RECORD NO. 17-17522

In The

United States Court Of Appeals

For The Ninth Circuit

BENJAMIN W. ESPINOSA AND
AMERICAN HUMANIST ASSOCIATION,

Plaintiffs – Appellants,

v.

JAMES DZURENDA, *et al.*,

Defendants – Appellees.

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

APPELLANTS' PETITION FOR REHEARING WITH PETITION FOR REHEARING *EN BANC*

Monica L. Miller
AMERICAN HUMANIST ASSOCIATION
1821 Jefferson Place NW
Washington, DC 20036
(202) 238-9088
mmiller@americanhumanist.org

Counsel for Appellants

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

Counsel for Appellants

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FRAP 35(b)(1) INTRODUCTION AND STATEMENT

Appellants American Humanist Association ("AHA") and Benjamin Espinosa petition for rehearing by the panel and rehearing en banc pursuant to FRAP 35 and 40 and 9th Cir. R. 40-1 and 35-1 to -3.

The Nevada Department of Corrections ("NDOC") has been discriminating against Humanists by refusing to provide Humanist study group meetings while providing such meetings for a wide array of Faith Groups ranging from Scientology to Thelema. Espinosa filed his application for Humanist meetings over five years ago, yet NDOC *still* has not approved his request. Throughout litigation, NDOC has justified such discrimination on the same grounds as the District Court: that Humanists do not believe in a Supreme Being.[1]

Just weeks before oral argument, NDOC added "Humanism" to its Faith Group Overview Chart followed by a Motion to Dismiss (Docs.47-2, 47-1). Rather than remedy the disparate treatment, NDOC compounded it. On the same day it added Humanism, it also added Hebrew Israelite and *automatically* granted them the full gamut of rights and privileges, including study group meetings. Humanism is the only Faith Group that has not been approved for group meetings or anything for that matter. (Doc.47-2).

[1] The District Court's ruling flouts decades of settled precedent. *E.g.*, *Torcaso v. Watkins*, 367 U.S. 488, 495 & n.11 (1961); *Newdow v. U.S. Cong.*, 313 F.3d 500, 504 n.2 (9th Cir. 2002).

Nonetheless, the Panel held that NDOC's belated maneuver mooted all of Appellants' claims for injunctive relief. (Doc.56-1). And even though the pleadings and the Notice of Appeal name Stogner in his "personal capacity," and the Opening Brief (at 4) referred to the damages claim against Stogner, the Panel held that "by failing on appeal to name any of the Defendants in their personal capacities, Plaintiffs have waived this issue." (*Id.* at 3 n.2).

Rehearing or rehearing en banc is warranted for the following reasons:

1. The Panel misapprehended or failed to consider that the omission of "personal capacity" from the appellate caption was due solely to a clerical error by the District Court clerk's office;

2. Whether a district court's clerical error can result in the denial of a plaintiff's substantive constitutional rights is a question of exceptional importance which has far-reaching implications in every action involving governmental action under federal law;

3. The Panel misapprehended the fact that NDOC's addition of Humanism to the Overview Chart fails to provide the relief Appellants sought, and actually prohibits NDOC staff from providing that relief;

4. The Panel misapprehended the fact that NDOC did not require other Faith Groups to file additional forms to obtain group meetings, group property, or holidays in the Overview Chart, giving rise to an independent violation of the Equal Protection and Establishment Clauses;

5. Whether the state can moot claims for injunctive relief by taking action that compounds the unlawful activity is an issue of profound importance.

STATEMENT OF RELEVANT FACTS

On June 11, 2014, Espinosa submitted his Request for Accommodation of Religious Practices (Form DOC-3505), seeking that NDOC: (1) approve Secular Humanism as a Faith Group; (2) provide weekly Humanist study group meetings; and (3) provide group storage space for Humanist study materials. (R.47; R.73; R.147).[2]

Pursuant to NDOC policy, the Chaplain must submit the DOC-3505 to the Religious Review Team ("RRT"), which must "research the inmate's request and submit a recommendation to the designated Deputy Director." (R.125).

