**No. 17-17522**

---

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

---

Benjamin Espinosa, et al.,
*Plaintiffs-Appellants*,

v.

James Dzurenda, et al.
*Defendants-Appellees*.

On Appeal from the United States District Court for the District of Nevada
Civil Case No. 3:16-cv-00141-RCJ-WGC (Honorable Robert C. Jones)

---

# OPPOSITION TO MOTION TO DISMISS

---

**Monica L. Miller**
American Humanist Association
1821 Jefferson Place NW
Washington, DC 20036
Telephone: 202-238-9088 x120
mmiller@americanhumanist.org

**Kevin Benson**
Benson Law Nevada
123 W. Nye Lane #487
Carson City, NV 89706
Telephone: 775-884-0838
kevin@bensonlawnv.com

*Attorneys for Appellants*

## Introduction

Defendants–Appellees' (collectively "NDOC") Motion to Dismiss must be denied because NDOC has not carried its heavy burden of proving that this appeal is moot. First, NDOC's severely-belated addition of Secular Humanism to the Overview Chart does not provide the relief requested in the complaint. Second, even assuming it did, NDOC has not shown that its disparate treatment of Humanists will not recur. Third, Plaintiffs-Appellants have always asserted claims for nominal damages against Defendant Stogner in his personal capacity, and those claims are incapable of being rendered moot.

## Summary of the Facts

On June 11, 2014, Benjamin Espinosa submitted his Request for Accommodation of Religious Practices (Form DOC-3505), requesting that NDOC (1) approve Secular Humanism as a Faith Group; (2) provide time and space for weekly Humanist study group meetings; and (3) provide group storage space for the Humanist group. (R.147).

Policy AR 810 governs Faith Group programs. (R.115). The Chaplain is to submit the DOC-3505 to the Religious Review Team ("RRT"), which will then "research the inmate's request and submit a recommendation to the designated Deputy Director." (R.125). The Deputy Director will "render the final decision." (R.125-26). The "RRT will then provide written notice of the final decision to the

inmate." (R.126). The form states: "Please allow 120 days for a response." (R.147). *See also* (R.127); (Exhibit C to Motion to Dismiss ["MTD"], at 15, ¶7).

NDOC provided no response within 120 days. (NDOC Br.49). After 213 days, Espinosa filed an Informal Grievance. (R.74)(R.148-50). It wasn't until July 23, 2015 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). In the summer of 2015, Espinosa spoke with Defendant Stogner over the phone, while in Chaplain Carrasco's office. (R.75). Stogner stated that the RRT reviewed the request, but that Espinosa would have to wait another four months to receive a response. (R.75). No explanation was given for the *additional* four-month delay. (R.75).

On June 1, 2016, Espinosa submitted a "Faith Group Affiliation Declaration Form" (DOC-3503) requesting his affiliation be changed to "Humanist." (R.75)(R.163-64). On August 2, Carrasco responded: "'Humanist' is not among the recognized NDOC religions. . . . The only route, which you have already attempted is to submit for NDOC recognition." (R.76)(R.165-68).

On March 11, 2016, Espinosa filed a *pro se* complaint for injunctive relief and damages. (R.169-96). On September 7, 2016, the district court dismissed the complaint under 28 U.S.C. § 1915A(a) and granted leave to amend to allege facts that Secular Humanism is a "religion." (R.197-203).

On October 5, 2016, Plaintiffs American Humanist Association (AHA) and Espinosa, through counsel, filed an Amended Complaint. (R.64). The parties agreed to a 90-day stay for settlement negotiations. (R.217). NDOC filed its Answer on February 2, 2017. (R.50).[1]

On December 4, 2017, the district court *sua sponte* entered an order and final judgment dismissing the case with prejudice on the grounds that Humanism does not constitute a religion for Establishment Clause purposes. (R.1-6)(R.215).

Plaintiffs-Appellants timely filed a notice of appeal on December 20, 2017. (R.7), and filed their Opening Brief on February 20, 2018. NDOC sought a 60-day extension and filed its Answering Brief on June 18, 2018. Oral argument is scheduled for August 6, 2019.

