IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
GAINESVILLE DIVISION

BRYNAN HADAWAY, GARRICK BECK, and ADAM BUXBAUM Plaintiffs v. THOMAS TOOKE in his official capacity as chief of THE FOREST SERVICE OF THE UNITED STATES OF AMERICA, Defendant.	)	CIVIL ACTION FILE NO. _____

BRIEF

I. STATEMENT OF FACTS

Rainbow family gatherings have been held since 1971. Affidavit of Stephen Sedlacko. Summer gatherings, held annually in a National Forrest from approximately July 1 through July 7, draw thousands of people who "gather to give honor & respect to all those who have aided the positive evolution of earth & humankind." In addition to an annual summer gathering, smaller regional gatherings are held periodically in various locations.

There have been 47 Rainbow Family Gatherings since 1972 gatherings in the future. Affidavit of Sedlacko.

People, including plaintiff, attend gatherings for spiritual reasons and to participate in councils, workshops, and other educational activities.

One of the primary purposes of the annual summer gatherings is to pray for world peace on the Fourth of July, each in their own way, from dawn until noon on the Fourth of July, many attendees gather in a large circle—sometimes half a mile across—join hands, and conduct a silent prayer for world peace. The silent prayer ends when the children's parade comes to the prayer circle, at which point the people cheer, celebrate the birth of this nation.

Gatherers also assemble for breakfast and dinner "circles," at which there are prayers and announcements of other activities and matters of general interests. Annual gatherings encompass activities such as meetings of drum circles and workshops on everything from communal living to UFOs.

People like plaintiffs assemble at Rainbow Family gatherings to associate with other like-minded individuals, to engage in religious activities including prayer, to participate in workshops on a variety of issues, and to discuss a wide range of political issues, among other things. Thus, "[t]he record fully reflects that the [Rainbow Family] councils, gatherings or meetings in the National Forrest will involve significant expressive activity." United States v. Rainbow Family, 695 F. Supp. 294, 308 (E.D. Tex. 1988). Furthermore, the Forrest Service has accepted that the Rainbow Family has a First Amendment right to use the National Forests

for its gatherings. 60 Fed. Reg. 45265 (Aug. 30 1995).[1] And it is beyond dispute that "public Forrest Service lands are the type of forum in which expressive activity has historically occurred, and in which public expression of views must be tolerated to a maximal extent." United States v. Rainbow Family, 695 F. Supp. at 308.

At many of the gatherings members of the Rainbow "Family" have attended since 1986, the Forrest Service has established checkpoints or roadblocks on forest roads near the gathering sites, and the authorities staffing those roadblocks have stopped countless vehicles, most of which carried people traveling to Rainbow Family gatherings.[2] Thus, this case "reflect[s] a convergence of First and Fourth Amendment values not present in cases of 'ordinary' [roadblocks]." United States v. United States District Court, 407 U.S. 297 (1972).

The First and Fourth Amendments "are indeed closely related, safeguarding not only privacy…but 'conscience and human dignity and freedom of expression as well." Frank v. Maryland, 359 U.S. 360, 376 (1959) (Douglas, J., dissenting). In fact, the Forest Service's actions at issue in this case demonstrate "[t]he historical

[1] It is noteworthy that in the Federal Register, the Government states "it is not necessary or appropriate to search cars entering the Gathering or to verify the driver's car registration, insurance and license." 60 Fed. Reg. 45265-45266. The affidavits submitted with this motion show that vehicles are still being stopped for these reasons. Affidavits of Chastain, Beck, and Buxbaum.

[2] See affidavits of Chastain, Beck, Buxbaum, and Wenrich.

judgment, which the Fourth Amendment accepts,…that unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasion of privacy." United States v. United States District Court, 407 U.S. at 317; O'Connor v. Ortega, 480 U.S. 709, 743 (1989) (Scalia, concurring). "Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs." Id. United States District Court, supra, 407 U.S. at 314; United States v. Ferrera, 771 F. Supp. 1266, 1286 (D. Mass. 1991).

The intersection of First and Fourth Amendment values present in this case poses this question: Is the location of the roadblock near the site of the 2018 Gathering an unreasonable abuse of discretion so as to make the seizures at the roadblock unconstitutional within the meaning of the fourth Amendment? Compare Sause v. Bauer, 2018 WL 3148262 (2018).

