RECORD NO. 17-17522

In The

United States Court Of Appeals

For The Ninth Circuit

BENJAMIN W. ESPINOSA; AMERICAN HUMANIST ASSOCIATION,

Plaintiffs – Appellants,

v.

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

Defendants – Appellees.

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

REPLY BRIEF OF APPELLANTS

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I. Introduction

This is an easy case. Appellants seek the Nevada Department of Correction's ("NDOC") recognition of Secular Humanism so Humanists can study and discuss their shared convictions in a group setting. NDOC concedes that it recognizes at least 27 Faith Groups and offers meetings for groups with as few as two members, but refuses to recognize Secular Humanism and allow Humanist meetings, even though there are at least ten Humanists in Appellant Benjamin Espinosa's facility.

This Court need not undertake an analysis of whether Secular Humanism constitutes a "religion" because the Establishment Clause requires the government to accord Humanists equal treatment for group meeting purposes regardless of "whether Humanism is a religion or a nonreligion." *American Humanist Association v. United States*, 63 F. Supp. 3d 1274, 1282, 1286 (D. Or. 2014) ("*AHA*"); *see American Humanist Association & Kwame Jamal Teague v. Perry*, 2018 U.S. Dist. LEXIS 112378, at *11, *23 (E.D.N.C. Mar. 28, 2018) (holding that "Defendants' refusal to recognize Humanism as a faith group and to accommodate Humanist meetings violates the Establishment and Equal Protection Clauses," without needing to decide whether "Humanism is a religion") ("*Perry*").

It is apodictic that when "making accommodations in prisons, states must treat atheism as favorably as theistic religion. What is true of atheism is equally true of humanism." *Center for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758

F.3d 869, 873-74 (7th Cir. 2014) ("*CFI*"). *See Kaufman v. Pugh*, 733 F.3d 692 (7th Cir. 2013) ("*Kaufman II*") (Atheist/Humanist umbrella group); *Kaufman v. McCaughtry*, 419 F.3d 678 (7th Cir. 2005) ("*Kaufman I*") (Atheist group); *Perry*, 2018 U.S. Dist. LEXIS 112378, at *23 (Humanist group); *AHA*, 63 F. Supp. 3d at 1284 (Humanist group).

And even if the Constitution required that Humanism be deemed a "religion" in order for Humanists to meet on the same terms as Rastafarians, Yogis, Wiccans, and Scientologists, precedent makes this an easy task. The Supreme Court in *Torcaso v. Watkins* expressly recognized that "Secular Humanism" is a "religion" for First Amendment purposes. 367 U.S. 488, 495 n.11 (1961). This Court in *Newdow v. U.S. Congress* also declared that "recognized religions exist that do not teach a belief in God, e.g., secular humanism." 313 F.3d 500, 504 n.2 (9th Cir. 2002). Appellants cited numerous cases from nearly every circuit holding or stating that "Secular Humanism" constitutes a religion. (Br.25-35).

Due to the lack of any contrary precedent, NDOC resorts to a straw man argument, asserting that *Newdow* did not overrule the *Africa/Alvarado* analysis used to determine "novel" religion claims, and then devotes the majority of its Establishment Clause analysis citing cases that applied *Africa/Alvarado.* (NDOC Br.31-37). But the *Africa/Alvarado* test is simply not implicated here both because: (1) the Establishment Clause requires equal treatment of

Humanists even if Humanism is a "nonreligion;" and (2) there is nothing "novel" about "Secular Humanism," and in fact binding precedent already recognizes it as a "religion."

NDOC's discrimination against Secular Humanists reflects "deep-seated prejudice." *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982). *See American Humanist Association v. Maryland-National Capital Park & Planning Commission*, 874 F.3d 195, 208 n.11 (4th Cir. 2017) (recognizing that Humanists and "atheists were forbidden from holding public office until the Supreme Court's intervention in the 1960's" and that the Maryland constitution "*still* contains the offending provision") (emphasis added) (citing *Torcaso*).

It should go without saying that Humanists' disbelief in the supernatural bears no relation to their "ability to perform or contribute to society." *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality). A quick perusal of the American Humanist Association's ("AHA") "Humanists of the Year" provides a hint of the immense contributions made by Humanists, which include Jonas Salk, Gloria Steinem, Carl Sagan, Betty Friedan, Margaret Sanger, Kurt Vonnegut (who also served as AHA's honorary president) and many others.[1] Yet Humanists continue to face widespread discrimination in America. (Br.39-41).[2]

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[1] *https://americanhumanist.org/what-is-humanism/humanist-of-the-year-awards/* (last visited July 26, 2018).

[2] Of note, this is the AHA's fourth lawsuit necessitated by a prison's discrimination against Humanists.

Adding insult to the injury, NDOC cannot even be bothered to get the name right. NDOC repeatedly refers to "*Human Secularism*."[3] NDOC is either callous or clueless, or is trying to deceive this Court into believing this case involves a "novel" religion to implicate *Africa*/*Alvarado*.

II. The screening issue is not before this Court.

NDOC accuses Appellants of widening the issues on appeal (at 29), but has it exactly backwards. Knowing that the merits are devastatingly against it, and that reversal is inevitable, NDOC raises an issue that *it knows* is not properly before the Court in the hopes the Court will reverse on a technicality. NDOC acknowledges:

> Appellants have not argued to this Court that the District Court erred when it concluded that it was required to screen the amended complaints even though the original Complaint had been screened and the amended complaints were filed by an attorney. Thus, it appears as if Appellants have conceded this preliminary issue.

