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

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

PLAINTIFFS' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

I. Introduction.[1]

NDCPS does not deny its "differing treatment" of Humanists as compared to Wiccans, Native Americans, Buddhists, Rastafarians, and the many other faith groups it accommodates. (D.Opp. 7). In fact, NCDPS boasts that it "recognizes both theistic and non-theistic groups and centralized and de-centralized groups." (*Id.*). And yet NCDPS never provides any adequate explanation, let alone a compelling state interest, for its disparate treatment of Humanists. Instead, according to NCDPS: "Such groups are simply not suitable for group practices within the confines of a correctional setting." (D.Opp. 8). Not only does this fail to justify serious infringements of the First and Fourteenth Amendments, but it is also belied by the fact that a number of prison systems, including the federal BOP, recognize Humanism.

II. NCDPS's disparate treatment of Humanists violates the Establishment Clause.

A. NCDPS's disparate treatment of Humanists is unconstitutional regardless of whether Humanism has been "definitively" held as a religion.

NCDPS continues to rest its entire defense on the argument that Humanism is not a religion, while falsely claiming that Plaintiffs' case depends solely upon the footnote in *Torcaso v. Watkins*, 367 U.S. 488 (1961). (D.Opp. 2, 5). As Plaintiffs comprehensively demonstrated, this argument has no traction. (P.Opp. 8-14). *Torcaso* aside, the Establishment Clause forbids the government from preferring religion to nonreligion. NCDPS itself cites *McCreary* for this very notion. (D.Opp. 6). Therefore, as many courts have correctly held, the Establishment Clause demands equal treatment of Humanists and Atheists regardless of "whether Humanism is a religion or a nonreligion." *Am. Humanist Ass'n v. United States*, 63 F. Supp. 3d 1274, 1283, 1286 (D. Or. 2014) ("*AHA*").

In *AHA*, the court recognized that even without *Torcaso*, the Establishment Clause prohibits the government from refusing to authorize Humanist group meetings when such meetings are allowed for other groups of equal or smaller size. *Id.* at 1283. The Seventh Circuit reached the same conclusion in *Kaufman I* an *II*, holding that Atheism need not be a religion-in-fact for Atheists to be entitled to meeting groups. *Kaufman v. Pugh*, 733 F.3d 692 (7th Cir. 2013); *Kaufman v. McCaughtry*, 419 F.3d 678, 682-83 (7th Cir. 2005). NCDPS's argument "misses the point of *Torcaso* and *Kaufman*." *Ctr. for Inquiry, Inc. v. Marion Circuit Court Clerk*, 758 F.3d 869, 873-74 (7th Cir. 2014) ("*CFI*"). "Atheists don't call their own

[1] Pursuant to Local Civil Rule 56.1(c), Plaintiffs incorporate by reference their Statement of Material Undisputed Facts ("PSUF"), along with Plaintiffs' Appendix ("A."). Citations to the previously filed briefs are as follows: Plaintiffs' summary judgment memorandum ("P.Br."), Opposition ("P.Opp."), NCDPS's summary judgment memorandum ("D.Br.") and Opposition ("D.Opp.").

stance a religion but are nonetheless entitled to the benefit of the First Amendment's neutrality principle." *Id.*; *see also Wright v. Fayram*, 2012 U.S. Dist. LEXIS 84804, at *36-37 (N.D. Iowa June 18, 2012) ("A weekly meeting is in accordance with the [non-theistic religious] traditions and no less justified than mainstream religions currently accommodated at the prison.").

Although Plaintiffs can easily prevail without consideration of *Torcaso*, the fact that the Supreme Court declared Secular Humanism to be a religion for First Amendment purposes makes NCDPS's position that Humanism is not a religion all the more unreasonable. 367 U.S. at 495 n.11. Even in the face of numerous courts that have relied on *Torcaso* for that very proposition (P.Opp. 8-9), NCDPS still insists Plaintiffs' reliance on *Torcaso* is "misplaced." (D.Opp. 5). If such were the case, however, then every single court, including the Seventh, Eighth, and Ninth Circuits, and a legion of federal district courts — including *this Court* — that has cited *Torcaso* for the fact that Secular Humanism is a religion, is wrong. (DE-59, at n.1 ("the Supreme Court has held that Secular Humanism is a religion.")).