The Fourth Amendment to the United States Constitution protects "[t]he right of the people to secure in their persons, houses, papers, and effects against unreasonable searches and seizures[.]" U.S. Const., Amend. IV. "The Fourth amendment imposes limits on search-and-seizure powers in order to prevent arbitrary and oppressive interference by enforcement officials with privacy and personal security of individuals." United States v. Martinez-Fuerte, 428 U.S. 543,

554 (1976); Chandler v. Secretary of Florida DOT, 695 F. 3d 1194, 1199 (11th Cir. 2012).

Because "[t]he Bill of Rights was fashioned against the background of knowledge that the unrestricted power of search and seizure could also be an instrument for stifling liberty of expression," Marcus v. Search Warrant, 367 U.S. 717, 729 (1961), the government must bear a particularly heavy burden of proving that a roadblock meets the requirements of the Sitz balancing test where, as here, the government's exercise of its search and seizure powers trammels upon First Amendment rights by targeting a roadblock at a particular group of people engaging in protected First Amendment activities in a public forum.[3] Whether the government's burden is phrased in terms of "scrupulous exactitude" or some other terminology, the intersection of First and Fourth Amendment rights present in this case imposes a significantly heavier burden of proof on the government than it would shoulder in ordinary cases of drunk driving or similar, non-targeted roadblocks.

[3] When a warrant targets books for seizure based on the ideas which they contain, the Fourth Amendment's protections must "be accorded the most scrupulous exactitude." Stanford v. Texas, 379 U.S. 476, 485, 85 S.Ct. 506, 511-512 (1965). "No less a standard could be faithful to First Amendment freedoms." Id. 379 U.S. at 485, 85 S.Ct. at 512. See Maryland v. Main, 472 U.S. 463, 470 (1985) ("a police officer may not engage in a 'wholesale search and seizure in these circumstances"). But see Park v. Forrest Service, 69 F. Supp. 2d 1165, 1172 (W.D. Mo. 1999), reversed on other grounds 205 F. 3d 1034 (8th Cir. 2000).

United States v. Stevens, 559 U.S. 460 (2010); Ocheesee Creamery, LLC v. Putnam, 831 F. 3d 1228 (11th Cir. 2017).[4]

There are a number of circumstances in which roadblocks have been sanctioned. Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 455, 110 S.Ct. 2481, 2488 (1990) (fixed sobriety roadblock); Delaware v. Prouse, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401 (1979) (license & registration checkpoint) (dictum); Brouhard v. Lee, 125 f. 3D 656 (8TH Cir. 1997) (sobriety checkpoint); Garrett v. Goodwin, 569 F. Supp. 106 E.D. Ark. 1982) (license & registration roadblock).

But the government may go too far. Searches conducted during roadblocks, like any other search normally require individualized suspicion. See City of Indianapolis v. Edmond, 531 U.S. 32, 37-40 (2000). The need to inderdict drugs does not change the calculus. Id. "The reasonableness of checkpoint stops, however, turns on factors such as the location and method of operation of the checkpoint[.]" United States v. Martinez-Fuerte, 428 U.S. at 565-566. "Moreover, a claim that a particular exercise of discretion in locating or operating a checkpoint is unreasonable is subject to post-stop review." Id., 428 U.S. at 559.

As Judge Evans noted in United States v. Cole, 2010 WL 3210963 (N.D. Ga. 2010):

[4] In a criminal case, devoid of First Amendment interests, the defendant would have the burden of proof. See United States v. Cooper, 133 F. 3d 1394 (11th Cir. 1998).

> The Fourth Amendment test 'is reasonableness in light of all the circumstances.' " Smith, 694 F. Supp. 2d at 1254 (quoting United States v. Prevo, 435 F. 3d 1343, 1345 (11th Cir. 2006)). "Consideration of the constitutionality of [suspicionless] seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." Regan, 218 F. App'x at 903 (citing Brown v. Texas, 443 U.S. 47, 50–51, 99 S.Ct. 2637, 61 L.Ed. 2d 357 (1979)). "Even if the government has the authority to conduct a checkpoint, the reasonableness inquiry under the Fourth Amendment requires a determination of whether the intrusion on an individual's privacy was warranted in light of the state's interest." Id. at 904 (citing Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 453–53, 110 S.Ct. 2481, 110 L.Ed. 2d 412 (1990)).