Throughout these proceedings, NDOC has consistently maintained that Secular Humanism is not a religion and that Humanist inmates are not entitled to equal treatment under the Establishment and Equal Protection Clauses. (NDOC Br. 29-51). And despite having over five years since Espinosa filed his request, NDOC waited until now to add Humanism to the Overview Chart (MTD, Ex. A).

Crucially, Humanists still have no venue for meetings and no group area to store Humanist materials. To have weekly group meetings, NDOC states that

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

Espinosa and other Humanists will have to file another DOC-3505 form and go through the exact same process of waiting for approval. (MTD 3, 7; Ex. B at 3).

NDOC still has not actually approved Espinosa's Faith Group Affiliation Form (DOC-3503) or Request for Accommodation of Religious Practices (DOC-3505). (Ex. B, Benson Declaration ¶¶3-5). Such approval is highly unlikely, considering that NDOC "continues to believe it had discretion to not recognize Humanism" (MTD 1), and the Overview Chart itself literally confers nothing to Humanists (MTD Ex.A at 21).

## Argument

### I. The NDOC's long overdue addition of Secular Humanism to the Overview Chart does not moot Plaintiffs-Appellants' claims for prospective relief.

#### A. The Establishment Clause and Equal Protection Clause violations have not been redressed.

"The voluntary cessation of challenged conduct does not ordinarily render a case moot." *Knox v. Serv. Emps. Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (citation omitted). *Accord Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013). NDOC bears the "heavy burden" of demonstrating that this appeal is moot. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). NDOC must prove that (1) "interim relief or events have *completely and irrevocably* eradicated the effects of the alleged violation," *Fikre v. FBI*, 904 F.3d 1033, 1037 (9th Cir. 2018) (internal quotations and citations omitted, emphasis added), *and* (2) that it is "absolutely clear that the allegedly wrongful behavior could not reasonably

be expected to recur." *Camreta v. Greene*, 131 S. Ct. 2020, 2034 (2011) (quotations omitted).

Thus, at a minimum, NDOC must demonstrate that it has "completely eliminate[d] the harm of which plaintiffs complained." *Ciudadanos Unidos de San Juan v. Hidalgo Cnty. Grand Jury Comm'rs*, 622 F.2d 807, 824 (5th Cir. 1980). NDOC has failed to meet this burden. On the contrary, the *sine qua non* of the lawsuit remains unchanged: Humanists are still not provided weekly study group meetings or storage space for those meetings, *infra.*

**1. Humanist study group meetings**

NDOC merely asserts that Humanists "may request a study group" now that Humanism is in the chart. (MTD 7). The application process for group meetings is the same process that is used to seek the recognition of a New Faith Group (MTD Ex.C at 13-15), meaning Espinosa would have to potentially wait another five years and file another lawsuit to have weekly study group meetings. If Plaintiffs-Appellants prevail, NDOC would be required to provide space for Humanist meetings without forcing Humanists to endure another unending application process. (R.36-37). *See also Am. Humanist Ass'n & Kwame Jamal Teague v. Perry*, 303 F. Supp. 3d 421, 433 (E.D.N.C. 2018) ("The court enters a permanent injunction ordering Defendants, their agents, successors, and any person in active concert with the Defendants: (a) to recognize Humanism as a faith group and as an assignment option for OPUS and all other prison records; and (b) *permit Teague and other*

*Humanist inmates to meet in a Humanist study group*") (emphasis added); *id.* at 426 (noting that the Federal Bureau of Prisons provides Humanists two time slots per week to meet a result of its settlement with the AHA).

And it is unlikely that NDOC would grant such a request because NDOC expressly reserves its discretion to not recognize Humanism (MTD 1) and has vehemently maintained that Humanists are not entitled to equal treatment under the Establishment and Equal Protection Clauses. (NDOC Br.29-51). For instance, NDOC has made clear that it does not see Humanists as similarly situated to Scientologists, Buddhists, Wiccans, and Yogis (*id.* at 50), and agrees with the district court that belief in the supernatural is necessary for equal treatment under the Establishment and Equal Protection Clauses (*id.* at 43-44).