(NDOC Br.23). Nonetheless, NDOC implores the Court to make "an explicit holding" on this issue "to provide direction to the district courts of this Circuit generally." (NDOC Br.24, 29). NDOC even admits it *unsuccessfully* attempted this exact same diversion tactic in a 2017 case, conceding, "[w]hile the State of Nevada *addressed the issue at length*, . . . this Court *did not need* to reach the issue." (NDOC Br.24) (emphasis added).

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[3] (NDOC Br.7) ("*Human* Manifesto"); (NDOC Br.34) ("*human secularistic* beliefs"); (NDOC Br.36) ("*Human Secularism*"); (NDOC Br.41) ("*Human Secularism*"); (NDOC Br.44) ("*Human Secularism*" twice) (emphasis added).

III. The District Court erred in dismissing the Establishment Clause Claim.

A. Appellants' pleadings were more than sufficient to survive dismissal.

NDOC's argument that Appellants "had not alleged sufficient facts" to "survive screening" is untenable. (NDOC Br.16). This Court "must accept as true all allegations of material fact and must construe those facts in the light most favorable to the plaintiff." *Resnick v. Warden Hayes*, 213 F.3d 443, 447 (9th Cir. 2000). In *Hartmann v. California Department of Corrections & Rehabilitation*, this Court reversed the "dismissal of Plaintiffs' Establishment Clause claim because sufficient facts were pleaded." 707 F.3d 1114, 1125-26 (9th Cir. 2013). This Court described those sufficiently pled facts as follows:

> Plaintiffs allege that the Policy violates the Establishment Clause because it "favor[s] some religions over others on a preferential basis." They further assert that defendants do not apply any "neutral, equitable, and unbiased criteria" to determine chaplain hiring needs or other religious accommodations for inmates of various faiths. They submit that there are more inmates practicing the Wiccan religion at CCWF than there are practicing Jewish, Muslim, and Catholic inmates at CCWF. Yet, they claim that chaplaincy positions are available for the benefit of Jewish, Muslim, and Catholic inmates but not for Wiccan inmates.

Id. Appellants' pleadings are materially indistinguishable, and indeed, far more extensive. (R.64-81). The AHA also presented nearly identical pleadings in the District Courts of Oregon and North Carolina and both cases were decided in AHA's favor. *Perry*, 2018 U.S. Dist. LEXIS 112378 (*https://perma.cc/26HW-WM98*); *AHA*, 63 F. Supp. 3d 1274 (*https://perma.cc/VBJ8-QGTL*); (R.88-91).

B. The District Court dismissed the complaint solely because Humanists do not believe in the supernatural, defying decades of binding precedent.

The District Court dismissed Appellants' Establishment Clause claim (and the entire complaint) on the sole ground that Secular Humanism does not constitute a "religion" because, according to a single dictionary definition: "'[R]eligion is the 'belief in and reverence for a supernatural power accepted as the creator and governor of the universe.'" (R.5). As discussed in Appellants' brief, this holding is wrong for three reasons: (1) a "religion" for First Amendment purposes cannot be conditioned upon a belief in a supernatural creator; (2) the Supreme Court and this Court have already deemed "Secular Humanism" a "religion;" and (3) Secular Humanism need not constitute a "religion" for Humanists to be entitled to equal treatment for group meetings. (Br.23-44).

Again, the Supreme Court has long "forbidden distinctions between religious and secular beliefs that hold the same place in adherents' lives." *CFI*, 758 F.3d at 873. *E.g.*, *Welsh v. United States*, 398 U.S. 333 (1970) (moral or ethical beliefs about what is right and wrong qualify as "religious" beliefs); *United States v. Seeger*, 380 U.S. 163, 166, 176 (1965) ("belief in and devotion to goodness and virtue for their own sakes and a religious faith in a purely ethical creed."). In *Torcaso*, the Court ruled that the government must not "aid those religions based on a belief in the existence of God as against those religions founded on different

beliefs." 367 U.S. at 495, & n.11. This Court in *Kong v. Scully* recognized that "religion has been understood broadly" to include "'a sincere and meaningful belief which occupies in the life of its possessor a place parallel to that followed by the God of those admittedly qualifying for the exemption.'" 341 F.3d 1132, 1138 (9th Cir. 2003) (quoting *Seeger*).

The District Court brazenly defied such binding precedent when it held that Espinosa was required to plead that his "belief system" is "at least partially *spiritual* or *other-worldly*." (R.200). It did so again when it dismissed the Amended Complaint on the grounds that Secular Humanism "'rejects the existence of a supreme being'" "'rejects all supernaturalism'" and is "'non-theistic.'" (R.4).

Even NDOC admits that the District Court was wrong: "NDOC does not disagree with Appellants' underlying claim that Espinosa need not believe in a 'god,' . . . to be classified as a religion." (NDOC Br.38). NDOC merely creates another straw man argument contending that the "decision was not based on the fact that Espinosa does not espouse a belief in a *traditional* God." (NDOC Br.30) (emphasis added). Appellants never asserted that the District Court required a belief in "traditional God." Appellants argued instead that the "District Court's requirement of a 'supernatural power accepted as the creator and governor of the universe' (R.5) directly contravenes *Torcaso*, *Welsh*, and *Seeger*." (Br.27).

