RECORD NO. 17-17522

In The

United States Court Of Appeals

For The Ninth Circuit

BENJAMIN W. ESPINOSA; AMERICAN HUMANIST ASSOCIATION,
Plaintiffs-Appellants,

v.

JAMES DZURENDA, in his official capacity as Director of the Nevada Department of Corrections; JAMES STOGNER, in his official capacity as Head Chaplain of LCC,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT COURT FOR NEVADA, RENO
NO. 3:16-CV-00141-RCJ-WGC
(HONORABLE ROBERT CLIVE JONES)

APPELLANTS' OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Ninth Circuit Rule 26.1, Appellant American Humanist Association makes the following disclosures:

The American Humanist Association is a non-profit corporation, exempt from taxation under 26 U.S.C. § 501(c)(3). It has no parent or publicly held company owning ten percent or more of the corporation.

Date: February 20, 2018

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343 because this action involves constitutional claims brought under 42 U.S.C. § 1983. On December 12, 2017, the District Court, *sua sponte*, dismissed Plaintiffs-Appellants' Complaint under 28 U.S.C. § 1915A(a). (R.1-6).[1] Plaintiffs-Appellants filed a timely notice of appeal on December 20, 2017. (R.7-8). This Court has jurisdiction under 28 U.S.C. § 1291.

[1] Plaintiffs-Appellants' Record Excerpts are cited as "R." followed by the page number(s).

INTRODUCTION AND ISSUES PRESENTED

The Nevada Department of Corrections ("NDOC") recognizes 28 faith groups ("Faith Groups") of various sizes, ranging from Asatru, Thelema, and Church of Scientology, to Nation of Islam and Hare Krishna, and accords such groups numerous benefits including weekly group meetings (for study, congregation, or worship), work proscription days, holiday celebrations, group materials (i.e., books and DVDs), and storage space. Yet NDOC refuses to approve Humanism as a Faith Group and denies Humanists the foregoing benefits. And despite having well over three years to consider an inmate's request for Humanist accommodations, NDOC has never once articulated any reason for its disparate treatment of Humanists. Flouting decades of binding precedent, the District Court sanctioned NDOC's discrimination against Humanists solely because Humanists reject a belief in a supernatural creator.[2]

The questions presented are as follows:

1. The Supreme Court in *Torcaso v. Watkins*, and this Court in *Newdow v. United States Congress*, explicitly recognized Secular Humanism as a religion for Establishment Clause purposes. Moreover, the Supreme Court has long held that a "religion" for First Amendment purposes does not require belief in a supernatural deity and even includes Atheism. Did the District Court err in holding

[2] Humanists espouse the motto, "Good Without A God." https://americanhumanist.org (last visited Jan. 31, 2018).

that: (1) Secular Humanism is not a religion for Establishment Clause purposes; and (2) belief in a supernatural deity is necessary?

2. Federal courts have repeatedly held that the Establishment Clause requires prisons to authorize Atheist and Humanist group meetings on the same terms as theistic groups. Does a prison's refusal to recognize Humanism and authorize Humanist group meetings on the same terms as theistic groups violate the Establishment Clause?

3. The Establishment Clause prohibits governmental favoritism of religion over nonreligion. An accommodation cannot treat religions favorably when secular groups are identical with respect to the attribute selected for that accommodation. Did the District Court err in holding that Humanism must be a "religion" for Humanists to be accorded equal treatment for group meetings, holidays, and storage space?

4. Discrimination on the basis of religion violates the Equal Protection Clause absent a compelling governmental interest. Does a prison's disparate treatment of Atheists and Humanists for no compelling or even legitimate reason violate the Equal Protection Clause? Did the District Court err in dismissing the Equal Protection Clause claim without any discussion whatsoever?

STATEMENT OF THE CASE

1. Nature of the case

Plaintiffs-Appellants challenge NDOC's disparate treatment of Humanists as violative of the Establishment and Equal Protection Clauses. NDOC approves and accommodates 28 Faith Groups regardless of size or demand, but refuses to: (1) approve Humanism; (2) allow Humanists to meet in groups to study and discuss their shared convictions; and (3) allow Humanists to store materials in a Faith Group container. Plaintiffs-Appellants seek injunctive and declaratory relief and damages under 42 U.S.C. § 1983 to redress these constitutional violations. (R.12-13)(R.21)(R.64-65).

2. Parties

Plaintiff-Appellant the American Humanist Association ("AHA") is a national nonprofit membership organization with over 236 local Chapters and Affiliates in 47 states, including Nevada, and over 600,000 members and supporters. (R.21)(R.40-41)(R.44)(R.65). [3] Founded in 1941, AHA is the

[3] https://americanhumanist.org/get-involved/find-or-start-a-chapter/ (last visited Jan. 31, 2018). The Court can take judicial notice of AHA's history, programs, values, and practices publicly available on AHA's website. *See* FED. R. EVID. 201; *Matthews v. Nat'l Football League Mgmt. Council*, 688 F.3d 1107, 1113 n.5 (9th Cir. 2012) (judicial notice of statistics on NFL's website); *see also United States v. Espinoza*, 528 Fed. App'x 727, 730 (9th Cir. 2013); *Blue Lake Rancheria v. United States*, 2010 WL 144989, *2 n.4 (N.D. Cal. Jan. 8, 2010). NDOC has relied on AHA's website and does not challenge its authenticity. (R.49).

nation's oldest and largest Humanist organization.[4] *See also* (R.17)(R.40-41)(R.65).

Plaintiff-Appellant Benjamin Espinosa is a Humanist and AHA member. (R.5)(R.12)(R.41)(R.44)(R.46)(R.65-67)(R.70). The events giving rise to this action took place while Espinosa was housed at Lovelock Correctional Center ("LCC"). (R.12). Espinosa was later transferred to Northern Nevada Correctional Center (R.67) and is currently housed at Ely State Prison.[5] Espinosa sincerely wishes to meet and study with other Humanists who share his Humanist convictions. (R.46)(R.70). Humanism comforts, guides, and provides meaning to Espinosa. (R.46-47)(R.67)(R.70). The District Court found "no basis to doubt Plaintiff's sincerity as to his professed beliefs." (R.5). NDOC also concedes the sincerity of Espinosa's Humanist convictions. (R.41).

[4] *See* AHA, https://americanhumanist.org/what-we-do/grassroots/start-humanist-group-area/ (last visited Jan. 31, 2018); Mel Lipman, *Humanism on the Rise* (May 24, 2003), http://www.nytimes.com/2003/05/24/opinion/l-humanism-on-the-rise-814814.html; Pew Research, *Lobbying for the Faithful: American Humanist Association*, https://perma.cc/Q4JB-7SS4 (last visited Feb. 14, 2018); Wikipedia, *American Humanist Association*, https://perma.cc/86HQ-4S73 (last visited Feb. 14, 2018); *Io Group, Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132, 1145 n.8 (N.D. Cal. 2008) (judicial notice of Wikipedia).

[5] NDOC, *Benjamin W. Espinsoa*, http://167.154.2.76/inmatesearch/form.php (last visited Jan. 31, 2018).

Defendant NDOC houses approximately 14,000 inmates statewide.[6] NDOC's Director, James Dzurenda, has the final decision regarding religious accommodations and appoints members to the Religious Review Team ("RRT") (R.40-41)(R.51-52), a three-member body composed of a Warden, Chaplain, and Deputy Attorney General. (R.66)(R.118)(R.145). NDOC's Head Chaplain, James Stogner, serves on the RRT and is responsible for making recommendations to the Director regarding whether to approve or deny requests for religious accommodations. (R.41)(R.51-52)(R.55)(R.66)(R.75).

3. Humanism Overview

Humanism is a federally and constitutionally recognized religion. (R.69-70)(R.88-92); *Torcaso v. Watkins*, 367 U.S. 488, 495, & n.11 (1961); *infra* at 9-10. Humanism has a formal structure akin to many religions, with clergy (usually known as celebrants), chaplains, and entities dedicated to the practice of religious Humanism, such as the American Ethical Union (based on the Ethical Culture movement founded in 1876) and the Society for Humanistic Judaism (founded by Rabbi Sherwin Wine in 1969), among others. (R.23-24)(R.67-68)(R.85). Humanist principles are promoted and defended by organizations such as the AHA and the International Humanist and Ethical Union (which

[6] *NDOC StatFacts Monthly As of May 31, 2017*, http://doc.nv.gov/uploadedFiles/docnvgov/content/About/Statistics/Monthly_Reports_by_Year/StatFacts_052017.pdf.

provides a statement of Humanist principles known as "The Amsterdam Declaration"). (R.23)(R.67).

The key tenets of Humanism are articulated in the Humanist Manifesto III, also known as "Humanism and Its Aspirations," which has been endorsed by 22 Nobel laureates and thousands of others. (R.25)(R.69)(R.84-85). The Humanist Manifesto was first published in 1933. (R.25)(R.69)(R.86).[7]

Humanism is comprehensive in nature and explores fundamental and ultimate questions of life, existence, and even end of life, and holds a central place to its adherents comparable to theistic religions. (R.23-26)(R.46-47)(R.67-69)(R.86).[8] The lifestance of Humanism — "guided by reason, inspired by compassion, and informed by experience" — affirms "our ability and responsibility to lead ethical lives of personal fulfillment that aspire to the greater good of humanity" without supernaturalism. (R.86). Humanism draws from variety of nontheistic views while adding the important element of a comprehensive worldview and ethical values. (R.23)(R.67-69)(R.86). Whereas Atheism addresses only the specific issue of the existence of a deity, the

[7] The first Humanist organization (the Humanist Fellowship) was formed in 1927 at the University of Chicago, which reorganized into the AHA in 1941. https://americanhumanist.org/what-we-do/publications/ (last visited Jan. 31, 2018).
[8] *See also* British Humanist Association, *Death, Dying And Meaning*, *Trainer's Course Book* (2012), https://humanism.org.uk/wp-content/uploads/death-dying-and-meaning-trainer-course-book.pdf.

Humanism affirmed by Espinosa includes an affirmative recognition of ethical duties and empiricism as the primary means of attaining truth. (R.46)(R.67).

AHA's adjunct organization, the Humanist Society, is a religious 501(c)(3) organization, incorporated in 1939 under the laws of California to issue charters anywhere in the world and to train and certify Humanist clergy. (R.24)(R.68). The Humanist Society continues to endorse and train Humanist celebrants, chaplains, lay leaders, and invocators to conduct observances across the nation and worldwide, including weddings, commitment/same-sex unions, memorial services, baby namings, and other life-cycle events. (R.24)(R.68).[9] Humanist celebrants are accorded the same rights and privileges granted by law to priests, ministers, and rabbis of traditional theistic religions. (R.24)(R.68).

Humanist chaplaincies are established at numerous institutions including at Harvard University, New York University, Yale University, Stanford University, Columbia University, Rutgers University, and American University. (R.24)(R.68).

Humanists observe various Humanist holidays, including:

- Darwin Day (February 12)
- National Day of Reason (first Thursday in May)

[9] The Association for Professional Chaplains recognizes the Humanist Society as an endorser of chaplains. *Humanist Society Guidelines*, https://perma.cc/FD8A-PWW9 (http://thehumanistsociety.org/about/guidelines/)(last visited Jan. 31, 2018).

- Summer Solstice (June 21), also known as World Humanist Day
- Winter Solstice (December 21) or HumanLight

(R.23)(R.67)(R.70)(R.89).