In fact, it appears NDOC has already decided to reject Espinosa's request. Espinosa's DOC-3505 specifically requested approval for group study meetings. (R.147). Yet under the "worship practices *personal * group" (the category for study meetings) on the new Overview Chart, NDOC states "none" for Humanists. (MTD Ex.A at 20). By contrast, all other Faith Groups (including those that are non-theistic) are listed as being allowed weekly group worship or study, and have special time for holidays. (*Id.* at 7) (Buddhism). Thus, it is evident that NDOC has already

decided to reject Espinosa's long-pending request for Humanist group meetings. (R.147). [2]

**2. Obtaining and storing group materials**

Similar to the study group issue, NDOC only asserts that Humanists "may request" to obtain group materials. (MTD 7). *See* (R.35, ll. 1-3; R 33). Espinosa's 2014 DOC-3505 specifically requests storage space for Humanist books, print materials, CDs, etc. (R.147). But the new Overview Chart indicates that no personal or group items have been approved for Humanism, while every other group listed in the chart has approved items. (MTD Ex.A).

**3. Recognition of Humanist holidays**

NDOC also does not address Plaintiffs-Appellants' claim that NDOC violates the Establishment and Equal Protection Clauses by refusing to recognize certain holidays celebrated by Humanists, while recognizing holidays for other Faith Groups. (R.23, ¶15, R.28, ¶¶ 33, 35). The Overview Chart lists "None" for Humanist holidays, despite Plaintiffs-Appellants identifying specific Humanist holidays. (R.23) (Br.8-9).

[2] At some point, NDOC apparently decided to deny Espinosa's request. *See* NDOC Br.41, n.121 ("the sentiment cited in *Kalka* is of equal relevance to the underlying decision of the NDOC to not, as of this time, not [sic] recognize Human Secularism"). Yet NDOC also implied in its brief that it was still reviewing Espinosa's request (at 10).

**4. Recognition in NOTIS**

NDOC's addition of Humanism to the Overview Chart does not even guarantee that Humanist inmates, and Espinosa specifically, can identify as Humanist in NOTIS. While Rev. Snyder's declaration suggests that listing in the chart automatically translate to listing in NOTIS (MTD 7; Rev. Snyder, ¶ 16(h)), Espinosa received a note from Chaplain Carrasco stating "Below is a list of NDOC Recognized Faith Groups with notations identifying *those without Notis recording abilities.*" (R.168) (Emphasis added). Thus, Humanism is not necessarily approved for NOTIS.

**5. Discriminatory Application Requirements and Treatment**

The addition of Secular Humanism to the Overview Chart does nothing to resolve NDOC's disparate treatment of Humanist applications. Even NDOC suggested that it treated Espinosa's application with "indifference or negligence." (NDOC Br.49). In *Perry*, the court ruled that the defendants' 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." 303 F. Supp. 3d at 431.

Moreover, the very process NDOC uses to "determine whether to recognize a particular faith group [and to provide it with weekly meetings]" unconstitutionally "inhibits non-traditional religious groups such as Humanism," and is therefore

unconstitutional. *Id.* at 430. Insofar as NDOC deems "holy days" and "religious items" "mandatory requirements" for group meetings (NDOC Br.11, 49), its policy continues to unconstitutionally "inhibit[] non-traditional religious groups such as Humanism," thus violating the Establishment Clause. *Id. See Center for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 873-74 (7th Cir. 2014) (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."); *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.").

In sum, NDOC continues to violate the Establishment and Equal Protection Clauses by treating certain religious groups more favorably than Humanists. *See Hartmann v. California Department of Corrections & Rehabilitation*, 707 F.3d 1114, 1125-26 (9th Cir. 2013).

### B. Even if NDOC's final-hour addition of Secular Humanism to the Overview Chart completely remedied the ongoing violations, it has failed to carry its heavy burden of proving that the violations will not recur.

