IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

AMERICAN HUMANIST ASSOC., AND KWAME TEAGUE,	)	
Plaintiffs,	)	**CASE NO. 5:15-ct-03053-BO**
v.	)	
FRANK L. PERRY, *et al.*,	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. The material facts are undisputed, despite NCDPS's misleading factual record.[1]

Defendants (collectively, "NCDPS") do not dispute the material facts in this case. To briefly summarize: There are numerous Humanist inmates in NCDPS's facilities, many of whom are members of Plaintiff American Humanist Association (AHA). (PSUF 199-226). One of those members is Kwame Teague, who has identified as a Humanist since 2011.[2] NCDPS recognizes approximately 15 Faith Groups of various sizes. The smallest group is Aquarian CCU with only three members statewide. (A.4). The Quaker and Eastern Orthodox Faith Groups each only have six adherents statewide. There are only 10 Christian Science members. (A.4). The Hindu group has 33 adherents and the Asatru group has 162 adherents statewide. (A.4). Faith Group recognition is necessary for group meetings. Only recognized Faith Groups (and specific sects) are allowed to meet in groups to study and discuss their beliefs.[3] Faith Groups are provided time and space for group study and group worship even if neither is required by the faith.[4] For instance, NCDPS's Manual's section on Wicca states: "There are no requirements for corporate worship." (A.167-72). Yet NCDPS offers "Wicca Study" and "Wicca Worship."[5] Likewise, NCDPS's section on Rastafarian states: "There is no published mandatory requirement" for "worship." (A.161-65). Yet NCDPS offers "Rastafarian Study" and "Rastafarian Service."[6] NDCPS also offers the following Buddhist programs even though Buddhism is non-theistic and individualized: (1) Discovering Buddhist, (2) Buddhist Meditation, (3) Buddhist Service, and (4) Buddhism Study. (A.110-14, 1202). Many Faith Group meetings often have only two inmates in attendance. (PSUF 158-163) (A.280-700).

NCDPS prohibits Humanist study groups while authorizing such groups for Rastafarians, Wiccans, Hindis, Buddhists, and Asatrus, among many others.[7] At least one Humanist inmate, Zachary Harwood, was admonished by NCDPS for attempting to form a Humanist group along with nine other Humanist inmates. (A.1022-24). Between January 2012 and October 2014, Teague submitted at least five requests (Inmate Request, Grievance Appeal, and three DC-572s) to establish Humanism as a Faith Group

[1] Pursuant to local rule 56.1(c), Plaintiffs incorporate by reference their Statement of Material Undisputed Facts (PSUF), as if fully stated herein, along with Plaintiffs' Appendix ("A.") Citations to Plaintiffs' summary judgment memorandum are ("P.Br.[page]"), and NCDPS's memorandum are ("D.Br.[page]").
[2] (A.1102-03, 1105-06, 1108, 1634). (D.Br.4).
[3] (A.1156-57, 1267-68, 1275, 1279, 1286, 1514, 1542).
[4] (A.161-65, 167-72, 184-279, 300-700, 1275, 1279, 1469). *See also* (A.92-97, 108-14, 123-27); (A.435-38) (Christmas Movie Night); (A.198) (Christmas party); (A.534) (Yokefellow Christmas Social).
[5] (A.167-72, 1314). *See also* (A.297-300, 412-17, 462-67, 527-30, 571-72).
[6] (A.161-65). *See also* (A.292-96, 335-37, 340-75, 400-07, 456-58, 510-16, 531, 663-88).
[7] (A.103-04, 108-14, 123-27, 164-65, 167-72, 1003-05, 1020-25, 1210, 1279, 1314, 1512, 1527-28).

so Humanist inmates could be eligible for study group meetings. (PSUF 189). Each was denied. (PSUF 190). Several other NCDPS inmates have sought Humanist recognition to no avail. (PSUF 202, 211, 226).

At no point in evaluating Teague's DC-572 forms did the Religious Practices Committee (RPC) state that its refusal to recognize Humanism was based on a lack of demand or interest. (A.909-10, 924-30). Nor did NCDPS ever cite security concerns, safety, or lack of space and resources as a basis to deny the recognition of Humanism. Much to the contrary, the RPC concluded: "Nothing in any the subcommittee's research found that Humanism teaches people violence or hatred of other people. Also, there is no reason to conclude that Humanism would impose a threat to the security, control, operation and safety of a correctional institution." (A.925). There is no dispute regarding the sincerity of Teague's Humanist convictions. (A.935, 962). (Teague Decl. ¶2). And it is uncontroverted that Humanists find fulfillment in congregating with other Humanists on a regular basis.[8] 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." (A.782) *see also* (R.710-11, 715, 752-57). The AHA has over 227 local Chapters and Affiliates nationwide. (A.734-37). While NCDPS maintains that Humanism does not qualify as a religion for prison purposes (D.Br.14), a number of prison systems in fact recognize Humanism and offer Humanist group meetings, including but not limited to: the Federal Bureau of Prisons (BOP),[9] Iowa State Penitentiary,[10] Fort Dodge Correctional Facility (A.862-66), Wisconsin Department of Corrections (PSUF 89), Virginia Department of Corrections,[11] and the Mike Durfee State Prison in South Dakota.[12]

Before responding to NCDPS's legal arguments, three misleading factual issues must be addressed.[13] First, NCDPS asserts that Teague did not join the Ethical Humanist Society of the Triangle (EHST) until 2015. (D.Br.4). This is false and irrelevant. Teague became a member of EHST around 2012, when he began interacting regularly with Randy Best, a Humanist Minister and then-EHST leader who provided him with membership services. (A.1082, 1111-12, 1071). Paperwork is not required for

[8] (A.834); *See also* (A.722, 743, 782, 863, 1075-78).
[9] (A.825-29, 833-39, 1075, 1081). FCI-Sheridan has had a Humanist group since July 2014, which meets twice a week. (A.1075). On average, about six to ten Humanist inmates attend the meetings. (A.1075-76).
[10] The group boasts thirty members, with fifteen on a waiting list. The group meets monthly. (A.862-66)
[11] (Declaration of Sam Grover ¶¶3-6 and Exs. A and B). The Humanist group boasts thirty-five members and meets weekly for an hour and a half. (*Id.* at ¶6). [Exhibit 113, A.1729-1732].
[12] (Grover Decl. ¶ 3, ¶¶ 8-9). The group has about fifteen Humanist members. (*Id.*).
[13] Plaintiffs incorporate by reference their separate Objections to NCDPS's Statement of Undisputed Facts.

EHST membership. (A.1082-83, 1138-39). Moreover, Teague was a member of the AHA prior to this lawsuit. (A.1082). Of course, a "claimant need not be a member of a particular organized religious denomination to show sincerity of beliefs." *Jackson v. Mann*, 196 F.3d 316, 319 (2d Cir. 1999) (citing *Frazee v. Illinois Dep't of Employment* Sec., 489 U.S. 829 (1989)).

Next, NCDPS asserts that "Teague completed the form to the best of his ability but included incorrect information such as listing a deceased individual as the 'official religious leader' and including his lawyer's information as the name and address of the religious organization." (D.Br.5). There was nothing "incorrect" in Teague's DC-572 form. Humanism does not have an "official religious leader," but Teague accurately identified the founder of Ethical Culture, which is part of Humanism's origins.[14] Regardless, the "fact that an individual's understanding of the origins or reasons for a particular religious practice may be mistaken, incomplete, or at odds with the understanding of other followers and even experts of his stated religion is 'beside the point' when determining whether his personal belief is religious and sincere." *Blount v. Johnson*, 2007 U.S. Dist. LEXIS 39146, at *18 (W.D. Va. May 30, 2007) (quoting *Doswell v. Smith*, 139 F.3d 888, 1998 U.S. App. LEXIS 4644, at *10-11 (4th Cir. 1998)).[15]

Nor was there anything "incorrect" about Teague including the contact information for AHA and listing its legal director. (A.899, 1355, 1542). NCDPS's 30(b)(6) designee Carlton Joyner conceded that "Mr. Teague providing the contact information for the American Humanist Association satisfies that [DC-572] requirement." (A.1543). NCDPS was already in communication with AHA's lawyer at that time, and AHA's lawyer was in the best position to answer NCDPS's questions pertaining to Teague.[16] NCDPS cannot dictate which AHA directors AHA appoints to handle these matters.

Third, NCDPS states that "Teague does not . . . know if [Defendants] have individually or personally impeded his constitutional rights." (D.Br.8). But because defendants are sued in their official

[14] Formal entities dedicated to the practice of Humanism include the American Ethical Union (based on the Ethical Culture movement founded by Felix Adler in 1876) and the Society for Humanistic Judaism (founded by Rabbi Sherwin Wine in 1969), among others. (A.718, 781-809).
[15] It bears repeating that inmates do not have access to the Internet so they are unable to conduct independent research about the faith group they are seeking to have recognized. (A.1362).
[16] (A.883-87, 911-15, 923, 973-86, 989-92, 1355).

capacities only, "it is irrelevant whether the [defendant] participated in the alleged violations." *Gonzalez v. Feinerman*, 663 F.3d 311, 315 (7th Cir. 2011).[17]

II. Plaintiffs' claims against NCDPS are not mooted by Teague's intra-facility transfer because NCDPS forbids Humanist meetings at *all* its facilities including his current facility.

NCDPS's argument that Teague's claims are moot merely because he was transferred to another NCDPS facility rings hollow. (D.Br.28). An "inmate's transfer to a separate prison facility moots his requests for injunctive relief, so long as the transfer prevents the inmate from encountering those same allegedly unconstitutional prison conditions that gave rise to his original grievances." *Turner v. Clelland*, 2016 U.S. Dist. LEXIS 164965, at *41-42 (M.D.N.C. Nov. 30, 2016). Obviously that "'is not the case,' however, where the inmate challenges a system-wide policy that applies 'wherever [the inmate] is next sent until his release.'" *Id.* (citation omitted).[18] NCDPS's refusal to approve Humanism as a Faith Group applies system-wide, as does NCDPS's ban on Humanist meetings. (A.924-30, 1272); (Teague Decl. ¶10). A favorable decision would therefore undoubtedly redress Teague's injuries. "The scope of injunctive relief is dictated by the extent of the violation established." *Lewis v. Casey*, 518 U.S. 343, 359 (1996). "System-wide relief is *required* if the injury is the result of violations . . . that are attributable to *policies or practices pervading the whole system* (even though injuring a relatively small number of plaintiffs)." *Armstrong v. Davis*, 275 F.3d 849, 870 (9th Cir. 2001) (emphasis added).[19] "Especially in the Establishment Clause context, courts must endeavor to craft remedies that correspond to the violations." *Cooper v. United States Postal Serv*., 577 F.3d 479, 496 (2d Cir. 2009) (citation omitted).