Humanists find fulfillment in regularly congregating with other Humanists. (R.46)(R.67-71)(R.86)(R.89). A primary focus of the AHA is to form and sustain local Humanist groups. (R.41)(R.44)(R.65). The principles of Humanism include helping others, meeting in community with others of like mind, making connections and growing by connection with others who hold diverse beliefs, and building a legacy that makes our world a better place. (R.49)(R.69)(R.86).[10]

The Federal Bureau of Prisons (BOP) officially recognizes Humanism and provides Humanist group meetings as part of its religious programming. (R.70)(R.87-91). The BOP's "Manual on Inmate Beliefs and Practices" includes a section on Humanism with detailed information on Humanist practices, observances, writings, organizational structure, theology, and history.[11] FCI-Sheridan has had an active Humanist group since June 2014. (R.88-89). BOP

[10] The Humanist Society, http://thehumanistsociety.org/about/humanism/ (last visited Jan. 31, 2018).

[11] *American Humanist Association, et al v. Perry, et al.*, 5:15-ct-03053-BO, DE-93-1 (E.D.N.C. Oct. 13, 2017), https://ecf.nced.uscourts.gov/doc1/13115642124. *See also* https://perma.cc/UH63-SM8L (BOP FOIA and Manual). The Court can take judicial notice of BOP's records along with court documents in *Perry* (a virtually identical case). *See Interstate Nat. Gas Co. v. S. Cal. Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953) (judicial notice of the "records and reports of administrative bodies"); *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 n.6 (9th Cir. 2006) (judicial notice of "court filings").

allots the Humanist group two meeting slots per week and a separate day to observe Darwin Day. (R.70)(R.89).[12]

Other federal departments recognize Humanism as a religion, including the Internal Revenue Service,[13] Department of Defense,[14] and Department of Veterans Affairs.[15] State prison systems also recognize Humanism and offer Humanist group meetings as part of religious programming, including but not limited to:

- Iowa State Penitentiary[16]
- Fort Dodge Correctional Facility[17]
- Wisconsin Department of Corrections[18]

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[12] *See Perry*, *supra*, DE-80-10 (Holden Declaration), https://ecf.nced.uscourts.gov/doc1/13115530413 (https://perma.cc/K7BA-Y5ZU).

[13] IRS Manual, 7.25.3.6.5 (02-23-1999), *Religious Belief Defined*, https://perma.cc/JRV5-6QKA (*see also* https://www.irs.gov/irm/part7/irm_07-025-003). *See Davis v. United States*, 861 F.2d 558, 560 (9th Cir. 1988) (judicial notice of IRS publication).

[14] Religion News Service, *Department of Defense Expands its list of recognized religions* (Apr. 21, 2017), http://religionnews.com/2017/04/21/defense-department-expands-its-list-of-recognized-religions/; AHA, *Faith and Belief Codes For Reporting Personnel Data of Service Members*, https://perma.cc/WR4H-5V34.

[15] Department of Veterans Affairs, *Available Emblems of Belief for Placement on Government Headstones and Markers*, https://www.cem.va.gov/hmm/emblems.asp (last visited Jan. 31, 2018).

[16] Paul Knupp, *The Story of Humanists Behind Bars* (Dec. 6, 2017), https://thehumanist.com/commentary/story-humanists-behind-bars.

[17] The Humanist (Nov. 15, 2017), https://thehumanist.com/news/secularism/humanist-inmates-iowa-busy-keeping-real.

[18] *Wisconsin Department of Corrections Opportunities and Options Resource Guide* (March 2017), https://perma.cc/KVM6-VBNP, at p.11.

- Virginia Department of Corrections[19]
- The Mike Durfee State Prison in South Dakota.[20]

4. NDOC Faith Group policies

The 28 Faith Groups NDOC approves and accommodates are listed as follows:

- American Indian / Native American (Earth-Based)
- Asatru / Odinism (Earth-Based)
- Baha'i
- Buddhism
- Christian (General)
- Christian, Non-denominational
- Christian, Orthodox
- Christian, Protestant
- Church of Christ, Scientist
- Church of Scientology
- Druid, Celtic Pagans, Pre-Christian (Earth-Based)
- Hindu
- Islam / Muslim (orthodox variants, including Sunni and Shi'ite)
- Islam / Muslim, Nation of Islam (NOI)
- Jehovah's Witnesses
- Judaism
- Judaism, Hebrew Israelites

[19] *Perry*, DE-90-4 (Sam Grover Declaration), (https://perma.cc/RQ8Q-YQFC), https://ecf.nced.uscourts.gov/doc1/13115602482.
[20] *Id.*

- Judaism, Messianic
- Krishna Consciousness / Hare Krishna
- Moorish Science Temple of America
- Mormons / Church of Jesus Christ of Latter Day Saints
- Rastafarian
- Roman Catholic
- Seventh day Adventist (SDA)
- Siddha Yoga
- Sikh
- Thelema (Earth-Based)
- Wicca (Earth-Based)

(R.26-27)(R.97-111)(R.117)(R.71-72)(R.53)(R.168).

NDOC requires each "institution/facility to provide space adequate for Faith Group programs." (R.132). Faith Groups are accorded numerous benefits, including the ability to: (1) regularly meet with a spiritual leader; (2) enroll in religious correspondence courses; (3) observe work proscription days and holidays; (4) acquire religious group items (i.e., books, DVDs, medallions); and (5) store items in Faith Group containers. (R.28)(R.72)(R.53)(R.41)(R.46)(R.94-111)(R.118)(R.124-25)(R.138-44).

More significantly, Faith Groups are allotted regular scheduled meeting time to study and discuss their beliefs, support each other in applying those beliefs to personal growth, and celebrate events and holidays. (R.72)(R.53)(R.98-

111)(R.118-20)(R.132). Faith Groups typically meet in the chapel or in a study room. (R.72)(R.119-20)(R.132). All Faith Groups are eligible for weekly meetings and most have scheduled time slots. (R.46)(R.72)(R.117-18)(R.120)(R.132). Even small groups have scheduled meetings, such as the non-Messianic Judaism group at LCC (with approximately 2-4 members), and the Siddha Yoga and Moorish Science Temple groups. (R.46)(R.54)(R.72)(R.109)(R.132). Some scheduled Faith Group meetings have no attendance at all. (R.46)(R.72).

Faith Groups are provided time for group study and/or group worship even if neither is required by the faith. (R.94-111). For instance, NDOC approves Buddhism and offers Buddhist meetings even though Buddhism is nontheistic, has no "holy days," and no "mandatory requirements" for group worship. (R.100). NDOC approves and accommodates "Church of Christ, Scientist," "Church of Scientology," "Hindu," "Jehovah's Witnesses," "Moorish Science Temple of America," "Rastafarian," "Roman Catholic," "Seventh Day Adventist," "Thelema," and "Wicca," despite acknowledging that these groups do not require group worship either. (R.102-103)(R.105)(R.107-11).

Nonetheless, NDOC refuses to approve Humanism as a Faith Group and refuses to provide any accommodations for Humanists. (R.72-74)(R.54)(R.46-47)(R.41). Humanists have no venue for meetings and no group area to store Humanist materials. (R.72-74)(R.54)(R.41)(R.47).

NDOC Policy AR 810 governs Faith Group programs. (R.115). During intake, inmates submit a "Faith Group Affiliation Declaration Form," but can only select an approved Faith Group. (R.122-23)(R.163-64)(R.166-68). Neither Humanism nor Atheism is an option. (R.47)(R.72-73)(R.54)(R.163-68).

For NDOC to recognize a new Faith Group, an inmate/group must submit a DOC-3505 "Request for Accommodation of Religious Practices Form." (R.73)(R.117)(R.124-25). The Chaplain submits the completed DOC-3505 to the RRT, which will then "research the inmate's request and submit a recommendation to the designated Deputy Director." (R.125). The Deputy Director will "render the final decision." (R.125-26). The "RRT will then provide written notice of the final decision to the inmate." (R.126). The form states that the inmate's request will be responded to within 120 days of submission. (R.147).

5. NDOC's Refusal to Recognize Humanism

On June 11, 2014, Espinosa submitted a DOC-3505 requesting: (1) approval of Humanism as a Faith Group; (2) meeting time slots for Humanist congregation and group study; and (3) group storage space for Humanist materials. (R.47)(R.73)(R.147). As "source[s] of authority," Espinosa identified AHA (with a link to AHA's website), the Humanist Manifesto, and *Torcaso v. Watkins*, 367 U.S. 488 (1961), which recognized Secular Humanism as a "religion" for First

Amendment purposes. (R.73)(R.147). On June 16, 2014, LLC Chaplain Anthony Carrasco forwarded the DOC-3505 to the RRT. (R.73)(R.147).

After 213 days and no response, on January 10, 2015, Espinosa filed an Informal Grievance stating he never received a response to his DOC-3505. (R.74)(R.148-50). Espinosa's Informal Grievance was denied. (R.74)(R.151-52). The Official Response, dated February 9, 2015, stated:

> [Y]our DOC 3505 . . . has been forwarded to the RRT. After review by the RRT it is forwarded to the designated Deputy Director, with the RRT's recommendation, for final approval. As stated in the N.D.O.C. Religious Practice Manual, request and approval process MUST be completed before any grievance process can be initiated. Grievance Denied.

(R.74)(R.152).

On February 15, 2015, Espinosa submitted a First Level Grievance concerning the sixth-month delay and stated that he had spoken to Carrasco, who could not give him any information regarding the status of his DOC-3505. (R.74)(R.153-55). The Official Response, dated March 13, 2015, stated in part: "There is not a time frame indicated for approval or denial of your request. If you have questions as to the status of your request you can contact the LCC Chaplain. Grievance denied." (R.74)(R.156-57).

On March 23, 2015, Espinosa filed a Second Level Grievance, noting it had been nine months since he submitted his DOC-3505, and no one could give him any reason for the delay. (R.74)(R.158-60). The Official Response, dated July 23,

2015, stated that Chaplain Stogner "will be meeting with you to address your concerns," and that the "RRT committee needs more information from you before they can process your request." (R.75)(R.161-62). This was the first indication the RRT needed any information from Espinosa. (R.75). In the summer of 2015, Espinosa spoke with Stogner over the phone, while in Carrasco's office. (R.75). Stogner stated that the RRT reviewed the request, but that Espinosa would have to wait another four months to receive a response. (R.75). No explanation was given for the *additional* four-month delay. (R.75).

The following year, on June 1, 2016, Espinosa submitted a "Faith Group Affiliation Declaration Form" requesting his affiliation be changed to "Humanist." (R.75)(R.163-64). On August 2, Carrasco responded:

> You know that I can't do anything with your form or this request as "Humanist" is not among the recognized NDOC religions. A list is provided indicating those religions. The only route, which you have already attempted is to submit for NDOC recognition.

(R.76)(R.165-68). At that time, Espinosa had submitted his DOC-3505 more than two years earlier and was still waiting on a response. (R.76)(R.147)(R.166).

To date, Espinosa still has not received any response from NDOC or the RRT. (R.32)(R.47)(R.52)(R.54). NDOC's delay of more than *three years and six months* constitutes a *de facto* denial of his request. (R.76)(R.47)(R.41). *E.g.*, *Clark v. City of Lakewood*, 259 F.3d 996, 1009 (9th Cir. 2001); *see also Sapp v. Kimbrell*, 623 F.3d 813, 823 (9th Cir. 2010) ("[I]mproper screening of an inmate's

administrative grievances renders administrative remedies 'effectively unavailable' such that exhaustion is not required under the PLRA."); *Rupe v. Beard*, 2013 U.S. Dist. LEXIS 80041, at *45-46 (E.D. Cal. June 3, 2013) ("administrative remedies are effectively unavailable if 1) prison officials have failed to timely respond to a grievance, 2) the inmate has received no notice of or justification for the delay, and 3) the inmate has no other available avenues to seek administrative relief.") (citation omitted). Neither the magistrate nor the District Court disputed that Espinosa satisfied the Prison Litigation Reform Act's exhaustion requirement. (R.18-19)(R.10). *See also* (R.41).