NCDPS fails to offer contrary authority. NCDPS continues to rely on the same three nonbinding, inapt cases: *Kalka v. Hawk*, 215 F.3d 90 (D.C. Cir. 2000), *McGinley v. Houston*, 361 F.3d 1328 (11th Cir. 2004), and *Heap v. Carter*, 112 F. Supp. 3d 402 (E.D. Va. 2015). (D.Opp. 5). Plaintiffs already demonstrated that these cases do not support NCDPS's position and are otherwise distinguishable. (P.Opp. 11-14). Again, even *Heap* correctly recognized that, contrary to NCDPS's position, "*many* lower courts have read the footnote in *Torcaso* as controlling on the question of whether Humanism is a religion." *Id.* at 437 (emphasis added). The court simply did not believe, considering the standard for qualified immunity, that *Torcaso* placed "the constitutional question 'beyond debate.'" *Id.* At the same time, the court did "not deny that Humanism could indeed be a secular moral system equivalent to religion." *Id.* Other than *Kalka*, *McGinley*, and *Heap*, NCDPS states that the "Eastern District of Virginia was affirmed in holding that 'only religious beliefs garner ***free exercise*** protection under the First Amendment …" (D.Opp. 5) (emphasis added).[2] Again, this is a complete red herring because Plaintiffs are *not* seeking ***free exercise*** protection. Moreover, *Desper* supports Plaintiffs' argument, as the court cited *Torcaso* for the position that a religion need not be "based on the existence of a supreme being or beings," and that the "'Supreme Court has long recognized that some religions practiced in this country 'do not teach what

[2] Citing *Desper v. Ponton*, 2012 U.S. Dist. LEXIS 166546, 5-6 (E.D. Va. 2012) *aff'd*, 2013 U.S. App. LEXIS 10806 (4th Cir. 2013) (citing *Wisconsin v. Yoder*, 406 U.S. 205, 215-16 (1972)).

would generally be considered to be a belief in the existence of God.'" 2012 U.S. Dist. LEXIS 166546, at *5. The Virginia federal court also cited *McCreary* for the notion that "such beliefs may even be encompassed in the practice of atheism." *Id.* Given that *Torcaso* explicitly identified Secular Humanism as a religion, NCDPS's reliance on *Desper* is manifestly inapt.

NCDPS is also wrong in stating that Plaintiffs rely only on the *footnote* in *Torcaso*. (D.Opp. 5). While the footnote is surely noteworthy, the opinion itself supports Plaintiffs' case. Among other things, 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.

B. NCDPS misapprehends the holdings of *Kaufman I* and *II*, and *AHA*.

The case law is decidedly in Plaintiffs' favor. NCDPS failed to cite a single case that supports its view of the Establishment Clause that allows it to discriminate against Humanists. And rather than distinguish directly relevant precedent (such as *Kaufman I* and *II* and *AHA*), NCDPS merely attempts to diminish their significance by asserting that they did not "*definitively*" hold Humanism as a religion. (D.Opp. 2). For one, this is not true, as the court in *AHA* definitively held "that Secular Humanism is a religion for Establishment Clause purposes." 63 F. Supp. 3d at 1283. And the Seventh Circuit definitively "held that a prison violated inmates' constitutional rights when it refused to allow an Atheist study group on the grounds that it was not a religion." *Id.* at 1286 (citing *Kaufman I*).[3] The Seventh Circuit stressed that the Supreme Court "specifically included 'Secular Humanism' as an example of a religion." *Kaufman I*, 419 F.3d at 682-83. And in *CFI*, the Seventh Circuit explicitly held that "[w]hat is true of atheism is equally true of humanism, and as true in daily life as in prison." 758 F.3d at 873.