It is "well settled" that "'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (citation omitted). A claim is only moot "'if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'" *Id.* (citation omitted). The party asserting mootness bears the "formidable," and "'heavy burden of persua[ding]' the court that the challenged conduct cannot reasonably be expected to start up again[.]" *Id.* at 190, 189 (citation omitted).

The voluntary cessation exception "traces to the principle that a party should not be able to evade judicial review, or to defeat a judgment, by temporarily altering questionable behavior." *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 284 n.1 (2001). Because of this stringent burden, even the formal repeal of a statute may be insufficient to moot a challenge to that statute.[3]

This Court has repeatedly found that a prison's voluntary cessation of challenged activity insufficient to moot injunctive relief. *See McCright v. Santoki*,

[3] *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982); *Jacobus v. Alaska*, 338 F.3d 1095, 1103 (9th Cir. 2003) (challenge to Alaska's campaign finance laws was not moot, even though the statutes had been repealed).

1992 U.S. App. LEXIS 25017, at *4-5 (9th Cir. 1992) (inmate's claim of denial of access to law library was not moot even though state restored his library privileges); *Gluth v. Kangas*, 951 F.2d 1504, 1507-08 (9th Cir. 1991) (refusing to hold voluntary cessation of prison library restrictions moot in light of long history of policy); *Schroeder v. Kaleo-Lum*, 1991 U.S. App. LEXIS 7919, *8 (9th Cir. 1991); *accord Doe v. Wooten*, 747 F.3d 1317, 1323-24 (11th Cir. 2014); *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014) ("defendants failed to meet their 'heavy burden' of establishing that it is 'absolutely clear' the 2010 Ramadan policy will not be reinstated."); *Scott v. Pierce*, 2012 U.S. Dist. LEXIS 190126, *23 (S.D. Tex. 2012) ("While the defendants have alleged that the Jehovah's Witnesses currently . . . now meet more frequently, they have not proffered any facts to show that the plaintiff's alleged discrimination amongst denominations will not recur to other Jehovah's Witness prisoners").[4]

Courts are particularly reluctant to find mootness in Equal Protection and discrimination cases because prejudice against an unpopular group warrants

[4] *See also Roane v. Leonhart*, 741 F.3d 147, 150 (D.C. Cir. 2014); *Americans United for Separation of Church & State v. Prison Fellowship Ministries, Inc.*, 509 F.3d 406, 421 (8th Cir. 2007); *Borkholder v. Lemmon*, 983 F. Supp. 2d 1013, 1017 (N.D. Ind. 2013); *Vigil v. Colo. Dep't of Corr.*, 2012 U.S. Dist. LEXIS 98740 (D. Colo. 2012); *Saleh v. BOP*, 2010 U.S. Dist. LEXIS 137761, *17-18 (D. Colo. 2010); *Inmates of the Northumberland Cnty. Prison v. Reish*, 2009 U.S. Dist. LEXIS 126479 (M.D. Pa. 2009); *Robinson v. Delgado*, 2008 U.S. Dist. LEXIS 111173, *24-25 (N.D. Cal. 2008); *Jesus Christ Prison Ministry v. Cal. Dep't of Corr.*, 456 F. Supp. 2d 1188, 1196 (E.D. Cal. 2006).

prophylactic injunctive relief. *E.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1 (1971); *United States v. Paradise*, 480 U.S. 149, 183 (1987) ("A district court has 'not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'") (citation omitted); *E.E.O.C. v. Goodyear Aerospace Corp*., 813 F.2d 1539, 1544 (9th Cir. 1987) (a defendant's curative actions following discrimination suit are insufficient to provide "assurances that it will not repeat the violation to justify denying an injunction."); *United States v. City of Buffalo*, 721 F. Supp. 463, 467 (W.D.N.Y. 1989) *aff'd*, 993 F.2d 1533 (2d Cir. 1993) (recognizing "the broad power of federal district courts to implement relief that operates both retrospectively to redress past discrimination and prospectively to ensure that it does not recur.").[5]

As discussed below, NDOC has not carried its heavy burden of showing that its disparate treatment of Humanist inmates will not recur, *infra*.