There can be no dispute that the government bears the burden of proving that the type of roadblock search at issue here was reasonable; because it was targeted at First Amendment rights, the government bears the burden of proof. Rankin v. McPherson, 483 U.S. 378, 388, 107 S.Ct. 2891, 2899 (1987) (employment context);

But even if heightened scrutiny is not appropriate, it is still apparent that plaintiffs' rights have been violated. In Bourgeois v. Peters, 387 F. 3d 1303 (11th Cir. 2004), the City required protectors to submit to a metal detector search prior to entering a protest site, the Court explained at 1311:

> This argument is troubling. While the threat of terrorism is omnipresent, we cannot use it as the basis for restricting the scope of the Fourth Amendment's

protections in any large gathering of people. In the absence of some reason to believe that international terrorists would target or infiltrate this protest, there is no basis for using September 11 as an excuse for searching the protestors.

Even putting aside the City's ill-advised and groundless reference to September 11, its demand for the unbridled power to perform "magnetometer searches at [all] large gatherings" is untenable. The text of the Fourth Amendment contains no exception for large gatherings of people. It cannot be argued that the Framers simply failed to foresee the possibility of large protests of this character. The Assembly Clause of the First Amendment, expressly guaranteeing "the right of the people peaceably to assemble," U.S. Const. amend. I, demonstrates the Framers' commitment to protect individuals exercising this fundamental right from governmental interference. The City's request for the broad authority to conduct mass, suspicionless, warrantless searches is similarly bereft of any support from either the Supreme Court or the Eleventh Circuit.

As SAW points out, under the City's theory,

> mass suspicion-less [sic] searches could be implemented for every person who attends any large event including: a high school graduation, a church picnic, a public concert in the park, an art festival, a Fourth of July parade, sporting events such as a marathon, and fund-raising events such as the annual breast cancer walk. And if the government began to pick and choose amongst [sic] these groups, viewpoint discrimination would likely result.

The City's position would effectively eviscerate the Fourth Amendment. It is quite possible that both protestors and passersby would be safer if the City were permitted to engage in mass, warrantless, suspicionless searches. Indeed, it is quite possible that our nation would be safer if police were permitted to stop and search anyone they wanted, at any time, for no reason at all. Cf. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed. 2d 889 (1968) (requiring that police demonstrate

> individualized suspicion that a suspect is armed before frisking him). Nevertheless, the Fourth Amendment embodies a value judgment by the Framers that prevents us from gradually trading ever-increasing amounts of freedom and privacy for additional security. It establishes searches based on evidence—rather than potentially effective, broad, prophylactic dragnets—as the constitutional norm.

The Court went on to note at 1312 et seq:

> The City, quoting the district court, next contends that the search is permissible as a "special needs" search because its purpose is "not to detect unlawful activity or criminal wrongdoing, but ... [to] detect[ ] dangerous devices to ensure the safety of participants, spectators, and law enforcement." Appellees' Brief at 10. The Supreme Court has held that warrantless, suspicionless searches are constitutionally permissible in certain narrow cases where they are meant to further "special needs, beyond the normal need for law enforcement." Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653, 115 S.Ct. 2386, 2391, 132 L.Ed. 2d 564 (1995)(quotation marks and citation omitted).
>
> The City contends that the searches here were not intended to further the City's interest in law enforcement, but instead to help to achieve its "special need" to keep the protestors and others safe by detecting weapons and contraband. The City of Columbus and State of Georgia have enacted a variety of laws against the possession or use of certain kinds of weapons, smoke bombs, and incendiary devices to achieve this goal of public safety. As the City admits, many arrests under these laws occurred as a result of these searches. In a case such as this, where the very purpose of a particular law (such as the law banning the possession of certain dangerous items) is to protect the public, and the government protects the public by enforcing that law, it is difficult to see how public safety could be seen as a governmental

interest independent of law enforcement; the two are inextricably intertwined.

Under the City's rationale, a search intended to enforce a given law would be permissible so long as the government officially maintained that its purpose was to secure the objectives that motivated the law's enactment in the first place (e.g., public safety) rather than simply to enforce that law for its own sake. Such a distinction is untenable. Moreover, it is difficult to conceptualize what the government's interest in "enforcing a law for its own sake" would be, if not to secure the benefits of having that law enforced. Given "[t]he extensive involvement of law enforcement and the threat of prosecution" in this search, and our inability to tease out a rationale totally independent of the City's interest in law enforcement, we find that the search does not fall within the special needs doctrine. Ferguson v. City of Charleston, 532 U.S. 67, 83–84 & n. 20, 121 S.Ct. 1281, 1291 & n. 20, 149 L.Ed. 2d 205 (2001); cf. Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 454–55, 110 S.Ct. 2481, 110 L.Ed .2d 412 (1990) (upholding highway sobriety checkpoints run by police who arrested drunk drivers).