At no point in evaluating Espinosa's DOC-3505 did NDOC articulate any reason for disapproving Humanism. (R.146-67). Further, there is no evidence that the number of Humanists in NDOC facilities is smaller than the number of inmates in other Faith Groups. (R.73)(R.77). Indeed, there are at least ten Humanist and Atheist inmates at LCC alone. (R.73).

6. Procedural History

Espinosa filed a *pro se* complaint on March 11, 2016, alleging violations of his First and Fourteenth Amendment rights. (R.169-96). On September 7, 2016, the District Court screened the complaint under 28 U.S.C. § 1915A(a) and dismissed it without prejudice for failure to state a claim. (R.197-203). The court asserted that Secular Humanism does not constitute a "religion in the context of

the Establishment Clause," and granted leave to amend to allege facts that Secular Humanism is a "religion." (R.199-201).

On October 5, 2016, the AHA and Espinosa, through counsel, filed an Amended Complaint. (R.64). On October 12, the magistrate issued an order exempting the case from screening because Espinosa was now represented by counsel. (R.61-63). The parties agreed to a 90-day stay for settlement negotiations. (R.217). The parties were unable to settle, and NDOC filed its Answer on February 2, 2017. (R.50).[21]

On May 5, 2017, NDOC filed a motion for partial summary judgment arguing that the AHA lacked standing. (R.48)(R.217). On October 17, 2017, the magistrate entered a report and recommendation that the motion be denied. (R.12-19). The magistrate observed: "Espinosa has alleged that he has suffered a particularized injury in fact with a sufficient causal connection: violation of his rights under the First and Fourteenth Amendments due to Defendants' failure to recognize Humanists as a faith group and provide accommodations given to other faith groups within NDOC." (R.17). The magistrate also found NDOC's argument that Espinosa failed to exhaust his administrative remedies "unavailing." (R.18). The District Court adopted the report and recommendation

[21] A Second Amended Complaint was filed on August 4, 2017, solely to correct the name of one of the defendants. (R.20)(R.216).

in its entirety, and entered an order denying NDOC's motion on November 29, 2017. (R.10).[22]

The parties stipulated to extend the discovery deadline to January 8, 2018, and were in the process of scheduling depositions. (R.216). On December 4, 2017, the District Court *sua sponte* entered an order and final judgment dismissing the case with prejudice under the screening provisions of 28 U.S.C. § 1915A. (R.1-6)(R.215). The court dismissed all the claims on the grounds that Humanism does not constitute a religion for Establishment Clause purposes. (R.4-5).[23] Plaintiffs-Appellants timely filed a notice of appeal on December 20, 2017. (R.7).

[22] According to the docket sheet, this order was rescinded on November 30, 2017. (R.215). However, no notice of this action was given to the parties or counsel.
[23] The court then declared NDOC's motion for partial summary judgment moot. (R.6).

SUMMARY OF THE ARGUMENT

NDOC's discrimination against Humanists violates the Establishment Clause and Equal Protection Clause based on well-settled precedent forbidding the government from arbitrarily favoring some religions over others, and religion over nonreligion. The District Court's decision upholding such blatant discrimination rested exclusively on the fact that Humanists do not believe in a supernatural deity, in contravention of decades of binding precedent.

First, the District Court's decision squarely conflicts with *Torcaso*, where the Supreme Court explicitly stated that Secular Humanism *is* a "religion" for Establishment Clause purposes. This Court in *Newdow* correctly found that under *Torcaso*, Secular Humanism is a "religion." Perplexingly, the District Court ignored both *Torcaso* and *Newdow* entirely.

Second, the District Court's decision directly conflicts with numerous Supreme Court cases holding that even Atheism constitutes a "religion" for Establishment Clause purposes. Third and relatedly, the court's holding that belief in a supernatural creator is necessary for First Amendment protection defies well-settled Supreme Court precedent, including *Welsh* and *Seeger*, holding that belief in a supernatural creator is not necessary.

Fourth, the entire premise upon which the District Court's holding rests — that Humanism must be a "religion" for its adherents to receive equal treatment — is

erroneous. The Supreme Court has long held that the Establishment Clause forbids the government from favoring religion over *nonreligion*. Thus, as the Seventh Circuit and U.S. District Court of Oregon recently held, the Establishment Clause requires equal treatment of Humanists *regardless* of whether Humanism is a religion. This is especially true in the prison context. Federal courts have held that the Establishment Clause is violated when prisons refuse to authorize Atheist and Humanist study groups on the same terms as theistic religions. The District Court failed to explain why a Buddhist or Scientology group has any more right to a weekly meeting than a Humanist group. Such arbitrary discrimination violates basic constitutional principles and reflects society's age-old prejudice against Atheists.

In approving NDOC's invidious discrimination against Atheists and Humanists, the District Court relied solely on three inapposite cases, none of which remotely support its ultimate conclusion that a prison can deny equal treatment to a group of Humanists while affording a plethora of benefits to theistic groups, regardless of whether such benefits even mandated by the faith. The court relied most heavily upon a Third Circuit Free Exercise Clause case that had nothing to do with Humanism. The second case merely held that a public school does not endorse religion by teaching evolution. And the third case involved an Aztec monument that promoted Mexican culture and was found not to be religious. Apart from being completely irrelevant, all three cases predated this Court's decision in

Newdow and federal court cases specifically holding that Atheists and Humanists must be accorded equal treatment in the prison context.

Because NDOC is discriminating among religions, *Larson* strict scrutiny applies. Under *Larson*, NDOC's disparate treatment of Humanists violates the Establishment Clause because it lacks a compelling interest. Remanding would prove futile, as NDOC has yet to muster a single reason for denying Humanists equal treatment since receiving Espinosa's request in 2014. Consequently, NDOC's actions also fail *Lemon*, which requires a legitimate secular interest. Both tests reject post-hoc rationalizations. And because there is no conceivable reason for the disparate treatment, this Court should exercise its *de novo* review to decide the constitutional issues rather than remand only to prolong the inevitable.

Finally, at a minimum, the Court must reverse because the District Court completely ignored the separate Equal Protection Clause claim. Because Humanists are similarly situated to other religions NDOC accommodates, and because religious discrimination triggers strict scrutiny, NDOC's actions are unconstitutional for want of a compelling governmental interest. Even under the deferential *Turner* test, NDOC's actions fail because there is no plausible legitimate penological interest that could support NDOC's denial of equal treatment to Humanists while allowing so many other groups to meet, regardless of demand and whether the faith group even requires group meetings.

ARGUMENT

I. Standard of Review

This Court "reviews *de novo* a district court's dismissal of a complaint under 28 U.S.C. § 1915A." *Resnick v. Warden Hayes*, 213 F.3d 443, 447 (9th Cir. 2000). The Court "must accept as true all allegations of material fact and must construe those facts in the light most favorable to the plaintiff." *Id.* Dismissal is only proper "'where the complaint lacks a cognizable legal theory.'" *Hartmann v. Cal. Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1121-22 (9th Cir. 2013) (citation omitted).

II. The District Court's decision contravenes binding precedent holding that Humanism is a religion for Establishment Clause purposes, that belief in a supreme being is not necessary, and that the government cannot favor religion over nonreligion.

A. Overview

NDOC's refusal to recognize Humanism as a Faith Group, and its refusal to authorize Humanist group meetings while authorizing group meetings for a wide variety of traditions ranging from Thelema, Siddha Yoga, and Rastafarian, to Krishna Consciousness and Christianity, violates the Establishment Clause.

The "clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244 (1982). The Establishment Clause equally prohibits the government from favoring "religious belief over disbelief." *Allegheny v. ACLU*, 492 U.S. 573, 593 (1989). It demands neutrality between "religion and nonreligion." *McCreary*

Cnty. v. ACLU, 545 U.S. 844, 860 (2005). A "prison administration accommodating inmates' rights under the First Amendment must do so without unduly preferring one religion over another." *Hartmann*, 707 F.3d at 1126 (citation omitted).

When "making accommodations in prisons, states must treat atheism as favorably as theistic religion. What is true of atheism is equally true of humanism, and as true in daily life as in prison." *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 873 (7th Cir. 2014) ("*CFI*"). Federal courts have specifically ruled that a prison's refusal to authorize an Atheist or Humanist meeting group violates the Establishment Clause when meetings are allowed for theistic groups. *See Kaufman v. Pugh*, 733 F.3d 692 (7th Cir. 2013) ("*Kaufman II*"); *Kaufman v. McCaughtry*, 419 F.3d 678 (7th Cir. 2005) ("*Kaufman I*"); *Am. Humanist Ass'n v. United States*, 63 F. Supp. 3d 1274, 1284 (D. Or. 2014) ("*AHA*"); *see also Am. Humanist Ass'n v. Perry*, 2017 U.S. Dist. LEXIS 38600, *2 n.1 (E.D.N.C. Mar. 17, 2017) (granting AHA and Humanist inmate's motion to compel in identical case, and warning prison that "the Supreme Court has held that Secular Humanism is, a religion") (pending final order).[24]

[24] *See also Sherman-Bey v. Marshall*, 2011 U.S. Dist. LEXIS 73801, *27-28 (C.D. Cal. 2011) (inmate stated cognizable Establishment Clause and Equal Protection claims where he was denied group study on same terms as other religions); *Saif'Ullah v. Assoc. Warden*, 2017 U.S. Dist. LEXIS 102438, *15 (N.D. Cal. June 30, 2017); *Brown v. Livingston*, 17 F. Supp. 3d 616, 631 (S.D. Tex. 2014); *Buchanan v. Burbury*, 2006 U.S. Dist. LEXIS 48244, *23-24 (N.D. Ohio 2006); *Rouser v. White*, 707 F. Supp. 2d 1055, 1060, 1066-67 (E.D. Cal. 2010).

The District Court inexplicably held that the Establishment Clause permits the government to discriminate against Humanists simply because Humanists do not believe in a supreme being. (R.4-5). This decisions flouts decades of precedent holding that: (1) Humanism is a religion for Establishment Clause purposes; (2) "religious beliefs protected by the . . . Establishment Clauses need not involve worship of a supreme being," *Kaufman II*, 733 F.3d at 696; and (3) the Establishment Clause forbids the government from favoring religion over nonreligion, *infra*.

B. Humanism constitutes a religion for Establishment Clause purposes.

The District Court's holding that Humanism is not a religion directly conflicts with *Torcaso v. Watkins*, where the Supreme Court explicitly recognized "Secular Humanism" as a "religion" for Establishment Clause purposes. 367 U.S. at 495, & n.11. In striking down a statute requiring notaries to affirm their belief in the existence of God, the Court ruled that the government must not "aid those religions based on a belief in the existence of God as against those religions founded on different beliefs." *Id.* Among these latter religions, the Court included "Secular Humanism." *Id*. at 495 n.11. *See also Gillette v. United States*, 401 U.S. 437, 439, 461-62 (1971) (entertaining claim "based on a humanist approach to religion"); *McDaniel v. Paty*, 435 U.S. 618, 633 n.4 (1978) (Brennan, J., concurring) (condemning discrimination "among religions" including "*humanistic faiths*") (emphasis added).

