for a permit and the "special use" authorization (i.e., the permit) is *substantially* more burdensome of the Defendants' expressive and religious exercise than obvious alternatives available to the Government. The regulation excludes those who wish to attend from using the Forest for their assembly. An assembly of 20,000 or more individuals has few places to gather, if not on Forest Service land. And while the regulation excludes those who wish to attend, it serves no governmental purpose and certainly no purpose that cannot be served equally well by other means.

Under the Forest Services regulation, in order to gather in groups larger than seventy-five, the group (the applicant) must first designate and authorize an individual to apply for and sign a "special use" permit on behalf of the applicant. 36 C.F.R. § 251.54(e)(2)(E) and § 251.54(h)(viii). The requirement that the group designates and authorizes an individual to act on its behalf admits of no exception. A hypothetical illustrates the problem. If an individual wishes to conduct a large meeting on Forest Service land, and if this individual posted flyers, sent mailings or created a website encouraging citizens to attend, he would be unable, under existing

regulations, to apply for a "group use" permit so that the gathering could lawfully occur. The individual posting the flyers would certainly be an organizer of the group use, but he would not be *designated* [36 C.F.R. § 251.54(h)(viii)] to sign the permit application or the "special use" authorization (i.e., permit) on behalf of the group. Nor would other individuals, who volunteer to assist the speaker in dealing with the expected crowd, be able to comply with the Forest Service permit requirements. Until the gathering actually occurred there would be no way for the individuals organizing and assisting in the organization of the assembly to know whom the attendees would be. The assembly would thus be unlawful the moment the seventy-fifth person arrived. And it is problematic as in the present case whether the attendees at this unstructured gathering would be willing to designate another, whom they may not know or trust, to act on their behalf in securing a "special use" permit binding them collectively to the, as yet unknown, terms and conditions of a permit.

The current regulations do not allow a leader, qua leader, or an organizer, qua organizer, of an assembly to apply for or secure a permit; only an individual designated by the group for that specific purpose may sign the permit on behalf of the group. Nor would self-designation by an individual, with a wink and a nod to the regulations, be advisable since every statement to a federal employee in an official matter is subject to prosecution, and imprisonment for up to five years, if untrue. 18 U.S.C. § 1001. The permit application carries just such an explicit warning.

The Forest Service non-commercial Group Use regulations effectively restrict "special use" permits only to certain types of groups – those that have a formal hierarchical structure capable of binding its members. From a bureaucratic viewpoint, it may be convenient to deal with such as a "group," but as presently written, the regulations exclude groups of individuals …<u>as individuals</u>… from gathering on Forest Service land unless the assembly first organizes

itself into a hierarchical structure and authorizes a sole individual to deal with the Forest Service on the group's collective behalf.

Assumably, the Government argues that the regulation in question is valid because it is facially neutral and justified without reference to the content of the speech. The refusal of the Government, through the guise of this permit scheme, to permit large groups of individuals to gather on Forest Service land, without first organizing and thereafter delegating authority, is unduly burdensome. The act of organizing and delegating some measure of individual autonomy is not a neutral act; it would fundamentally alter the willingness of many individuals to participate and, by excluding those unwilling to submit to hierarchical decision making, alter the nature of speech, expression and association that occurs at the assembly. The First Amendment grants rights of speech and assembly to individuals. And, it protects the infinite variety of ways in which humans may choose to gather and express themselves.

The particular mechanism the Government uses to exclude the defendants and other individuals attending non-structured gatherings in the National Forest is the demand for a signature on the permit application and the "special use" authorization (the permit).

The issuance of the permit itself gives the Forest Service the right to insist on compliance with the permits terms and conditions. As with every permit, legal effect arises from the power of the agency to require a permit and the agency's control over the land where the gathering or demonstration is to occur. Moreover, the use of Forest Service land is regulated by a plethora of laws, rules and regulations that prohibit what individuals may do on this land. Quite apart from any permit, conduct deleterious to Forest Service land is already proscribed and can be readily enforced upon individual violators. Arguing that a signature is necessary on a permit to occupy a Forest Service campsite in order to give the permit legal effect is analogous to arguing that a

federal prisoner must sign the sentencing order in order to occupy his cell. In both instances the power of the order or permit arises from the inherent power of the issuing authority.