NCDPS attempts to minimize the holding of *AHA* by pointing out that the court was ruling on a motion to dismiss for qualified immunity rather than summary judgment. (D.Opp. 4). That distinction, however, makes *AHA* even more problematic for NCDPS. The fact that the court refused to grant BOP officials qualified immunity for *personal liability* upon finding the law "clearly established" as of 2014, makes *AHA* more compelling, not less. *Id.* at 1286-87. The court noted that in addition to *Kaufman* and *CFI*, "the Supreme Court in *Torcaso*, referred to 'Secular Humanism' as a religion," and in *McCreary*, "the Supreme Court said that the touchstone of the Establishment Clause was the 'principle that the First

[3] *See also Kaufman v. Frank*, 2006 U.S. Dist. LEXIS 47840, at *54 (W.D. Wis. July 13, 2006) ("In *Kaufman*, 419 F.3d at 682, the court of appeals ***held*** that petitioner's atheism qualified as a religion and that prison officials ***violated*** petitioner's rights under the ***establishment clause***[.]") (emphasis added).

Amendment mandates government neutrality . . . between religion and nonreligion.'" *Id.* The court added that *CFI* "simply summarized the law as it is commonly understood." *Id.*

NCDPS seriously misses the mark when it seizes on the fact that *Kaufman I* "affirmed the grant of summary judgment to the inmate's Free Exercise claim because the inmate failed to demonstrate a substantial burden on his ability to practice Atheism/Humanism." (D.Opp. 3). Again, this *strengthens* Plaintiffs' argument. That the Seventh Circuit rejected an inmate's Free Exercise Clause claim, while ruling in favor of his Establishment Clause claim, *furthers* Plaintiffs' argument that Humanism need not be a religion-in-fact to prevail. 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). The Establishment Clause is violated "without a substantial burden on religious practice if the government favors one religion over another." *Kaufman II*, 733 F.3d at 696.[4] Thus, in *Kaufman II*, the court found, just as in *Kaufman I*, that the Establishment Clause would be violated if the prison failed to provide "a legitimate secular justification for discriminating between the proposed atheist study group and the seven recognized umbrella groups," *even if* the denial of such a group would not "impose a substantial burden on his practice of atheism." *Id.* at 697.

NCDPS also omits a critical distinction the *Kaufman I* district court drew between Atheism and Humanism in granting prison officials qualified immunity on remand. (D.Opp. 3).[5] Specifically, the officials *would not* have been entitled to immunity if they refused a ***Humanist*** group. The court noted that *in contrast to atheism*, "courts have recognized that pacifism, ***secular humanism*** and other non-theistic belief systems are entitled to the protection of the First Amendment's free exercise clause." 422 F. Supp. 2d 1016, 1022 (W.D. Wis. 2006) (emphasis added).[6] Unlike here, in *Kaufman I*, the "plaintiff identified himself to prison officials as an atheist." *Id* at 1022. The court emphasized: "He did not tell prison officials that he was a ***secular humanist***." *Id.* (emphasis added). In concluding that the officials were

[4] The same is true for the Equal Protection Clause. Unlike a Free Exercise claim, an inmate need not show that the practice is "central to his own religious observance" or that a denial "somehow infringed upon his religious practices." *Abdulhaseeb v. Saffle*, 65 F. App'x 667, 673-74 (10th Cir. 2003). All he must show is that he was "denied equal treatment on the basis of his religion." *Id.*

[5] The citation NCDPS provided, *Kaufman v. Frank*, 2006 U.S. Dist. LEXIS 47840 (W.D. Wis. July 13, 2006), is actually to an entirely separate proceeding filed by the same plaintiff. (D.Opp. 3).

[6] Citing *Torcaso*, 367 U.S. at 495 (Buddism, Secular Humanism, Taoism, Ethical Culture and other nontheistic philosophical systems qualify as "religions" within meaning of the First Amendment); *Welsh v. United State*s, 398 U.S. 333, 342-43 (1970) (moral, ethical, or religious beliefs about what is right and wrong held with the strength of traditional religious convictions qualify as "religious" beliefs).

entitled to immunity, the court again reiterated: "Plaintiff had alleged that he was an atheist, ***not a humanist*** or a freethinker." *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.* The court emphasized this distinction in a later proceeding as well: "following the decision in *Kaufman*, this court ruled that prison officials were entitled to qualified immunity for treating his atheism as something other than a religious belief because it was not clearly established at the time their decision was made that atheists (***as opposed to*** freethinkers, ***humanists*** or adherents of other belief systems premised upon some type of affirmative belief system, however secular) were to be treated as religious adherents." 2006 U.S. Dist. LEXIS 47840, at *54 (citing 422 F. Supp. 2d at 1023) (emphasis added).