The form states: "Please allow 120 days for a response." (R.147). NDOC did not provide a response to Espinosa within 120 days. (Doc.22 at 49). At all relevant times, Defendant Stogner served on the RRT as NDOC's Head Chaplain and was responsible for making recommendations to the Director. (R.41; R.51-52; R.55; R.66; R.75). In the summer of 2015, Stogner informed Espinosa that the RRT reviewed the request, but that Espinosa would have to wait another four months to receive a response. (R.75).

[2] Humanism is a comprehensive nontheistic ideology that espouses reason, ethics, and social responsibility. (R.69-70; R.88-92).

On March 11, 2016, Espinosa filed a *pro se* complaint for injunctive relief and damages. (R.169-96). The District Court dismissed the complaint under 28 U.S.C. § 1915A(a) with leave to amend. (R.197-203). On October 5, 2016, AHA and Espinosa filed an Amended Complaint seeking nominal damages and injunctive relief under the Equal Protection Clause and Establishment Clause. (R.64).

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

Approximately four weeks before oral argument, over a year after its Opening Brief was filed, and over five years after Espinosa submitted his DOC-3505, on June 17, 2019, NDOC added "Humanism" to its Faith Group Overview Chart followed by a Motion to Dismiss the appeal as moot (Doc.47-1).

NDOC still has not approved Espinosa's DOC-3505. The Overview Chart literally confers nothing to Humanists (Doc.47-2 at 21) while *automatically* conferring property, meetings, worship, and holidays to Hebrew Israelites approved the same day. NDOC states that Humanists have to file additional forms to receive the same benefits automatically granted to Hebrew Israelites, and the filing of those forms would prove futile, as they only cover practices *already* approved in the Overview Chart. (Doc.47-1 at 3, 7; Doc.47-3 at 3). Humanism remains the *only* Faith Group for which no group meetings are authorized.

REASONS REHEARING OR REHEARING EN BANC SHOULD BE GRANTED

I. The Panel's holding that a clerical error by the District Court waived Appellants' substantive rights is unjust and directly conflicts with decisions of other Circuits, this Circuit, and the Supreme Court.

A. The Panel's ruling conflicts with decisions that hold that judgments and waivers cannot be based on a court's clerical errors.

This Court has held that a waiver occurs only "when 'a party intentionally relinquishes a right' or 'when that party's acts are so inconsistent with an intent to enforce the right as to induce a reasonable belief that such right has been relinquished.'" *Salyers v. Metro. Life Ins. Co*., 871 F.3d 934, 938 (9th Cir. 2017) (citation omitted). No waiver occurred because the omission of "personal capacity" was a clerical error by the District Court, and Appellants referenced their claim for damages in their Opening Brief and Notice of Appeal.

As the Supreme Court stated: "It is axiomatic that courts have the power and *the duty* to correct judgments which contain clerical errors or judgments which have issued due to inadvertence or mistake." *Am. Trucking Assn., Inc. v. Frisco*, 358 U.S. 133, 145 (1958) (emphasis added).

This Court thus granted a petition for rehearing in *United States v. Mageno*, where, "because of an error in the official transcript, [the court] misapprehended the actual facts upon which our opinion was based." 786 F.3d 768, 774-75 (9th Cir. 2015). The present case is analogous to *Mageno* because an error in the caption supplied by

the District Court caused the Panel to misapprehend the facts: From the inception of this litigation, Appellants have expressly sued Stogner for damages in his personal capacity, R.170 (*pro se* complaint); R.64, 66 (First Amended Complaint), R.20, 22 (Second Amended Complaint), and asserted that claim on appeal. (Br. at 4).

But the case title as entered by the District Court clerk's office inexplicably failed to reflect that fact. (R.214-15). This was obviously a clerical error because all of the District Court pleadings refer to Stogner in his personal capacity. (R.170; R.64, 66, R.20, 22). More importantly, the Notice of Appeal includes Stogner in his personal capacity and it appeals the *entire* judgment and order of dismissal. (R.7).

The error in the District Court's case title was then perpetuated by this Court's rules, *unbeknownst to Appellants*. FRAP 12(a) provides in part: "the circuit clerk must docket the appeal under the title of the district-court action." FRAP 32(a)(2)(C) states that a brief "must contain: … (C) the title of the case (see Rule 12(a))." The printing service that prepared the final form of the Opening Brief and Appellants' Excerpts of Record (Gibson Moore) complied with Rule 32(a)(2)(C). (Doc.7-2 at 220; Doc. 7-1 at 232).