**1. The timing of NDOC's addition of Humanism to the chart, together with its unwavering position that Humanists are not entitled to equal treatment, demonstrates that its disparate treatment of Humanists is likely to recur.**

[5] *See also Teamsters v. United States*, 431 U.S. 324, 364-65 (1977); *Rios v. Enter. Ass'n Steamfitters Local 638 of U. A*., 501 F.2d 622, 629 (2d Cir. 1974) ("Once a violation of Title VII is established, the district court possesses broad power as a court of equity to remedy the vestiges of past discriminatory practices"); *United States v. Ironworkers Local 86*, 443 F.2d 544 (9th Cir. 1971).

The timing of NDOC's recognition of Humanism—five years after Espinosa's application and virtually on the eve of oral argument—strongly militates against a mootness finding. *See McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015) (the timing of the grant of immunity to prosecution was "suspicious" where it appeared to be an attempt to moot plaintiff's constitutional claims). "[M]aneuvers designed to insulate a decision from review . . . must be viewed with a critical eye." *Knox*, 132 S. Ct. at 2287. "It is the duty of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is probability of resumption." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 n.5 (1953).

In *Am. Humanist Ass'n v. United States*, 63 F. Supp. 3d 1274, 1281-82 (D. Or. 2014), after filing their motion to dismiss, the Federal Bureau of Prisons began accommodating Humanist inmates and claimed this mooted injunctive relief. Citing Ninth Circuit precedent, the district court rejected the government's argument, reasoning:

> while the defendants argue that they have accommodated Holden's requests after more than two years—his requests for Humanist study materials and a community volunteer were not addressed until after defendants filed their motion to dismiss—they have not stipulated or demonstrated that their behavior is unlikely to reoccur after this case is dismissed.

Here, the NDOC took over *five years* merely to add Humanism to a chart and it did so only a month before oral argument. And whereas the BOP actually provided

Humanists with services, NDOC maintains that Espinosa and others will still have to file a request for Humanist meetings, holidays, and materials. (MTD 7). Even more troubling, Espinosa *did* file a request for meetings and materials (R.147). It is unclear whether NDOC ever intends to approve that request, which has been pending since June 11, 2014.

Courts have "allowed claims to proceed when defendants cease an activity without admitting wrongdoing." *ForestKeeper v. Benson*, 2014 U.S. Dist. LEXIS 117582, *11 (E.D. Cal. 2014). NDOC has emphatically defended the district court's ruling that Humanists are not entitled to equal treatment. (NDOC Br.29-51). In fact, NDOC explicitly states on the very first page of its Motion that it "continues to believe it had discretion to not recognize Humanism." This also strongly militates against a mootness finding. *See McCormack*, 788 F.3d at 1025.

**2. NDOC's addition of Secular Humanism to the Overview Chart is a matter of executive whim that can change at any time.**

When evaluating a government's claim for mootness, the "form the governmental action takes is critical and, sometimes, dispositive." *Fikre*, 904 F.3d at 1038. An "executive action that is not governed by any clear or codified procedures cannot moot a claim." *Id.* (internal quotations omitted).

This case easily fits into the category of unfettered executive action that provides no assurances whatsoever that NDOC will not revert to its old ways. The NDOC is not subject to the Nevada Administrative Procedures Act. Nev.Rev.Stat. §

233B.039(1)(b). Its recent change to the Overview Chart is therefore not subject to any of the ordinary rigors of agency rule-making, which provide many of the same protections as the legislative process. Instead, the new policy is simply an executive decree that can be, and has been, changed at will. *See* (MTD 20) (asserting that the NDOC "routinely" reviews its faith group recognitions, and noting that it has changed the Overview Chart in 2014, 2017, and now in 2019).

Oddly, NDOC insists that its good faith is shown by the fact that it recognized Hebrew Israelite at the same time that it recognized Humanism. (MTD Ex. D at 2-3, ¶¶ 8-10). Yet NDOC recognized Hebrew Israelite as a Faith Group in 2016. (R.168). It was removed from the list of in 2017,[6] and re-added in 2019. (MTD Ex.A at 4). Thus, the fact that NDOC *re*-added Hebrew Israelite at the same time as Humanism actually tends to show *bad* faith. NDOC is just trying to put a fig leaf over its gamesmanship.