Even putting aside this difficulty, the type of search at issue here does not fall within any of the "special needs" exceptions recognized by the Supreme Court. Both due to the potentially unlimited sweep of the "special needs" standard, as well as to the concerns discussed in Part II.A supra, we decline to take it upon ourselves to craft another exception to the Fourth Amendment's general requirement of individualized suspicion.

The City's final argument is that this search is constitutionally permissible because it is "reasonable." A necessary ancillary to this argument is that the Fourth Amendment permits all reasonable searches, whether or not the officials conducting them have either a warrant, probable cause, or indeed any degree of individualized suspicion. The City focuses too much on the grammatical

> construction of the first half of the amendment, however. As the Supreme Court reminds us in Chimel v. California, 395 U.S. 752, 765, 89 S.Ct. 2034, 2041, 23 L.Ed. 2d 685 (1969), discussions of reasonableness "must be viewed in the light of established Fourth Amendment principles."

Judge Evans has sucinctly set out the appropriate factors in Cole, supra at slip 6:

> "The Fourth Amendment test 'is reasonableness in light of all the circumstances.' " Smith, 694 F. Supp. 2d at 1254 (quoting United States v. Prevo, 435 F .3d 1343, 1345 (11th Cir.2006)). "Consideration of the constitutionality of [suspicionless] seizures involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." Regan, 218 F. App'x at 903 (citing Brown v. Texas, 443 U.S. 47, 50–51, 99 S.Ct. 2637, 61 L.Ed. 2d 357 (1979)). "Even if the government has the authority to conduct a checkpoint, the reasonableness inquiry under the Fourth Amendment requires a determination of whether the intrusion on an individual's privacy was warranted in light of the state's interest." Id. at 904 (citing Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 453–53, 110 S.Ct. 2481, 110 L.Ed. 2d 412 (1990)).

It is difficult, if not impossible, to assess "the gravity of the public concern" at which the 1996 gathering checkpoint was addressed because the purpose of the checkpoint was so broadly defined.

In a story published by Tom Regan updated on June 20, 2018, Mr. Steven Bekkeros with the United States Forrest Services stated "Our primary concern is traffic." Of course, traffic is no reason for a roadblock. He also stated, "We are

asking our festival visitors to obey state and local laws and we plan on enforcing these laws." Id. But this basically takes us back to City of Indianapolis v. Edmond 531 U.S. 32 (2000) and the requirement of individualized suspicion. The reporter notes "One attendee told Channel 2 Action News he was stopped at a checkpoint where rangers unloaded and searched his vehicle" but "they found nothing on him."

Another story in the Times Courier of June 26, 2018, by Mr. Matt Atkin and Keg Finor, Jr. quoted the County Sheriff as taking measures "to try to maintain a safe event because "he's been notified of incidents of violence."

The vague, ill-defined purpose of the roadblock is also well demonstrated by mercurial practices employed by the officer staffing the roadblock. Specifically, during the checkpoint's operation the authorities conducted among other things a documents check, a safety equipment inspection and a search for drugs. Further, the authorities used the checkpoint as an opportunity to inspect the interiors of the stopped cars and to ask for the identities of passengers.

In its 1995 response to the public comments about a proposed group use permit current regulation, the forest service essentially admitted that checkpoints at gatherings serve little public concern; "[I]t is not necessarily appropriate to search cars entering the Gathering or to verify the driver's car registration, insurance, and license." 60 Fed. Reg. 45265-45266 (August 30, 1965). Furthermore, the

government's varied practices and vague justifications for the roadblock show that the government agency involved lacked a clearly defined purpose for establishing this roadblock and were instead operating an unconstitutional general-purpose law enforcement checkpoint. Thus, the governmental action must fail the "public concern" prong of the balancing test.