Beyond expressly recognizing Humanism as a "religion," the Supreme Court has also long "forbidden distinctions between religious and secular beliefs that hold the same place in adherents' lives." *CFI*, 758 F.3d at 873. *E.g.*, *Welsh v. United States*, 398 U.S. 333 (1970); *United States v. Seeger*, 380 U.S. 163, 166, 176 (1965); *see also Bd. of Educ. v. Grumet*, 512 U.S. 687, 716 (1994) (O'Connor J., concurring) ("A draft law may exempt conscientious objectors, but it may not exempt conscientious objectors whose objections are based on theistic belief (such as Quakers) as opposed to nontheistic belief (such as Buddhists) or atheistic belief"); *Lee v. Weisman*, 505 U.S. 577, 617 (1992) (Souter, J., concurring) (a policy that treats theistic religions similarly is not sufficient to avoid Establishment Clause concerns because many religions are non-theistic).

In *Seeger*, the Court held that while a "religion" can involve belief in "a supernatural deity," it also includes "a way of life envisioning as its ultimate goal the day when all men can live together in perfect understanding and peace." 380 U.S. at 174. The Court added that some, "such as the Buddhists, strive for a state of lasting rest through self-denial and inner purification; in Hindu philosophy, the Supreme Being is the transcendental reality which is truth, knowledge and bliss." *Id*. at 174-75. Much like Espinosa's Humanism, Seeger's was a "belief in and devotion to goodness and virtue for their own sakes and a religious faith in a purely ethical creed." *Id.* at 166.

In *Welsh*, the Court subsequently held that moral or ethical beliefs about what is right and wrong held with the strength of traditional religious convictions qualify as "religious" beliefs. 398 U.S. at 342-43. In his concurrence, Justice Harlan reiterated: "This Court has taken notice of the fact that recognized 'religions' exist that 'do not teach what would generally be considered a belief in the existence of God,' e.g., 'Buddhism, Taoism, Ethical Culture, Secular Humanism and others.'" *Id.* at 357 n.8 (quoting *Torcaso*) (internal citation omitted).

The District Court's requirement of a "supernatural power accepted as the creator and governor of the universe" (R.5) directly contravenes *Torcaso*, *Welsh*, and *Seeger*. Astonishingly, the District Court ignored all three cases without any explanation.

The District Court's holding is equally irreconcilable with Supreme Court cases holding that even Atheism qualifies as a "religion." Indeed, the "Supreme Court has recognized atheism as equivalent to a 'religion' for purposes of the First Amendment on numerous occasions." *Kaufman I*, 419 F.3d at 682. In *Wallace v. Jaffree*, the Court made clear that Establishment Clause protection "extends beyond intolerance among Christian sects – or even intolerance among 'religions' – to encompass intolerance of the disbeliever and the uncertain." 472 U.S. 38, 52-54 (1985). In *Allegheny*, the Court explained that the Establishment Clause guarantees "religious liberty and *equality* to 'the infidel, the *atheist*, or the adherent

of a non-Christian faith.'" 492 U.S. at 589-90 (citation omitted, emphasis added).[25] The District Court ignored *Wallace* and *Allegheny* even though Humanism is far more akin to a religion than Atheism, *supra* at 6-10.

The District Court also flagrantly disregarded this Court's cases recognizing Humanism and Atheism as religions. *See Newdow v. U.S. Cong.*, 313 F.3d 500, 504 n.2 (9th Cir. 2002) ("recognized religions exist that do not teach a belief in God, e.g., secular humanism."); *see also United States v. Ward*, 989 F.2d 1015, 1017-18 (9th Cir. 1993) (recognizing that religion need not be theistic); *EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 614 n.5 (9th Cir. 1988) ("atheistic beliefs" are protected "against religious discrimination.").[26] In addition to *Newdow*, this Court in *Kong v. Scully* stressed that belief in a supreme being is not required:

> As the Constitution has been interpreted in the past fifty years, religion has been understood broadly so that the Selective Service Act of 1951's reference "to religious training and belief in a Supreme Being" was functionally satisfied by "a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that followed by the God of those admittedly qualifying for the exemption."

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[25] *See also Town of Greece v. Galloway*, 134 S. Ct. 1811, 1816 (2014) (upholding legislative prayer practice under narrow *Marsh* exception to Establishment Clause and *Lemon* test in part because a "minister or layperson of any persuasion, *including an atheist*, could give the invocation.") (emphasis added).

[26] *See also Grove v. Mead Sch. Dist.*, 753 F.2d 1528, 1534 (9th Cir. 1985) (noting without deciding that "Secular humanism may be a religion"); *and id.* at 1537 (Canby, J., concurring) (suggesting that an organized group of Secular Humanists is religious for First Amendment purposes).

341 F.3d 1132, 1138 (9th Cir. 2003) (quoting *Seeger*). No mention of *Newdow* or *Kong* is found in the lower court's opinion.

Equally disconcerting is the absence of any consideration given to directly-applicable federal court decisions both within the Ninth Circuit and elsewhere holding specifically that a prison violates the Establishment Clause when it refuses to authorize Humanist and Atheist study groups.

In *Kaufman I*, the Seventh Circuit held that a prison unconstitutionally rejected an Atheist study group on the ground that Atheism is not religious. 419 F.3d at 681. The court noted that the "Supreme Court has recognized atheism as equivalent to a 'religion.'" *Id.* at 682-83 (citations omitted). It added that the Supreme Court "specifically included 'Secular Humanism' as an example of a religion." *Id.* The court thus held that "Atheism is Kaufman's religion, and the group that he wanted to start was religious in nature even though it expressly rejects a belief in a supreme being." *Id.* at 684.

Notably, on remand, the district court held the prison officials would not be entitled to qualified immunity if they refused to recognize a *Humanist* group. *Kaufman v. McCaughtry*, 422 F. Supp. 2d 1016, 1022 (W.D. Wis. 2006). The court reasoned that in contrast to Atheism, "courts have recognized that pacifism, *secular humanism* and other non-theistic belief systems are entitled to the

protection of the First Amendment's free exercise clause." *Id.* (emphasis added) (citing *Torcaso* and *Welsh*).

Several years later, in *Kaufman II*, a different prison refused to authorize an umbrella Atheist study group, which would include "Humanist" and "Freethinker" subgroups, while recognizing seven other "Umbrella Religions Groups." 733 F.3d at 695-96. The prison denied the request on the grounds it was "not viewed as a religious request" and was "more educational and philosophical in nature." *Id.* Again, the Seventh Circuit held that a prison must accord an Atheist group equal treatment on par with theistic religious groups. *Id. See also Kaufman v. Pugh*, 2014 U.S. Dist. LEXIS 84532, *5 (W.D. Wis. 2014) ("There is a colorable argument that defendants were violating clearly established law by refusing to allow prisoners to designate atheism as a religious preference.").

In 2014, the Seventh Circuit in *CFI* expressly found that pursuant to *Welsh* and *Torcaso*, "secular humanism must be treated the same as religion" including specifically for "accommodations in prisons." 758 F.3d at 873.

The U.S. District Court of Oregon subsequently found the law within this Circuit "clearly established" as of 2014 that "Secular Humanism is a religion for Establishment Clause purposes," and thus denied federal officials qualified immunity for refusing to approve Humanism and authorize Humanist group meetings. *AHA*, 63 F. Supp. 3d at 1284, 1286-87. The court noted that although

CFI was "issued after the alleged violations occurred, the court does not find the Seventh Circuit's opinion to be revelatory or a departure from existing doctrine. Rather, the court simply summarized the law as it is commonly understood." *Id.*

Despite their obvious relevance, the District Court below ignored *AHA*, *CFI*, *Kaufman I*, and *Kaufman II*, as well as other recent cases within this Circuit recognizing that Humanism and Atheism constitute "religions" for First Amendment purposes. *E.g.*, *McDonald v. W. Contra Costa Narcotics Enf't Team*, 2015 U.S. Dist. LEXIS 36125, *6-7 (N.D. Cal. Mar. 20, 2015) (citing *Kaufman I* for proposition that Atheism is a religion); *Conner v. Tilton*, 2009 U.S. Dist. LEXIS 111892, *18-19 (N.D. Cal. Dec. 2, 2009) ("theistic system of beliefs is not an essential requirement of a religion.") (citing *Torcaso*); *Barnes-Wallace v. Boy Scouts of Am.*, 275 F. Supp. 2d 1259 (S.D. Cal. 2003), *aff'd in part, rev'd in part on other grounds*, 704 F.3d 1067 (9th Cir. 2012) ("it is well-established that the Establishment Clause prohibits government from endorsing religious belief over nonbelief.") (citing *Allegheny* and *Wallace*); *O'Connor v. California*, 855 F. Supp. 303, 307-08 (C.D. Cal. 1994) ("even atheism falls within the protection of the First Amendment.") (citation omitted).

Accordingly, affirmance by this Court would yield a paradoxical outcome foreclosed by binding precedent and create a clear split with the Seventh Circuit's cases. *See also Reed v. Great Lakes Cos.*, 330 F.3d 931, 934 (7th Cir. 2003) ("If

we think of religion as taking a position on divinity, then atheism is indeed a form of religion."); *United States v. Bush*, 509 F.2d 776, 780-84 (7th Cir. 1975) (en banc) (finding religious the ethical beliefs of an Atheist). It would also create a split with the decisions of the other circuits and their district courts:

- **First Circuit**
  - *Rhode Island Federation of Teachers v. Norberg*, 630 F.2d 850, 854 (1st Cir. 1980) (Secular Humanism may be a religion)
  - *Bates v. Commander, First Coast Guard Dist.*, 413 F.2d 475, 479-80 (1st Cir. 1969) (religion need not be based on belief in a "supernatural deity") (citing *Seeger*)
  - *Van Schaick v. Church of Scientology, Inc.*, 535 F. Supp. 1125, 1143 (D. Mass. 1982) (Supreme Court in *Torcaso* "explicitly recognized as religions Buddhism, Taoism, Ethical Culture and Secular Humanism")
- **Second Circuit**
  - *Int'l Soc'y for Krishna Consciousness, Inc. v. Barber*, 650 F.2d 430, 439-40 (2d Cir. 1981) (a "religion" "need not be founded on a belief" in a supreme being, as the Supreme Court "stated that several non-theistic belief-systems are *commonly recognized* as 'religions,' including . . . *Secular Humanism*.") (citing *Torcaso*) (emphasis added)
  - *United States v. Seeger*, 326 F.2d 846, 852-53 (2d Cir. 1964), *aff'd*, 380 U.S. 163 (1965) ("a requirement of belief in a Supreme Being . . . cannot embrace all those faiths which can validly claim to be called 'religious.' Thus it has been noted that, among other *well-established* religious sects, Buddhism, Taoism, Ethical Culture and Se*cular Humanism* do not teach a belief in the existence of a Supreme Being.") (citing *Torcaso*) (emphasis added)
  - *Equal Opportunity Emp't Comm'n v. United Health Programs of Am., Inc.*, 213 F. Supp. 3d 377, 397 (E.D.N.Y. 2016) (citing *Torcaso* as "characterizing 'Buddhism, Taoism, Ethical Culture, [and] Secular Humanism' as religions")

- *Hatzfeld v. Eagen*, 2010 U.S. Dist. LEXIS 139758, *17-18 (N.D.N.Y 2010) ("Atheists are protected by the First Amendment.")