C. The Establishment Clause prohibits discrimination against Humanists regardless of whether Humanism is a "religion," making *Africa/Alvarado* irrelevant.

NDOC devotes nearly its entire Establishment Clause section to its straw man argument that the *Africa/Alvarado* test has not been overruled (NDOC Br.35), failing to grasp that the Establishment Clause requires equal treatment of Humanists regardless of "whether Humanism is a religion or a nonreligion." *AHA*, 63 F. Supp. 3d at 1283, 1286. (Br.24-25, 36, 54). *See McCreary County v. ACLU*, 545 U.S. 844, 860 (2005); *Allegheny v. ACLU*, 492 U.S. 573, 589-90, 593 (1989); *Torcaso*, 367 U.S. at 495; *CFI*, 758 F.3d at 873-74; *Perry*, 2018 U.S. Dist. LEXIS 112378, at *11.

It is well settled that an "accommodation cannot treat religions favorably when secular groups are identical with respect to the attribute selected for that accommodation." *CFI*, 758 F.3d at 872. Although a state "may accommodate religious views that impose extra burdens on adherents," this "does not imply an ability to favor religions over non-theistic groups." *Id.* at 873. The cases make clear that weekly meetings are no less justified for Humanists and Atheists than they are for the Faith Groups currently accommodated within NDOC. *See Kaufman II*, 733 F.3d at 695-96; *Kaufman I*, 419 F.3d at 682; *Perry*, 2018 U.S. Dist. LEXIS 112378, at *16-17; *AHA*, 63 F. Supp. 3d at 1279-83.

Despite their obvious relevance, NDOC completely ignored *Kaufman I*, *Kaufman II*, and *CFI*. NDOC only discussed *Kaufman v. McCaughtry*, 422 F. Supp. 2d 1016 (W.D. Wis. 2006), and did so to advance its bizarre position that: "because the District Court concluded that Appellants failed to allege sufficient facts to set forth the possibility that Espinosa's beliefs could be considered a 'religion,' it goes without saying that the Establishment Clause is not implicated." (NDOC Br.46). This argument is meritless to the point of being frivolous.

In *Kaufman I*, the Seventh Circuit held that a prison violated the Establishment Clause by rejecting an *Atheist* study group on the ground that *Atheism* is not religious. 419 F.3d at 681. The court reasoned that the Supreme Court has treated Atheism as an "equivalent" to religion and "specifically included 'Secular Humanism' as an example of a religion." *Id.* at 682-83. The Seventh Circuit remanded for a determination of qualified immunity.

On remand, the court noted that prison officials *would not* be entitled to immunity if they refused to approve a *Humanist* group, reasoning that it was well settled that "secular humanism" is protected under the First Amendment. 422 F. Supp. 2d at 1022 (citing *Torcaso* and *Welsh*). But unlike here, in *Kaufman I*, the "Plaintiff had alleged that he was an atheist, *not a humanist*." *Id.* at 1023 (emphasis added). The court reasoned, "[u]nder the then-governing law, atheism's status as a religion in 2002 was unclear at best." *Id.* Thus, NDOC's contention that

recognizing Humanism would create an "impossible standard" (NDOC Br. 45) is *refuted* rather than supported by *Kaufman.*

D. Secular Humanism has long been recognized as a "religion" for Establishment Clause purposes.

The *Alvarado/Africa* analysis is simply not applicable in cases involving familiar belief systems. *Alvarado v. City of San Jose*, 94 F.3d 1223, 1227 (9th Cir. 1996) (observing that Establishment Clause usually "involve well–known religions" making *Africa* unnecessary). NDOC concedes that although determining "religion" claims can be a difficult task, "'that does not mean there are no easy cases.'" (NDOC Br.35). This is an easy case because this Court, the Supreme Court, and federal courts in almost every circuit have recognized "Secular Humanism" as a religion for Establishment Clause purposes. (Br.25-35). Over fifty years ago, the Second Circuit ruled, and the Supreme Court affirmed, that "Secular Humanism" is among other "*well-established* religious sects" for First Amendment purposes. *United States v. Seeger*, 326 F.2d 846, 852-53 (2d Cir. 1964), *aff'd*, 380 U.S. 163 (1965) (citing *Torcaso*) (emphasis added).

That the Establishment Clause requires equal treatment of Humanists is so well settled within *this Circuit* that the District Court of Oregon, in 2014, denied federal officials *qualified immunity* for refusing to recognize Humanism and authorize Humanist meetings. *AHA*, 63 F. Supp. 3d at 1286-87. NDOC all but ignores this case, citing it only in passing in its Equal Protection Clause section.

(NDOC Br.49). NDOC made no attempt to distinguish *Perry* either, in which the North Carolina District Court recently ruled that a prison violated the Establishment Clause by refusing to recognize Secular Humanism and accord Humanists the benefits of recognition, including group study, resources, and holiday celebrations. 2018 U.S. Dist. LEXIS 112378, at *11. Instructively, neither *AHA* nor *Perry* applied *Africa*. Nor did Seventh Circuit in *Kaufman I*, 419 F.3d at 682, and *Kaufman II*, 733 F.3d at 697.

Unable to distinguish these directly applicable cases, NDOC relies on its irrelevant argument that "*Alvarado* and *Africa* have never been overruled." (NDOC Br.35). But Appellants never claimed they have been overruled. Instead, Appellants argued that the cases the District Court relied upon "predated *Newdow*, where this Court expressly acknowledged 'secular humanism' as a 'religion,' 313 F.3d at 504 n.2, as well as *CFI, Kaufman I, Kaufman II*, and *AHA*." (Br.41).