Under the second factor, the roadblock must also fail. First, because the government agency does not keep track of the numbers of vehicles passing through the roadblock, it is impossible to calculate the effectiveness of this roadblock as the Supreme Court has defined it. Second, and more fundamentally, the facts show that the roadblock now during the 2018 Gathering is doomed to ineffectiveness from the start, even assuming arguendo that some kind of vague "public safety" purpose inspired the checkpoint. This is so because, when the authorities stopped them, the vast majority of vehicles are within a half a mile of their destination where they would be off the road and posing no safety risks. This is in marked contrast to the usual sobriety checkpoint, which is located on a busy street or highway far from the destinations of most of the drivers that pass through the roadblock. Because of the very short distance between the roadblock and the end of the journey for most of the vehicles stopped, the roadblock here has little or no chance of effectively advancing public safety.

Finally, the individual liberty factor clearly tips the balance against the use of a checkpoint in these circumstances. In laying this factor, the Court must "consider both the objective and subjective intrusions in checkpoint stops. See United States v. Martinez-Fuerte, 428 U.S. at 553.

In Park, supra, the District Court issued a well reasoned opinion in circumstances similar to the case at bar[5] and plaintiff respectfully refers the Court to it. Accord Shankle v. Texas City, 885 F. Supp. 996, 1002 (S.D. Tex. 1995):

The targeting of groups of citizens for governmental action, such as a roadblock, based on their association with an unpopular group runs against the constitutional grain. For example, such unrestrained targeting is precisely the type of conduct that the Fourth Amendment's requirements of probable cause (or individualized suspicion) and a warrant were designed to counteract. United States v. Martinez-Fuerte, 428 U.S. 543, 565-566. Furthermore, such targeting smacks of prohibited warrantless group seizures based on suspicion that the targeted group contains some law violators. See Gallegos v. Haggerty, 689 F. Supp. 93, 103 (N.D. N.Y. 1988) (seizure of group suspected of containing illegal aliens violated Fourth Amendment). And such targeting is inconsistent with the strong constitutional presumption against guilt by association. United States v. Di Re, 332 U.S. 581, 593

[5] As plaintiffs have pointed out, this case was reversed on appeal, but that reversal was only because of lack of standing. The persuasiveness of the Park district court opinion and the cases it cites remain undiminished.

(1948) ("Presumption of guilt are not lightly to be indulged from mere meetings"). "Although this precise issue has not come before the Court heretofore, the Court has consistently disapproved governmental action imposing criminal sanctions or denying rights and privileges solely because of a citizen's association with an unpopular organization." Healy v. James, 408 U.S. 169, 185-186 (1972).

In order to be reasonable, roadblock locations must "be chosen without regard to any racial, ethnic, or economic characteristics of the surrounding population or neighborhood, or of the population or neighborhood, or of the population using the roadway." Stark v. Perpich, 590 F. Supp. 1057, 1061 (D. Minn. 1984). Thus, the short answer to the issue here is that the decision to locate the roadblock was unconstitutional because it targeted a specific group of people, those attending the 2018 Gathering, who were exercising their First Amendment rights of freedom of religion, association, assembly, and expression.

II. PLAINTIFFS HAVE STANDING

In Park, supra, the Eighth Circuit reversed because of lack of standing. It is noteworthy that there was another basis of standing not argued.

A. CHILL

There is standing because of injury that is occurring right now. The statement under penalty of perjury of Ms. Hadaway shows that because of the unreasonable searches, she has been chilled from taking part in this year's event.

In ACLU v. Rabun County, 698 F. 2d 1098 (11th Cir. 1983), the plaintiffs' injury was that they were unwilling to camp in a state park where there was a gigantic cross, 698 F. 2d at 1101, 1107-1108; See Bell v. Keating, 697 F. 3d 445 (7th Cir. 2012); Parsons v. U.S. DOJ, 801 F. 3d 701, 712 (2015). As the Eleventh Circuit has explained:

> an actual injury can exist when the plaintiff is chilled from exercising her right to free expression or foregoes expression in order to avoid enforcement consequences.

Pittman v. Cole, 267 F. 3d 1269, 1283 (11th Cir. 2001).

This analysis also applies anytime a person gives up their First Amendment rights to be free of an illegal search, Plaintiffs are entitled to be free of unconstitutional conditions. See Bourgeois, supra, at 1324-1325. The imposition of the unconstitutional conditions supplies their standing.

But persons facing illegal searches also have standing apart from any unconstitutional conditions. See below at pages 18-20.