NCDPS nonetheless asserts that even "if Plaintiff were to gain the injunctive relief demanded, the Defendants would be incapable of implementing the injunction in any effective manner at Nash CI due to circumstances beyond their control - such as a quorum requirement." (D.Br.28). This is nonsense. Plaintiffs merely seek equal treatment for Humanists with respect to the opportunity to engage in group

[17] *See also Colwell v. Bannister*, 763 F.3d 1060, 1070 (9th Cir. 2014) ("corrections department secretary and prison warden were proper defendants in a § 1983 case because '[a] plaintiff seeking injunctive relief against the State is not required to allege a named official's personal involvement'") (citation omitted).

[18] *See also Shaw v. Rogers*, 2016 U.S. Dist. LEXIS 100382, at *4 (D.S.C. June 28, 2016) ("insofar as Plaintiff trying to get a pair of boots is being thwarted pursuant to an SCDC policy that is applied system-wide, his claim for injunctive relief may not be moot.").

[19] *See Washington v. Reno*, 35 F.3d 1093, 1103-04 (6th Cir. 1994) (nationwide injunction was not overly broad); *Harmon v. Thornburgh*, 878 F.2d 484, 495 n. 21 (D.C. Cir. 1989) ("When a reviewing court determines that agency regulations are unlawful, the ordinary result is that the rules are vacated—not that their application to the individual petitioners is proscribed."); *Kahane v. Carlson*, 527 F.2d 492, 493 n.1 & 496 n.7 (2d Cir. 1975) (affirming nationwide injunction against BOP, filed by one plaintiff).

meetings. Without Faith Group approval, Humanists are prohibited from meeting in groups.[20] There is no quorum requirement for Faith Group approval. (A.1260, 1560). Around the same time that NCDPS refused to approve Humanism, NCDPS approved Aquarian CCU even though there "was only one person interested in this faith." (A.1260). And despite NCDPS's vague reference to a "quorum requirement," the reality is that NCDPS regularly authorizes group meetings with two or three inmates in attendance. (PSUF 158-163). If a facility allows Buddhist or Wiccan meetings with only two or three inmates in attendance, then it must also allow Humanist meetings of the same size. That is within NCDPS's control.

Indeed, courts have granted the type of relief sought by Plaintiffs. In *Buchanan v. Burbury*, the court issued an injunction requiring a prison to provide "the Sacred Name Sabbatarians with the opportunity to engage in group worship under the same supervisory requirements imposed on other groups." 2006 U.S. Dist. LEXIS 48244, at *24 (N.D. Ohio July 17, 2006). The court in *Hummel v. Donahue* issued an injunction ordering the Indiana Department of Corrections to permit Odinist group worship, even though insufficient demand was possible. 2008 U.S. Dist. LEXIS 47534, at *24-25 (S.D. Ind. June 19, 2008). In *Thunderhorse v. Pierce*, the court issued an injunction ordering that "the religious faith of 'Native American shamanism' shall be recognized as a valid faith, within the ambit of Native American religion, and shall be given its own separate faith code. All of the rights, privileges, and responsibilities which apply to Native American practitioners shall also apply to Native American shamanism practitioners." 2008 U.S. Dist. LEXIS 58842, at *77 (E.D. Tex. July 30, 2008).

Teague's claims for nominal damages, moreover, cannot be mooted by subsequent events.[21] Likewise, AHA's prospective relief claims would not be mooted by Teague's transfer since AHA has other members confined in NCDPS facilities that also prohibit Humanist meetings. (PSUF 199-226). AHA would even maintain its standing to seek injunctive relief if Teague were completely released from prison. *See Am. Humanist Ass'n v. Greenville Cty. Sch. Dist.*, 652 F. App'x 224, 230 (4th Cir. 2016) (holding that AHA maintains representational standing as to non-party members residing in the school district even after the original plaintiffs left district, and noting that "AHA was not required to establish standing before entry of judgment based on the interests of its other members.").

NCDPS's final contention that the claims against several of the official capacity defendants

[20] (A.46, 1022-24, 1512, 1156-57, 1267-68, 1275, 1279, 1286, 1514, 1542).
[21] *See Rendelman v. Rouse*, 569 F.3d 182, 187 (4th Cir. 2009).

"should be dismissed" since these officials "are either retired or work in positions away from Nash CI" is a non-issue as these individuals are named in their *official* capacities only. Under Fed. R. Civ. P. 25 (d)(1), "their successors are automatically substituted as parties." *Ragland v. N.C. State Bd. of Educ*., 2017 U.S. Dist. LEXIS 107851, at n.1 (E.D.N.C. May 10, 2017).

III. AHA has standing to represent its other Humanist members within NCDPS facilities.

NCDPS concedes that "Teague has standing to sue in his own right." (D.Br.25). Consequently, the Court need not even consider whether AHA separately has standing. *See Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 586 (4th Cir. 2017) ("And because we find that at least one Plaintiff possesses standing, we need not decide whether the other individual Plaintiffs or the organizational Plaintiffs have standing with respect to this claim."). Of course, AHA has standing to represent its other Humanist members. An association has standing when: "(a) its members would otherwise have standing;" (b) "the interests it seeks to protect are germane to the organization's purpose;" and (c) the relief requested does not require "participation of individual members in the lawsuit." *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). NCDPS does not dispute that AHA satisfies all three prongs of this test. Instead, it argues AHA lacks standing for two other reasons.

First, NCDPS states that "Teague has standing to sue in his own right and has sued jointly with AHA in this action; thus, their participation is not necessary." (D.Br.25). But AHA need not be a *necessary* party to be a plaintiff. Numerous courts — including the Fourth Circuit — have recognized AHA's standing to assert the rights of its members in similar contexts, even when there is only one individual-named plaintiff in the case. *See Greenville*, 652 F. App'x at 230 (reversing dismissal of AHA for lack of standing on behalf of non-party members in school district); *Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 523 (5th Cir. 2017) (*sub silentio* recognizing AHA's standing because the one individual plaintiff was an AHA member), *Certiorari Filed* (NO. 17-178) (Aug 04, 2017); *Am. Humanist Ass'n v. United States*, 63 F. Supp. 3d 1274, 1278 (D. Or. 2014) (sub *silentio* recognizing AHA's standing predicated upon the single inmate plaintiff); *Am. Humanist Ass'n v. Baxter Cty.*, 143 F. Supp. 3d 816, 821 (W.D. Ark. 2015) (explicitly finding that AHA had associational standing because the one plaintiff was an AHA member).[22] This argument also erroneously assumes that Teague is the only AHA member

[22] *See also Am. Humanist Ass'n v. Douglas Cty. Sch. Dist. Re-1*, 859 F.3d 1243, 1261 (10th Cir. 2017) (reversing dismissal of AHA for lack of associational standing); *Hake v. Carroll Cty*., 2014 U.S. Dist. LEXIS 40476, at *3 (D. Md. Mar. 25, 2014) (*sub silentio* recognizing AHA's standing).

within NCDPS. NCDPS avers that "[t]he alleged harm claimed by AHA here is based purely on the standing of inmate Teague." (D.Br.26). AHA, however, has many members within NCDPS facilities, including six who have filed declarations. (PSUF 199-226).

Second, NCDPS confuses associational standing with organizational standing, averring that "AHA cannot submit evidence demonstrating that it has somehow lost funds or suffered a financial injury attributable to the conduct of these Defendants." (D.Br.26). AHA need not show a direct injury for *associational* standing.[23] NCDPS goes on to suggest that AHA is seeking to vindicate the legal rights of third parties. (D.Br.27). AHA's standing, however, is predicated on its *own members'* standing, *supra.*[24] NCDPS's reliance on *Heap v. Carter*, 112 F. Supp. 3d 402, 418-19 (E.D. Va. 2015) is therefore completely misplaced. NCDPS argues that *Heap* "held that the Humanist association asserting standing lacked the ability to 'bring claims on behalf of Humanist service members *who are not members of THS*.'" (D.Br.28) (emphasis added). AHA, however, brings its claims on behalf of inmates *who are AHA members*. The court in *Heap* found that The Humanist Society (THS) did not have associational standing solely because the THS, unlike the AHA, is *not* a membership organization. *Id.* at 418-19.

IV. NCDPS's disparate treatment of Humanists 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). "One of the great causes which led to the settlement of the American colonies was the desire of the immigrants that their government should not make discriminations against them because of their religious tenets." *State v. Powers*, 51 N.J.L. 432, 435 (1889). "It was not so much that they esteemed any particular privilege denied to them as of value sufficient to warrant their expatriation, but they insisted upon the more general doctrine that their belief or disbelief on religious topics should not debar them from rights which the laws afforded to other subjects." *Id.* 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 v. Watkins*, 367 U.S. 488, 495 n.10 (1961).

[23] *See Wilson v. Thomas*, 43 F. Supp. 3d 628, 632 (E.D.N.C. 2014).
[24] *See Trump*, 857 F.3d at 586 ("We likewise reject the Government's suggestion that Plaintiffs are seeking to vindicate the legal rights of third parties.").