NDOC failed to cite a single case holding that Humanism is not a religion. It merely cites several non-binding cases that supposedly rejected a "broad interpretation of *Torcaso*." (NDOC Br.38). These few outliers, however, do not support NDOC's argument that the District Court's decision was correct, *infra*.

First, NDOC claims that "the most concise rejection of the broad interpretation [of *Torcaso*] is that" in *Kalka v. Hawk*, 215 F.3d 90 (D.C. Cir. 2000), followed by a two-and-a-half page block quote. (NDOC Br.38-41). Yet *Kalka*

predated *Newdow*, *Kaufman I*, *Kaufman II*, *CFI*, *Perry*, and *AHA*, and is legally and factually distinguishable. The only issue was whether officials were entitled to qualified immunity for refusing to permit an AHA chapter to meet under the BOP Religious Services Department. *Id.* at 93. The court assumed, without deciding, that Humanism *is a religion*, but determined that the law in 2000 was not then settled. *Id.*[4] Additionally, Kalka was allowed 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.* As of 2014, the BOP recognizes Secular Humanism as a faith group under the Religious Services Department. (Br.9)(R.70)(R.87-91).

Second, NDOC relies on *Heap v. Carter*, 112 F. Supp. 3d 402 (2015) for the contention that: "*Just as this Court*, '[t]he Fourth Circuit has not interpreted [the *Torcaso*] footnote.'" (NDOC Br.42-43) (emphasis added). But this Court *has* interpreted *Torcaso*, most recently in *Newdow*, 313 F.3d at 504 n.2.

Furthermore, *Heap* undermines NDOC's assertion that a broad reading of *Torcaso* "has been rejected by numerous courts." (NDOC Br.38). Quite the opposite, *Heap* recognized that "*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

[4] *See Harbury v. Deutch*, 233 F.3d 596, 601-02 (D.C. Cir. 2000) ("Without reaching the merits of Kalka's constitutional claim, we affirmed based on qualified immunity alone.") (citing *Kalka*).

437-38 (emphasis added). *Heap*, like *Kalka*, was limited to qualified immunity in a case of first impression (involving a Navy employment matter). *Id.* The court simply did not believe *Torcaso* placed "the constitutional question 'beyond debate'" for *qualified immunity*. *Id.*[5]

The third and final case, *Hale v. Federal Bureau of Prisons*, did not involve Humanism or the Establishment Clause. 2018 WL 1535508, at *2 (D. Colo. Mar. 28, 2018), *pending appeal* (No.18-1141). Instead, the question was whether a "new movement" called "Creativity" could be considered a "religion" for RFRA and Free Exercise purposes. *Id.* In stark contrast to Humanism, the *Hale* court noted that "several district courts have entertained this question and have *uniformly* found that . . . Creativity is *not a religion*." *Id.* at *4 n.4 (citations omitted, emphasis added). The inmate attempted to shoehorn "Creativity" into the BOP's system by likening it to Humanism, but as *Hale* recognized, the real purpose of "Creativity" is "to further dominance of the white race," *id.*, an aim Humanists emphatically reject.[6]

[5] NDOC also cites *Heap* for the contention that "'the Fourth Circuit did not hold that Humanism was a religion' in *Dettmer v. Landon*." (NDOC Br.42). This misrepresents *Heap*'s footnote, which actually states: "While *Humanism may satisfy the factors* laid out in *Dettmer*, the Fourth Circuit did not hold that Humanism was a religion in that case *nor did it even mention Humanism in its holding*." *Id.* at 436 n.22 (emphasis added).

[6] The AHA's Black Humanist Alliance is "devoted to confronting social, economic, and political deprivations that disproportionately impact Black Americans." *https://thehumanist.com/contributor/black-humanist-alliance.*

After exhausting its few case law options, NDOC selectively harvests dictionary definitions that refer to Humanism as having a "philosophy" component. (NDOC Br.43). This, of course, is irrelevant, both because the dictionary does not trump precedent, *and* because NDOC recognizes "Buddhism," "Hindu," and "Rastafarian" (Br.11-12), which are no less philosophical, and no more religious, than Humanism. *Torcaso*, 367 U.S. at 495 n. 11 ("Secular Humanism" is no less a "religion" than "Buddhism"). *See 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"); *Tafralian v. Commissioner*, T.C. Memo 1991-33 (T.C. 1991) ("the philosophy of . . . Buddhism"); *Reed v. Faulkner*, 653 F. Supp. 965, 971 (N.D. Ind. 1987) (describing Rastafarianism as a "philosophy.").

The cases are clear that an Atheist or Humanist group cannot be denied on the grounds it is philosophical in nature. *Kaufman II*, 733 F.3d at 695-96 (prison could not constitutionally refuse Atheist study group on the grounds it is "more educational and philosophical in nature."); *Kaufman I*, 419 F.3d at 681-84 (same); *Perry*, 2018 U.S. Dist. LEXIS 112378, at *4-5 (prison could not refuse Humanist group on the grounds "Humanism appeared to 'be a philosophy of life' rather than a religion"); *AHA*, 63 F. Supp. 3d at 1279, 1283 (BOP could not refuse Humanist group on the grounds that it viewed "Humanism as a philosophy.").