Appellants were unaware of the omission until it was first raised in NDOC's *Motion to Dismiss*. Again, Appellants referred to their claim for damages on page 4 of the Opening Brief. NDOC was unaware of the error too, as its Answering Brief explicitly acknowledged the nominal damages claim in footnote 121 page 41:

"NDOC notes that Appellants have sought '[a]n award of nominal damage,' [sic] which certainly implies monetary damages." Consequently, NDOC should have been estopped from arguing that the claim was waived over a year later.

More importantly, to hold that a clerical error by a district court clerk waives a party's substantive rights is directly contrary to this Court's policy of resolving cases on their merits. *See Phillips v. Gilman*, 887 F.3d 956, 964 (9th Cir. 2018). And a failure to correct this error would contravene *American Trucking*, *supra.*

B. The Panel's decision conflicts with this Circuit's cases that individually-named state defendants in § 1983 cases seeking damages are presumptively sued in their personal capacity.

This Court has held: "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." *Shoshone-Bannock Tribes v. Fish & Game Comm'n*, 42 F.3d 1278, 1284 (9th Cir. 1994) (citation omitted). Again, the Opening Brief (p.4) expressly states that Appellants "seek injunctive and declaratory relief *and damages*." And Appellants' Notice of Appeal refers to Stogner in his personal capacity. Thus, the Panel's ruling is irreconcilable with *Shoshone-Bannock Tribes.*

The Panel's ruling also conflicts with *Rosenbaum v. City and County of San Francisco*, 484 F.3d 1142, 1150 n.3 (9th Cir. 2007), where this Court ruled that matters not raised in an opening brief should be considered under any of these three circumstances: (1) good cause; (2) the issue is raised in appellee's brief; or (3) the

failure to raise issue does not prejudice opposing party. Here, the issue was raised in Appellees' brief and NDOC was not even aware of the omission until it filed its Motion to Dismiss. This is not the type of case where the district court dismissed only the personal capacity claims, and the appellant failed to address that dismissal on appeal. *Cf. Avalos v. Baca*, 596 F.3d 583, 587 n.3 (9th Cir. 2010). The District Court dismissed *all* claims on the basis that Humanism is not a "religion." (R.4-6). There was nothing that could be "specifically and distinctly" argued with respect to the individual capacity claim.

C. Rehearing or rehearing en banc is needed to avoid perpetuating a Circuit split.

The Panel's ruling directly conflicts with *Moore v. City of Harriman*, 272 F.3d 769, 772 (6th Cir. 2001), which held that the "failure to [name a defendant in her personal capacity] is not fatal if the course of proceedings otherwise indicates that the defendant received sufficient notice." The Sixth Circuit noted that "the vast majority of our sister circuits apply [this] 'course of proceedings' test." *Id.* (citing cases by the Second, Third, Seventh, Tenth, Eleventh, and D.C. Circuits).

Appellants' nominal damages claim would clearly survive in those Circuits. NDOC's Answering Brief (Doc.22 at 41, n.121) expressly acknowledged that Appellants sought "nominal damages."

D. The Panel's decision encourages prison officials to discriminate against minority religious groups with impunity.

By "making the deprivation of such rights actionable for nominal damages . . . the law recognizes the importance to organized society that those rights be scrupulously observed." *Carey v. Piphus*, 435 U.S. 247, 266 (1978). Nominal damages encourage government officials "to reform [unconstitutional] patterns and practices." *Amato v. City of Saratoga Springs*, 170 F.3d 311, 317-18 (2nd Cir. 1999).