NCDPS's interpretation of *Kaufman II* is even more askew. NCDPS states: "In the second claim, the Court had to resolve whether the Establishment Clause was violated by prison officials when grouping the Atheist inmates into an umbrella goup' [sic]." (D.Opp. 3). NCDPS has it exactly backwards. In *Kaufman II*, a prison *refused* to authorize a proposed umbrella Atheist study group, which would include "Humanist" and "Freethinker" subgroups, while recognizing seven other "Umbrella Religions Groups." 733 F.3d at 695-96. The court made very clear: "we must evaluate whether the prison has provided a legitimate secular justification for discriminating between the proposed atheist study group and the seven recognized umbrella groups." *Id.* at 697.

NCDPS then states that the "Court did not hold that the prison officials had violated any right." (D.Opp. 3). But at the outset, the Seventh Circuit admonished prison officials for refusing to recognize the Atheist group on the ground that it was not religious: "prison officials apparently had not read our 2005 opinion in *Kaufman I* and thus rejected Kaufman's requests out of hand because his proposed group does not recognize any kind of divine entity or higher power." *Id.* at 694. The court held that such a decision was unconstitutional because *Kaufman I* "conclusively held to the contrary." *Id.* at 697. The district court had correctly "recognized that the atheist study group is a religious one, but it found that the prison supplied a legitimate secular reason for prohibiting an atheist group: Only two inmates (including Kaufman), it thought, have any interest in an atheist group." *Id.*[7] The Seventh Circuit then vacated the

[7] The Seventh Circuit was skeptical of this reasoning, noting, "the idea that the prison's action was justified because not enough people were interested in an atheist group came late to the game. The contemporaneous explanations indicate that the authorities denied Kaufman's request because they thought that an atheist group does not qualify as a 'religious' one." *Id.* at 697.

grant of summary judgment to the prison and remanded. *Id.* at 700.

NCDPS is correct that the court in *Kaufman II* indicated that further evidence would be necessary to show demand for the group relative to the existing groups. But NCDPS is incorrect in stating that the "Court specifically noted that the *inmate* needed additional discovery." (D.Opp. 3)(emphasis added). The court instead placed the onus on the *prison*. In particular, the court stated that, by failing to allow prisoners to designate an atheism preference (just as here), "the prison made it impossible to know how many inmates would have joined [an atheist] group." *Id.* at 697. The court concluded: "Only a credible survey of the inmate population, or the simple expedient of adding 'atheist, agnostic, or humanist' to the preference form and collecting new data, can resolve this uncertainty." *Id.* at 698.

On remand, and in assessing qualified immunity, the district court declared: "There is a colorable argument that defendants were violating clearly established law by refusing to allow prisoners to designate atheism as a religious preference." 2014 U.S. Dist. LEXIS 84532, at *5-6 (citing *Kaufman I*). The court added, "[f]urther, defendants' continued failure to allow an atheist religious preference was part of the reason the court of appeals remanded this case." *Id.* Nonetheless, the court found that the prisoner still could not show sufficient demand *relative* to the recognized umbrella groups. The court noted that the "smallest designated religious group at prison had 28 members," while "only four prisoners . . . identify as an atheist, humanist or agnostic." *Id.* at *6-7.[8]

Just like in *Kaufman II*, NCDPS's refusal to add "Humanist" or even atheist to the preference form makes it impossible to grasp the full demand for Humanist services. But that is largely beside the point because unlike in *Kaufman II*, Plaintiffs have already shown sufficient interest for Humanist services relative to approved groups. (P.Opp. 23) (P.Br. 3, 7-9). There are at least as many Humanists as there are inmates in recognized Faith Groups like Aquarian CCU (3), Quakers (6), and Eastern Orthodox (6). (A.4) (P.Opp. 23) (P.Br. 3, 7-9). In March 2012, NCDPS approved Aquarian CCU upon the request of a *single* inmate. (A.1260, 903). The Religious Practices Committee ("RPC") even acknowledged: "There is was only one person interested in this faith[.]" (A.1260). By contrast, in August 2013, at least ten Humanists were interested in a Humanist group at just *one* NCDPS facility (*excluding* Teague), and NCDPS was well aware of this demand. (A.1008, 1022-24) (P.Opp. 29). Furthermore, NCDPS regularly