NDOC's delisting and relisting of Hebrew Israelite also undermines the veracity of Rev. Snyder's declaration. He states that NDOC has not, since 1996, rescinded the recognition of any Faith Group. (MTD Ex.D at ¶14). Not only did NDOC delist Hebrew Israelite, but the new chart's list omits Nation of Islam, which appeared on NDOC's previous list. (MTD Ex.A at 4). *See generally Brown v.*

[6] Exhibit A (attached); *See* http://doc.nv.gov/uploadedFiles/docnvgov/content/About/Administrative_Regulations/Faith%20Group%20Overview%20-%20810.PDF (last visited July 13, 2019).

*Herbert*, 2012 U.S. Dist. LEXIS 117508, *3-4 (D. Utah Aug. 17, 2012) (a "formal declaration, made under the penalty of perjury, that the Utah County Attorney's office had adopted a formal policy of non-prosecution," coupled with a promise to the plaintiffs that "no charges would be filed against them," was insufficient to moot challenge to the underlying statute).

**C. The cases NDOC relies upon are inapposite.**

NDOC relies on *Ackerman v. State Dep't of Corr.*, 669 F. App'x 901 (9th Cir. 2016) where the plaintiff argued that he was deprived kosher food in violation of the Free Exercise Clause and RLUIPA. The plaintiff admitted that by May 2013, the NDOC served properly certified kosher food. Accordingly, the case was moot. *Id.* But here, Plaintiffs-Appellants do not admit that the NDOC is providing the requested relief and the claims are based on numerous actions and inactions of NDOC, not a single issue (serving kosher food) that inarguably was addressed in *Ackerman.*

NDOC also relies on *Jones v. Caruso*, 421 Fed. Appx. 550, 551 (6th Cir. 2011), which likewise dealt with a single issue, exposure to tobacco smoke. After the Michigan Department of Corrections banned smoking inside all buildings, there was nothing left to enjoin. *Id.*

NDOC's reliance on *Sutton v. Rasheed*, 323 F.3d 236, 242-44 (3d Cir. 2003) is equally misplaced. *Sutton* involved a dispute over access to religious texts. After a protracted series of limited remands and hearings on mootness, the Third Circuit

determined that the plaintiffs' claims for prospective relief were moot. *Id.* at 249. All of the plaintiffs had been transferred out of the facility in question, and two plaintiffs ultimately obtained the texts they had requested. *Id.* Conversely, NDOC's minor change to the Overview Chart does not provide any of the relief requested, and in fact, masks the underlying problem of unequal and discriminatory treatment towards Humanists.

It is quite rare that a government entity will expressly state that it intends to revert to its old ways. But here, NDOC's statement that it continues to have discretion to not recognize Humanism, together with its unwavering position that Humanists are not constitutionally entitled to equal treatment, is the functional equivalent. The timing also demonstrates that NDOC is not truly committed to according Humanists equal treatment. In sum, Plaintiffs-Appellants' claims for prospective relief are not moot.

## II. Even if NDOC's addition of Secular Humanism to the Overview Chart moots Plaintiffs-Appellants' claims for prospective relief, their claims for nominal damages remain alive.

### A. Nominal damages are not susceptible to mootness.

A properly pled claim for damages cannot be mooted by a defendant's voluntary cessation of unlawful activity. *See Richmond v. J.A. Croson Co*., 488 U.S. 469, 478 n.1 (1989); *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 590 F.3d 725 (9th Cir. 2009) (monetary damages precluded mootness); *Yniquez v. Arizona*, 974 F.2d 646, 647 (9th Cir. 1992) (same). And nominal damages must be awarded

upon finding a constitutional violation. *Schneider v. County of San Diego*, 285 F.3d 784, 794 (9th Cir. 2002).