A. The Establishment Clause demands equal treatment of Humanists.

NCDPS argues that the Establishment Clause permits it to discriminate against Humanists because, according to NCDPS, Humanism is not a religion. (D.Br.14-15). Rather than cite cases that actually support its ultimate position, NCDPS merely states that "only the Seventh Circuit has held Humanism/Atheism constitute religions for purpose of First and Fourth [sic] Amendment protection." (D.Br.13). This is provably false. (P.Br.1-4). Significantly, the *Supreme Court* has recognized Humanism as a religion for purpose of First Amendment protection. *E.g.*, *Torcaso*, 367 U.S. at 495 n.11 ("Secular Humanism" is a "religion" for First Amendment purposes); *see also Gillette v. U.S.*, 401 U.S. 437, 439, 461-62 (1971) (adjudicating claim "based on a humanist approach to religion"); *U.S. v. Seeger*, 380 U.S. 163, 176 (1965).[25] Indeed, the "Supreme Court has recognized *atheism* as equivalent to a 'religion' for purposes of the First Amendment *on numerous occasions*." *Kaufman v. McCaughtry*, 419 F.3d 678, 682 (7th Cir. 2005) (emphasis added). And *this Court* already decided that "the Supreme Court has held that Secular Humanism is a religion." (DE-59, at n.1).[26] In addition to the Seventh Circuit, many other courts have recognized Humanism and/or Atheism as religions for First Amendment purposes including the:

- **Eighth Circuit**: *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); *ACLU v. City of Plattsmouth*, 358 F.3d 1020, 1041 (8th Cir. 2004) (Atheism)
- **Ninth Circuit**: *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."); *U.S. v. Ward*, 989 F.2d 1015, 1017-18 (9th Cir. 1993) (recognizing that religion need not be theistic)[27]
- **U.S. District Court of Virginia:** *Desper v. Ponton*, 2012 U.S. Dist. LEXIS 166546, *5-6 (E.D. Va. 2012) ("To be recognized as religious, sincerely held beliefs need not be . . . based on the existence of a supreme being or beings [*Torcaso* and *Myers*] . . . [A]nd, as the Supreme Court noted in the Establishment Clause case of *McCreary*, [] such beliefs may even be encompassed in the practice of atheism.") (internal citations omitted)
- **U.S. District Court of West Virginia:** *Crockett v. Sorenson*, 568 F. Supp. 1422, 1425 (W.D. Va. 1983) ("secular humanism is a religion")

[25] *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"); *McDaniel v. Paty*, 435 U.S. 618, 633 n.4 (1978) (Brennan, J., concurring) (condemning discrimination "among religions" including "*humanistic faiths*") (emphasis added).

[26] *See also 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*)).

[27] *Cf. EEOC v. Townley Engineering & Mfg. Co*., 859 F.2d 610, 614 n.5 (9th Cir. 1988) ("atheistic beliefs" are protected "against religious discrimination.").

- **U.S. District Court of Oregon**: *AHA*, 63 F. Supp. 3d at 1284 ("the court finds that Secular Humanism is a religion for Establishment Clause purposes")
- **U.S. District Court of Nevada:** *Cavanaugh v. Bartelt*, 178 F. Supp. 3d 819, 829-30 (D. Neb. 2016) ("humanism" is "'religious'")
- **U.S. District Court of Texas:** *ACLU v. Eckels*, 589 F. Supp. 222, 227 & 239 n.20 (S.D. Tex. 1984) ("The Supreme Court recognized Humanism as a religion")
- **U.S. District Court of Pennsylvania:** *Fields v. Speaker of the Pa. House of Representatives*, 2017 U.S. Dist. LEXIS 64711, at *1-2 (M.D. Pa. Apr. 28, 2017) (refusing to dismiss case challenging House practice of refusing to allow Humanists and other non-theists to deliver nontheistic invocations as violative of Establishment Clause); *Real Alts., Inc. v. Burwell*, 150 F. Supp. 3d 419, 440-41 (M.D. Pa. 2015) ("belief systems such as Atheism, Shintoism, Janism, Buddhism, and secular humanism, all of which 'are situated similarly to religions in everything except belief in a deity'" are protected under the First Amendment)
- **U.S. District Court of Nebraska:** *Cavanaugh v. Bartelt*, 178 F. Supp. 3d 819, 829 (D. Neb. 2016) ("Nor, however, does FSMism advocate for humanism or atheism, which the Court acknowledges have been found to be 'religious' for similar purposes.")
- **U.S. District Courts of New York:** *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."); *McChesney v. Hogan*, 2010 U.S. Dist. LEXIS 25705, *36 (N.D.N.Y 2010) (same); *Decker v. Hogan*, 2009 U.S. Dist. LEXIS 89048, *9 (N.D.N.Y 2009)
- **U.S. District Court of Iowa:** *Loney v. Scurr*, 474 F. Supp. 1186, 1194 (S.D. Iowa 1979) (citing *Torcaso* as holding that Secular Humanism is a religion)
- **Wisconsin Supreme Court:** *Welker v. Welker*, 24 Wis. 2d 570, 575-76 (1964) ("nontheistic creeds as Buddhism, Taoism, Ethical Culture, and Secular Humanism have been recognized as being within the protection of the First amendment") (citing *Torcaso*)
- **New Jersey Supreme Court:** *In re "E"*, 59 N.J. 36, 55 n.4 (1971) ("Burke described himself as a humanist which is specifically mentioned as a 'religion' by the Supreme Court in *Torcaso*."); *Powers*, 51 N.J.L. at 434-35 (rejecting argument that "disbelief cannot be called a religious principle")
- **Maryland Court of Appeals:** *Schowgurow v. State*, 240 Md. 121, 130 & 124 n.1 (1965) (citing *Torcaso* as holding Secular Humanism a religion under First Amendment)
- **California:** *Fellowship of Humanity v. Cnty. of Alameda*, 153 Cal. App. 2d 673 (1st Dist.1957) (holding that Humanism is a religion for state constitutional purposes)

The Establishment Clause requirement of equal treatment of Humanists is so well settled that a federal court, three years ago, refused to grant federal prison officials qualified immunity from *personal damages* stemming from their refusal to approve Humanism and authorize Humanist group meetings. *AHA*, 63 F. Supp. 3d at 1286-87. NCDPS completely ignored *AHA* in asserting that the "Seventh Circuit" is the "only" court to find that "Humanism/Atheism constitute religions." (D.Br.13). And in making this

absurd claim — in this face of *this Court's* own finding to the contrary, *supra* — NCDPS cited only the 2005 *Kaufman* decision. In 2014, the Seventh Circuit laid it out even more specifically, that "when making *accommodations in prisons*, states must treat atheism as favorably as theistic religion," and that, "[w]hat 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) (emphasis added). In *AHA*, the court noted 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." 63 F. Supp. 3d at 1286-87. *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."). Thus, NCDPS's reliance on *Heap*, which expressed a minority interpretation of *Torcaso* at odds with this Court's *subsequent* interpretation (DE-59, at n.1), is mistaken. Even *Heap* correctly recognized that, contrary to NCDPS's position, "*many* lower courts have read the footnote in *Torcaso* as controlling on the question of whether Humanism is a religion." 112 F. Supp. 3d at 437 (emphasis added).

NCDPS further posits that even if *Torcaso*'s recognition of Secular Humanism is controlling, "*Torcaso* was a 'Free Exercise' case and not an 'Establishment Clause' case." (D.Br.14). The Supreme Court in *Torcaso*, however, specifically recognized "Secular Humanism" as a religion for *Establishment Clause* purposes. 367 U.S. at 495. The Court, relying on *Establishment Clause cases*, explained: "We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person 'to profess a belief or disbelief in any religion.' Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers [n.10]." *Id.* (quoting *Everson v. Bd. of Educ*., 330 U.S. 1, 15-16 (1947), an Establishment Clause case).

Yet the premise upon which NCDPS's entire argument rests — that Humanism must be a religion for Establishment Clause protection — is erroneous. The focus on *Torcaso* and whether Secular Humanism is in fact a religion is a red herring. Simply put, Humanism need not be a religion for inmates to be entitled to equal treatment under the Establishment Clause. At the most fundamental level, the Establishment Clause prohibits the government from taking sides between "religion and religion or religion and *nonreligion*." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 (2005) (citations omitted, emphasis added). It "mandates governmental neutrality between religion and religion, and between

religion and *nonreligion*." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (emphasis added). The Establishment Clause "requires the state to 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).

It is firmly established that Establishment Clause protection "extends beyond intolerance among Christian sects – or even intolerance among 'religions' – to encompass intolerance of the disbeliever and the uncertain." *Wallace v. Jaffree*, 472 U.S. 38, 52-54 (1985). In *Allegheny v. ACLU*, 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. 573, 589-90 (1989) (citation omitted, emphasis added). More recently, in *Town of Greece v. Galloway*, the Court upheld a town's legislative prayer practice under the narrow *Marsh* exception to the general Establishment Clause prohibition against government prayer based in part on the fact that a "minister or layperson of any persuasion, *including an atheist*, could give the invocation." 134 S. Ct. 1811, 1816 (2014) (emphasis added).

Thus, "whether Humanism is a religion or a nonreligion, the Establishment Clause applies." *AHA*, 63 F. Supp. 3d at 1286. In *AHA*, the court properly recognized that, *Torcaso* aside, the Establishment Clause prohibits the government from refusing to authorize Humanist study group meetings when such meetings are allowed for other religious groups of equal or smaller size. The court recognized that "'disparate treatment of theistic and non-theistic religions is as offensive to the Establishment Clause as disparate treatment of theistic religions.'" *Id.* at 1283 (citation omitted). The same result obtained in *Kaufman I* an *II*, where the Seventh Circuit held that Atheism need not be a religion in order for Atheists to be entitled to equal treatment with respect to meeting groups. *Kaufman v. Pugh*, 733 F.3d 692 (7th Cir. 2013) ("*Kaufman II*"); *Kaufman I*, 419 F.3d at 683.

In support of its position that the Establishment Clause allows discrimination against Humanists, NCDPS relied primarily on a seventeen-year-old, non-binding case, *Kalka v. Hawk*, 215 F.3d 90 (D.C. Cir. 2000). *Kalka*, however, does not even support its position and is legally and factually distinguishable. The only issue was whether federal prison officials were entitled to *qualified immunity* for refusing to permit a chapter of the AHA to meet under the auspices of the BOP Religious Services Department based on the law *prior to* 2000. Unlike here, there were no claims for prospective relief because they were mooted by the inmate's release from prison. *Id.* at 93. The court then assumed, without deciding, that Humanism is a religion, but determined that the law was not well settled as of 2000. *Id.* The same court

later reiterated the narrowness of *Kalka*: "Without reaching the merits of Kalka's constitutional claim, we affirmed based on qualified immunity alone." *Harbury v. Deutch*, 233 F.3d 596, 601-02 (D.C. Cir. 2000). Numerous courts have since concluded that Humanism, as well as Atheism, must be treated as religion in the prison context, *supra*. *Kalka* is further distinguishable because unlike here, the inmate was actually authorized to establish a "humanism group under the aegis of the prison's Education Department." 215 F.3d at 93. "At the time the briefs were filed, Kalka had begun teaching a class on humanism at FCI-Edgefield." *Id.* In stark contrast, NCDPS precludes Humanist meetings of any kind.