[8] The groups in *Kaufman II* were: "178 Catholics, 236 Muslims, 166 Pagans, 517 Protestants, 28 from Eastern Religions, 67 Jewish, and 67 Native American." 733 F.3d at 698.

authorizes group meetings with only one or two inmates in attendance. (A.280-700).

C. NCDPS's disparate treatment of Humanists is subject to, and fails, strict scrutiny.

NCDPS continues to eschew *Larson* strict scrutiny without any justification for departing from settled law. (D.Opp. 6). With no further explanation, NCDPS quotes a Fourth Circuit case quoting *Larson* for the general proposition that: "a court applies strict scrutiny only to statutes that 'make[] *explicit and deliberate* distinctions between different religious organizations.'"[9] Based on NCDPS's emphasis on "explicit and deliberate," Plaintiffs can only assume that NCDPS's argument is that its disparate treatment of Humanism is neither explicit nor deliberate. Yet NCDPS offers no insight as to how that possibly could be the case. NCDPS explicitly and deliberately refused to recognize Humanism and authorize Humanist study groups while explicitly authorizing study groups for numerous groups of similar and smaller size. (A.909-10, 924-30). NCDPS even acknowledges its "differing treatment of religious groups" by approving Buddhism but not Humanism. (D.Opp. 7). NCDPS *still* refuses (and deliberately so) to authorize Humanist groups. (D.Opp. 8). Thus, this case fits squarely within *Larson*'s ambit rather than *Lemon. Lemon* applies to policies and practices "affording uniform benefit to *all* religions." *Larson*, 456 U.S. at 252 (emphasis in original). *Larson* is required when the government favors "particular religious denominations [while] excluding others." *Lew*, 733 F.3d at 102. The "distinguishing among religions … *requires strict scrutiny*." *Rouser v. White*, 630 F. Supp. 2d 1165, 1195 (E.D. Cal. 2009) (emphasis added). Indeed, *Larson* frequently applies "in the prison context." *Id.* at 1195. *See* (P.Opp. 15)(citing numerous cases). For example, in *Natarajan Venkataram v. Bureau of Prisons*, the court held that *Larson* applied where a prison was "providing meal accommodations to Jewish and Muslim inmates, but denying similar accommodations to Hindu inmates." 2017 U.S. Dist. LEXIS 5418, at *23-24 (S.D. Fla. Jan. 12, 2017).

D. NCDPS's disparate treatment of Humanists fails the *Lemon* test.

Although *Larson* undeniably applies, the distinction is of little consequence here, as NCDPS's actions cannot survive scrutiny under either test. Just like in *Kaufman I* and *II*, NCDPS has failed to set forth a single legitimate secular purpose for refusing to authorize a Humanist group while authorizing them for similar and smaller-sized groups. *See* (P.Br. 6-26) (P.Opp. 18-19). In attempting to satisfy *Lemon*'s purpose test, NCDPS vaguely posits: "Defendants have set forth, in their depositions and

[9] (D.Opp. 6) (citing *Liberty Univ., Inc. v. Lew*, 733 F.3d 72, 101 (4th Cir. 2013) (quoting *Larson v. Valente*, 456 U.S. 228, 246-47 (1982)) (emphasis supplied by NCDPS).

discovery responses, adequate explanations for the differing treatment of religious groups." (D.Opp. 7). Missing from this is *any citation* or actual mention of those explanations. Plaintiffs have yet to see any explanation that justifies NDCPS's "differing treatment" of Humanists *relative* to other groups. Similarly, in *Kaufman I*, the Seventh Circuit held that a prison failed the purpose test because it "advanced no secular reason why the security concerns they cited as a reason to deny his request for an atheist group do not apply equally to gatherings of Christian, Muslim, Buddhist, or Wiccan inmates." 419 F.3d at 683-84.