### B. Defendant Stogner was and still is named in his personal capacity.

#### 1. An error in the district court's title or the case cannot deprive Appellants of their substantive rights.

It is undisputed that Plaintiffs-Appellants' original and amended complaints named Defendant Stogner in his personal and official capacities and sought nominal damages. R.170 (*pro se* complaint); R.64, 66 (First Amended Complaint), R.20, 22 (Second Amended Complaint). Plaintiffs-Appellants also named Stogner in his personal capacity in their Notice of Appeal (R.7), and in the Representation Statement. (ECF Doc.44-1). They also expressly mentioned their claim for damages in their Opening Brief at page 4. Nonetheless, the NDOC claims—for the first time in its Motion to Dismiss—that Plaintiffs-Appellants waived their right to assert nominal damages due to a clerical glitch in the appellate caption. (MTD 14-15).

This Court uses the title provided by the district court. *See* FRAP 12(a); FRAP 32(a)(2)(C). The district court's caption inexplicably omitted Stogner's personal capacity designation. (R.214-15). This was obviously a clerical error because all of the district court pleadings refer to Defendant Stogner in his personal capacity. (R.170; R.64, 66, ¶8; R.20, 22, ¶8). *See* (Ex. B, Benson Decl. ¶¶7-9). More importantly, the caption in the Notice of Appeal includes Stogner in his personal

capacity. (R.7). And the Notice of Appeal appeals the *entire* judgment and order of dismissal. *Id.*[7]

NDOC asserts that "this Court has held" that "any claim against [an appellee] in his individual capacity [is] waived [where an appellant] not mention an individual capacity claim in his opening brief." (MTD 15). This Court has never "held" any such rule. NDOC relies upon *Jacobs v. Tanchek*, 415 F. App'x 763, 765 (9th Cir. 2011), which is a non-precedential memorandum disposition. *Id.* at n.* Moreover, the appellant in *Jacobs* "concede[d] in his reply brief that any individual capacity claim was an error in pleading." *Id.* at 765.

NDOC also relies on *Avalos v. Baca*, 596 F.3d 583, 587 n.3 (9th Cir. 2010), but *Avalos* stands only for the familiar proposition that issues not raised or argued on appeal are waived.[8] In *Avalos*, the district court had granted summary judgment on the individual capacity claims because the plaintiff failed to present any evidence that the named defendants were personally involved in the unlawful conduct. *Id.* at 587, n.3. Because the plaintiff did not raise that issue in his briefs, the Court held that he had abandoned any challenge to that ruling. *Id.*

Here, by contrast, there is no separate ruling on the personal capacity claims. The district court *sua sponte* dismissed the *entire* case. And the Notice of Appeal

[7] Counsel believes that the district court's title has been corrected and will now appear correctly on the electronic docket sheet. (Benson Decl. ¶9).
[8] *See e.g.*, *Dilley v. Gunn*, 64 F.3d 1365, 1367 (9th Cir. 1995).

appeals the entire judgment and order of dismissal. (R.7). And again, Plaintiffs-Appellants expressly refer to their claim for damages at the beginning of their Opening Brief (at 4). *See generally Shoshone-Bannock Tribes v. Fish & Game Com'n, Idaho*, 42 F.3d 1278, 1284-85 (9th Cir. 1994) ("Where state officials are named in a complaint which seeks damages under 42 U.S.C. § 1983, it is presumed that the officials are being sued in their individual capacities."). "[W]hile it is clearly preferable that plaintiffs explicitly state whether a defendant is sued in his or her 'individual capacity,' [citation omitted], failure to do so is not fatal if the course of proceedings otherwise indicates that the defendant received sufficient notice." *Moore v. City of Harriman*, 272 F.3d 769 (6th Cir. 2001).