NCDPS also relies on *Heap*, a qualified immunity case that is even more inapt. (D.Br.13-14). *Heap* presented a case of first impression involving a Navy employment matter, specifically, a First Amendment retaliation and discrimination claim from an Army Chaplain who claimed to be a Humanist. 112 F. Supp. 3d at 437-38. *Heap* does not even support NCDPS's position that the Establishment Clause permits disparate treatment of Humanists. The *Heap* court emphasized that "though it may be the case that *going forward Humanism is a religion for First Amendment purposes*, such a conclusion could not be said to be well established at the time of *the events in question here*." *Id.* (emphasis added). The court simply did not believe *Torcaso* placed "the constitutional question 'beyond debate,'" which is the standard for *qualified immunity*. *Id.* At the same time, the court did "*not deny* that Humanism *could indeed* be a secular moral system equivalent to religion." *Id.* (emphasis added). Notably, the *Heap* court denied the official capacity defendants' motion for summary judgment on Heap's Establishment Clause and Equal Protection claims. *Id.* at 412, 438. The official defendants argued "there is no basis to infer that there is an unwritten policy of discrimination against Humanists based on the decision not to select one Humanist chaplain for discrimination." *Id.* at 426-27. The court denied the "motion for summary judgment on these claims as premature." *Id.*

Unlike in *Kalka* and *Heap*, this Court need not determine whether "the constitutional question [is] 'beyond debate'" because defendants are sued in their *official capacities* only. The question is simply whether the Establishment Clause is violated in fact, without regard to defendants' understanding of the law. Neither *Heap* nor *Kalka* held that Humanism is *not* a religion, and certainly neither held that the Establishment Clause allows disparate treatment of Humanists, as NCDPS claims. Moreover, both cases involved matters of first impression, making it unfair to hold officials liable in their personal capacities. Whereas the *Heap* court had no cases before it holding that declining to hire a Humanist chaplain in the

Navy would rise to the level of a First Amendment retaliation claim, several courts including the Seventh Circuit and the U.S. District Court of Oregon have ruled on the *exact* issue here. (P.Br.3-4). And notably, both the federal BOP and the Virginia Department of Corrections have since approved Humanism and authorize Humanist meeting groups. (A. 824-39) (Grover Decl. ¶¶3-7 and Exs. A & B).

The remaining cases NCDPS relies upon are readily distinguished. (D.Br.12-13). *Peloza v. Capistrano Unified Sch. Di*st., 37 F.3d 517 (9th Cir. 1994) and *McGinley v. Houston*, 361 F.3d 1328 (11th Cir. 2004) involved challenges by Christians claiming that *secular* government actions promoted Humanism. The court in *AHA* found BOP's reliance on such cases "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.* (citing *Peloza*, 37 F.3d at 521-52). The court held that "evolutionist theory is not a religion." 37 F.3d at 521. In *McGinley*, the plaintiffs argued that the *removal* of a Ten Commandments monument "created empty space, and that this empty space violates the Establishment Clause because it is an endorsement of religion, or in this instance, nontheism." 361 F.3d at 1332-33. The court correctly found this argument to be "without merit." *Id.* Moreover, the Ninth Circuit itself "has cast doubt on defendants' broad interpretation of *Peloza*." *AHA*, 63 F. Supp. 3d at 1283.[28]

NCDPS's final point is that "AHA does not hold itself out to be a religion." (D.Br.8, 22). The weakness of NCDPS's "semantic argument is evident." *Marria v. Broaddus*, 2003 U.S. Dist. LEXIS 13329, at *40-42 (S.D.N.Y. July 31, 2003). The Establishment Clause does not turn on mere semantic distinctions. A group that refuses to define itself as a "religion" is even entitled to protection under the Free Exercise Clause.[29] NCDPS's argument "misses the point of *Torcaso* and *Kaufman*." *CFI*, 758 F.3d at 873-74. "Atheists don't call their own stance a religion but are nonetheless entitled to the benefit of the First Amendment's neutrality principle, under which states cannot favor (or disfavor) religion vis-à-vis comparable secular belief systems." *Id.* The district court in *CFI*, like NCDPS here, asserted "that none of these [Supreme Court] decisions matters, because in plaintiffs' own view humanism is not a religion." *Id.*

[28] In 2002, the Ninth Circuit cited *Torcaso* for the notion that the Supreme Court has "recognized religions exist that do not teach a belief in God, e.g., secular humanism." *Newdow*, 313 F.3d at 504 n.2.

[29] *Id.* ("a group that refuses to describe itself as a 'religion'" is entitled to protection under "the Free Exercise Clause"); *Joseph v. Fischer*, 900 F. Supp. 2d 320, 325 (W.D.N.Y. 2012) (plaintiff eschewed "religion," but NOGE should be considered religious); *Wright v. Fayram*, 2012 U.S. Dist. LEXIS 84804, at *12 (N.D. Iowa June 18, 2012) (same); *Graham v. Cochran*, 2000 U.S. Dist. LEXIS 1477, at *30 (S.D.N.Y. 2000) ("failure to label one's beliefs a 'religion' does not prohibit constitutional protection").

The Seventh Circuit soundly rejected this reasoning, observing that when "a secular moral system is equivalent to religion except for non-belief in God . . . the state must treat them the same way it treats religion." *Id. See also Kaufman I*, 419 F.3d at 681-82 ("[t]he problem here was that the prison officials did not treat atheism as a 'religion,' perhaps in keeping with Kaufman's own insistence that it is the antithesis of religion."). NCDPS is also wrong from a factual standpoint because AHA takes a *neutral* stance on whether Humanism is a religion. (A.1141). AHA recognizes that some of its members, such as Teague, may consider Humanism to be a religion, whereas other members prefer not to use this term. (A.1141). And regardless of AHA's position, Teague sincerely believes Humanism occupies a place in his life as a religion does. First Amendment protection is "'not limited to beliefs which are shared by all of the members of a religious sect.'" *Holt v. Hobbs*, 135 S. Ct. 853, 862-63 (2015) (citation omitted). When a person sincerely holds beliefs dealing with issues of "ultimate concern" that for her occupy a "place parallel to that filled by . . . God," those beliefs represent his religion. *Fleischfresser v. Dirs. of Sch. Dist*. 200, 15 F.3d 680, 688 n.5 (7th Cir. 1994).[30] NCDPS does not dispute that Teague's Humanist beliefs are deeply and sincerely held. The "significance of plaintiff's beliefs in his life is considerably more relevant than what plaintiff and other members of his community choose to call their beliefs.'" *Marria*, 2003 U.S. Dist. LEXIS 13329, at *40-42.

B. *Larson* strict scrutiny applies to NCDPS's disparate treatment of Humanists.

1. NCDPS misapprehended the nature of the claims and the governing standard.

NCDPS erroneously eschewed *Larson*'s strict scrutiny test and applied *Lemon* instead. *Lemon* applies to policies and practices "affording uniform benefit to *all* religions, and not to [those] . . . that discriminate *among* religions." *Larson*, 456 U.S. at 252 (emphases in original). *Larson* strict scrutiny is required when the government favors "particular religious denominations [while] excluding others." *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 102 (4th Cir. 2013).[31] Although NCDPS's disparate treatment of Humanists readily fails *Lemon* (P.Br.6-26), NCDPS cannot avoid *Larson*. "The State may not adopt programs or practices . . . which aid or *oppose any religion* . . . This prohibition is *absolute*." *Larson*, 456 U.S. at 246 (emphasis added). "Strict scrutiny is *required* when laws discriminate among religions." *Awad v. Ziriax*, 670 F.3d 1111, 1126-27 (10th Cir. 2012). In *Awad*, the Tenth Circuit held that the district

[30] *See also Welsh*, 398 U.S. at 340; *Seeger*, 380 U.S. at 184-88.
[31] *See also Corp. of Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*, 483 U.S. 327, 339 (1987) ("laws discriminating among religions are subject to strict scrutiny.").

court erred in applying *Lemon* rather than *Larson* to the disparate treatment of Muslims. *Id.* Other courts have likewise held that the "distinguishing among religions implicates the Establishment Clause in a manner that *requires strict scrutiny*." *Rouser v. White*, 630 F. Supp. 2d 1165, 1195 (E.D. Cal. 2009) (emphasis added).[32] NCDPS offered no explanation for ignoring *Larson*. This is confounding considering *Larson* is binding and frequently applies "in the prison context." *Id.* at 1195 (citing *Cutter v. Wilkinson*, 544 U.S. 709 (2005)). *See Scott v. Pierce*, 2012 U.S. Dist. LEXIS 190126, at *8-9 n.4 (S.D. Tex. May 7, 2012) (*Larson* applies "in the prison setting").[33] *Larson* was also fully discussed in Plaintiffs' memorandum filed well before NCDPS filed its memorandum. (P.Br.4-6).

2. NCDPS has not come forward with any interest, let alone a compelling one.

Under *Larson*, NCDPS's disparate treatment of Humanists is *presumed unconstitutional* and can be upheld *only* if NCDPS can prove that the disparate treatment "furthers a compelling state interest, that is narrowly tailored to achieving that interest." *Brown*, 17 F. Supp. 3d at 632 (citing *Larson*, 456 U.S. at 244-47). NCDPS failed to meet this tall burden. (P.Br.4-5). The only mention of any compelling interest in NCDPS's memorandum is curiously located in its *Lemon* "entanglement" section. (D.Br.21). NCDPS claims that its refusal to approve Humanism and allow Humanists to meet on the same terms as Faith Groups furthers "their compelling interest in preservation of security, operations, and financial resources."

[32] *See also Koenick v. Felton*, 190 F.3d 259, 264 (4th Cir. 1999); *Harkness v. Sec'y of the Navy*, 2017 U.S. App. LEXIS 9516, at *15 (6th Cir. May 31, 2017) (*Larson* strict scrutiny must be applied to practices that prefer one religion over another); *Sklar v. Comm'r of Internal Revenue*, 549 F.3d 1252, 1257 n.3, 1265-67 (9th Cir. 2008); *Jenkins v. Kurtinitis*, 2015 U.S. Dist. LEXIS 34772, at *71-72 (D. Md. Mar. 20, 2015) ("If a preference for a particular religion or for 'nonreligion' is facially apparent, strict scrutiny applies.")