- **Third Circuit**

  - *Real Alts., Inc. v. Sec'y of HHS*, 867 F.3d 338, 349 (3d Cir. 2017) (citing *CFI* for the proposition that Humanism is a religion)

  - *Fallon v. Mercy Catholic Med. Ctr.*, 2017 U.S. App. LEXIS 25241, *6-7 (3d Cir. Dec. 14, 2017) (*Welsh* "made clear that belief in God or divine beings was not necessary; nontheistic beliefs could also be religious")

  - *Fields v. Speaker of the Pa. House of Representatives*, 2017 U.S. Dist. LEXIS 64711, at *1-2 (M.D. Pa. Apr. 28, 2017) (treating Humanism as religious for purposes of challenge to legislative prayer practice)

  - *Real Alts., Inc. v. Burwell*, 150 F. Supp. 3d 419, 440-41 (M.D. Pa. 2015) ("secular humanism" is a religion)

- **Fourth Circuit**

  - *Myers v. Loudoun Cty. Pub. Sch.*, 418 F.3d 395, 411 (4th Cir. 2005) (Motz, J., concurring) ("The Supreme Court has long recognized that some religions practiced in this country 'do not teach what would generally be considered a belief in the existence of God.'") (quoting *Torcaso*)

  - *United States v. Eades*, 430 F.2d 1300, 1301-02 (4th Cir. 1970) ("belief in a Supreme Being" is not necessary) (citing *Welsh*)

  - *Perry*, 2017 U.S. Dist. LEXIS 38600, *2 n.1 ("the Supreme Court has held that Secular Humanism is, a religion") (citing *Torcaso* and *Myers*)

  - *Coward v. Robinson*, 2017 U.S. Dist. LEXIS 138263, *44 (E.D. Va. Aug. 28, 2017) ("As the Supreme Court has recognized, there are many religions in this country that 'do not teach what would generally be considered a belief in the existence of God' including '. . . Secular Humanism '") (quoting *Torcaso*)

  - *Desper v. Ponton*, 2012 U.S. Dist. LEXIS 166546, *5-6 (E.D. Va. 2012) ("sincerely held beliefs need not be . . . based on the existence of a supreme being [*Torcaso* and *Myers*] . . . [A]nd, as the Supreme Court

noted in . . . *McCreary*, [] such beliefs may even be encompassed in the practice of atheism.") (internal citations omitted); *Muhammad v. Wade*, 2011 U.S. Dist. LEXIS 22234, *14 (E.D. Va. Mar. 2, 2011) (same)

- *Crockett v. Sorenson*, 568 F. Supp. 1422, 1425 (W.D. Va. 1983) ("secular humanism is a religion")

- **Fifth Circuit**

  - *Theriault v. Silber*, 547 F.2d 1279, 1281 (5th Cir. 1977) ("To the extent that *Kuch* includes within its test criteria the requirement that one possess a '. . . belief in a Supreme being . . .' and such a criterion excludes, for example, agnosticism or conscientious atheism, from the Free Exercise and Establishment shields, that requirement is too narrow.") (citing *Seeger* and *Torcaso*)

  - *Young v. Sw. Sav. & Loan Asso.*, 509 F.2d 140, 142 (5th Cir. 1975) (Atheism is a religion under Title VII)

  - *ACLU v. Eckels*, 589 F. Supp. 222, 227, 239 n.20 (S.D. Tex. 1984) ("The Supreme Court recognized Humanism as a religion")

- **Eighth Circuit**

  - *ACLU v. City of Plattsmouth*, 358 F.3d 1020, 1041 (8th Cir. 2004) (recognizing Atheism as a religion)

  - *Chess v. Widmar*, 635 F.2d 1310, 1318 n.10 (8th Cir. 1980) ("Secular Humanism" is a "religion"); *In re Weitzman*, 426 F.2d 439, 457 & n.5 (8th Cir. 1970) (same)

  - *United States v. Levy*, 419 F.2d 360, 366 (8th Cir. 1969) (finding that nontheistic beliefs "in essence a community of the human conscience, requiring men to do that which is right," constitute religion under *Seeger*)

  - *Cavanaugh v. Bartelt*, 178 F. Supp. 3d 819, 829 (D. Neb. 2016) ("humanism or atheism . . . have been found to be 'religious'")

  - *Loney v. Scurr*, 474 F. Supp. 1186, 1194 (S.D. Iowa 1979) (citing *Torcaso* as holding that Secular Humanism is a religion)

- **Tenth Circuit**
  - *Wells v. City & Cty. of Denver*, 257 F.3d 1132, 1152 (10th Cir. 2001) (assuming Atheism is a religion for First Amendment purposes)
- **Eleventh Circuit**
  - *Glassroth v. Moore*, 335 F.3d 1282, 1294 (11th Cir. 2003) ("The Supreme Court has instructed us that for First Amendment purposes religion includes non-Christian faiths and those that do not profess a belief in the Judeo-Christian God; indeed, it includes the lack of any faith.").
  - *Smith v. Board of Sch. Comm'rs of Mobile County*, 827 F.2d 684, 689 (11th Cir. 1987) (assuming Secular Humanism is a religion for Establishment Clause purposes)
  - *Williamson v. Brevard Cty.*, 2017 U.S. Dist. LEXIS 163707, *49-50 (M.D. Fla. Sep. 30, 2017) ("the Supreme Court and other courts have recognized atheism and Humanism as religions entitled to First Amendment protection.") (citing *Torcaso*)
- **D.C. Circuit**
  - *Wash. Ethical Soc'y v. District of Columbia*, 249 F.2d 127, 128 (D.C. Cir. 1957) (nontheistic ethical society qualified for tax exemption as church)

Numerous state courts have also long recognized Secular Humanism as religion.[27]

[27] *E.g.*, *Friedman v. S. Cal. Permanente Med. Grp.*, 102 Cal. App. 4th 39, 50 (2002); *In re "E"*, 59 N.J. 36, 55 n.4 (1971); *Schowgurow v. State*, 240 Md. 121, 124 n.1, 130 (1965); *Welker v. Welker*, 24 Wis. 2d 570, 575-76 (1964); *Strayhorn v. Ethical Soc'y of Austin*, 110 S.W.3d 458, 462 n.1, 472 (Tex. App. 2003); *Fellowship of Humanity v. Cnty. of Alameda*, 153 Cal. App. 2d 673 (1957); *see also State v. Powers*, 51 N.J.L. 432, 433-35 (1889) (rejecting argument that "disbelief cannot be called a religious principle").

C. The Establishment Clause prohibits the disparate treatment of Humanists regardless of whether Humanism is a "religion."

The District Court's ruling contravenes yet another, separate legion of Supreme Court cases, holding that the Establishment Clause, at its core, prohibits the government from taking sides between "religion and religion or religion and *nonreligion*." *McCreary*, 545 U.S. at 860 (citations omitted, emphasis added).[28] The government must "be a neutral in its relations with groups of religious believers and *non-believers*." *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 218 (1963) (emphasis added).[29] Thus, the entire premise upon which the District Court's decision rests — that Humanism must be a "religion"— is erroneous. The Establishment Clause demands equal treatment of Humanists regardless of "whether Humanism is a religion or a nonreligion." *AHA*, 63 F. Supp. 3d at 1283, 1286. *See CFI*, 758 F.3d at 873-74.

Relying on this line of precedent, the Seventh Circuit in *CFI*, and the District Court in *AHA*, *supra*, properly recognized that the Establishment Clause requires equal treatment of Humanists and theists alike, even if Humanism is not a religion. The Seventh Circuit in *CFI* reasoned: "Atheists don't call their own stance a religion but are nonetheless entitled to the benefit of the First Amendment's

[28] *Accord Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).
[29] *Accord Everson v. Bd. of Educ.*, 330 U.S. 1, 9 (1947).

neutrality principle, under which states cannot favor (or disfavor) religion vis-à-vis comparable secular belief systems." *Id.*

Furthermore, an "accommodation cannot treat religions favorably when secular groups are identical with respect to the attribute selected for that accommodation." *Id.* at 872. Establishment Clause claims, "unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed." *Schempp*, 374 U.S. at 224 n.9.

In *CFI*, a group of Secular Humanists alleged that Indiana's marriage-solemnization statute violated the Establishment and Equal Protection Clauses because it allowed solemnization by religious officials of certain religious groups but disallowed solemnization by equivalent officials of secular groups, including Humanists. 758 F.3d at 872. The Seventh Circuit agreed that the statute violated both Clauses by discriminating "arbitrarily among religious and ethical beliefs." *Id.* at 873, 875. Although a state "may accommodate religious views that impose extra burdens on adherents," this "does not imply an ability to favor religions over non-theistic groups that have moral stances that are equivalent to theistic ones except for non-belief in God." *Id.* at 873. The court found no reason for the fact that, under the statute, "Lutherans can solemnize their marriage in public ceremonies conducted by people who share their fundamental beliefs; humanists can't." *Id.*

"[L]ike many others, humanists want a ceremony that celebrates *their values*." *Id.* at 875.

The cases make clear that weekly meetings are no less justified for Humanists and Atheists than they are for the Faith Groups currently accommodated within NDOC. *See Kaufman II*, 733 F.3d at 695-96; *Kaufman I*, 419 F.3d at 682 (Atheists have equal right to "meet with other atheist inmates to study and discuss their beliefs"); *AHA*, 63 F. Supp. 3d at 1279-80, 1283 (same for Humanists).[30] In *Kaufman I*, the Seventh Circuit held that Atheists have an equal right to meeting groups regardless of whether an Atheist "would be unable to practice atheism effectively without the benefit of a weekly study group." 419 F.3d at 682-83. Similarly, in *Kaufman II*, the Seventh Circuit ruled that the Establishment Clause is violated even if the denial of an Atheist umbrella group would not "impose a substantial burden on his practice of atheism." 733 F.3d at 696-97. *See also Hartmann*, 707 F.3d at 1126 (Establishment Clause violations, unlike Free Exercise violations, do not require a "substantial burden" on "religious exercise," but simply "endorsement of one religion over another.").

The District Court's decision is bereft of any explanation as to why a weekly meeting is more justified for Buddhists, Hindis, Druids, Asatrus, and Rastafarians,

[30] *See also Wright v. Fayram*, 2012 U.S. Dist. LEXIS 84804, *36-37 (N.D. Iowa June 18, 2012) ("A weekly meeting is in accordance with the [non-theistic religious] traditions and no less justified than mainstream religions currently accommodated at the prison.").

than it is for Humanists. NDOC authorizes Buddhist group meetings even though Buddhism is nontheistic, philosophical, and has no congregational or worship requirements. *See Torcaso*, 367 U.S. at 495 n.11; *Tafralian v. Commissioner*, T.C. Memo 1991-33 (T.C. 1991) (Buddhism is a "philosophy," the focus of which is to develop individual lives "through self-development"). The Court in *Torcaso* made clear that "secular humanism is a religion, as much so as Buddhism." *Crockett*, 568 F. Supp. at 1425 (citing *Torcaso*). Likewise, NDOC accommodates Druids even though they "avoid choosing any one conception of Deity, believing that by its very nature this is unknowable."[31] NDOC also recognizes Hinduism, which the Supreme Court described as a "philosophy." *Seeger*, 380 U.S. at 174-75.[32] Rastafarianism is also deemed a "philosophy," *Reed v. Faulkner*, 653 F. Supp. 965, 971 (N.D. Ind. 1987), and a "movement," *United States v. Jefferson*, 175 F. Supp. 2d 1123, 1127 (N.D. Ind. 2001).[33] Asatru is considered a "movement" and "individualistic" as well.[34]

NDOC's willingness to accommodate an array of philosophical and individualistic groups but not Humanism is at best arbitrary (thus offending even

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[31] The Druid Way, *Druid Beliefs*, http://www.druidry.org/druid-way/druid-beliefs (last visited Jan. 31, 2018).

[32] *See also Malnak v. Yogi*, 440 F. Supp. 1284, 1322 (D.N.J. 1977) ("These [Hindu] concepts do not shed that religiosity merely because they are presented as a philosophy"), *aff'd per curiam*, 592 F.2d 197 (3d Cir. 1979).

[33] *See also Daley v. Lappin*, 555 F. App'x 161, 165 (3d Cir. 2014).