As to the permit application, the argument that a signature is necessary to deter false statements is demolished by a collision with the facts. First, the insistence by the Forest Service of a signature on a permit application is without authority. The regulations dealing with permit applications contain no such requirement. 36 C.F.R. § 251.54 (e) has no requirement for a signature on an application. But, the Forest Service demands a signature without regulatory authority as a condition to processing the permit application. Second, false statements are already proscribed by 18 U.S.C. § 1001. Section 1001 prohibits any false statement, *oral* or written, to a government agent or agency in an official matter. The mere utterance of a false exculpatory "no" may subject an individual to felony prosecution. The permit application itself contains a prominent warning that it is a crime to make a false statement on the application. A writing might be helpful to establish and memorialize a false statement made on a permit application but the written permit application itself serves that purpose. Third, matters of vital importance to the Government frequently do not require verification by signature, i.e. FBI "302" statements and grand jury testimony are not signed. It violates the Government's own regulations to demand a signature on the permit application. And, it strains credibility to argue that that an application to occupy a Forest Service campsite implicates such essential government functions that the system cannot function without a signature on a permit application or permit.

It may be that the Government is also arguing that a signature on a permit is necessary to deter false statements on the preceding application. If so, it is important to note that the regulations do not envisage that the person applying for a group permit be the same person who

signs the permit. Compare 36 C.F.R. §251.54(e) and § 251.54(h)(viii). Such an argument, if it is being made, is illogical.

As noted above, time, place, and manner review does not require that the Government adopt the least restrictive possible regulation of expression of religious exercise, but it does demand that the Government forego regulations which are *substantially* more burdensome than available alternatives. *Ward*, supra. at 799-800.

The Government's legitimate interests in protecting National Forest lands, preparing to assist those who will be using the National Forests, preventing conflicts among uses of the National Forests, and serving as a "reservation desk" to allocate use of particular National Forest lands on a first-come, first-served basis can all be fully served by a system which assesses proposed land uses on a case by case basis but does not require an agent for the group to sign a special use authorization.

From all that appears in the record, a signature on a permit, as the Forest Service demands, may be unique. The burden is on the Government to establish justification for such a requirement. The proffered justification for the signature requirement, either on the application or permit, fails to measure up. The challenged regulations are not narrowly tailored to serve a significant government interest nor, in walling off the entire National Forest system, do they leave open ample alternative channels of communication.

Thus, it is respectfully requested that this Court find that the regulation(s) which serve(s) as a basis for Defendant-Appellants' convictions are unconstitutional.

2. Proof of Prior Restraint

A. Facial Issues Refocused

"The term prior restraint is used 'to describe administrative and judicial orders *forbidding* certain communications when issued in advance of the time that such communications are to occur…" *Alexander v. United States,* 509 U.S. 544, 550, 113 S.Ct. 2766, 2771, 125 L.Ed.2d 441 (1993). "Prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity," *Organization for a Better Austin v. Keefe,* 402 U.S. 415, 419, 91 S.Ct. 1575, 1578, 29 L.Ed.2d 1 (1971) (quoting *Carroll v. President and Comm'rs of Princess Anne,* 393 U.S. 175, 181, 89 S.Ct. 347, 351, 21 L.Ed.2d 325 (1968)).

It is well settled that any system requiring a license, permit, or similar official authorization in advance of expression, religious exercise, or "conduct commonly associated with expression" carries a serious danger of censorship. *City of Lakewood v. Plain Dealer Publishing Co*., 486 U.S. 750, 759 (1988). Whenever a licensing official has the authority to permit or deny expression or religious exercise in advance on a case-by-case basis, the law recognizes the danger that that official may base the licensing decision on an official or even a personal distaste for the message to be conveyed or the religion to be practiced. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130, (1992). Furthermore, the law recognizes two additional constitutional difficulties presented by a system of prior restraint. First, the very possibility of close, unfettered pre-expression administrative review may chill the willingness of some potential speakers or worshippers even to apply for official permission. *Lakewood* at 757-58. Second, even if a willing applicant submits an application and even if the licensing official unconstitutionally denies that application because of official or personal distaste for the content of the expression or religious exercise, it will generally be quite difficult to identify such surreptitious censorship unless a reviewing court can measure the reasons for the licensor's decision against established criteria for issuance or denial of the permit in question. *Id.* at 758.