[33] *See also Natarajan Venkatraman v. Bureau of Prisons*, 2017 U.S. Dist. LEXIS 5418, at *23-24 (S.D. Fla. Jan. 12, 2017) (*Larson* strict scrutiny applied and prison violated "the Establishment Clause by providing meal accommodations to Jewish and Muslim inmates, but denying similar accommodations to Hindu inmates."); *AHA*, 63 F. Supp. 3d at 1282-83; *Brown v. Livingston*, 17 F. Supp. 3d 616, 632 (S.D. Tex. 2014) (applying *Larson* and holding that the "effect and operation of the volunteer policy on Muslim inmates' access to religious activities, when compared with that enjoyed by Catholic and Protestant inmates, is unconstitutional"); *Warrior v. Gonzalez*, 2013 U.S. Dist. LEXIS 165387, *23-24 (E.D. Cal. 2013) (prison's "strip search policy prefers other religions over Islam. . . . [S]trict scrutiny should be applied."); *Evans v. Cal. Dep't of Corr. & Rehab.*, 2012 U.S. Dist. LEXIS 5373, *5-6 (C.D. Cal. 2012) (prison violated Establishment Clause under *Larson* by providing kosher meals to Jews but not Muslims); *Glenn v. N.H. State Prison Family Connections Ctr.*, 2012 U.S. Dist. LEXIS 78689, *12-13 (D.N.H. 2012) ("by offering Christian religious services conducted by state-employed chaplains and Christian Bibles at no cost, and not providing a paid Imam or Qur'ans to inmates, the prison is demonstrating a preference for Christianity over Islam" failing "strict scrutiny"); *Scott*, 2012 U.S. Dist. LEXIS 190126, at *8-9 n.4; *Caruso v. Zenon*, 2005 U.S. Dist. LEXIS 45904, *47 (D. Colo. 2005); *Rouser*, 630 F. Supp. 2d at 1195-96 ("evidence that Native American inmates are allowed access to a sweat lodge and fire pit, while Wiccan inmates are not" is subject to *Larson* strict scrutiny).

(D.Br.21). This generalized pronouncement is grossly inadequate. *Smith v. Ozmint*, 578 F.3d 246, 252 (4th Cir. 2009) ("This conclusory, one-sentence explanation does not, by itself, explain why the security interest is compelling."). "Routine and automatic arguments to this effect have been made before and have been rejected by [the Supreme Court]." *Cleavinger v. Saxner*, 474 U.S. 193, 207 (1985).[34]

"Supreme Court case law instructs that overly general statements of abstract principles do not satisfy the government's burden to articulate a compelling interest." *Awad*, 670 F.3d at 1129-30 (citations omitted).[35] The Fourth Circuit has similarly admonished that the "'mere assertion of security or health reasons is not, by itself, enough for the Government to satisfy the compelling governmental interest requirement.'" *Couch v. Jabe*, 679 F.3d 197, 201 (4th Cir. 2012) (citations omitted). *Accord Lovelace v. Lee*, 472 F.3d 174, 190 (4th Cir. 2006). The "state must do more than simply offer conclusory statements.'" *Weaver v. Jago*, 675 F.2d 116, 119 (6th Cir. 1982). Prison officials "cannot merely brandish the words 'security' and 'safety' and expect that their actions will automatically be" insulated from scrutiny. *Campos v. Coughlin*, 854 F. Supp. 194, 207-09 (S.D.N.Y. 1994) (Sotomayor, J.). *Accord Spratt v. R.I. Dep't of Corr*., 482 F.3d 33, 42-43 (1st Cir. 2007). NCDPS "must *demonstrate*, not just assert," that its dissimilar treatment of some religious groups over others is grounded in a compelling interest. *O'Bryan v. Bureau of Prisons*, 349 F.3d 399, 401 (7th Cir. 2003). The "interest must be shown with evidentiary support." *Rouser*, 630 F. Supp. 2d at 1197.[36] In *Lovelace*, the Fourth Circuit held that a prison failed to demonstrate that its "Ramadan policy is the least restrictive means of furthering a compelling governmental interest" because it did not "present any evidence with respect to the policy's security or budget implications." 472 F.3d at 190. NCDPS tendered *no evidence whatsoever* that approving Humanism would be costly or threaten "security" and "operations." Much to the contrary, NCDPS conceded: "there is no reason to conclude that Humanism would impose a threat to the security, control, operation and safety of a correctional institution." (A.925). Thus, NCDPS's asserted interests are not only conclusory and unsubstantiated, but are in fact *contradicted* by NCDPS's admissions.

For an interest to be sufficiently compelling to justify discrimination among religions, it must also "address an identified problem that *the discrimination seeks to remedy*." *Awad*, 670 F.3d at 1129-30

[34] *See Procunier v. Martinez*, 416 U.S. 396, 405 (1974); *Johnson v. Avery*, 393 U.S. 483, 486-87 (1969); *Lee v. Washington*, 390 U.S. 333, 334 (1968); *Ex parte Hull*, 312 U.S. 546 (1941).
[35] *E.g., Watchtower Bible Tract Society of New York, Inc. v. Village of Strauss*, 536 U.S. 150, 169 (2002).
[36] *See, e.g., City of Richmond v. Croson*, 488 U.S. 469, 501-02 (1989).

(emphasis added).[37] NCDPS has not identified *any problem*. It also bears repeating that NCDPS never once cited any of these alleged interests at the time it rejected Teague's requests. 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). Even if a prison has "a compelling interest in institutional security," it cannot offer "'post hoc rationalizations for their conduct.'" *Murphy v. Mo. Dep't of Corr.*, 372 F.3d 979, 988-89 (8th Cir. 2004) (citation omitted). *See Lovelace*, 472 F.3d at 190-91 (safety and security considerations were not "compelling interests" because neither was asserted by prison officials as a motivating factor in the enactment of the challenged practices).[38]

Even assuming NCDPS could somehow demonstrate a compelling interest for its disparate treatment of Humanists, under *Larson*, it must also prove that it is "closely fitted" to the state's compelling interest. 456 U.S. at 246-47. To make this showing, NCDPS would have to produce facts to substantiate its assertions. *Id*. at 248-51. This second step "is unnecessary because both a compelling interest and a close fit are required to survive strict scrutiny." *Awad*, 670 F.3d at 1130-31 (citing *Larson*). It also "is not feasible because we have no concrete problem or compelling interest to try to fit." *Id.*

To be certain, NCDPS's general interests in "preservation of security, operations, and financial resources" cannot justify its treatment of Humanists *relative* to similar and smaller-sized groups.[39] NCDPS offers a wide variety of faith group meetings irrespective of size, demand, and whether they are even mandated by the faith. "Inadequate resources, such as a shortage of prison staff, cannot justify" disparate treatment of similar sized groups under "the Establishment Clause," which "requires 'the principle of denominational neutrality.'" *Scott*, 2012 U.S. Dist. LEXIS 190126, at *8 (quoting *Larson*, 456 U.S. at 246). NCDPS tendered no evidence justifying its refusal to approve Humanism — a necessary step for group meetings — while approving Aquarian CCU upon the request of only one inmate, in light of their security and resource concerns. The court in *Hummel* held that "although maintaining safety and

[37] *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2738 (2011); *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 644 (1994) (plurality).
[38] *Cf. Trump*, 857 F.3d at 603 ("the Government's asserted national security interest in enforcing Section 2(c) appears to be a post hoc, secondary justification for an executive action rooted in religious animus").
[39] *See Sherman-Bey v. Marshall*, 2011 U.S. Dist. LEXIS 73801, *27-28 (C.D. Cal. 2011) ("qualified immunity is unwarranted on this record, where Plaintiff alleges that *his* group was denied services that were granted to others of equal or smaller size").

security in prisons is a compelling governmental interest, the defendants have not met their burden of showing that a blanket ban on group worship for Odinists" actually "furthers a compelling governmental interest" and "is the least restrictive means." 2008 U.S. Dist. LEXIS 47534, at *2, *14. *See also LeMay v. Dubois*, 1996 U.S. Dist. LEXIS 11645, at *12-13 (D. Mass. July 29, 1996) ("The DOC has failed to present any compelling interest *that can distinguish* between a cross on a chain or a Star of David and LeMay's leather and bone necklace. The DOC claims a compelling interest in 'restricting the possession of items which may be fashioned into weapons.' . . . However, it has failed to provide evidence that the pieces of bone in LeMay's necklace are any more dangerous than a 1 ½ metal cross").[40]

C. NCDPS's disparate treatment of Humanists fails muster under *Lemon*.

Even though *Larson* applies, the outcome is the same under *Lemon*. As Plaintiffs demonstrated in their motion, NCDPS's disparate treatment of Humanists fails this test by a landslide. (P.Br.6-26).

1. NCDPS has failed to shoulder its burden of proving a secular purpose.

Under the first prong of *Lemon* "the Government must show that the challenged action has a secular purpose that is 'genuine, not a sham, and not merely secondary to a religious objective.'" *Trump*, 857 F.3d at 593 (citations omitted). Specifically, "the government must show that the challenged action's *primary* purpose is secular." *Id.*[41] The test is "not a pushover for any secular claim." *McCreary*, 545 U.S. at 865, 871 (rejecting "new statements of purpose . . . presented only as a litigating position").

NCDPS failed to prove that its disparate treatment of Humanists is justified by a legitimate secular purpose. Instead, NCDPS simply asserted that its policies and practices *in general* have a secular purpose, stating: "NCDPS' policies, procedures, and practices are neutral, without advancement to any particular religion, and adopted to foster the spiritual needs of the inmate population, while accounting for security concerns, logistical difficulties, and financial constraints." (D.Br.15). But Plaintiffs' "Establishment Clause claim is about the government's conduct in preferring one denomination to another, rather than about a prisoner challenging a Department of Corrections directive." *Scott*, 2012 U.S. Dist. LEXIS 190126, at *15. The Establishment Clause "extends beyond facial discrimination." *Church*

[40] *See also Rouser*, 630 F. Supp. 2d at 1197 n.17 ("this does not explain why chaplains for those five groups and not others were selected."); *Pineda-Morales v. De Rosa*, 2005 U.S. Dist. LEXIS 37179, *38-39 (D.N.J. 2005) ("Defendants present no evidence that refusing to recognize the Apostolic Faith Church, or provide it additional physical accommodations, was the least restrictive means").