III. PLAINTIFFS ARE ENTITLED TO A TRO

A. THE STANDARDS

The standards for a temporary restraining order are the same as for a preliminary injunction, See City of Eufaula v. Alabama DOT, 2014 WL 7369783 (M.D. Ala. 2014); O'Boyle v. Town of Gulf Stream, 2013 WL 3147639 (S.D. Fla. 2013); Florence v. Donald, 2007 WL 1033523 (S.D. Ga. 2007) citing Bieros v.

Nicola, 857 F. Supp. 445, 446 (E.D. Pa. 1994); Johnson v. Patterson, 2012 WL 353238 (S.D. Ala. 2012) fn. 1.

The appropriate standards are set out in Texas v. Seatrain International, 518 F. 2d 175, 179-180 (5th Cir. 1975);

> As we said in Canal Authority of State of Florida v. Callaway, 489 F. 2d 567 (5th Cir. 1974), it is an extraordinary and drastic remedy which should not be granted unless the movant has clearly carried the burden of persuasion concerning the existence and application of what we have recognized as the four prerequisites to such relief. These are: (1) a substantial likelihood that the movant will eventually prevail on the merits; (2) a showing that the movant will suffer irreparable injury unless the injunction issues; (3) proof that the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the party or parties opposed; and (4) a showing that the injunction, if issued, would not be adverse to the public interest. Canal Authority, supra, 489 F. 2d at 572; Di Giorgio v. Causey, 488 F. 2d 527 (5th Cir. 1973); Blackshear Residents Organization v. Romney, 572 F. 2d 1197 (5th Cir. 1973); Allison v. Froehlke, 470 F. 2d 1123 (5th Cir. 1972).
>
> No matter how severe and irreparable an injury one seeking a preliminary injunction may suffer in its absence, the injunction should never issue if there is no chance that the movant will eventually prevail on the merits. Nor is there need to weigh the relative hardships which a preliminary injunction or the lack of one might cause the parties unless the movant can show some likelihood of ultimate success. Obviously, it is inequitable to temporarily enjoin a party from undertaking activity which he has a clear right to pursue. However, one appealing to the conscience of the chancellor to maintain the status quo pending final decision, although he carries a burden, is not required to

> prove to a moral certainty that his is the only correct position. The prerequisite, as an absolute, is more negative than positive: one cannot obtain a preliminary injunction if he clearly will not prevail on the merits; however, that he is unable, in an abbreviated proceeding, to prove with certainty eventual success does not foreclose the possibility that temporary restraint may be appropriate. In its negative sense, the factor is critical; but viewed positively, the importance and nature of the requirement can vary significantly, depending upon the magnitude of the injury which would be suffered by the movant in the absence of interlocutory relief and the relative balance of the threatened hardship faced by each of the parties. Canal Authority, supra. This is so because, as we have noted, none of the four prerequisites has a fixed quantitative value. Rather, a sliding scale is utilized, which takes into account the intensity of each in a given calculus. Siff v. State Democratic Executive Committee, 500 F. 2d 107 (5th Cir. 1974).

As set out above, there is a substantial likelihood that plaintiffs will prevail on the merits. See also Addison v. The Forest Service of the U.S. Department of Agriculture, 108 F. Supp. 2d 1365, 1366 (M.D. Fla. 2000) (discussing Judge Schlesinger's order granting preliminary injunctive relief).

B. PLAINTIFFS WILL SUFFER IRREPARABLE HARM.

It is clear that a preliminary injunction can be issued to prevent violations of the Fourth Amendment. As the Ninth Circuit noted in Easyriders Freedom F.I.G.H.T. v. Hannigan, 92 F. 3d 1486, 1501 (9th Cir. 1996):