By letting NDOC officials completely off the hook for unduly delaying Espinosa's request for five years *and counting*, NDOC has no incentive to cease its practice of indefinitely delaying the applications of religious minorities. *See Means v. Nev. Dept. of Corr.*, 2010 U.S. Dist. LEXIS 112507, at *6-7 (D. Nev. Oct. 8, 2010) (finding that NDOC officials' "undue delay in reaching and advising plaintiff of a decision on his request to have his religion [Vedantu/Kashmir Shavism] recognized" stated violations of the "due process clause" and "First Amendment"); *Collman v. Skolnik*, 2010 WL 4272479 (D. Nev. Oct. 8, 2010) ("This delay or failure to recognize the PCG [Philadelphia Church of God] as a faith group has denied plaintiff the opportunity to observe the religious holidays and practices required by his faith."). *See also Stoner v. Stogner*, 2007 WL 4510202 (D. Nev. Dec. 17, 2007).

II. In dismissing Appellants' Establishment and Equal Protection Clause claims for injunctive relief as moot, the Panel overlooked the fact that NDOC's latest action only magnifies and compounds its longstanding disparate treatment of Humanists.

A. The Panel's mootness determination misapprehended the facts and is irreconcilable with binding precedent.

Under Supreme Court precedent, "[i]t is the *duty* of the courts to beware of efforts to defeat injunctive relief by protestations of repentance and reform." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632 n.5 (1953) (emphasis added).

NDOC must carry the "heavy burden," *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000), of proving that it has "*completely and irrevocably* eradicated the effects of the alleged violation." *Fikre v. FBI*, 904 F.3d 1033, 1037 (9th Cir. 2018) (citations omitted, emphasis added).

Plaintiffs sought injunctive relief requiring NDOC to, *inter alia*: (1) "Authorize Humanist study groups in all Department prisons;" (2) "approve of said Humanist group;" and (3) refrain from "[o]therwise discriminating against atheist and humanist inmates" (R.36-37). The Panel's determination that NDOC met its heavy burden cannot be squared with the facts: Humanists are still denied study group meetings and NDOC is still discriminating against Humanist inmates.

The Panel relied on NDOC's representations that Humanists just need to fill out additional forms. But the Panel misapprehended the policy and the function of those forms. Since NDOC's policy states that inmates can only receive

accommodations that are *reflected in the Overview Chart*, NDOC's latest maneuver actually *prohibits* Humanists from having meetings, *infra.*

i. Study Group Meetings

Espinosa's DOC-3505 specifically requested approval for Humanist group study meetings. (R.147). In the new Overview Chart, NDOC states "none" for Humanist meetings. (Doc.47-2 at 21). By contrast, all other Faith Groups—including Hebrew Israelites—are listed as being allowed weekly group worship or study, and have special time for holidays. (Doc.47-2).

The Panel acknowledged that NDOC still has not approved Espinosa's DOC-3505. Mem. Op. at 2, n.1. In finding this issue moot, however, the Panel relied solely upon NDOC's "represent[ation] that the official recognition of Humanism as a faith group automatically confers certain accommodations." *Id.*

The panel misapprehended the facts. In its Motion to Dismiss, NDOC did not say that Humanists have been automatically approved for group meetings; it said Humanists "may request a study group." (Doc.47-1 at 8). *See also* (*Id.* at 4) (Humanists may "*seek* religious services") (emphasis added). NDOC claimed that for Humanist meetings to be approved in the Overview Chart, Humanists must first file a "kite" (DOC-3012). (Doc.50-1 at 5). But the kite is used only to add a new or additional service to the "*institution where they are currently housed*." (Doc.47-4 at 16 [11(D)(2]). It does not result in amendment to the Overview Chart. (*Id.* at 16-17).

Rather, the DOC-3505 is the only form relevant to the approval of group meetings by the RRT for the *Overview Chart* (Doc.47-4 at 13-15). The Manual states that if the Faith Group is approved, "the RRT will make the *necessary amendments* to the Faith Group Overview." (Doc.47-4 at 15) (emphasis added). Because the Overview Chart says "None" for Humanist meetings, filing a kite will prove futile.

The Panel also failed to reconcile the fact that NDOC has not stopped discriminating against Humanists. Quite the opposite. NDOC automatically approved Hebrew Israelite for meetings in the Overview Chart rather than saying "None" as it did for Humanists on the same day. If NDOC truly intends to allow weekly meetings for Humanists, why it did not simply include that in the Overview Chart defies reason.