[41] *See id.* at 603 (Executive Order fails purpose prong despite having "national security interests.").

of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 534 (1993). NCDPS may not rely upon a general prison policy when it fails to apply it in a uniform and consistent manner. *See, e.g.*, *Holt v. Hobbs*, 135 S. Ct. 853, 863-64 (2015); *Smith v. Ozmint*, 578 F.3d 246, 252 (4th Cir. 2009) ("The only justification offered for the MSU grooming policy that is specific to the MSU is the policy itself"). In *Hodges v. Brown*, this Court rejected the same approach taken by NCDPS, noting that although "[NCDPS] defendants contend that their outside-volunteer policy serves legitimate and compelling governmental interests in preserving prison safety and security and conserving budgetary resources, . . . defendants are not applying the outside-volunteer policy uniformly and consistently." 2015 U.S. Dist. LEXIS 22199, at *21-22 (E.D.N.C. Feb. 20, 2015) (citations omitted).[42]

Lemon's purpose test requires a legitimate "secular justification for *the difference in treatment*." *Metzl v. Leininger*, 57 F.3d 618, 621 (7th Cir. 1995) (emphasis added). NCDPS's offered no secular reason for treating Humanists *differently*. In *Kaufman I*, the Seventh Circuit found that a prison had no "legitimate secular reason" for refusing to allow an Atheist study group. 419 F.3d at 683-84. As here, the prison "advanced no secular reason why the security concerns they cited as a reason to deny his request for an atheist group do not apply equally to gatherings of Christian, Muslim, Buddhist, or Wiccan inmates." *Id.* at 684.[43] Again, not only does the record fail to establish any secular purpose, but it also reveals "direct, specific evidence" of anti-Humanist sentiment, making NCDPS's unconstitutional purpose all the more conspicuous. *Trump*, 857 F.3d at 594-95. *See* (P.Br.6-9).

2. NCDPS is sending a message that it prefers some religions over Humanism.

NCDPS cannot satisfy *Lemon*'s second prong either, which "asks whether a government act has the primary effect of endorsing or *disapproving of religion*." *Id.* at 597 (emphasis added). There is a "long established policy of not picking and choosing among religious beliefs." *Welsh*, 398 U.S. at 338; *Seeger*, 380 U.S. at 175. Just as before, NCDPS attempts to coast by this requirement by invoking general prison policies and concerns. NCDPS argues that "the procedures set forth to gain recognition to faith practices

[42] *See also Brown*, 17 F. Supp. 3d at 632 ("the facially 'neutral' requirement, that all religious activities not supervised by a prison chaplain or guard must have an outside volunteer in attendance, is not constitutionally neutral if, in operation, it means that only Catholic, Protestant and Jewish inmates have access to more than one hour of religious programming per week. Such is the result that we see here.").
[43] *See also 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 Christain [sic] inmates with juice").

by way of a form DC- 572 are also neutral and established for the secular purpose of verifying the existence of the religion." (D.Br.17). NCDPS adds that the "'process of adding new Programs, Activities and Services to the existing structure and schedule of a prison facility is a very complex task with many variables.'" (D.Br.18). Based only these general issues, NCDPS sweepingly concludes: "*As a result*, Plaintiffs fail to provide evidence that the current structure of NCDPS' religious services neither advances nor inhibits any particular religion or religion in general, but rather serves to facilitate religious expression, without impermissibly promoting any specific religion." (D.Br.19).

NCDPS's conclusion does not follow from its argument. It has not reconciled the fact that "by accommodating some religious views, but not his, they are promoting the favored ones." *Kaufman I*, 419 F.3d at 684. Since 2010, NCDPS has approved at least three new Faith Groups: Hebrew Israelites, Messianic Judaism, and Aquarian CCU.[44] NCDPS has not explained why a Humanist group is any more complex than a Rastafarian or Wiccan group. In fact, NCDPS approved Wicca despite its own recognition that Wicca has "no known central leadership, authority nor organizational structure. This makes it *difficult to determine comprehensive, uniform beliefs and/or set practices*." (A.170, 1348-49) (emphasis added).

NCDPS's misapprehension of *Lemon*'s second prong does not end there. NCDPS suggests that the Establishment Clause only condemns *endorsement* of a *particular* religion. (D.Br.17). NCDPS states that the "varying nature of the religious groups and number alone precludes a determination that Defendants, or NCDPS, has 'endorsed' any particular religion." (D.Br.17). This argument suffers from three major flaws. First, the government must not "'aid one religion, aid all religions, or prefer one religion over another.'" *Mellen v. Bunting*, 327 F.3d 355, 366 (4th Cir. 2003) (citation omitted). Second, 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). Government action must not have the effect of "*disapproving of religion*." *Trump*, 857 F.3d at 597 (emphasis added). *Accord Hialeah*, 508 U.S. at 532. A "mere message of disapproval" suffices. *Catholic League v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1057 (9th Cir. 2009). Third, NCDPS highlights the fact that it recognizes a wide variety of religious groups. But this "just *restates the discrimination* of which plaintiffs complain." *CFI*, 758 F.3d at 873, and underscores the irrationality of NCDPS's refusal to recognize Humanism.

Even more outrageous is NCDPS's argument that the effect prong is satisfied because "Defendant

[44] (A.924-26, 1260, 1263-65, 1272, 1345, 1498-99, 1561).

Mitchell encouraged Teague to participate in cognitive behavioral programs, which are decidedly non-religious, but Teague refused to do so." (D.Br.17). "This glib remark made by the Government in response to a serious first amendment claim is disturbing," particularly in light of its "obvious willingness to accommodate many other religions." *Howard v. U.S.*, 864 F. Supp. 1019, 1028 (D. Colo. 1994). Teague and other AHA members desire an equal opportunity to study and discuss their shared *Humanist* convictions in a group setting. Why NCDPS believes a psychotherapy program is a sufficient "alternative" to Humanist study group meetings evades logic and is actually insulting.

In *Kaufman I*, the inmate wished to meet with other atheists and Humanists "to study and discuss their beliefs." 419 F.3d at 862. The prison refused this request but allowed "him to study atheist literature on his own, consult informally with other atheist inmates, and correspond with members of the atheist groups he identified," and the inmate "offered nothing to suggest that these alternatives are inadequate." *Id.* at 683. Even with these accommodations, the Seventh Circuit held that the prison could not reject an Atheist group while allowing meetings for other faiths. *Id.* In *CFI*, the state argued that Humanists were not excluded from the marriage solemnization statute because they had alternative methods to solemnize marriages. 758 F.3d at 873. The court found that while true, this "just *restates the discrimination* of which plaintiffs complain. Lutherans can solemnize their marriage in public ceremonies conducted by people who share their fundamental beliefs; humanists can't. Humanists' ability to carry out a sham ceremony, with the real business done in a back office, does not address the injury of which plaintiffs complain." *Id.*

NCDPS goes further astray by proclaiming that the effect prong is satisfied because "inmates are not required to participate in religious services, including prayer." (D.Br.17). The "Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 221 (1963).

NCDPS goes on to argue that "the committee determined that the practice of Humanism appeared be suited for an individual setting" and "appeared to be 'a philosophy of life, a free way of thinking' and not a religious practice." (D.Br.18). As Plaintiffs thoroughly discussed in their memorandum, none of these assertions justify NCDPS's disparate treatment of Humanists. (P.Br.12-13, 15-16). *See Kaufman II*, 733 F.3d at 695-96 (prison could not constitutionally refuse Atheist study group on the grounds it is "not viewed as a religious request" and is "more educational and philosophical in nature."); *Kaufman I*, 419 F.3d at 681-84 (same); *AHA*, 63 F. Supp. 3d at 1279, 1283 (BOP could not constituently refuse to

authorize a Humanist group on the grounds that it viewed "Humanism as a philosophy.").

NCDPS's "philosophy" argument simply does not justify its *disparate treatment* of Humanists relative to the philosophically-driven Faith Groups NCDPS has approved, including:

- **Hinduism**: NCDPS's Manual states "Philosophy is the essence of the religion." (A.125). It adds that while some worship deities, many others only engage in "philosophical speculation." *Id.*[45]
- **Buddhism**: "These Sila demonstrate that the ethics of Buddhism are much like that of Christianity. Buddhism asserts, however, that human deliverance lies firmly in one's own hands, the Buddha and the Dharma (teaching) which he proclaimed can only point the way" (A.111).[46]
- **Asatru**: the Manual recognizes: "Asatru is characterized by a conviction that the goal of living is to lead a worthwhile and useful life. Values are based on individual liberty . . ." (A.99).
- **Rastafarianism**: the Manual describes it as a "movement" and notes they are "eclectic in their beliefs as revelations are personal." (A.163). *See also Reed v. Faulkner*, 653 F. Supp. 965, 971 (N.D. Ind. 1987) (describing Rastafarianism as a "philosophy.")
- **Native American**: the Manual recognizes they "do not have a written set of guidelines. Instead the tenants [sic] of the faith are basic to humanity …" (A.84)

"[S]ecular humanism is a religion, as much so as Buddhism." *Crockett*, 568 F. Supp. at 1425. *See Torcaso*, 367 U.S. at 495 n.11. Likewise, NCDPS recognizes many Faith Groups that are individualized:

- **Wicca**: the Manual recognizes that there "are no requirements for corporate worship" (A.167-72)
- **Asatru**: many "practice the religion alone." (A.99). *See also Krieger v. Brown*, 2010 U.S. Dist. LEXIS 108822, *21 (E.D.N.C. 2010) ("Asatru religion is decentralized, individualistic").
- **Buddhism:** *See Tafralian v. Commissioner*, T.C. Memo 1991-33 (T.C. 1991) ("The focus of Buddhism is to develop individual lives" "through self-development").
- **Aquarian CCU:** "Everyone is a priest or Priestess in their own temple of their body, soul and spirit. Therefore there is no laity, everyone is clergy…" (A.94)
- **Rastafarianism**: there is no "mandatory requirement" for corporate "worship." (A.161-65). *See also Daley v. Lappin*, 555 F. App'x 161, 165 (3d Cir. 2014) ("Rastafarianism is individualistic.").

Nor has NCDPS demonstrated why this matters for group study meetings. Unlike the Free Exercise Clause, the Establishment Clause is violated "even without a substantial burden on religious practice if the government favors one religion over another." *Kaufman II*, 733 F.3d at 696. *See Kaufman I*, 419 F.3d at 682 (Atheists have an equal right to "meet with other atheist inmates to study and discuss their beliefs" even if Atheism is "individualized."); *AHA*, 63 F. Supp. 3d at 1279-80, 1283 (Humanists entitled to group

[45] *See also Seeger*, 380 U.S. at 174-75 (recognizing "Hindu" as a "philosophy"); *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").
[46] *See Tafralian v. Commissioner*, T.C. Memo 1991-33 (T.C. 1991) ("the philosophy of…Buddhism").

meeting regardless of BOP's claim that "Humanism is an 'individualized religion'"); *Wright*, 2012 U.S. Dist. LEXIS 84804, *36-37 ("A weekly meeting is in accordance with the [non-theistic religious] traditions and no less justified than mainstream religions currently accommodated at the prison.").