NDOC disingenuously claims that it would have argued qualified immunity as an alternative basis for affirming, had it understood that the personal capacity claims were also on appeal. (MTD 15-16). NDOC attempts to show this alleged reliance by citing to its Answering Brief, page 41, footnote 121. (MTD 16). Yet that very footnote acknowledges that Plaintiffs-Appellants seek damages and that qualified immunity could be an issue before the Court at a later time:

> The NDOC notes that while qualified immunity is not an issue before this Court *at this time*, and may not be in the future, given that Appellants have apparently sought injunctive relief, as opposed to monetary relief, the *NDOC notes that Appellants have sought "[a]n award of nominal damage," [sic] which certainly implies monetary damages*, as was [sic] as "other and further relief as the Court shall deem just and proper." 2 EOR 37 (18:5–8).

(Emphasis added.) At no point in its Answering Brief did NDOC ever mention the caption issue or argue that the claim was waived.

Puzzlingly, NDOC also argues that courts should be wary of nominal damages claims "extracted late in the day from [a] general prayer for relief and asserted solely to avoid otherwise certain mootness." (MTD 18). NDOC quotes *Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1997), which involved a complaint that did *not* expressly request nominal damages. From the inception of this case, Espinosa has sought nominal damages explicitly. *Compare* Complaint, R.181, ¶ F (specifically requesting "nominal damages") *with* R.182, ¶ J (requesting "such further and other relief as this Honorable court may deem appropriate"). All subsequent versions of the complaint also expressly seek nominal damages. R.81, line 22 (First Amended Complaint, requesting "[a]n award of nominal damages to the Plaintiffs"); R.37, line 5 (Second Amended Complaint, same).

## III. The doctrine of constitutional avoidance is inapplicable here.

NDOC's final argument is that this Court should dismiss the case as moot in order to avoid wading into constitutional issues. (MTD 21). The doctrine of constitutional avoidance, however, only applies where there is a non-constitutional basis for reaching the same result. Because this case is not moot, *supra*, mootness cannot supply a non-constitutional ground for affirming the district court's decision. Rather, it is this Court's duty to decide issues that are properly before it. *Kollsman v. Los Angeles*, 737 F.2d 830, 833 (9th Cir. 1984).

## CONCLUSION

In a clear attempt to thwart litigation, NDOC waited until weeks before oral argument—over five years after Espinosa's application was submitted, three years after the first complaint was filed, and a year after its Answering Brief was filed—to add Secular Humanism to the Faith Group list. Espinosa's requests for Humanist group meetings, Humanist holidays, and storage space for Humanist books and DVDs remain unresolved. It is not even clear that Espinosa and other inmates can identify as a Secular Humanist in NOTIS. At best, NDOC's last-minute maneuver allows Espinosa and fellow Humanists to endure another lengthy and arbitrary application process to seek the full relief sought in this case.

And regardless, NDOC's actions have no effect on Plaintiffs-Appellants' claims for nominal damages against Defendant Stogner in his personal capacity.

For the foregoing reasons, Plaintiffs-Appellants respectfully request that the Court deny NDOC's Motion to Dismiss.

Respectfully submitted,

July 15, 2019

*/s/ Monica L. Miller*
MONICA L. MILLER
American Humanist Association
1821 Jefferson Place NW
Washington, DC, 20036
Telephone: (202) 238-9088
mmiller@americanhumanist.org

Kevin Benson
Benson Law, LLC
123 W. Nye Lane, Suite 487
Carson City, NV 89706
Telephone: (775) 884-0838
kevin@bensonlawnv.com

*Attorneys for Appellants*

## CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 27(d)(2)(A) and 9th Cir. R. 27-1, the attached brief is proportionately spaced, has a typeface of 14 points or more and contains 5,177 words.

RESPECTFULLY SUBMITTED this 15th day of July, 2019.

*/s/ Monica L. Miller*

**Monica L. Miller**
American Humanist Association
1821 Jefferson Place NW
Washington, DC 20036
Telephone: 202-238-9088 x120
mmiller@americanhumanist.org

*Attorney for Appellants*

## CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2019, 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.

All participants in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

*/s/ Monica L. Miller*

**Monica L. Miller**
American Humanist Association
1821 Jefferson Place NW
Washington, DC 20036
Telephone: 202-238-9088 x120
mmiller@americanhumanist.org

*Attorney for Appellants*