E. Humanism qualifies as a religion under the *Africa/Alvarado* test.

After strenuously (yet pointlessly) trying to prove that the *Africa/Alvarado* analysis has not been overruled, NDOC makes no attempt to demonstrate that Humanism fails *Africa*/*Alvarado*'s three-factor analysis, because it can't. First, Humanism "addresses fundamental and ultimate questions having to do with deep and imponderable matters." *Alvarado*, 94 F.3d at 1229. (R.23-26)(R.46-47)(R.67-69)(R.86). [7] Second, Humanism is "comprehensive in nature," in that it is not "confined to one question or one moral teaching." *Id.* (Br.6-10)(R.23-25)(R.67-69)(R.84-86). Third, Humanism "can be recognized by the presence of certain formal and external signs." *Id*. Humanism has a formal structure replete with celebrants and chaplains, entities dedicated to the practice of Humanism, holidays and observances, and a *Humanist Manifesto* setting forth the key tenets of Humanism. (Br.6-10)(R.23-24)(R.67-68)(R.70)(R.85)(R.89).

F. Remand would be futile.

NDOC argues that this Court cannot determine that NDOC is violating the Establishment Clause until the District Court first applies the *Turner* test. (NDOC Br.53). Establishment Clause claims, however, are evaluated under either the *Lemon* test or *Larson* strict scrutiny, not *Turner*. (Br.45-46). *See Americans United*

[7] *See also* Lyle Simpson, *Why Was I Born: What is my purpose for being here? A Humanistic View of life* (2005), *https://perma.cc/S3U6-6DJV*.

for Separation of Church & State v. Prison Fellowship Ministries, Inc., 509 F.3d 406, 426 (8th Cir. 2007) (*Turner* inapplicable to Establishment Clause claim). *See also Inouye v. Kemna*, 504 F.3d 705, 716 (9th Cir. 2007). The "Supreme Court has never held that *Turner* should be applied to cases raising Establishment Clause issues." *Scott v. Pierce*, 2012 U.S. Dist. LEXIS 190126, at *10-11 (S.D. Tex. May 7, 2012). *See also Williams v. Lara*, 52 S.W.3d 171, 187-88 (Tex. 2001) ("an overwhelming majority of the courts that have considered an inmate's Establishment Clause challenge have declined to apply *Turner*") (citations omitted).

Rather than *Turner*'s deference, "distinguishing among religions" in the "prison context" "requires strict scrutiny." *Rouser v. White*, 630 F. Supp. 2d 1165, 1194-96 (E.D. Cal. 2009) (citing *Larson v. Valente*, 456 U.S. 228 (1982)). *E.g.*, *AHA*, 63 F. Supp. 3d at 1282-83 (strict scrutiny); (Br.45 n.45). Under *Larson*, *NDOC* bears the burden of proving a "compelling governmental interest" for discriminating against Humanists, and show that the disparate treatment "is closely fitted to further that interest." 456 U.S. at 246-47.

The outcome is the same under *Lemon*. *Perry*, 2018 U.S. Dist. LEXIS 112378, at *12 ("Regardless of the standard applied, the court concludes that plaintiffs have demonstrated an Establishment Clause violation."). Under *Lemon*, *the government* must "show by a preponderance of the evidence that action challenged" has a primary secular purpose. *Church of Scientology Flag Serv. v.*

City of Clearwater, 2 F.3d 1514, 1530 (11th Cir. 1993); *see Metzl v. Leininger*, 57 F.3d 618, 621-22 (7th Cir. 1995) (a secular purpose "is in the nature of a defense" and government must prove "secular justification for the difference in treatment."). Thus, NDOC is seriously mistaken in stating that "it is Espinosa's burden to disprove the validity of the prison regulation or policy." (NDOC Br.54).

In *Perry*, the court held that "*defendants* have not demonstrated a secular purpose for denying Humanism recognition." 2018 U.S. Dist. LEXIS 112378, at *15 (emphasis added). Rather, it found that the "decision to recognize some faith groups, and not Humanism" is "arbitrary." *Id.* at *17. *Accord CFI*, 758 F.3d at 875 (statute "arbitrarily" discriminated against Humanists). Likewise, in *Kaufman I*, the Seventh Circuit held that *officials* "advanced no secular reason why the security concerns they cited" to deny an Atheist group did "not apply equally to gatherings of Christian, Muslim, Buddhist, or Wiccan inmates." 419 F.3d at 683-84.

No matter what test is used, *Larson*, *Lemon*, or even *Turner* (*infra* at IV-D), the burden is on NDOC to prove *at a minimum*, a legitimate penological interest for treating Humanists differently from its 28 Faith Groups.

And a prison has no legitimate interest, much less a compelling one, in disallowing Humanist meetings while allowing meetings for groups of similar or

smaller size. *See Perry*, 2018 U.S. Dist. LEXIS 112378, at *16-17 (there is no evidence "to support space, resource, or security concerns applicable to Humanist inmates, which do not apply equally to Christian, Muslim, Buddhist, or Wiccan inmates."); *Kaufman I*, 419 F.3d at 684 (same for Atheist group); *AHA*, 63 F. Supp.3d at 1282-83 (same for Humanist group); *Kaufman II*, 733 F.3d at 698 (the only legitimate interest in refusing Atheist/Humanist group is lack of demand).[8]

NDOC cannot prove insufficient demand because it recognizes Faith Groups with as few as 2-4 members. (Br.13)(R.46)(R.54)(R.72)(R.109)(R.132). Some scheduled meetings have *no attendance* at all. (R.46)(R.72). And yet there are at least 10 Humanist and/or Atheist inmates at LCC alone. (R.73).