NCDPS's final argument (strangely placed under its "entanglement" section) is that: "Even for recognized faith practices, NCDPS has established policies which set a quorum for meetings for recognized religious groups as well as mandating the time and space constraints on inmate faith group." (D.Br.20). This is irrelevant. For one, there is no quorum requirement for Faith Group approval and approval is necessary for meetings and for tracking demand in OPUS.[47] In March 2012, NCDPS approved Aquarian CCU despite only one inmate expressing interest. (A.1260, 903). By contrast, there were at least nine AHA members in NCDPS's custody at the time of Teague's requests.[48] Four testified that they are aware of *many* other Humanist inmates at their respective facilities.[49] Additionally, in 2013, about 10 Humanist inmates at Foothills CI attempted to form a Secular Humanist Group but NCDPS refused to approve the group. (A.999, 1008-12, 1022). The only policy that touches on any quorum requirement is its "faith helper" policy, which was not adopted until 2015, *after* NCDPS refused to recognize Humanism. (A.1153, 1156-57, 1285, 1454, 1510). The policy simply states: "If a facility chaplain or community volunteer is not available for a specific minority faith group and at least six (6) inmates intend to regularly attend services then an inmate faith helper may be considered to assist with facilitation of a religious service or program. The faith group must be listed in the Religious Practices Manual." (A.69). This does not impose a quorum for group meetings generally. (*Id.*). Indeed, NCDPS regularly continues to authorize group meetings consisting of only two or three inmates. (PSUF Tables 2-4) (A.280-700).

V. NCDPS's disparate treatment of Humanists violates the Equal Protection Clause.

NCDPS's failure to accord equal treatment to Humanists violates the Equal Protection Clause for the reasons set forth in Plaintiffs' memorandum. (P.Br.26-29). Nothing in NCDPS's memorandum compels a different conclusion. Teague stated a *prima facie* Equal Protection claim for religious discrimination by showing that Humanists are treated differently from recognized Faith Groups. (*Id.*). *See Cooper v. Pate*, 378 U.S. 546 (1964) (inmate stated claim when "alleging that solely because of his religious beliefs he was denied . . . privileges enjoyed by other prisoners"); *Native Am. Council of Tribes*

[47] (A.1260, 1560). *See also* (A.4, 1156-57, 1267-68, 1275, 1279, 1286, 1514, 1542).
[48] (A.1023, 1029, 1038, 1039, 1042, 1047).
[49] (A.1028-29, 1038, 1043, 1047).

v. Solem, 691 F.2d 382, 384 (8th Cir. 1982) ("The denial of the privilege of including family and friends in religious services to adherents of one faith while granting it to others is discrimination on the basis of religion."); *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) ("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."); *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"). In *AHA*, the court found that "[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. Likewise, in *Burke v. N.D. Dep't of Corr. & Rehab.*, an inmate alleged that he was "denied a study day akin to a Bible study day afforded to Christian inmates." 2007 U.S. Dist. LEXIS 35733, at *11-12 (D.N.D. May 16, 2007). The court agreed: "Burke's allegation constitutes a cognizable equal protection claim." *Id.* (citing *Solem*). Similarly, in *Fisher v. Va. Dep't of Corr.*, an Asatru inmate made a "showing of an equal protection violation" where he alleged that a prison discriminated against his group by forbidding them from "possessing the 'Thor's Hammer' pendant, central to the practice of Asatru, yet allowed various Christian, Jewish, Islamic, Hindi, and Indian religious medallions." 2007 U.S. Dist. LEXIS 13063, at *28-29 (W.D. Va. Feb. 23, 2007).

A. Humanists are similarly situated to recognized Faith Groups.

NCDPS does not deny that Humanists are treated differently from recognized Faith Groups. NCDPS instead argues that Humanists are not similarly situated for three reasons. (D.Br.22). NCDPS must prove there is a "relevant difference" between the religious groups. *Reed v. Faulkner*, 842 F.2d 960, 964 (7th Cir. 1988) ("We reject the defendants' argument that it was Reed's burden to show that there is no relevant difference between Rastafarians and Indians.").

First, NCDPS submits, "Defendants dispute that Teague is an inmate who is similarly situated because Humanism is not a religion, nor does it hold itself out to be." (D.Br.22). This semantic argument has no merit, *supra.* To reiterate, Humanism is no less of a religion than Buddhism, Wicca, and Rastafarianism. *See Torcaso*, 367 U.S. at 495 n.11; *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*). In *AHA*, as in *Kaufman I* and *II*, the court found that Humanists are similarly situated to other faith groups. 63 F. Supp. 3d at 1284. Importantly, Humanism *need not be a religion* for Humanists to be similarly situated to inmates of other faiths. *See CFI*, 758 F.3d at 872-74. It is well settled that discrimination against *Atheists* constitutes religious discrimination, even though Atheism is decidedly *non-religious.*[50]

NCDPS's second reason is that "Teague regularly availed himself of Muslim services throughout his incarceration." (D.Br.22). This is a nonstarter. The inquiry is not whether Teague is personally similarly situated to a Wiccan or Buddhist inmate, but whether Humanists collectively are. And Teague is hardly the only Humanist in NCDPS's facilities. In any event, Teague attends other meetings only because NCDPS refuses to allow him to attend the meetings of his choice. Teague has affirmatively stated that such attendance is not an indication that his commitment to Humanism is in any way diminished. (Teague Decl. ¶¶5-10). *See Marria*, 2003 U.S. Dist. LEXIS 13329, at *37-38 (refusing to "find plaintiff insincere [in his beliefs as a member of Nation of Gods and Earths] because he signed up for and attended" other groups' services, especially because the department treated Nation as an "unauthorized group"); *Campos*, 854 F. Supp. 194 (finding "not persuasive" DOCS' attempt to cast doubt on the sincerity of Santeria adherents' religious beliefs because they had previously self-identified as "Catholic"). In fact, NCDPS allows and encourages inmates to attend certain Faith Group meetings for which they are *not adherents.* (A.68-69). Brown testified that Christian Bible Study is curriculum-based and open to "anyone that wants to participate in it." (A.1471). Christian worship service is also open to all inmates, regardless of whether they are Christian. (A.1510). If non-Christians can attend Christian gatherings to study and

[50] *See 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) ("atheism is a protected class for purposes of Title VII"); *Reed v. Great Lakes Cos.*, 330 F.3d 931, 933-34 (7th Cir. 2003) (same); *Young v. Southwestern Savings and Loan Ass'n.*, 509 F.2d 140, 142 (5th Cir. 1975) (same); *EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 613-14 n. 5 (9th Cir. 1988) (same); *Tooley v. Martin-Marietta Corp.*, 476 F. Supp. 1027, 1030 (D. Or. 1979) (same); *Williams v. Allied Waste Serv.*, 2010 U.S. Dist. LEXIS 84218, at *22-23 (E.D. Tex. June 30, 2010) (same); *Am. Atheists, Inc. v. Shulman*, 21 F. Supp. 3d 856, 866 (E.D. Ky. 2014) ("the IRS argues that atheist and non-theist organizations may be eligible for treatment as religious organizations or churches under the I.R.C."); *Hatzfeld v. Goord*, 2007 U.S. Dist. LEXIS 98782, at *14 (N.D.N.Y. Feb. 5, 2007) ("atheist" 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 under "First, Fifth and Fourteenth Amendments"); *Streeter v. Brogan*, 113 N.J. Super. 486, 488 (Super. Ct. 1971) ("an atheist is entitled to equal protection of the laws").

learn about Christianity, then non-Muslims must be allowed to attend Muslim gatherings on the same terms. Of course, all that matters is that Teague's Humanist convictions are sincere, which NCDPS does not challenge. (A.935, 962).[51] Beliefs "need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Ind. Review Bd*., 450 U.S. 707, 714 (1981). Therefore, "an inmate may decide not to be religious about one practice and still be religious about other practices of an established religion." *Blount v. Johnson*, 2007 U.S. Dist. LEXIS 39146, at *18-20 (W.D. Va. May 30, 2007) (citing *Lovelace*, 472 F.3d at 188).[52]

NCDPS's third reason for contending that Humanists are not similarly situated to Faith Groups is that "Teague's request . . . was not the only DC- 572 denied by the RPC in recent years." (D.Br.22). But the fact that NCDPS denied other requests is in no way relevant to whether Humanism is similarly situated to the Faith Groups it *has approved*. If anything, all this proves is that NCDPS is discriminating against other minority faith groups. NCDPS has not shown how Humanism is more similar to the faith groups it has rejected. NCDPS rejected Church of the Enlightened Souls because it believed the materials came from the "Dungeons and Dragons game." (A.909-10, 1343). In denying this group at the January 2013 meeting, NCDPS explained: "The practice seems to be made up by the inmate so that he may smoke throughout the day and have special community meals throughout the year." (A.910). At the next meeting, NCDPS's minutes state that Brown learned that "several Enlighten Souls organizations that were actually KKK and terriost [sic] group affiliation." (A.928). Yet at that very same meeting, NCDPS reached the opposite conclusion regarding Humanism: "Nothing in any the subcommittee's research found that Humanism teaches people violence or hatred of other people." (A.925).

B. Strict scrutiny rather than *Turner* applies, and NCDPS fails that test.

Having shown that NCDPS is intentionally treating Humanists differently from similarly situated Faith Groups, the burden shifts to NCDPS to "demonstrate that the disparate treatment lacks justification under the requisite level of scrutiny." *Veney v. Wyche*, 293 F.3d 726, 731 (4th Cir. 2002). The requisite level of scrutiny is strict scrutiny because religion is a suspect class. (P.Br.4-6). NCDPS incorrectly assumed that the *Turner* standard applies without providing any explanation therefor. (D.Br.21). The Supreme Court in *Johnson v. California* made very clear that strict scrutiny, rather than *Turner*, must be

[51] *See Salih v. Smith*, 1994 U.S. Dist. LEXIS 19562, at *32-34 (D. Md. Nov. 8, 1994).
[52] *See also Dettmer v. Landon*, 799 F.2d 929, 932 (4th Cir. 1986).

applied to suspect classifications. 543 U.S. 499, 510-11 (2005). And religion, like race, is a suspect classification. (P.Br.28-29).[53] As set forth above and in Plaintiffs' memorandum, NCDPS cannot justify its refusal to accord Humanists equal treatment under this exacting test. (P.Br.26-29).