> While we are dealing with a relatively small number of citations of only fourteen individual plaintiffs in this case, the citations have been the result of a clear CHP citation policy in violation of the Fourth Amendment,

which has continued despite the Bianco court's limiting interpretation of the helmet law. CHP argues that none of the motorcyclists is threatened with irreparable injury because the Fourth Amendment lack-of-probable-cause defense would be available at their trials on potential traffic citations. Because the Fourth Amendment establishes "[t]he right of the people to be secure in their persons ... against unreasonable searches and seizures," however, the wrong that the Fourth Amendment is designed to prevent is completed when a motorcyclist is cited without probable cause. See United States v. Calandra, 414 U.S. 338, 354, 94 S.Ct. 613, 623, 38 L.Ed. 2d 561 (1974) ("The purpose of the Fourth Amendment is to prevent unreasonable governmental intrusions into the privacy of one's person, house, papers, or effects. The wrong condemned is the unjustified governmental invasion of these areas of an individual's life. That wrong ... is fully accomplished by the original search without probable cause."); Covino v. Patrissi, 967 F. 2d 73, 77 (2d Cir. 1992) (holding that "given the fundamental right involved, namely, the right to be free from unreasonable searches" the plaintiff had sufficiently shown likelihood of irreparable harm for preliminary injunction purposes); Cerro Metal Prods. v. Marshall, 620 F. 2d 964, 974 (3d Cir. 1980) (holding that "an [OSHA] inspection violating the Fourth Amendment would constitute irreparable injury for which injunctive relief would be appropriate").

Indeed, this circuit has upheld injunctions against pervasive violations of the Fourth Amendment. In Conner v. City of Santa Ana, 897 F. 2d 1487 (9th Cir.), cert. denied, 498 U.S. 816, 111 S.Ct. 59, 112 L.Ed. 2d 34 (1990), we affirmed the district court's grant of an injunction against the City of Santa Ana to prevent it from entering Conner's property without a warrant to remove old, inoperable automobiles, without questioning whether such a violation of the Conner's Fourth Amendment rights would result in irreparable harm. Id. at 1493–94. In International Molders' and

> Allied Workers' Local Union No. 164 v. Nelson, 799 F. 2d 547, 551 (9th Cir. 1986), we affirmed the district court's finding that absent an injunction, a labor union, five employers, and nine employees of Hispanic ancestry would suffer irreparable harm from INS searches and arrests at factories that violated the Fourth Amendment. See also Zepeda v. INS, 753 F. 2d 719, 727 (9th Cir. 1983)(American citizens of Mexican descent and Mexican citizens legally in the United States who were subjected to searches of their residences without consent, and detention without reasonable suspicion that they were illegal aliens, were entitled to a preliminary injunction against the INS where they had "demonstrated a possibility or irreparable injury by showing violations of their constitutional rights which, if proven at trial, could not be compensated adequately by money damages"); LaDuke, 762 F. 2d at 1330 (enjoining INS searches of houses in violation of Fourth Amendment was appropriate where INS did not argue that legal relief would adequately compensate victims and there was a high likelihood of continued violations in the absence of an injunction). Likewise, in light of the CHP's clear policy for helmet law enforcement that violates the Fourth Amendment when used to cite motorcyclists without knowledge of their certified helmet's non-compliance with federal standards, an injunction is appropriate here.

Accord Lebron v. Wilkins, 820 F. Supp. 2d 1273 (S.D. Fla. 2011).

Moreover, it has long been held that the "loss of First Amendment freedoms, for even minimal amounts of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373 (1976); Cate v. Oldham, 707 F. 2d 1176, 1188 (11th Cir. 1983).

C. THE BALANCE OF HARMS FAVORS PLAINTIFFS

The balance of the harms favors plaintiffs. See e.g. Tillman v. Miller, 917 F. Supp. 799, 801 (N.D. Ga. 1995). Plaintiffs want to make clear that they are not seeking to be free of any lawful search or arrest. As the Supreme Court noted in City of Indianapolis, supra at 41:

> We have never approved a checkpoint program whose primary purpose was to detect evidence of ordinary criminal wrongdoing. Rather, our checkpoint cases have recognized only limited exceptions to the general rule that a seizure must be accompanied by some measure of individualized suspicion. We suggested in Prouse that we would not credit the "general interest in crime control" as justification for a regime of suspicionless stops. 440 U.S., at 659, n. 18, 99 S.Ct. 1391.

D. THE PUBLIC INTEREST WILL BE SERVED

Finally, the public always wins when constitutional rights are preserved. See e.g. Tillman v. Miller, 917 F. Supp. 799, 801-802 (N.D. Ga. 1995).[6]

The TRO should issue.

[6] The TRO to the benefit of all of the persons at the gathering. See Doe v. Rumsfeld, 341 F. Supp. 2d 1 (D.D.C. 2004) citing NLRB v. Express Publishing Co., 312 U.S. 426, 435 (1941); Easyrider, supra.

Respectfully submitted,

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