Oddly, NCDPS reasserts its same confused argument that "Plaintiffs have set forth documents indicating the diverse religious groups which are recognized by NCDPS which undercuts their same argument that NCDPS favors one group or denomination over another." (D.Opp. 7). This simply underscores NCDPS's misunderstanding of what the Establishment Clause requires. NCDPS has failed to reconcile the fact that "by accommodating some religious views, but not [Humanism], they are promoting the favored ones." *Kaufman I*, 419 F.3d at 684. There is a "long established policy of not picking and choosing among religious beliefs." *Welsh*, 398 U.S. at 338. The unconstitutional "message of exclusion … is *all the more conspicuous* when the government acts with a specific purpose to disfavor a particular religion." *Aziz v. Trump*, 2017 U.S. Dist. LEXIS 20889, at *18-19 (E.D. Va. Feb. 13, 2017).

It is also perplexing, and indeed troubling, that NCDPS now readily concedes that it recognizes "both theistic and non-theistic groups and centralized and de-centralized groups." (D.Opp. 7). NCDPS apparently forgets that it explicitly denied the Humanist group on these very grounds. To recap:

- "they do not believe in a deity" (A.909)
- "You could not find a centralized head for this group." (A.909).
- "There exist no single outside authority to verify a governing body." (A.907-08)
- "There are other humanism groups in the NC but none seems to be associated with each other" (*Id.*)
- "There is no . . . hierarchy of religious leaders" (A.924-26)

Evidently now acknowledging the hypocrisy of rejecting Humanism on such grounds, NCDPS is grasping for a suitable explanation for its discrimination. NCDPS selectively hones in on just one of the many rationalizations proffered by the RPC, yet this justification is equally wanting of substance:

> The denial of the request is simply motivated as was reflected by the committee notes: "The subcommittee finds that there is nothing that could prohibit an inmate from exploring a personal philosophy of any chosen discipline of Humanism. Nevertheless, due its diverse nature and lack of tangible elements *to establish a plausible policy for its oversight*, the subcommittee does agree that Humanism is not an appropriate fit for the structure of Religious Services with North Carolina's correctional institutions.' (Pl. Ex. pp. 925-926). (emphasis added).

(D.Opp. 7-8). NCDPS even claims: "This reasoning is sufficient to satisfy *Lemon*." (*Id.*). This "reasoning," however, is not actually reasoning at all and grossly fails to satisfy *Lemon*.

First, NCDPS is still missing the point. *Lemon*'s purpose test requires a legitimate "secular justification for *the difference in treatment*." *Metzl v. Leininger*, 57 F.3d 618, 621 (7th Cir. 1995) (emphasis added). The burden of proof falls on NCDPS. *Int'l Refugee Assistance Project v. Trump*, 857 F.3d 554, 593 (4th Cir. 2017). NCDPS asserts, "as the subcommittee identifies, there must be some ability to formulate a policy for oversight within the confines of a prison." (D.Opp. 8). Yet NCDPS has not demonstrated how it is more difficult to "establish a plausible policy" for Humanism relative to Buddhism, Wicca, Aquarian CCU, or any other group. On the contrary, NCDPS approved Wicca despite its own recognition that Wicca has "no known central leadership, authority nor organizational structure. This makes it *difficult to determine comprehensive, uniform beliefs and/or set practices.* In addition, secrecy and the clandestine nature of Wicca impede both the identification of religious officials and attempts at authoritative consultation." (A.170) (emphasis added).