C. Even if *Turner* applied, NCDPS failed to show a legitimate penological interest.

Significantly though, NCDPS's actions readily fail the *Turner* test, because its disparate treatment of Humanists is not "reasonably related to legitimate penological interests." *Turner v. Safley*, 482 U.S. 78, 89 (1987). (P.Br.29). NCDPS launches a myriad of unimpressive arguments as to why it believes *Turner* is satisfied. Plaintiffs address each one in turn, below.

First, NCDPS states: "Defendant Brown and non-party Carlton Joyner have explained the process and significance of considerations like budget, resources, logistics, and security which are considered during evaluation for additional groups and for meetings." (D.Br.22). NCDPS's later restates, without any supporting evidence: "the denial was based on an evaluation of the authoritative sources provided by Teague, available space, resources and security concerns." (D.Br.23). Such "conclusory assertions are wholly insufficient." *Walker v. Sumner*, 917 F.2d 382, 387 (9th Cir. 1990). Prison "authorities cannot rely on general or conclusory assertions to support their policies. Rather, they must first identify the specific penological interests involved and then demonstrate both that those specific interests are the actual bases for their policies and that the policies are reasonably related to the furtherance of the identified interests. An evidentiary showing is required as to each point." *Id.* at 386.[54] NCDPS has introduced absolutely no evidence to suggest that refusing allow Humanists to meet in groups while allowing so many other groups of similar and smaller size to meet furthers any legitimate penological objective. On the contrary, NCDPS expressly found: "there is no reason to conclude that Humanism would impose a threat to the security, control, operation and safety of a correctional institution." (A.925).[55] Additionally, other prison systems offer Humanist group meetings without any security or safety issues. (A.825-29, 833-39, 1075-76, 1081)

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[53] *See Weaver*, 534 F.3d at 1266-67; *Davis v. Abercrombie*, 2014 U.S. Dist. LEXIS 43966, at *79 (D. Haw. Mar. 31, 2014) ("The strict scrutiny standard" applies to inmate's "equal protection claim regarding daily, outdoor, group worship.").

[54] *See Turner*, 382 U.S. at 98; *Heyer v. U.S. Bureau of Prisons*, 849 F.3d 202, 215 (4th Cir. 2017).

[55] It is not at all clear what is even meant by "an evaluation of the authoritative sources provided by Teague." (D.Br.23). The extent of NCDPS's evaluation of the DC-572 does not equate to a legitimate penological interest. *See generally Wall v. Wade*, 741 F.3d 492, 499 (4th Cir. 2014) ("First, demanding specific physical items as proof of faith will rarely be an acceptable means of achieving the prison's stated interest in reducing costs. Strict application of such a rule fails even a rational connection requirement.").

(Grover Decl. ¶¶3-9 and Exs. A & B).

Significantly, *none* of these "space, resources and security concerns" were cited by NCDPS in refusing to recognize Humanism. (P.Br.23). The "penological interest that the prison officials invoke in court to justify the restriction must have actually motivated them at the time they enacted or enforced the restriction; the invoked interests fail under *Turner* if they are a pretext for an illegitimate, content-specific motivation." *Hammer v. Ashcroft*, 512 F.3d 961, 968 (7th Cir. 2008).[56]

The case NCDPS relies upon, *Veney*, is plainly distinguishable. *Veney* did not involve religious discrimination but rather, a challenge to "the segregation of homosexual, male inmates." 293 F.3d at 733-34. The court found that "a valid, rational *connection* between safety and security and housing homosexual males in single-occupancy cells." *Id.* (emphasis added). The court explained, "housing homosexuals with other homosexuals could lead to sexual activity between cellmates, which . . . would jeopardize prison security. Sexual activity between cellmates also raises concerns about the transmission of diseases, such as HIV. Similarly, housing homosexuals with heterosexuals might cause friction between cellmates that potentially could lead to violence." *Id.* By contrast, NCDPS has not shown any *connection* to the interests it asserts and its disparate treatment of Humanists.

NCDPS's second *Turner* argument is even less comprehensible: "The record reflects that Teague is the only inmate to request recognition of Humanism by way of a DC-572." (D.Br.23). This is irrelevant for five reasons. *First*, NCDPS has no policy requiring a minimum number of DC-572 requests to be filed in order for it to recognize a faith group.[57] In fact, once the Committee makes a determination not to approve a DC-572 request, it will not even process subsequent requests seeking the same recognition. (A.1414-15). *Second*, this fails to justify NCDPS's treatment of Humanists relative to other Faith Groups. Once again, in March 2012, NCDPS approved Aquarian CCU even though only one inmate had submitted a DC-572 requesting recognition of this faith. (A.1260, 903). *Third*, at no point in evaluating Teague's DC-572 forms did the RPC state that its refusal was based on a lack of interest. (A.909-10, 924-30). *Fourth*, there are indeed many other Humanist inmates interested in Humanist meetings. (A.1022,

[56] *See also Salahuddin v. Goord*, 467 F.3d 263, 276-77 (2d Cir. 2006) (prison officials must show that they "actually had, not just could have had, a legitimate reason"); *Quinn v. Nix*, 983 F.2d 115, 118 (8th Cir. 1993) ("[p]rison officials are not entitled to the deference described in *Turner* . . . if their actions are not actually motivated by legitimate penological interests at the time they act.").

[57] NCDPS concedes there was no quorum policy when Teague's requests were denied. (A.1156, 1241).

1028-29, 1038). *Fifth*, NCDPS has in fact received other requests from Humanists. (A.1023, 1028, 1038, 1042, 1046). NCDPS staff is responsible for informing inmates of the DC-572 process. (A.1243-44, 1519). Several Humanists, including Teague, made NCDPS aware of the demand for Humanist services, yet were not properly informed of the DC-572 process. On January 18, 2012, Teague submitted an Inmate Request Form (WCI-A68) stating: "I am a Humanist although I'm listed as a Muslim, this is because Humanism does not have any allotted time nor is it recognized as a religion in N.C. . . . I want to know what must be done to recognize Humanism here at Warren." (A.872). NCDPS staff responded: "You may not organize a religion on this unit. Because it is not a recognized faith group nothing will be done to recognize Humanism." (A.872) (emphasis in original). NCDPS's 30(b)(6) deponent was asked whether this was the "standard response when someone asks to get a new religion?" He conceded: "No. The response should be, I will provide you with a DC572, and you fill out the form and we'll send it through the process." (A.1519). Harwood and approximately nine other inmates attempted to form a Humanist group while at Foothills CI. (A.1022). In August 2013, Superintendent Reed emailed NCDPS officials inquiring about Humanist materials sent to Harwood's group by AHA. (A.1008). In October 2013, Reed sent another email to NCDPS officials stating in part: "I spoke to this Lady yesterday who would like to send this inmate some more [Humanist] material. Last time I sent it through the Publication Review Committee who like myself don't know that much about it and I made the decision to let the inmate send it home (on his on funds)." (A.1013-16). He added: "she has ask if he can hold group meeting, *which I told her-No*." (A.1013-16) (emphasis added). In April 2013, Roland Snoke, at Scotland CI, wrote to AHA's local chapter: "I am working diligently to change my religion to 'Humanist' in the Department of Corrections computer system, but they do not recognize 'Humanism' as a religion!" (A.1017-18, 1088, 1110). AHA member Stamey testified that in 2016, he made a "handwritten request that my RPI designation be changed to Humanist." (A.1042). His case manager told him "Humanist was not acknowledged by the State and therefore not an option." (A.1042). He was not provided a DC-572.

NCDPS's third *Turner* argument is that "the RPC research suggested that the practice of Humanism was suited to individual practice, as a philosophy of living." (D.Br.23). Again, this cannot justify NCDPS's treatment of Humanists relative to other individualized and philosophically-driven Faith Groups it has approved including Buddhism, Asatru, Wicca, and Rastafarianism, *supra*.

NCDPS's final *Turner* argument is that the "record also demonstrates that there are substantially

more inmates spread throughout the fifteen religious recognized by NCDPS than there are requesting Humanists." (D.Br.23-24). Comparing Teague to the entire population of approved Faith Groups proves absolutely nothing. Obviously there are more inmates in *all* of the Faith Groups *combined* than there are "requesting Humanists" (i.e. Teague). But that is irrelevant when *one* of those Faith Groups only has *three* members statewide (Aquarian CCU) and two have only six inmates statewide. (D.Br.23). By contrast, there were at least *ten* Humanist inmates confined in a *single* NCDPS facility in 2013. (A.1022).

NCDPS goes on, "to the extent there were inequitable services or resources, the evidence reflects that such inequities were a result of the fact that there were more community resources available to mainstream religions and an increased demand for those services from the inmate population." (D.Br.23-24). Beyond never citing inadequate resources or lack of demand at any point in refusing to recognize Humanism, NCDPS failed to cite any actual evidence supporting these post-hoc claims. (D.Br.23-24). The only citation provided is *Blagman v. White*, 112 F. Supp. 2d 534, 538-39 (E.D. Va. 2000), where a Muslim argued that "Muslim inmates were treated differently from Christian inmates." But in *Blagman*, "Christian and Muslim inmates were afforded essentially equal opportunities for religious services in separate locations at the same times and that both groups of inmates were subject to the same daily boot camp regimen and schedule." *Id.* The inmate merely argued that "the space offered Muslim inmates was inferior." *Id.* And the prison eventually "addressed this situation." *Id.* Here, by sharp contrast, Humanist inmates are not afforded *any* opportunities for group meetings.

VI. Conclusion

NCDPS's disparate treatment of Humanists is unconstitutional and NCDPS has not shown otherwise. Plaintiffs request that the Court grant their Motion for Summary Judgment and deny NCDPS's Motion in its entirety.

Respectfully submitted, this 18th day of September, 2017.

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CERTIFICATE OF SERVICE

I certify that I electronically filed the attached **Plaintiffs' Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment** with the Clerk of the Court using the CM/ECF system, which will provide notice to the following CM/ECF participant(s):

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