For these reasons, whenever a government decides to further its substantial or compelling concerns by requiring an advance license for expression, religious worship, or conduct commonly associated with either, the licensing scheme must contain “narrow, objective, and definite” substantive standards to constrain licensing discretion. *Nationalist Movement* at 131; *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-52 (1969). The courts cannot simply rely upon the good faith of the government officials involved to avoid unconstitutional censorship, *Lakewood* at 770; the objective standards narrowly constraining the licensor’s authority “must be made explicit by textual incorporation, binding judicial or administrative construction, or well-established practice.” *Ibid.*

One of the major premises of this Appeal is to show extreme discretions exercised in the Group Use scheme as applied, and also immanent in the Permit and requirements as stated – with clear chilling effects on peaceful assembly. If properly examined under *Lakewood*, the *‘nexus to expression’* is obvious, the *‘threat of censorship’* is painfully real, and the major fallacy of this regulation is revealed in this test: A *‘law of general application’* cannot preclude a broad class of speakers from compliance.

The *Masel* ruling addressed similar facial arguments, and was most cogent on the standards applied. That Court noted the general rule that facial analysis on prior restraint can proceed if the regulation is *“directed narrowly and specifically”* at expressive conduct, and it knew the limits of the issues before it:

> "... the query under Lakewood is not simply whether the regulation may occasionally implicate First Amendment activities, it is whether the regulation targets them." U.S v. Masel, 54 F.Supp.2d 903,920; Opinion and Order, 6/24/99; pg. 14.

In this way the *Masel r*uling opened *prior restraint* arguments to proof of the regulation's impact on speech. It continues to outline the applicable test:

> "...defendant might have been able to establish that the regulation has a greater impact on expressive activities by presenting evidence showing that applicants seeking to engage in protected expression comprise a substantial portion of the pool of applicants for special use authorizations. *See, e.g., Kentucky Sports Concepts, Inc. v. Chandler*, 995 F.Supp. 767, 772 (W.D. Ky. 1998). ...[Upon such a showing there is] basis to conclude that the... provision presents a substantial opportunity for censorship on an ongoing basis." (Id., pp. 16-17)

Precisely this proof is in the present case – viewing the Permit and stated requirements as facial elements, examining the imminent harms and chilling effects faced by this Appellant, and showing how this regulation systematically restrains, defrauds, or excludes all speakers of similar standing and creed.

B. Permit, *Ultra Vires*

The Noncommercial Group Use Permit is first and foremost a *legal instrument* requiring an able 'group' party as Holder, and an authorized agent to sign. The Forest Service avers that a signature is required to give the permit legal effect. This is self-evident as applied to a legally-endowed Group, but an oxymoron otherwise. If these capacities do not exist, the Permit is tantamount to a fraudulent contract: Enacted *ultra vires,* it is void and meaningless with an imaginary Holder lacking the authority of those subjected to its terms.

This was the significance of events in 1996, when the annual 'Rainbow Gathering' also took place in Mark Twain National Forest. The person who signed a permit was in Wisconsin, not present at the gathering, and identified as permit Holder *"The Divine Composting and Composing Church of the Sacred Rainbow Imagination"*. This permit was later disclaimed by

council consensus at the gathering, and then nullified by the signer in a formal 'refusal for cause'. The named entity was unheard-of before that time or outside that document, yet Forest Service officials *"were willing to accept it as representing Rainbow People."*

In similar instances around the country, the Forest Service has repeatedly tried to implement permits on behalf of made-up or *ad hoc* 'groups' – presumably convoked upon the signature of an alleged 'agent', embodied in name only within the permit and for its purposes, yet binding unknown and involuntary 'members' to its terms.

In fact the resultant compact is anomalous among special use authorizations, or proper regulatory permits of any kind – at once void in its stated purposes, yet bearing wide collateral impacts under color of law:

~ Such a permit vests sanctions and obligations in a fictional party that has no ability to act at law. An aggregate entity must have fixed procedures and discrete delegations to conduct ongoing business, elements that are lacking in a gathering. To give permit terms continuing legal force upon *and through* all 'group members' as intended, officials must repeatedly contact participants as *de facto* agents, and confer obligations personally under threat of criminal penalties – just as if there were no permit at all.

~ An individual signer is made responsible for 'group' compliance, but has no binding authority over others' actions. Stipulating to agent powers he could not fulfill, he is held personally accountable for conditions and communications onsite, yet with no ability to be a *guarantor* of conduct outside his control. He is subject to repeated 'official contacts' preempting his activities during the event, and these may persist afterwards.

~ The Permit signer also incurs personal liability, despite official disclaimers of this effect. The 'hold harmless' clause indemnifies the government and nominally shifts liabilities to

a hypothetical ‘Group’ that cannot assume them. Yet as the principal agent of record, in fact this person is the only legal party engaged, and is then subject to peer claims for damages or misrepresentation, as well as the government’s: If costs are assessed on the ‘group’, the same individual would be sent the bill and held liable for payment as its named agent -- or for a felony if he disavows such a role after signing (18 USC 1001). This is *liability in fact,* regardless of any policy palaver.