In fact, the only excuse NDOC mustered—presented for the first time on appeal no less—is a vague suggestion that Espinosa's application was deficient because it failed to mention "holy days" and did "not provide specifics regarding the practices of the desired religion." (NDOC Br.11). The Court need not remand because it has all the evidence it needs to find that this proffered justification fails even the most deferential standards. *E.g.*, *Perry*, 2018 U.S. Dist. LEXIS 112378, at *16-17, *22 ("DPS's decision to not recognize Humanism as a faith group" failed *Lemon* and *Turner* because it was "arbitrary" and "irrational.").

[8] *See also Sherman-Bey v. Marshall*, 2011 U.S. Dist. LEXIS 73801, at *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").

First, this justification is severely belated, rendering it a sham under *Lemon*'s purpose prong. *McCreary*, 545 U.S. at 865, 871. (Br.49). Espinosa submitted his request for accommodation form on June 11, 2014. (R.47)(R.73)(R.147). NDOC's policy provides that NDOC will issue a response within 120 days. (R.147). NDOC provided no response within 120 days, not even to tell Espinosa his form was allegedly deficient. (NDOC Br.49). After 213 days, Espinosa filed an Informal Grievance. (R.74)(R.148-50). It wasn't until July 23, 2015—over a *year* after the accommodation form was submitted—that NDOC told Espinosa, in response to his *Grievance*, that the "RRT committee needs more information from you." (R.75)(R.161-62). NDOC did not even specify what information was needed. (R.75). When Espinosa spoke with Stogner that summer, Stogner said Espinosa would have to wait another *four months* to receive a response. (R.75). No explanation was given for the *additional* four-month delay. (R.75). And to date, no other response has been received.

In *Perry*, the court ruled that DPS's treatment of a Humanist application was unconstitutional because, as here, the inmate "was subjected to additional requirements in his attempt to obtain DPS's recognition of Humanism as a faith group, without explanation." 2018 U.S. Dist. LEXIS 112378, at *16. Even NDOC acknowledges that it treated Espinosa's application with "indifference or negligence." (NDOC Br.49).

Second, the very process NDOC uses to "determine whether to recognize a particular faith group advances more traditional religions, but inhibits non-traditional religious groups such as Humanism," and is therefore unconstitutional. *Id.* at *15-16. *See also Brown v. Livingston*, 17 F. Supp. 3d 616, 631 (S.D. Tex. 2014) ("[Prison officials have] intentionally made it easier for Jewish inmates over Muslim inmates to have volunteer-led religious activities. That circumstance alone, in and of itself, constitutes a violation of the Establishment Clause.").

Expecting an inmate who has no access to the Internet and no meaningful ability to research Humanism in the prison library (largely because NDOC refuses to offer Humanism materials) to provide detailed information is preposterous. (NDOC Br.49) (contending that "Espinosa is also responsible for [the delay] given the dearth of information provided to the RRT"). "How many Christians would struggle to recite the Ten Commandments in order? Or to follow them every day? How many Jews might not know the symbolism behind each component of the Seder?" *Singh v. Holder*, 720 F.3d 635, 644 (7th Cir. 2013). 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.'" *Blount v. Johnson*, 2007 U.S. Dist. LEXIS 39146, at *18 (W.D. Va. May 30, 2007) (citation omitted).

Third, the application was not missing information. Humanism does not have "holy days" (though it does have Humanist holidays) or "religious items." Espinosa provided more than enough information for NDOC "to fully and completely address" (NDOC Br.49) his modest request for: (1) the approval of Secular Humanism as a Faith Group; (2) Humanist meetings; and (3) group storage space. (R.47)(R.73)(R.147). As "source[s] of authority," Espinosa identified AHA, with a URL to AHA's website, the *Humanist Manifesto*, and *Torcaso*. (R.73)(R.147). If NDOC needed more information, it could have readily visited the AHA's website. In *Perry*, the state similarly asserted that it denied recognition of Humanism because "it could not find a contact person to discover more information about Humanism." 2018 U.S. Dist. LEXIS 112378, at *14. The court found this excuse wholly inadequate, especially because the prison had access to AHA's website. *Id.*

Fourth, insofar as NDOC deems "holy days" and "religious items" "mandatory requirements" for Faith Group approval (NDOC Br.11, 49), or else will deem the application is deficient, resulting a four-year and counting delay, its policy unconstitutionally "inhibits non-traditional religious groups such as Humanism," failing *Lemon*'s effect prong and *Larson*. *Id.* at *16. *See Larson*, 456 U.S. at 247, n.23 (statute unconstitutionally distinguished between "well-established churches" and "churches which are new and lacking in a constituency"); *CFI*, 758 F.3d at 874

(statute unconstitutionally "discriminates among religions, preferring those with a particular structure (having clergy)" while disfavoring Humanism); *Koger v. Bryan*, 523 F.3d 789, 799-801 (7th Cir. 2008) (clergy verification requirement held unconstitutional because it "renders impracticable religious exercise by" religions "without traditional clergy or universal requirements.").