And it is unlikely that the RRT will approve Humanist meetings in the Overview Chart after the case is dismissed, because NDOC made clear in its Motion to Dismiss that it "continues to believe it had discretion to not recognize Humanism." (Doc.47-1 at 2). And it has consistently maintained that Humanists are not entitled to equal treatment under the Establishment and Equal Protection Clauses. (Doc.22 at 29-51).

ii. Holidays

The Panel erroneously accepted NDOC's representation that for Humanists to have their holidays approved in the Overview Chart, they must file a DOC-3529

"Inmate Request for *Recognized* Holiday Service." (Doc.50-1 at 7-8) (emphasis added). On its face, that form is limited to requesting a special service on a specific date for *an already-recognized holiday* at the *facility* level. (Doc.47-3 at 5). The Manual states: "The chaplain/designee verifies the validity of the request and will make a recommendation to grant or deny it *based on what is allowed by the AR 810 Faith Group Overview.*" (Doc.47-4 at 17 [11(E)(2)(b)]) (emphasis added). It provides: "For currently approved holy days refer to the Faith Group Overview." (*Id*. at 13 [10(A)]).

Crucially, the Panel overlooked the fact that NDOC perpetuated the Establishment and Equal Protection Clause violations by *automatically* approving 17 holidays for Hebrew Israelites while not approving any of the four holidays celebrated by Humanists. This is rank discrimination. It is clear the Hebrew Israelites did not have to file the DOC-3529 form for two reasons. First, DOC-3529 can only be submitted by an already-approved Faith Group, *supra.* Hebrew Israelites were approved the same day as Secular Humanists. Second, the form must be "submitted at least thirty (30) but not more than forty-five (45) days prior to the requested special service/meeting or event." (Doc.47-3 at 5). It would thus be impossible for Hebrew Israelites to have a full calendar year of holidays approved on the same day through this form.

Contrary to NDOC's assertion in oral argument, there is no form to cover state-wide approval of holidays in Overview Chart. DOC-3505 just covers a "New Religion, Service, Property, Attire." There is no mention of holidays.

Instead, the RRT has the onus of researching and adding to its chart after approval of new Faith Group (Section 11(B of Manual). When evaluating a DOC-3505 for a new Faith Group, the Manual states that the *RRT* will "*research* the inmate's request." (Doc.47-4 at 14). It provides that if approved, "the *RRT* will make the *necessary amendments to the Faith Group Overview.*" (*Id*. at 15 [11(B)(7)]) (emphasis added). The Manual further specifies that "Holy Days are permitted as *documented by faith tenet*." (*Id*. at 13).

When NDOC approved Humanism, it had knowledge of at least four holidays per the submissions of AHA—the nation's leading humanist organization—as documented in the 2016 Amended Complaint and Opening Brief. (R.23, 28; R.67) (Br. at 8-9).[3] It was therefore incumbent upon NDOC to add those holidays to the chart. (Doc.47-4 at 13). *See also Am. Humanist Ass'n & Kwame Jamal Teague v. Perry*, 303 F. Supp. 3d 421, 429 (E.D.N.C. 2018) ("To the extent prison officials lacked information on Humanism, the record indicates that AHA's general counsel corresponded with DPS and offered to answer any questions.").

[3] These include: Darwin Day, National Day of Reason, Summer Solstice (*AKA* World Humanist Day) and Winter Solstice (*AKA* HumanLight).

Moreover, NDOC has already approved two of those same holidays—Summer Solstice and Winter Solstice—for six other Faith Groups (Native Americans, Wicca, Asatru, Buddhist, Druid, and Thelema), while denying them to Humanists. (Doc.47-2 at 6-8, 11, 18-19).

Because the formidable burden of proving the case is moot fell on NDOC, it had to demonstrate that it is no longer disparately applying its policies to Humanists. It certainly failed to carry that burden. Indeed, NDOC presented no evidence that any Faith Group had to fill out a DOC-3529 to have a holiday approved by the *RRT* in the *Overview Chart*.

iii. Faith Group Property

Whereas Hebrew Israelites were *automatically* approved for both Group Items (i.e., Kiddah cup, spice holder, candles) and Personal Items, NDOC claimed that Humanists have to file a form for their property to be approved (Doc.50-1 at 4-6), even though Espinosa's DOC-3505 specifically requests books, print materials, CDs, etc. (R.147). While every other group listed in chart has approved items (Doc.47-2), NDOC indicates that "*no*" personal *or group* items have been approved for Humanism. (*Id*. at 21).