~ As authorities devolve in the Permit transaction – if in fact there are no delegative powers among attendees, USFS personnel embody the ONLY vested official capacities in this exchange – so the alleged 'group leader' can only derive authorization from them. Thus in signing he acts as *their agent* exclusively, and the Permit is literally enacted and imposed singularly by the Government rather than mutually entered.

As shown in the instant case, it is only by sheer conjecture that the Forest Service identifies a ‘Group’ to act as party to a permit, or any person as its agent. The permit stands on no footing where the elements of mutual obligation are lacking, and has no real effect or actionable recourse. Yet the District ruling still infers group legal capacities from the personal cooperations that enable a gathering, and affords the government broad discretion to do the same with no burden of proof:

> “Therefore the Court does not find that the government must show that the defendant was authorized or had authority to sign the permit for the group.” (District Opinion, pg. 12)

Here the District Court’s theory devolves into pure solipsism, fixed on the dogma of government authority and dispossessed of real grounds. To arrive at such a finding does not follow from facts in the case or tenets of due process law: No legal permit conjures a subject party without proof,

engages unknown ‘members’ in vicarious liability without notice or consent, or takes unilateral force without mutual authorities.

Most importantly, the Permit has profound intrinsic impacts on consensual speech, vitiating Individual Standing *en masse.* Alleged ‘members’ can incur displaced liabilities, and all are bound to the signer for legal sanction in this exercise. In turn that person suffers chilling duress and is put in an untenable ‘treaty chief’ posture. The culture and creed of the gathering, its basis in self-responsibility and collaboration, are fundamentally altered. Ultimately participants confront an impossible choice: Either their personal rights of assembly & expression are made revocable privileges, held by a fictional entity that cannot defend them... or they can be prosecuted as criminals.

C. Targeted Expression

Addressing the test under *Lakewood*, a facial challenge of the permit requirement is a hard sell because it does not appear to be narrowly directed at expressive conduct. The Group Use rule was made to look that way: Prior permit schemes were twice found unconstitutional in the 1980’s, so the Forest Service crafted this rule on the model of a routine land use regulation, generally applicable to “all groups” and not singling out First Amendment activities.[2]

In the instant case, Defendant-Appellants argue the discriminatory and censorial effect of the Permit on their expressive purposes and views – quite relevant in light of *Hurley*. Moreover where the creed of consensual gathering is shown to align with their personal standing at law, this argument is compelling. The record is clear that there was no ‘Group’ embodied to apply, and nor could they legally *“sign a special use authorization on behalf of the applicant”,* as required. 36 C.F.R. §251.54(h)(1)(viii). Confronting this provision on its face, Defendant-

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[2] *U.S. v. Israel*, No. Cr.-86-027-TUC-RMB, Dist. Ariz. May 1000, 1986; *U.S. v. Rainbow Family*, 695 F.Supp 294, 303 E.D. Tex. 1988

Appellants were excluded from any possibility of legal compliance, and thereby it is shown how all similarly situated individuals are targeted in effect, regardless of their beliefs. Whether by obtuse oversight or capricious intent, this regulation bears an intrinsic jurisdictional flaw with respect to assembled users who are ‘Not Groups’ – inevitably resulting in fraud or prosecution.

In rationalizing the Group Use regulation, the Forest Service touts certain stated public interests and maintains that it is a *‘reasonable time, place, and manner restriction’,* only subject to challenge as-applied. Arguably this claim is purely pretextual if those interests are not rationally served, and constitutional review must go further if widespread and continuing conflicts are roused in the face of this stricture.

Ultimately the analysis must reach the three prongs of the constitutional test:

(1) The signature requirement might be reasonable as applied to an embodied organization able to apply for a Special Use Permit as a 'group' and legally act as Holder. However it precludes good-faith compliance by those who gather consensually, without delegated authorities In Fact and By Creed. Where no alternative means of compliance is allowed it discriminates against this exercise and is not `content-neutral`.

(2) The permit rule should achieve specified regulatory purposes, working narrowly to the public interests in resource protection, public health & safety, and fair allocation of uses on NFS lands. However it has persistent collateral effects outside those purposes, and arguably contrary to those interests: Where this restriction results in systematic harassment and prosecution against heretofore lawful expressive activities, and actually disables cooperation on legitimate public concerns, it is not `narrowly-tailored`.