[34] *See Krieger v. Brown*, 2010 U.S. Dist. LEXIS 108822, *21 (E.D.N.C. 2010); *Stoner v. Stogner*, 2007 U.S. Dist. LEXIS 103377, *2 n.2 (D. Nev. Nov. 7, 2007).

basic constitutional principles[35]) but is more aptly reflective of invidious McCarthy-era stereotypes about Atheists brought to the surface by the District Court's opinion. (R.5). "Some classifications are more likely than others to reflect deep-seated prejudice." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982). Prejudice against Atheists dates back to our nation's founding[36] and studies demonstrate that they remain a highly disfavored minority. A study published in American Sociological Review in 2006 ranked Atheists as the most disliked and distrusted minority group in the country, below immigrants, Muslims, and gays.[37] An article by two leading researchers on the rise of secularism noted Atheists "are one of the most despised people in the US today."[38] Even after the September 11 attacks, a study revealed that while a significant number of Americans would be reluctant to vote for a well-qualified candidate if they were Muslim (38%), many more expressed reservations about voting for an Atheist (52%).[39] Not much has changed, with 42% of Americans stating in 2015 that they still would not vote for an Atheist

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[35] *Romer v. Evans*, 517 U.S. 620, 632-33 (1996).

[36] Denying the existence of God was a criminal offense. 4 William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of* 1765-1769, at 59 (1979).

[37] Penny Edgell, Joseph Gerteis, and Douglas Hartmann, *Atheists as "Other": Moral Boundaries and Cultural Membership in American Society*, 71 Am. Soc. Rev. 211, 218 (2006), http://bit.ly/2daChwS.

[38] Ryan T. Cragun, Barry Kosmin, et al., *On the Receiving End: Discrimination toward the Nonreligious in the United States*, 27 J. Contemp. Religion 105, 105 (2012), http://bit.ly/2czdyQv.

[39] The Pew Forum on Religion & Public Life, July 24, 2003: *Many Wary of Voting For an Atheist or a Muslim*, 1, 10-14 (2003).

for president.[40] The 2008 American Religious Identification Survey reported that 42.9% of Atheists and agnostics had experienced discrimination because of their lack of religious affiliation.[41] The discrimination Atheists suffer has resulted in job loss, harassment, death threats, physical violence, and assault.[42] By rubber-stamping NDOC's discrimination against this politically unpopular group, the District Court not only defied decades of legal precedent, but perpetuated the notion that marginalizing Atheists and Humanists is socially acceptable too.

D. The few cases the District Court relied upon are inapposite.

While eschewing obviously-relevant precedent, *supra*, the District Court relied exclusively on three inapt cases, none of which upheld the government's disparate treatment of a group of Humanists: (1) *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994); (2) *Africa v. Pennsylvania*, 662 F.2d 1025, 1033–34 (3d Cir. 1981) (citing *Wisconsin v. Yoder*, 406 U.S. 216 (1972)); and (3) *Alvarado v. City of San Jose*, 94 F.3d 1223, 1229 (9th Cir. 1996) (quoting *Africa*, 622 F.2d at 1032). (R.5). Critically, all three of these cases predated *Newdow*, where this Court expressly acknowledged "secular humanism" as a "religion," 313 F.3d at 504 n.2, as well as *CFI*, *Kaufman I*, *Kaufman II*, and *AHA*, *supra*.

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[40] *Support for Nontraditional Candidates Varies by Religion*, Gallup (Jun. 24, 2015), http://bit.ly/2d46Z5V.
[41] Cragun, *supra*, at 111, 114.
[42] Margaret Downey, *Discrimination Against Atheists*: *The Facts*, 24 Free Inquiry No. 4 (2004), http://bit.ly/2cXO1jc.

The court in *AHA* correctly found BOP's reliance on such cases as *Peloza* "misplaced." 63 F. Supp. 3d at 1283. *Peloza* focused "on whether the teaching of evolutionary biology violated the Establishment Clause and the Ninth Circuit held that it did not." *Id*. The court added that this Court "has cast doubt on defendants' broad interpretation of *Peloza*." *Id*. Furthermore, nothing in *Peloza* suggests that the government can treat a *group of Humanists* differently from a theistic group.[43]

The District Court went even further astray by relying on *Africa*. Not only is *Africa* non-binding, it did not even involve the Establishment Clause *or* Humanism. The Third Circuit merely held that a prisoner was not entitled to a Free Exercise exemption (a special diet) because he failed to show that the "MOVE organization" is a religion. 662 F.2d at 1032-36. The court applied three "indicia" to determine the existence of a religion:

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[43] The District Court selectively adopted a single dictionary definition as the test for what constitutes "religion" for constitutional purposes, relying entirely on *Peloza*'s passing footnote reference to *Webster's II New Riverside University Dictionary* 993 (1988). (R.5). But *Peloza* did not hold *Webster* controlling for constitutional purposes. And this Court's *subsequent* finding in *Newdow* renders *Webster* irrelevant. Additionally, *Peloza*'s footnote included just one definition of "religion," but omitted equally-reputable definitions that encompass nontheistic beliefs. *Merriam-Webster*, for instance, defines "religion" to include "a cause, principle, or system of beliefs held to with ardor and faith." "Religion," *Merriam-Webster.com* (Jan. 16, 2018). Random House Dictionary defines "religion" in part as "a set of beliefs concerning the cause, nature, and purpose of the universe." "Religion," *Dictionary.com Unabridged, Random House, Inc.* http://www.dictionary.com/browse/religion (Jan. 6, 2018). Oxford Dictionary defines "religion" to include "[a] pursuit or interest followed with great devotion." https://en.oxforddictionaries.com/definition/religion (Jan. 6, 2018).

> First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion often can be recognized by the presence of certain formal and external signs.

Id. at 1032. The "MOVE organization" failed this test because it did not deal with "[f]undamental and ultimate questions" and was not "comprehensive in nature." *Id*. at 1031-35. Nothing in the ruling opined that Humanism would not satisfy this test, even for Free Exercise purposes.

More importantly, the Third Circuit *subsequently* recognized that Humanism *is* a religion for constitutional purposes in *Society of HHS*, 867 F.3d at 349 (citing *CFI*). And in *Fallon*, the Third Circuit "made clear that belief in God or divine beings was not necessary." 2017 U.S. App. LEXIS 25241, at *6-7 (citing *Welsh*). For the District Court to rely on *Africa* and yet completely ignore *Torcaso*, *Allegheny*, the *subsequent* Ninth and Third Circuit decisions, and the prison-specific cases, is inexplicable.

The District Court's reliance on *Africa*'s citation to *Yoder* (R.5) was equally misplaced because, like *Africa*, *Yoder* was not an Establishment Clause case and did not involve Humanism. 406 U.S. 205. In *Yoder*, the Court found Wisconsin's compulsory school-attendance statute violative of the Free Exercise Clause as to Amish parents who believed that any education beyond eighth grade undermined their religion. *Id.* at 218, 235-36. Instructively, the Seventh Circuit in *Kaufman I*,

supra, determined that *Yoder* posed absolutely no barrier to Atheists and Humanists seeking equal treatment under the Establishment Clause. 419 F.3d at 681-82 (citing *Yoder* and *Torcaso*).

Finally, *Alvarado* merely cited *Africa* to determine whether an Aztec "Plumed Serpent" sculpture erected to commemorate Mexican contributions to city culture promoted a "religious" object. 94 F.3d at 1225. The Court found that the sculpture was not "religious." *Id. Alvarado* does not support the District Court's sweeping conclusion that a group of Humanists are exempt from Establishment Clause concerns. The *AHA* court correctly found that subsequent Ninth Circuit precedent, together with *Torcaso*, make clear "that Secular Humanism is a religion for Establishment Clause purposes." 63 F. Supp. 3d at 1283.

In sum, the District Court's decision cannot stand. And, as shown below, NDOC's refusal to accord Humanists equal treatment is indefensible under even the most deferential standards. The material facts are undisputed (R.40-41) and this Court's *de novo* review permits it to decide the constitutional issues without remanding for a determination of the same. *See Swinton v. Potomac Corp.*, 270 F.3d 794, 817 (9th Cir. 2001) ("we need not remand because 'the constitutional issue merits *de novo* review.'") (citation omitted).

III. NDOC's discrimination against Humanists violates the Establishment Clause.

A. NDOC's disparate treatment of Humanists fails strict scrutiny.

The Establishment Clause "'means at least' that [n]either a state nor the Federal Government" can "aid one religion, aid all religions, or prefer one religion over another." *Hartmann*, 707 F.3d at 1125 (citation omitted). When, as here, the government discriminates "among religions," strict scrutiny applies. *Larson*, 456 U.S. at 244, 246-47, 252 & n.23.[44] Courts within this Circuit have properly recognized that the "distinguishing among religions" in the "prison context" "requires strict scrutiny." *Rouser v. White*, 630 F. Supp. 2d 1165, 1194-96 (E.D. Cal. 2009). Indeed, *Larson* frequently applies "in the prison context." *Id.* (citing *Cutter v. Wilkinson*, 544 U.S. 709 (2005)).[45]

Under *Larson*, NDOC's disparate treatment of Humanists is deemed unconstitutional and can only be sustained if NDOC can prove that its refusal to

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[44] *See also Corp. of Presiding Bishop v. Amos*, 483 U.S. 327, 339 (1987); *Sklar v. Comm'r of Internal Revenue*, 549 F.3d 1252, 1257 n.3, 1265-67 (9th Cir. 2008); *Awad v. Ziriax*, 670 F.3d 1111, 1126-27 (10th Cir. 2012). Otherwise, the tripartite *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) test applies.

[45] *E.g.*, *AHA*, 63 F. Supp. 3d at 1282-83; *Warrior v. Gonzalez*, 2013 U.S. Dist. LEXIS 165387, *23-24 (E.D. Cal. 2013); *Evans v. Cal. Dep't of Corr. & Rehab.*, 2012 U.S. Dist. LEXIS 5373, *5-6 (C.D. Cal. 2012); *Natarajan Venkataram v. Bureau of Prisons*, 2017 U.S. Dist. LEXIS 5418, *23-24 (S.D. Fla. Jan. 12, 2017); *Brown*, 17 F. Supp. 3d at 632; *Glenn v. N.H. State Prison Family Connections Ctr.*, 2012 U.S. Dist. LEXIS 78689, *12-13 (D.N.H. 2012); *Scott v. Pierce*, 2012 U.S. Dist. LEXIS 190126, *8-9 n.4 (S.D. Tex. May 7, 2012); *Caruso v. Zenon*, 2005 U.S. Dist. LEXIS 45904, *47 (D. Colo. 2005).

allow Humanist meetings, while allowing meetings for Faith Groups such as Church of Scientology, Thelema, and Wicca, is (1) "justified by a compelling government interest," and (2) "is closely fitted to further that interest." 456 U.S. at 246-47; *see AHA*, 63 F. Supp. 3d at 1282-83 (BOP's disparate treatment of Humanists presumed unconstitutional). This is "the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). NDOC cannot meet this tall burden.

"For an interest to be sufficiently compelling to justify a law that discriminates among religions, the interest must address an identified problem that the discrimination seeks to remedy." *Awad*, 670 F.3d at 1129-31 (citation omitted). NDOC has not identified "any *actual problem*" that would result from authorizing a Humanist group. *Id*. In fact, in the three-and-one-half years since NDOC first received Espinosa's request, it has never articulated *any reason at all* for refusing to recognize Humanism, much less a problem. Nor has it even attempted to justify its excessive delay in processing the request. *See Freedman v. Maryland*, 380 U.S. 51, 57 (1965) (failure to confine time within which censor must make decision "contains the same vice as a statute delegating excessive administrative discretion"); *Clark*, 259 F.3d at 1009 ("the unavoidable delay is tantamount to an effective denial of First Amendment rights."). Thus, NDOC has utterly failed to satisfy strict scrutiny.