Establishment Clause claims, "unlike those relating to the Free Exercise Clause, do not include proof that particular religious freedoms are infringed." *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224 n.9 (1963). In *Kaufman I*, the Seventh Circuit held that Atheists have an equal right to meetings regardless of whether an Atheist "would be unable to practice atheism effectively without the benefit of a weekly study group." 419 F.3d at 682-83. *See also Kaufman II*, 733 F.3d at 696-97 (it was irrelevant that denial of Atheist/Humanist group did not "impose a substantial burden on his practice of atheism.").

Fifth and perhaps most critically, nothing NDOC could prove on remand would justify its *continued refusal* to recognize Humanism. (NDOC Br.41 n.121) (referring to the "underlying decision of the NDOC to not, *as of this time*," recognize Humanism) (emphasis added). NDOC has more than enough information on hand to approve the request, including BOP's "Manual on Inmate Beliefs and Practices" (*https://perma.cc/UH63-SM8L*), which contains a detailed section on Humanism.

IV. The District Court's failure to address the Equal Protection Clause Claim requires reversal, but remand is not necessary.

NDOC "acknowledges that the screening order did not contain any specific analysis with regard to the Equal Protection Claim." (NDOC Br.46). This necessitates reversal. (Br.52-53). NDOC nonetheless argues that "there is sufficient evidence in the record to support the District Court's dismissal of the equal protection claim." (NDOC Br.47). Appellants agree that there is sufficient evidence on the record for this Court to determine the merits of the Equal Protection Claim. *See Greater L.A. Agency on Deafness, Inc. v. CNN, Inc.*, 742 F.3d 414, 425 (9th Cir. 2014) ("at the parties' urging and in the spirit of judicial economy, we exercise our discretion to decide this legal issue in the first instance."); *SmithKline Beecham Corp. v. Abbott Labs.*, 740 F.3d 471, 479 (9th Cir. 2014) ("we need not remand the question whether a *Batson* [equal protection] violation occurred" where record was clear juror "was struck because of his sexual orientation"). But reversal, rather than affirmance, is required.

A. Appellants were not required to "set forth all the beliefs and tenants [sic] of the other religions" to survive dismissal.

Secular Humanism is similarly situated to many Faith Groups NDOC recognizes including Buddhism, Wicca, and Rastafarianism, as a matter of well-settled law. (Br.57-59). *See Torcaso*, 367 U.S. at 495 n.11; *CFI*, 758 F.3d at 872-74; *Perry*, 2018 U.S. Dist. LEXIS 112378, at *16-17; *AHA*, 63 F. Supp. 3d at 1284.

NDOC cites no contrary authority. Instead, it argues that the "Amended Complaint does not set forth *all* the beliefs and tenants [sic] of the other religions or those of Espinosa's beliefs." (NDOC Br.48). Not surprisingly, NDOC cites no case suggesting that a plaintiff seeking equal protection needs to set forth "all the beliefs and tenets" of *all the other religions* and of their own. This would be an impossible task for even the most studious lawyer, let alone a *pro se* inmate. *See Singh*, 720 F.3d at 644.

Atheism does not even have "beliefs or tenets" but Atheists are similarly situated to "Christian, Muslim, Buddhist, and Wiccan inmates" for group study purposes. *Kaufman I*, 419 F.3d at 684; *Kaufman II*, 733 F.3d at 698. And in *Perry*, the court found that "DPS authorizes meetings for some non-theistic religions [such as Buddhism] but not Humanism. Therefore, . . . [Humanists] have been treated differently from others with whom they are similarly situated." 2018 U.S. Dist. LEXIS 112378, at *18. *See also AHA*, 63 F. Supp. 3d at 1284.

More importantly, the burden is on *NDOC* to 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."). NDOC has not made this showing.

B. NDOC is *currently* depriving Humanists of group meetings, while providing meetings for similar-sized and smaller groups.

NDOC argues that "Appellants failed to allege any facts that tend to show intentional discrimination" simply because "the NDOC has never explicitly denied Espinosa's Accommodation." (NDOC Br.49). Appellants need only show that NDOC is treating Humanists differently from similarly-situated groups. *Id.* at 964 ("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."). The prison's "actions need not be malicious, only motivated by the fact that plaintiffs hold a different set of religious beliefs." *AHA*, 63 F. Supp. 3d at 1284.

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." *Id.* Likewise, in *Perry*, the court found discriminatory intent because "DPS authorizes meetings for some non-theistic religions but not Humanism." 2018 U.S. Dist. LEXIS 112378, at *18. Here too, it is undisputed that NDOC authorizes meetings for some religions, including Buddhism, which is non-theistic, "but not Humanism." *Id.*

C. Espinosa was not required to prove that group meetings are central to his beliefs.

NDOC's next argument is that Espinosa "failed to indicate why group meetings are a necessary component of his beliefs" or a "religious mandate." (NDOC Br.50). Again, unlike a Free Exercise claim, an inmate need not show that the practice is "central to his own religious observance." *Abdulhaseeb v. Saffle*, 65 F. App'x 667, 673-74 (10th Cir. 2003). All he must show is that he was "denied equal treatment on the basis of his religion." *Id. See CFI*, 758 F.3d at 874-75; *AHA*, 63 F. Supp. 3d at 1284. Regardless, many Faith Groups are provided time for group study and/or worship even though neither is *required* by the faith. (Br.13)(R.102-103)(R.105)(R.107-11).

D. NDOC has no legitimate penological interest in treating Humanists differently from its 28 Faith Groups, making remand futile.