(3) There are no alternative channels of communication *"...on private property or on property not owned by the Forest Service".* A private sponsored event can exclude the public at

will and is subject to actual authority of the owner or principal; this is antithetical to the consensual creed. The National Forests are the only public lands suitable for gatherings over 75, and common ground for all citizens. Moreover the Forest Service is a trustee for broad public interests and rights, and has no proprietary authority to exclude expressive activities in a traditional public forum.

Expressive assembly in its essential form is targeted by exclusion, triggering invasive law enforcement and violations of Fifth Amendment rights under color of law. These impacts are systematic, causing repeated burdens and litigation, and bearing upon the broadest class of speakers – i.e., all unaffiliated citizens who may choose to assemble on their own accord and belief, in the personal protections of the First Amendment. Thus the Noncommercial Group Use Permit is an unconstitutional prior restraint upon peaceful consensual assembly, and the unique forums of faith and expression that this enables in the National Forests – warranting the highest judicial scrutiny.

3. The regulation compels the formal association of affiliated individuals and requires compliance by fraudulent representation in their capacities.

As the Appellants argue, it is significant that their beliefs in individual autonomy and consensus were affronted, and *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, offers an apt perspective if terms are clarified. The broad analogy is straightforward: If those who enact a parade may not be forced to associate with marchers who hold unwanted views, then those who participate in a gathering *should* not be forced to associate with other attendees unknown in name or conviction. However to explain how the Appellants protected under this principle, it must be re-examined at the nexus of avowed personal belief and actual legal standing.

Hurley further instructs that speakers have a First Amendment right to assemble in distinctive public forums of choice and creed. In this context, people join gatherings entirely by personal choice, as citizens and peers, and this reflects in the 'Rainbow' belief that defines this unique forum and enables its diverse expressive forms, i.e., the creed of Gathering in Consensus. Their 'soapbox' is about the act of assembling peaceably – in prayer, speech, petition, culture, cooperation, responsibility and respect – and showing that this can be done. In principle, this expression is protected under any device of regulation, but a special problem is posed where its content is at odds with the permit requirement: Gatherers' shared belief in *'No leaders'* may be sincere and profound, but does not suffice in itself as proof that the permit should not apply. And it is misleading to suggest that their non-association is evident "as a result" of an agreed ideology about "voluntary support among peers".

On the contrary, their lack of association is the *a priori* fact that gives rise to the consensual "nature" of communications. The disclaimer of 'leaders' simply stands on the fact that there *are none* – since by definition there is no delegative power among anonymous gatherers, no agent authorized by the whole. No one could be legally bound by any statement or compact among unknown parties. Thus, Defendant-Appellants could not be compelled to affirm that association or act in that capacity – neither against his creed, nor in legal fact if due process is preserved.

So the analysis must reach the facts: Confronted with the demand to endorse such statements, or be prosecuted for not having the group use permit, Appellants knew there is no 'Group', they are not a member, have no legal affiliation with other participants, nor any authority on their behalf. Here, the belief in cooperation without hierarchy is secondary and does not evade the law, but most significantly it is accurate.

By signing such a permit, Appellants would waive their own and others' individual standing in First Amendment exercise. And by acting *ex parte* and without authority, they would be committing a constructive Fraud – at once entering an improper complicity with a government agency to the detriment of others, and violating the law. Nowhere else in the law is an individual coerced into a fictional legal association, tort liability, and felony fraud as preconditions of Government-authorized expression.

4. The regulations under which the defendant-appellants have been convicted criminalize only conduct by a group and no individual may be convicted under them and thus the court erred in ruling that the regulations apply to individuals

The issue is whether a "group's" failure to obtain the necessary permit subjects every person in attendance at that group's activity criminally liable. See *Kalb*, 234 F.3d 827, 833 (3d Cir. 2000) and *United States v. Johnson*, 159 F 3d. 892 (4th Cir. 1998).

In *Johnson*, the defendants argued that the government had to prove that the defendants acted knowingly, in that they knew that 75 or more persons were present in the forest at the time the citations were issued. The Court noted that the regulations and the legislative history were silent as to the *mens rea* requirement. *Id.* at 895. The Court did not resolve the issue, for it determined that the evidence established that the defendants knowingly violated the regulations. In *Kalb*, the defendants raised a different issue: whether the regulations criminalized only group conduct, and had no *actus reus* element that could be applied to individuals. *Kalb* 234 F.3d at 830-31. The Court held that the statute applies to individuals, and liability attaches upon proof of 1) use 2) of National Forest land, 3) by a noncommercial group of 75 or more persons, either as participants or spectators, 4) without special use authorization. 234 F.3d at 831, citing *Johnson*. The Court found that these requirements were satisfied. Respectfully, the *Kalb* Court erred.