Remand would further prove futile in part because any professed interest at this stage of the game would be too late. *See McCreary*, 545 U.S. at 865, 871 (rejecting "new statements of purpose"). The Court cannot uphold government conduct "that abridges an enumerated constitutional right on the basis of a factitious governmental interest found nowhere but in the defendants' litigating papers." *Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1268-69 (10th Cir. 2008). *See Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 688 (9th Cir. 2007) ("we can neither 'accept appellate counsel's post hoc rationalizations for agency action' nor 'supply a reasoned basis for the agency's action that the agency itself has not given.'") (citation omitted).[46]

Additionally, NDOC would actually have to "*demonstrate*, not just assert," that its disparate treatment is grounded in a compelling interest. *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003). There is no evidence whatsoever that approving Humanism would impose a threat to the security, control, operation and safety of a correctional institution. On the contrary, many prison systems, including the BOP, offer Humanist meetings without issue, *supra* at 10-11.

While the Constitution does not require prisons to provide a special place "for every faith regardless of size," *Cruz v. Beto*, 405 U.S. 319, 322 n.2 (1972), any restriction must be applied evenly to Atheists and Humanists. *Kaufman II*, 733

[46] *See also San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 603 (9th Cir. 2014); *Hernandez-Cruz v. Holder*, 651 F.3d 1094, 1109 (9th Cir. 2011).

F.3d at 696.[47] There is no evidence of insufficient demand for Humanist meetings relative to other groups, especially since NDOC offers meetings even when there is no attendance at all. (R.46)(R.72). "Without a compelling interest based on an actual problem, the second step of the strict scrutiny analysis—whether there is a close fit with a compelling state interest—is unnecessary and not feasible." *Awad*, 670 F.3d at 1130-31 (citing *Larson*).

B. NDOC's disparate treatment of Humanists also fails the *Lemon* test.

The distinction between *Larson* and *Lemon* is of little consequence here, as NDOC's actions cannot survive either test. Under *Lemon*, the government must show that the action: (1) has a primary secular purpose, (2) does not have the effect of advancing or inhibiting religion, and (3) does not foster excessive entanglement with religion. *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007, 1076-77 (9th Cir. 2010). "Failure to satisfy any one of the three prongs" is "sufficient to invalidate the challenged law or practice." *Id.*

[47] *See also Sherman-Bey v. Marshall*, 2011 U.S. Dist. LEXIS 73801, *27-28 (C.D. Cal. 2011); *Rouser*, 630 F. Supp. 2d at 1197 n.17; *Scott*, 2012 U.S. Dist. LEXIS 190126, *8; *Hummel v. Donahue*, 2008 U.S. Dist. LEXIS 47534, *2, *14 (S.D. Ind. 2008) ("defendants have not met their burden of showing that a blanket ban on group worship for Odinists" actually "furthers a compelling governmental interest"); *LeMay v. Dubois*, 1996 U.S. Dist. LEXIS 11645, *12-13 (D. Mass. July 29, 1996) (although prison had a "compelling interest in 'restricting the possession of items which may be fashioned into weapons,'" it "failed to provide evidence that the pieces of bone in LeMay's necklace are any more dangerous than a 1 ½ metal cross"); *Remmers v. Brewer*, 361 F. Supp. 537, 542 (S.D. Iowa 1973) (no "compelling state concern" furthered "by denying to Church of the New Song members the same rights of assembly and worship enjoyed by Protestant and Catholic").

To survive the first prong, NDOC must "show by a preponderance of the evidence," *Church of Scientology Flag Serv. v. City of Clearwater*, 2 F.3d 1514, 1530 (11th Cir. 1993),[48] a legitimate "secular justification for the difference in treatment." *Metzl v. Leininger*, 57 F.3d 618, 621 (7th Cir. 1995). *See generally Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("the First Amendment forbids an official purpose to disapprove of a particular religion"). The test is "not a pushover for any secular claim." *McCreary*, 545 U.S. at 864-65. Rather, "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *Id.*

NDOC has no legitimate secular reason for treating Humanists differently from other groups such as Buddhists, especially in light of the Supreme Court's finding that Humanists and Buddhists are similarly situated. *Torcaso*, 367 U.S. at 495 n.11. In *Kaufman I*, the Seventh Circuit held that a prison failed *Lemon* where its officials "advanced no secular reason why the security concerns they cited" to deny an Atheist group did "not apply equally to gatherings of Christian, Muslim, Buddhist, or Wiccan inmates." 419 F.3d at 683-84. Here, NDOC has not even articulated, "much less support[ed] with evidence," *id.*, a single justification. And remanding for further fact-findings would be futile, as any new justifications

[48] *See McCreary*, 545 U.S. at 870-72.

presented during litigation must be rejected as sham. *McCreary*, 545 U.S. at 874. This lack of secular purpose "is dispositive." *Wallace*, 472 U.S. at 56.[49]

Yet NDOC's disparate treatment of Humanists separately fails *Lemon*'s second prong. The "effect prong asks whether, irrespective of government's actual purpose," *id.* at 56 n.42, the government's actions are "sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *School Dist. v. Ball*, 473 U.S. 373, 390 (1985). The "government runs afoul of the Establishment Clause through disparagement as well as endorsement." *C.F. v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 978 (9th Cir. 2011). A "mere message of disapproval" suffices. *Catholic League v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1057 (9th Cir. 2009). In *Kaufman I*, the Seventh Circuit held that by allowing gatherings for Christian, Muslim, Buddhist, and Wiccan inmates but not for Atheists, the prison was unconstitutionally

[49] *See also Kaufman II*, 733 F.3d at 697; *Brown*, 17 F. Supp. 3d at 631 ("TDCJ has intentionally made it easier for Jewish inmates over Muslim inmates to have volunteer-led religious activities. That circumstance alone, in and of itself, constitutes a violation of the Establishment Clause"); *Perez v. Frank*, 2007 U.S. Dist. LEXIS 27441, *42-43 (W.D. Wis. 2007) ("Defendants have failed to offer evidence providing a secular reason why providing [Muslims] with dates would be more burdensome than providing Wiccan and Christian [sic] inmates with juice").

"promoting the favored ones" over Atheism. 419 F.3d at 684. Likewise, NDOC is unconstitutionally promoting some religions over Humanism. [50]

Because NDOC cannot satisfy *Lemon* or *Larson*, there is "no compelling reason to subject the parties and the courts to further delays and expense by remanding the case for application of the proper legal standard to the undisputed facts." *In re Holloway*, 955 F.2d 1008, 1015 (5th Cir. 1992). *See United States v. Ruiz-Gaxiola*, 623 F.3d 684, 696 (9th Cir. 2010) (finding remand futile where "[t]here is no explanation that the court could provide on remand and no findings consistent with the record before us that would allow us to conclude that the government has met its burden"); *Ramirez Rivas v. INS*, 899 F.2d 864, 873 (9th Cir. 1990) (remand futile where evidence is overwhelming that petitioner entitled to relief); *United States v. Cutting*, 538 F.2d 835, 841 (9th Cir. 1976) ("A remand to determine whether the national standard is more or less strict than the local standard would be an exercise in futility.").

[50] *See also Rouser*, 630 F. Supp. 2d at 1196, 1199 (where prison staff made announcements "to about Protestant, Catholic and Muslim services, but rarely announce[d] Wiccan services," the policy had "the primary effect of advancing or inhibiting religion."); *Halloum v. Ryan*, 2011 U.S. Dist. LEXIS 114713, *7 (D. Ariz. Oct. 4, 2011).

IV. The District Court disregarded the Equal Protection Clause, which separately prohibits discrimination against Humanists and Atheists.

A. The District Court dismissed the Equal Protection Clause claim without any rationale.

Perhaps the District Court's most glaring error was its failure to even consider Plaintiffs-Appellants' Equal Protection Clause claim. (R.2-6)(R.78). It dismissed the *entire* case on the grounds that Humanism is not a religion for *Establishment Clause* purposes, while omitting any discussion of the separate and distinct Equal Protection Clause claim. (R.2-6). *See Moore v. Bryant*, 853 F.3d 245, 250 (5th Cir. 2017) ("Equal Protection and Establishment Clause cases call for different injury-in-fact analyses is that the injuries protected against under the Clauses are different."); *Doe v. Human*, 725 F. Supp. 1499, 1501 (W.D. Ark. 1989) (same). For this reason alone, reversal is mandated. *See Merrick v. Inmate Legal Servs.*, 650 F. App'x 333, 336 (9th Cir. 2016) (reversing where district court "never directly addressed Merrick's Establishment Clause claim" and "dismissed the claim with Merrick's free exercise claims"); *Sherman v. Network Commerce, Inc.*, 346 F. App'x 211, 214 (9th Cir. 2009).

However, in the interest of judicial economy and to avoid prolonging the inevitable, the Court can and should exercise its *de novo* review to decide the constitutional issues. *See Greater L.A. Agency on Deafness, Inc. v. CNN, Inc.*, 742 F.3d 414, 425 (9th Cir. 2014) ("at the parties' urging and in the spirit of

judicial economy, we exercise our discretion to decide this legal issue in the first instance."); *LGS Architects, Inc. v. Concordia Homes*, 434 F.3d 1150, 1155 (9th Cir. 2006) ("Because we consider legal questions *de novo*, . . . [r]emand for further findings of fact and conclusions of law is therefore unnecessary."); *Porter v. Bowen*, 496 F.3d 1009, 1018 n.7 (9th Cir. 2007). The material facts are undisputed and even under the most deferential analysis, NDOC's discrimination against Humanists fails muster; further fact-finding would simply prove futile. *See SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 479 (9th Cir. 2014) ("we need not remand the question whether a *Batson* violation occurred" where record was clear juror "was struck because of his sexual orientation"); *Negrete v. Allianz Life Ins. Co.*, 523 F.3d 1091, 1096 n.4 (9th Cir. 2008) ("we can fully understand the facts and the law in this instance without more formal findings and conclusions, and, therefore, we need not remand"); *Schwartz v. Citibank, N.A.*, 50 F. App'x 832, 835 (9th Cir. 2002) ("we need not remand to allow the entry of self-evident findings."); *Bud Antle, Inc. v. United States*, 593 F.2d 865, 870 n.12 (9th Cir. 1979) (although "the record is not as complete as we would prefer," "we can proceed on the record before us").