Second, NCDPS's justification lacks any factual basis. Many prisons systems, including the BOP, have successfully established policies for the oversight of Humanism. What is more, NCDPS *already possesses* a "plausible policy" for Humanism! Plaintiffs furnished a copy of the BOP's Humanism manual, which offers detailed information for the implementation of Humanism in the prison context.[10]

Third, NCDPS's justification is illegitimate. A "prison's level of familiarity with a specific religion is not a permissible criterion through which to determine the rights of the members of that religion." *Hummel v. Donahue*, 2008 U.S. Dist. LEXIS 47534, at *18 (S.D. Ind. June 19, 2008).[11]

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

NCDPS argues that its disparate treatment of Humanists satisfies Equal Protection because "[t]he record in this case precludes a finding of the purposeful or intentional discrimination required by *Cruz*," since "Defendants dispute that Teague is similarly situated to inmates who participate in recognized religious groups." (D.Opp. 8-9). NCDPS has completely failed to explain why this is so. NCDPS merely reasserts its previous position that "Teague has not been treated any differently than other inmates who

[10] NCDPS suggests that the Court should not consider Exhibit 19 (D.E.70-3), the BOP manual on Humanism. (D.Opp.5). The BOP, however, has consented to the disclosure of Exhibit 19 and has subsequently released the document to the general public via FOIA. (*See* Ex.114, A.1733-40, attached).

[11] *See Thomas v. Ind. Review Bd.*, 450 U.S. 707, 714 (1981) ("[R]eligious beliefs need not be acceptable logical, consistent, or comprehensible to others to be entitled to protection under the First Amendment.").

sought to have a religious group approved and then had their request denied." (*Id.*). Plaintiffs already refuted this argument and will refrain from repetition. (P.Opp. 24-26). It bears emphasis, however, that the Supreme Court and many courts have deemed Humanism to be similarly situated to recognized faith groups such as Buddhism and NCDPS has utterly failed to show otherwise. *Torcaso*, 367 U.S. at 495 n.11. Indeed, "secular humanism is a religion, as much so as Buddhism." *Crockett v. Sorenson*, 568 F. Supp. 1422, 1425 (W.D. Va. 1983). *See CFI*, 758 F.3d at 872-74; *AHA*, 63 F. Supp. 3d at 1284.

NCDPS continues to seek to evade Equal Protection strict scrutiny by operating under the false assumption —without *any rationalization* — that *Turner*'s penological interest standard applies. (D.Opp. 8). NCDPS made no attempt to reconcile or distinguish *Johnson v. California*, 543 U.S. 499, 510-11 (2005) and its progeny. (P.Br. 28-29). As previously shown, however, NCDPS's disparate treatment of Humanists readily fails *Turner*. (P.Br. 28-29) (P.Opp. 27-30). In response, NCDPS simply recites the same conclusory statements made in its opening brief, that its disparate treatment of Humanists is justified simply because, "Defendant Brown and non-party Carlton Joyner have explained the process and significance of considerations like budget, resources, logistics, and security." (D.Opp. 9). *See also* (D.Br. 22) (same). "Routine and automatic arguments to this effect have been made before and have been rejected by [the Supreme Court]." *Cleavinger v. Saxner*, 474 U.S. 193, 207 (1985). Prisons "must first identify the specific penological interests involved and then demonstrate both that those specific interests are the actual bases for their policies and that the policies are reasonably related to the furtherance of the identified interests. An evidentiary showing is required as to each point." *Walker v. Sumner*, 917 F.2d 382, 386 (9th Cir. 1990). In fact, the record *belies* any penological interest asserted by NCDPS. The RPC Minutes made clear: "there is no reason to conclude that Humanism would impose a threat to the security, control, operation and safety of a correctional institution." (A.925). And notably, *none* of these budget, resources, and security concerns were cited by NCDPS in refusing to recognize Humanism. (P.Br. 23). The "penological interest . . . must have actually motivated them at the time they enacted or enforced the restriction; the invoked interests fail under *Turner* if they are a pretext for an illegitimate, content-specific motivation." *Hammer v. Ashcroft*, 512 F.3d 961, 968 (7th Cir. 2008).

IV. Conclusion

In view of the above, Plaintiffs request that the Court grant their Motion for Summary Judgment and deny NCDPS's Motion in its entirety.

Respectfully submitted, this 13th day of October, 2017.

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CERTIFICATE OF SERVICE

I certify that I electronically filed the attached **Plaintiffs' Reply In Support Of Their Motion For Summary Judgment** with the Clerk of the Court using the CM/ECF system, which will provide notice to the following CM/ECF participant(s):

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This 13th day of October, 2017.

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