The Panel's conclusion that Espinosa simply has to fill out some more forms to get his group property approved is erroneous. As with the holiday form, the Religious Property Request Form states inmates can "[o]nly order religious items

allowed by AR 810." (Doc.47-3 at 4) (emphasis added). Any such request would invariably be denied because NDOC does not authorize books, CDs, DVDs, printed material, etc., as Group Religious Property for Humanists.

NDOC's policy distinguishes between "Personal Religious Property" and "Group Religious Property." (Doc.47-2 at 3). The distinction is critical because *personal* property must be stored in an inmate's cell. (Doc.47-4 at 30 [Section 13(E)(2)(c)]). Such storage space is limited and makes the materials unavailable to other members of the Faith Group. (*Id.* at 31-32). In contrast, *group* property is stored in a designated location so that it is accessible during group meetings. (*Id.* at 29 [Section 13 (D)(2)(b)]).

The policy actually *forbids* Humanists from having *group* storage for such property. The Overview Chart lists only two items of *group* property that are allowed to all Faith Groups: anointing oil and certain approved herbs, minerals, and incense. (Doc.47-2 at 3-4). All of the items the Panel refers to (books, printed materials, CDs) are listed as items of *Personal* Religious Property *only*. (*Id.* at 3, 1(B)). *Group* storage for books, CDs, DVDs, etc., is an accommodation Humanists *specifically requested*. (R.28-29; R.147). Such items are akin to *specific group* items approved for other faiths such as "rune cards" or "4-6 jewelry size stones." (Doc.47-2 at 18-19).[4] NDOC's

[4] AHA's website indicates: "Publishing and disseminating ideas has been a core task of the humanist movement since the emergence of the first books on modern humanism

representation that Humanists now "automatically" have storage space for books, printed materials, CDs, etc., is therefore misleading.

B. The Panel's determination that NDOC carried its formidable burden of proving that its disparate treatment of Humanists will not recur is irreconcilable with binding precedent.

"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; emphasis added). 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." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189-90 (2000) (citation omitted).

The Panel's determination that NDOC's litigation-inspired maneuver of merely adding Humanism to the Overview Chart—without even approving meetings and storage space—is sufficient to moot the case, conflicts with Ninth Circuit and other Circuit cases holding a prison's *actual* voluntary cessation of challenged activity insufficient to moot injunctive relief. *See McCright v. Santoki*, 1992 U.S. App. LEXIS 25017, at *4-5 (9th Cir. 1992); *Gluth v. Kangas*, 951 F.2d 1504, 1507-08 (9th Cir. 1991); *Schroeder v. Kaleo-Lum*, 1991 U.S. App. LEXIS

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at the beginning of the twentieth century." https://americanhumanist.org/what-we-do/publications/ (last visited September 4, 2019).

7919 (9th Cir. 1991); *Doe v. Wooten*, 747 F.3d 1317 (11th Cir. 2014); *Wall v. Wade*, 741 F.3d 492, 497 (4th Cir. 2014); *Roane v. Leonhart*, 741 F.3d 147, 150 (D.C. Cir. 2014).

The *only* evidence NDOC submitted was the declaration of Chaplain Snyder, who averred that NDOC is unlikely to remove a Faith Group after listing it because, "[o]nce recognized, adherents of that faith group have been given certain rights and privileges" and "taking those away would result in significant morale issues." (Doc. 47-5 at 6). But Humanists have not actually been given any rights or privileges.

C. Requiring Humanists to fill out additional forms violates the Equal Protection and Establishment clauses.

Rehearing should be granted because the Panel overlooked the fact that requiring Humanists, but not members of other Faith Groups (and Hebrew Israelites specifically), to file additional forms to obtain accommodations is itself a violation of the Equal Protection and Establishment Clauses. *See generally Hartmann v. Cal. Dep't of Corr. & Rehab.*, 707 F.3d 1114, 1126 (9th Cir. 2013); *Kaufman v. Pugh*, 733 F.3d 692 (7th Cir. 2013); *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.").