In the present case, a review of the transcript, or those parts that can be delineated and deciphered, indicates that the individual Defendant-Appellants in the case at bar were not similar to the defendant in *Johnson*. In the present case, there is no evidence that *Healy, Benedict, Gardner or Nichols* were forewarned regarding the regulation. Thus, it can not be said that they knowingly violated the regulation. Again, this case is distinguishable from that of *Johnson* given the fact that the defendant in *Johnson* admitted to being forewarned about the regulation and simply refused to sign a permit.

A permit is required for "non-commercial group use" which is defined as an "activity conducted on National Forest Service land that involves a group of 75 more people, either as participants or spectators." An application for a special use authorization for a group use requires, in part, the name of an adult to receive notices on behalf of the group, and the name of an adult "who will sign a special use authorization on behalf of the applicant." 36 CFR §251.54 (e)(2)(E). "Use or occupancy" of National Forest System land without special-use authorization when such authorization is required is prohibited, and subject to a fine and imprisonment.

The provisions at issue govern, and apply to, group use. The government will not let an individual apply for a permit for a gathering. The group must apply, through a contact person. The group must identify in the application a person who will sign the special use permit on behalf of the group. The person who signs the application as an agent for the group does not become a "holder," defined as the applicant which receives the authorization. *Black v. Arthur*, 201 F.3d at 1123-24 and n. 4. The person who signs the permit does not become individually liable as a result of the signature. *Arthur*, 201 F.3d at 1123. If a permit is issued and the group fails to comply, the permit may be revoked or suspended. *Id.* If a noncommercial group of 75 or

more conduct an event on national forest land without applying for and receiving the special use permit, the group should be criminally liable.

The Rainbow Family, for example, has been deemed an unincorporated association and may be sued. See, *United States v. Rainbow Family*. 695 F.Supp. 294 (D.Tex. 1988). The individual should not be subject to criminal liability. An individual should not be punished because he or she was present during the time the group's use was not permitted. To do so is to punish one for association, which is prohibited. "The First Amendment similarly restricts the ability of the State to impose liability on an individual solely because of his association with another." *NAACP v. Clairborne Hardware Co*., 458 U.S. 886, at 918-19.

Unless this Honorable Court intervenes and properly interprets these statutes, four individuals who essentially did noting but go to a national forest in the Summer of 2005 will have a conviction for a federal misdemeanor offense. They would certainly merit such a conviction if their conduct had violated a federal criminal statute or regulation. It did not. The particular regulation which has been applied to them as individuals does not apply to anyone as an individual; rather, it applies simply to punish a group which fails to obtain a proper permit.

Simply put, an analysis of the applicable regulations will show that the "crime" here is the mere use of the forest, not "use" in a particular manner which is prescribed, such as by doing damage to it, failing to restore it, or exploiting it in some other specifically described adverse way. The issue is by whom the "use" is prohibited and the answer to that question is "a group".

A review of the applicable regulations will demonstrate this point. Each appellant was convicted under 36 CFR, Section 261.10(k). It is one subsection of an overall section prohibiting certain activity.

> "The following are prohibited: …
> (k) Use or occupancy of National Forest System land

> or facilities without special use authorization when
> such authorization is required".

The citations issued to each appellant specified that the special use authorization was required under Title 36, CFR, Section 251.50(c)(3). In general, Section 251.50 states (in subsection (a)) that all uses of NFS land are designated "special uses" except for those involving the disposal of timber and materials, and the grazing of livestock. Section 251.50(a) then states that before engaging in a "special use" either "persons or entities" must submit an application to obtain a special use authorization unless that requirement is waived under Section 251.50(c).

Section 251.50(c) states that a special use authorization is not required for non commercial recreation and expression of views except under three circumstances: first, where an area of NFS land has been closed or restricted by an authorized official under Section 261.50. This section is not applicable to the present case. Second, authorization for non-commercial use is required under circumstances set forth in Section 261.70 that allows for the Forest Service to enact special regulations for fire control, disease prevention, protection of roads and trials and other public safety type circumstances. This section is not applicable here.

Finally, Section 251.50(c)(3) states that a permit is required for "noncommercial group uses". Such a "group use" is defined as "an activity conducted on National Forest Service Lands that involves a group of 75 or more people, either as participants or spectators".