B. NDOC's disparate treatment of Humanists violates the Equal Protection Clause.

NDOC's disparate treatment of Humanists constitutes discrimination on the basis of religion, which is presumed unconstitutional. The Equal Protection Clause "prohibits the Government from impermissibly discriminating among persons based on religion." *Washington v. Trump*, 847 F.3d 1151, 1167 (9th Cir. 2017) (citation omitted). It specifically "ensures that prison officials cannot discriminate against particular religions." *Freeman v. Arpaio*, 125 F.3d 732, 737 (9th Cir. 1997). Unlike a Free Exercise claim, an inmate need not show that the practice is "central to his own religious observance" or that a denial "somehow infringed upon his religious practices." *Abdulhaseeb v. Saffle*, 65 F. App'x 667, 673-74 (10th Cir. 2003). All he must show is that he was "denied equal treatment on the basis of his religion." *Id.*

Nor must Humanism be a "religion" for NDOC's disparate treatment of Humanists to violate the Equal Protection Clause. In *CFI*, the Seventh Circuit held that the exclusion of Humanists from Indiana's marriage-solemnization statute violated the Equal Protection Clause by drawing arbitrary distinctions about "religious and ethical beliefs." 758 F.3d at 874-75.[51] *See also Seeger*, 380 U.S. at 176. Indeed, even though Atheism is decidedly *non-religious*, it is well

[51] The statute included a list of religious officials but excluded "equivalent officials of secular groups such as humanist societies." *Id.* at 871.

settled that discrimination against Atheists constitutes religious discrimination. In *Townley*, for instance, this Court recognized that "atheistic beliefs" are protected "against *religious* discrimination." 859 F.2d at 614 n.5 (emphasis added). *See also TWA v. Hardison*, 432 U.S. 63, 90 n.4 (1977) ("The exemption here, like those we have upheld, can be claimed by any religious practitioner, a term that the EEOC has sensibly defined to include atheists"); *Steadman v. Urban Retail Props. Co.*, 282 F. App'x 465, 469 (7th Cir. 2008) (same); *Young*, 509 F.2d at 142 (same); *Williams v. Allied Waste Serv.*, 2010 U.S. Dist. LEXIS 84218, *22-23 (E.D. Tex. June 30, 2010) ("Atheism is not a religion. Literally, it represents antipathy to religion. Nonetheless, discrimination against employees because of their atheistic beliefs is equally prohibited under the penumbra of rights guaranteed by Title VII.") (citations omitted); *Hatzfeld v. Goord*, 2007 U.S. Dist. LEXIS 98782, *13-14 (N.D.N.Y. Feb. 5, 2007) ("atheist" is a religion under Equal Protection Clause); *Goguen v. Clifford*, 304 F. Supp. 958, 961-62 (D.N.J. 1969) ("atheists or heretics" are entitled to equal protection); *Streeter v. Brogan*, 113 N.J. Super. 486, 488 (Super. Ct. 1971) ("an atheist is entitled to equal protection of the laws").

To state a *prima facie* Equal Protection claim, a plaintiff must allege that "'defendants acted with an intent or purpose to discriminate against [him] based upon membership in a protected class,'" such as race or religion. *Furnace v.*

Sullivan, 705 F.3d 1021, 1030 (9th Cir. 2013) (citation omitted). "Intentional discrimination means that a defendant acted at least in part because of a plaintiff's protected status." *Maynard v. City of San Jose*, 37 F.3d 1396, 1404 (9th Cir. 1994). The intentional element is satisfied upon an inmate showing that his religious group is treated differently from another. The "denial of [a] privilege to adherents of one faith while granting it to others is discrimination on the basis of religion." *Native American Council of Tribes v. Solem*, 691 F.2d 382, 384-85 (8th Cir. 1982). *See Cruz*, 405 U.S. at 321 ("If [a Buddhist prisoner] was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts, then there was palpable discrimination by the state against the Buddhist religion"); *Cooper v. Pate*, 378 U.S. 546 (1964); *Patel v. Wooten*, 15 Fed. App'x 647, 651 (10th Cir. 2001) (providing meat substitute for Jews and Muslims but not Hindus permitted inference of discriminatory intent); *Reed v. Faulkner*, 842 F.2d 960, 964 (7th Cir. 1988) ("defendants are treating the Rastafarians differently from American Indians (and doing so deliberately) for no reason at all; and if so this is a denial of equal protection of the laws in an elementary sense."); *Brown v. Johnson*, 743 F.2d 408, 413 (6th Cir. 1984) ("by allowing prisoners of other faiths and their respective churches to hold group worship services, while denying

plaintiffs the same privilege" undoubtedly "is a distinction among religious faiths.").[52]

In *AHA*, the court found the intentional element met because "[a]llowing followers of other faiths to join religious group meetings while denying [a Humanist] the same privilege is discrimination on the basis of religion." 63 F. Supp. 3d at 1284. *See also Rouser*, 630 F. Supp. 2d at 1199-1200 ("differences in treatment of Wiccans and inmates of other faiths suffices to permit a jury to infer intentional animus"); *Burke v. N.D. Dep't of Corr. & Rehab.*, 2007 U.S. Dist. LEXIS 35733, *11-12 (D.N.D. May 16, 2007) (inmate stated equal protection claim where he was "denied a study day akin to a Bible study day afforded to Christian inmates.") (citing *Solem*, 691 F.2d 382). The same is true here.

After a *prima facie* case is made, the "[a]nalysis of an equal protection claim involves two steps." *Henry v. Shelley*, 170 F. App'x 492, 494 (9th Cir. 2006). The first step—the similarly-situated analysis—requires NDOC to prove a "relevant difference" between Humanism and the Faith Groups it approves. *Reed*, 842 F.2d at 964 ("We reject the defendants' argument that it was [the inmate's] burden to

[52] *See also Taylor v. Johnson*, 257 F.3d 470, 472-74 (5th Cir. 2001); *Dingle v. Zon*, 189 Fed. App'x 8, 10-11 (2d Cir. 2006); *DeHart v. Horn*, 227 F.3d 47, 61 (3d Cir. 2000); *Fulwood v. Clemmer*, 206 F. Supp. 370, 374 (DDC 1962) ("By allowing some religious groups to hold religious services" while "denying that right to petitioner and other Muslims, respondents have discriminated" on the basis of religion); *Davilla v. Watts*, 2016 U.S. Dist. LEXIS 56721, *19-20 (S.D. Ga. June 17, 2016); *Halloum*, 2011 U.S. Dist. LEXIS 114713, *6-7; *Fisher v. Va. Dep't of Corr.*, 2007 U.S. Dist. LEXIS 13063, *28-29 (W.D. Va. Feb. 23, 2007).

show that there is no relevant difference between Rastafarians and Indians."). NDOC cannot make this showing, as the Supreme Court has already found Humanism to be similarly situated to religions recognized by NDOC. *See Torcaso*, 367 U.S. at 495 n.11. *See also CFI*, 758 F.3d at 872-74 ("humanists are situated similarly to religions in everything except belief in a deity"); *AHA*, 63 F. Supp. 3d at 1284 (Humanists are similarly situated to other faiths for purposes of group meetings); *Burwell*, 150 F. Supp. 3d at 440-41 ("Atheism, Shintoism, Janism, Buddhism, and secular humanism, all of which 'are situated similarly to religions in everything except belief in a deity'" are entitled to protection) (citing *CFI*); *Crockett*, 568 F. Supp. at 1425 (same).

Under the second step, the court "'must analyze under the appropriate level of scrutiny whether the distinction made between the groups is justified.'" *Henry*, 170 F. App'x at 494 (citation omitted). Discrimination on the basis of religion, a "suspect" classification, triggers strict scrutiny. *See Ass'n of Christian Schs. Int'l v. Stearns*, 362 Fed. App'x 640, 646 (9th Cir. 2010) (religion is a suspect class).[53] The Supreme Court in *Johnson v. California* clarified that strict scrutiny, rather than the

[53] *See also United States v. Batchelder*, 442 U.S. 114, 125 n.9 (1979); *Ball v. Massanari*, 254 F.3d 817, 823 (9th Cir. 2001); *Hassan v. City of N.Y.*, 804 F.3d 277, 300 (3d Cir. 2015); *Abdulhaseeb v. Calbone*, 600 F.3d 1301, 1322 n.10 (10th Cir. 2010); *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 816 (8th Cir. 2008); *Irvin v. Yates*, 2014 U.S. Dist. LEXIS 2120, *9 (E.D. Cal. 2014); *Davis v. Powell*, 901 F. Supp. 2d 1196, 1219-20 (S.D. Cal. 2012); *Hysell v. Schwarzenegger*, 2011 U.S. Dist. LEXIS 72243, *17-18 (E.D. Cal. 2011); *Remmers*, 361 F. Supp. at 542.

Turner test, applies to prisoner claims that implicate a suspect classification. 543 U.S. 499, 510-11 (2005). *See Richardson v. Runnels*, 594 F.3d 666, 671 (9th Cir. 2010); *Harrington v. Scribner*, 785 F.3d 1299, 1306-07 (9th Cir. 2015).[54] And, as shown above, NDOC readily fails strict scrutiny.

Significantly though, NDOC's disparate treatment of Humanists for no reason at all cannot survive *Turner* either, which requires NDOC to prove that the "distinctions made between religious groups" are "reasonably related to legitimate penological interests." *Benjamin v. Coughlin*, 905 F.2d 571, 575 (2d Cir. 1990). *See Turner v. Safley*, 482 U.S. 78, 89-90 (1987).[55] "[C]onclusory assertions are wholly insufficient." *Walker v. Sumner*, 917 F.2d 382, 387 (9th Cir. 1990). As relevant to remand being futile, the "penological interest" must "have actually motivated them at the time they enacted or enforced the restriction." *Hammer v. Ashcroft*, 512 F.3d 961, 968 (7th Cir. 2008). *See Turner*, 382 U.S. at 98; *Sumner*, 917 F.2d at 386-87; *Quinn v. Nix*, 983 F.2d 115, 118 (8th Cir. 1993) (prison officials fail *Turner* if "their actions are not actually motivated by legitimate penological interests at the time they act."). In the three-and-one-half years NDOC

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[54] *See also Colo. Christian Univ. v. Weaver*, 534 F.3d 1245, 1266-67 (10th Cir. 2008); *Hilson v. Arnett*, 2015 U.S. Dist. LEXIS 140015, *14 (E.D. Cal. Oct. 13, 2015); *Davis v. Abercrombie*, 2014 U.S. Dist. LEXIS 43966, *79 (D. Haw. Mar. 31, 2014).

[55] This "is the sine qua non of the *Turner* inquiry." *Walker v. Gomez*, 370 F.3d 969, 975 (9th Cir. 2004). If the government fails to make this showing, the Court need not address the remaining *Turner* factors. *Ashker v. California Dep't of Corr.*, 350 F.3d 917, 923 (9th Cir. 2003).

has had to consider Espinosa's request, it has not offered *a single* interest whatsoever for treating Humanists differently, thus violating the Equal Protection Clause.

CONCLUSION

"One of the great causes which led to the settlement of the American colonies was the desire of the immigrants" that their "belief or disbelief on religious topics should not debar them from rights which the laws afforded to other subjects." *Powers*, 51 N.J.L. at 435. In the North Carolina Convention on the adoption of the U.S. Constitution, James Iredell, later a Supreme Court Justice, said: "It is objected that the people of America may, perhaps, choose representatives who have no religion at all, and that pagans and Mahometans may be admitted into offices. But how is it possible to exclude any set of men, without taking away that principle of religious freedom which we ourselves so warmly contend for?" *Torcaso*, 367 U.S. at 495 n.10. That principle of religious freedom was trampled on by the District Court's decision, which gives the government carte blanche to relegate Atheists and Humanists — who have no less of a desire to congregate and study and discuss their shared convictions than the Thelemites, Rastafarians, and Scientologists — to second-class citizenship. Fortunately, the Constitution precludes this invidious result.

This Court must reverse. The District Court ignored an entire claim and its Establishment Clause ruling contravenes binding precedent. And because the undisputed facts lead to the inescapable conclusion that NDOC's disparate treatment of Humanists violates the Constitution, this Court should exercise its *de novo* review to decide the issues of law, and then remand solely for a determination of the scope of relief and Plaintiffs-Appellants' attorneys' fees and costs.

Respectfully submitted,

Dated: February 20, 2018

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, Appellants respectfully advise that they are unaware of any related cases pending in this Court.

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STATEMENT CONCERNING ORAL ARGUMENT

This appeal involves the question of whether a state prison department's discrimination against Atheist and Humanist inmates violates the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, and whether the District Court erred in sanctioning such official discrimination. Due to the importance of the constitutional issues at stake, Appellants respectfully request that oral argument be heard.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because

this brief contains 13,921 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because

this brief has been prepared in a proportionately spaced typeface using MS Word, Times New Roman 14-point font.

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on February 16, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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