NDOC argues that this Court cannot find that its actions violate the Equal Protection Clause without remanding because "[t]here was no substantive discussion of *Turner*," and because Appellants "failed to address any of these four factors below or before this Court." (NDOC Br.53). This is palpably false. Appellants provided a substantive analysis of the first factor, which "is the *sine qua non* of the *Turner* inquiry." *Walker v. Gomez*, 370 F.3d 969, 975 (9th Cir. 2004). (Br.58-60). Appellants did so to demonstrate that NDOC's actions are so arbitrary as to render remand futile, even though religious discrimination claims

are subject to strict scrutiny, not *Turner*. *Johnson v. California*, 543 U.S. 499, 510-11 (2005). (Br.58-59). *See also 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.").

The difference is inconsequential here, because NDOC has no legitimate penological interest in treating Humanists differently, making remand futile. (Br.59-60). *Perry*, 2018 U.S. Dist. LEXIS 112378, at *20-21 ("defendants are unable to establish the first [] factor because there is no rational connection between DPS's cited interests and its refusal to recognize Humanism as a faith group.").

Rather than offer a legitimate interest, NDOC asserts that the "Amended Complaint fails to allege any factual allegations regarding why there is no legitimate penological interest in treating Espinosa . . . differently than the 27 religions the NDOC recognized." (NDOC Br.48). This convoluted statement is flawed for numerous reasons, but most significantly because it erroneously assumes that the burden is on Appellants.

NDOC "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." *Walker v. Sumner*, 917 F.2d 382, 386 (9th Cir. 1990)

(emphasis added). If "*the prison fails*" to make these showings, the Court does not even "consider the other factors." *Ashker v. Cal. Dep't of Corr.*, 350 F.3d 917, 922 (9th Cir. 2003) (emphasis added).

NDOC has not so much as *asserted* a single legitimate penological interest. The only inference made in its brief is that Humanism lacks "holy days" and "religious items." (NDOC Br.11, 49). Apart from being illegitimate interests, *supra*, at 21-22, NDOC recognizes Buddhism even though it has no "holy days," and no "mandatory requirements" for group worship either. (R.100).

Again, the *only* legitimate interest a state would have for denying Humanist meetings is lack of demand, *supra*, at 17-18, but NDOC allows groups as small as two to meet, and never once cited lack of demand as a reason for delaying and constructively denying Espinosa's application, nor has it cited demand to justify its *current and ongoing* discriminatory treatment of Humanists. (R.46)(R.54)(R.72-73)(R.109)(R.132).[9] In *Perry*, the court held that the Equal Protection Clause was violated because there was no evidence "that size or demand played a role in DPS's refusal to recognize Humanism." 2018 U.S. Dist. LEXIS 112378, at *20-21. The same is true here.

[9] Thus, it is irrelevant that NDOC generally considers "'[t]he number of inmates who would participate in the service'" (NDOC Br.10). *See Brown*, 17 F. Supp. 3d at 632 (it is not enough for religious programming policy to be "facially 'neutral'" when it is "not constitutionally" in "operation").

And for this reason alone, remand would be futile because the asserted "penological interest" must "have actually motivated [the prison officials] at the time they enacted or enforced the restriction." *Hammer v. Ashcroft*, 512 F.3d 961, 968 (7th Cir. 2008). *See United States v. Ruiz-Gaxiola*, 623 F.3d 684, 696 (9th Cir. 2010) (finding remand futile where "[t]here is no explanation that the court could provide on remand and no findings consistent with the record before us that would allow us to conclude that the government has met its burden"). It is irrelevant that "discovery remained open" and "[Appellants] never filed a summary judgment motion" (as the deadline was still two months away). (NDOC Br.52). That Appellants planned to take depositions to bolster their case does not mean the record is insufficient now. Nor does it matter that "NDOC has not conceded the sincerity of Espinosa's beliefs." (NDOC Br.54). While relevant to a Free Exercise claim, sincerity is not a factor under the Establishment Clause or Equal Protection Clause. *See Perry*, 2018 U.S. Dist. LEXIS 112378 (no mention of sincerity); *AHA*, 63 F. Supp. 3d 1274 (same).[10]

Because lack of demand was not a motivating factor at the time NDOC refused to grant the request within the 120-day window, and is still not an asserted justification, NDOC's actions could not survive any standard on remand. Should this Court nonetheless remand for fact-findings of demand, the Court should be

[10] This argument also ignores the fact that AHA represents other Humanist members within NDOC. (R.18). *See Perry*, 2018 U.S. Dist. LEXIS 112378, at *10.

mindful of the fact that NDOC's refusal to even recognize Secular Humanism as a Faith Group makes "it impossible to know how many inmates would have joined [an Atheist/Humanist] group." *Kaufman II*, 733 F.3d at 695-96. Therefore, in *Kaufman II*, the Seventh Circuit placed this onus on the *prison* on remand. The court stated that "[o]nly a credible survey of the inmate population, or the simple expedient of adding 'atheist, agnostic, or humanist' to the preference form . . . can resolve this uncertainty." *Id.* at 698.

CONCLUSION

The Court must reverse. And because the undisputed facts lead to the inescapable conclusion that NDOC's discriminatory treatment of Humanists violates both the Establishment and Equal Protection Clauses, this Court should decide ultimate legal issues now to avoid prolonging the inevitable, and remand solely for a determination of the scope of relief.

Respectfully submitted this 8th day of August, 2018.

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CERTIFICATE OF COMPLIANCE

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

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

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Dated: August 8, 2018

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 8, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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