Under Section 251.50(c)(3), it is clear that the entity required to get the permit and, consequently, the entity to be punished for failing to get it, is the group. Section 251.51 defines an "applicant" as "any individual, partnership, corporation, association, or other business entity". Under this entire statutory scheme, there are various types of special use authorizations (permits), some of which can be applied for by individuals, and some which can only obtained by groups. Where an individual is the applicant, the individual becomes the "holder" and the

individual becomes liable to the United States for all things that a "holder" is otherwise liable for under these regulations. Under Section 251.53(c), however, the only entity which can apply for a permit to satisfy that provision is a group.

The requirements for a special use application are set forth in Section 251.54. Where, as here, a group is required to be the applicant, the application merely requires the name of some person to receive notices on behalf of the group and "the name of the person or persons 21 years of age or older who will sign a special use authorization on *behalf of the applicant*".251.54(d)(2)(E) (emphasis added). The Forest Service is to grant such an application where the conditions of Section 251.54(g)(1) have been met, the one of these most relevant to this inquiry is Section 251.54(g)(3)(ii)(h) which requires that "a person or persons 21 years of age or older *have been designated* to sign and do sign a special use authorization on behalf of the applicant". (Emphasis added).

The two sections quoted above demonstrate the clear intent of these regulations to impose liability on a group. The group must apply for the permit; to do that, the group must designate someone to sign on its behalf; if the group fails to designate, the group cannot apply for the permit and its "use or occupancy" of NFS is illegal. Just as no individual can acquire personal liability if they sign the permit, *Black vs. Arthur*, 201 F 3d. 1120, 1123-1124 (9th Cir, 2000), no individual can be liable under the statute if they do not.

The statute here does not make it an offense for a person to fail to sign an application. Indeed, under Section 251.54(g)(3)(ii)(H), the only people who can sign for this application are those "designated" by the group. Unless an individual has been designated by the group, they are not allowed to sign the application. If the group fails to designate someone, the fault and criminality lies with the group not the individuals who have no power in the circumstance to

designate themselves to that end. Where an individual is incapable of doing an act, they cannot be found guilty of violating a statute that requires the act. See *United States vs. Dalton* 96 F. 3d. 121 (10th Cir. 1992) (failure to register a firearm where registration was impossible cannot be a crime); *United States vs. Spingola* 464 F. 2d. 909 (7th Cir. 1992) (where a person is incapable of causing the filing of a government form, they cannot be held criminally liable for failing to file it).

The failure to apply, and the failure to become a holder of a valid permit is a crime committed by the group, not by these individual defendants or anyone else. While it may have been the presence of a collection of more then seventy-five people which required the group to get a permit, there is no action by the individual which is proscribed by this statute.

Every criminal statute requires the occurrence of both an *actus reus* element as well as a mens rus state of mind with respect to which that act is done. The *actus reus* requirement is that which requires the law to specify conduct punishable by the Government. See *United States vs. Alkhabaz* 104 F. 3d. 1492, 1494-1495 (6th Cir. 1997), quoting *United States vs. Apfelbaum* 445 U.S. 115, 130 note 13 (1980). The *actus rus* requirement "must have its origin in some willed activity or omission on the part of the defendant". *United States vs. Mozh* 676 F. 2d. 919, 920 (2nd Cir. 1982).

This statute has no *actus reus* element that can be committed by an individual. If Congress wanted the statute to read that it was a violation for a person to "organize or assist in organizing" a gathering of seventy-five or more people without a special used permit, the statute could have easily said so. More broadly, the statute could seek to make it a crime "to participate in or observe an assembly of 75 or more persons on NFS land where the group has failed to obtain a special use authorization". The statute, of course, says nothing of the kind. What the

statute prohibits is the “use or occupancy” where a permit is required and none has been obtained. The use or occupancy is by a group, not an individual, and a group is the sole entity which is liable.

Were the United States position correct, profound Constitutional problems would be present. The First Amendment implications for individuals and the media would be most serious. See *Chicago vs. Morales*, 119 S. Ct. 1849 (1999). By adopting the interpretation of this regulation asserted by the Appellants, however, these serious matters of constitutional application will be avoided by the proper principles of statutory construction; this is the preferred method of legal analysis in such a circumstance. See *Jones vs. United States, supra Public Citizen vs. United States Department of Justice* 491 US 440, 465-466 (1989).

Finally, if there is ambiguity as to whom the statute applies, the rule of lenity requires a strict construction favoring the Appellants. *United States vs. Wiltberg* 18 U.S. 76 1820 *Jones vs. The United States*, supra at 1912; *Castilio vs. The United States* -US-, 120 S. Ct. 2090, 2096 (2000). Simply, this statute can not apply to the actions of individuals, and the citations should have been dismissed by the District Court. Thus, the convictions now should be reversed.