The Court cannot allow NDOC to purportedly remedy one constitutional violation by committing another.

CONCLUSION

Appellants respectfully request that the Court grant rehearing or rehearing en banc because the Panel's decision misapprehended critical issues of fact and law, and the decision conflicts with case law of this Circuit, other Circuits, and the Supreme Court.

Respectfully submitted,

September 5, 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

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 11. Certificate of Compliance for Petitions for Rehearing or Answers

Instructions for this form: http://www.ca9.uscourts.gov/forms/form11instructions.pdf

9th Cir. Case Number(s) 17-17522

I am the attorney or self-represented party.

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing/petition for rehearing en banc/answer to petition is (*select one*):

◉ Prepared in a format, typeface, and type style that complies with Fed. R. App. P. 32(a)(4)-(6) and **contains the following number of words**: 4,195.

(Petitions and answers must not exceed 4,200 words)

OR

○ In compliance with Fed. R. App. P. 32(a)(4)-(6) and does not exceed 15 pages.

Signature s/ Monica L. Miller **Date** September 5, 2019

*(use "*s/[typed name]*" to sign electronically-filed documents)*

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on September 5, 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.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Dated: September 5, 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

Counsel for Appellants

NOT FOR PUBLICATION

FILED

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MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

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.	No. 17-17522 D.C. No. 3:16-cv-00141-RCJ-WGC MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Robert Clive Jones, District Judge, Presiding

Argued and Submitted August 6, 2019
San Francisco, California

Before: O'SCANNLAIN, SILER,** and NGUYEN, Circuit Judges.

Benjamin W. Espinosa, a Nevada state prisoner, and the American Humanist

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

Association challenge the prison's failure to recognize Humanism as a Nevada Department of Corrections Faith Group under the Establishment Clause of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. During the pendency of this appeal, Defendants officially recognized Humanism as a faith group. Defendants also represented to the court that the recognition is "very permanent" and that Humanism is "entitled to all the same rights and privileges of all other recognized faith groups."[1] Defendants therefore have satisfied their burden under the voluntary cessation doctrine because "subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (internal citations omitted); *see also Fikre v. FBI*, 904 F.3d 1033, 1037 (9th Cir. 2018) (requiring the government to show that a

[1] While Defendants admit they have not officially adjudicated Espinosa's Request for Accommodation of Religious Practices Form (DOC-3505) and Faith Group Affiliation Declaration Form (DOC-3503) as they should have done under their own policy, Defendants represented that the official recognition of Humanism as a faith group *automatically* confers certain accommodations, including recognition in the Nevada Offender Tracking Information System ("NOTIS") and storage space for "donated books, printed materials, and other items," such as CDs, pictures, and religious medallions. To the extent that additional accommodations require other forms, such as the Religious Property Request Form (DOC-3528), the Inmate Request for Recognized Holiday Service Form (DOC-3529), the Request for NDOC to Accept Donated Items Form (DOC-4514), and the informal, quicker Inmate Request Form (DOC-3012 or "kite") to the chaplain for meetings, Espinosa's counsel conceded during oral argument that those forms have not been filed.

change in its behavior is "'entrenched' or 'permanent'" to prove mootness (quoting *McCormack v. Herzog*, 788 F.3d 1017, 1025 (9th Cir. 2015))). We therefore dismiss this case as moot for lack of a live case or controversy and deny as moot Defendants' motion to dismiss.[2] U.S. Const. art. III.

DISMISSED.

Each party shall bear its own costs on appeal.

[2] Plaintiffs argue that the complaint's prayer for nominal damages is sufficient to avoid mootness. By failing on appeal to name any of the Defendants in their personal capacities, Plaintiffs have waived this issue. *See Miller v. Fairchild Indus., Inc.*, 797 F.2d 727, 738 (9th Cir. 1986) (stating that we "will not ordinarily consider matters on appeal that are not specifically and distinctly argued in appellant's opening brief"). An action under 42 U.S.C. § 1983 "creates no [nominal damages] remedy against the State" and its official actors. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 68–69 (1997).