5. If These Regulations Are Applied To Individuals, They Are Both Impermissibly Vague And Overbroad In Violation Of The First And Fifth Amendment Rights Of The Defendant-Appellants

In *City of Chicago vs. Morales,* 119 S. Ct. 1849 (1999), the Supreme Court considered a regulation which made it a criminal offense for a person to loiter with a known street gang member and to fail to obey an order by a police officer to disperse upon that observation. The Court struck the regulation down as a violation of the right of free association an impermissibly vague statute. *Id* at 1857. The Court held that “it is imperative that an individual’s decision to

remain in the public place of his choice is as much a part of his liberty as freedom of movement inside frontiers". *Id* at 1858.

Here, as in *Morales*, the Court is faced with a criminal statute that contains no *mens rea* requirement and is one which, if applied to conduct by individuals, is as vague as was the statute in Morales. It fundamentally infringes on Constitutional protections in a manner which can not be tolerated.

As in *Morales*, this statute sweeps in both a vague and overbroad manner, prohibiting a wide range of innocent conduct indistinguishable from anything even arguable criminal. Moreover, it invites discriminatory enforcement. As the *Morales* Court noted, friends, relatives, or total strangers might unwittingly engage in forbidden activities simply by conversing with a gang member, *Id* at 1862, or, as here, by simply going to the National Forest as a news reporter, or spectator, which was precisely what Defendant-Appellants were, one would face criminal penalty.

Here, the Government has blanketly asserted that all people in the forest broke the law, including those who showed up for but a few minutes to observe the festivities or to gather news about the event to report in the print or electronic media. If the Government is right, the statute criminalizes mere presence by persons otherwise doing nothing even arguably illegal.

If the Court chooses to read these regulations as actually attempting to apply to individuals, the issue of their unconstitutionality must be squarely faced and the statute struck down.

6. The flawed Trial transcript prejudices the Defendant-Appellants' ability to perfect this appeal.

The Court Reporter Act requires that a reporter shall "record [ ] verbatim by shorthand, mechanical means, electronic sound recording, or any other method ··· (1) all proceedings in criminal cases had in open court····" 28 U.S.C. § 753(b). However, a defendant is not automatically entitled to a new trial every time there is an omission from the transcript. *United States v. Selva,* 559 F.2d 1303 (5th Cir.1977). Yet, A criminal defendant has a right to a meaningful appeal based on a complete transcript. *See* *Hardy v. United States,* 375 U.S. 277, 279, 84 S.Ct. 424, 11 L.Ed.2d 331 (1964). When a transcript is less than complete, the court must determine whether the alleged omissions or deficiencies justify a new trial. In *United States v. Gillis,* the Fourth Circuit held that whether an omission from a transcript warrants a new trial depends on whether the appellant has demonstrated that the omission "specifically prejudices his appeal····" 773 F.2d 549, 554 (4th Cir.1985) cited in *United States v. Huggins*, 191 F.3d 532 (4th Cir. 1999) Prejudice is found when a trial transcript is so deficient that it is "impossible for the appellate court to determine if the district court has committed reversible error." *Huggins* at 537, citing *United States v. Nolan,* 910 F.2d 1553, 1560 (7th Cir.1990).

In the case at bar, not only is the undersigned prejudiced in adequately appealing trial errors on behalf of his client given the "condition of the transcript/ audio recording, the undersigned can't even decipher what arguments were made by Defendant-Appellants, and more specifically, who would have made such arguments. The audio recordings are of such poor quality that it is literally impossible to review the evidence put forth by the Government against the undersigned's respective clients.

Errors such as sufficiency of the evidence and the like can not be further perfected given the lack of record. Large gaps exist were no witness, Defendant, Judge or attorney can be heard. Furthermore, when voices are heard, it is impossible to decipher the name of the person

speaking. Simply put, the record in the case at bar as it relates to Trial Group 10 leaves counsel to only speculate as to what the record indicates. Thus, given the above referenced standard, the Defendant-Appellants should have their convictions set aside, or in the alternative, they should be granted a new trial.

CONCLUSION

For all of the foregoing reasons, this Court is requested to reverse the decision of the District Court, vacate the defendants' conviction and sentence, and dismiss with prejudice the citations filed against these defendants.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on **March 29, 2006**, I electronically filed the foregoing **BRIEF OF APPELLANT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participant:

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