

In The  
**United States Court Of Appeals**  
**For The Ninth Circuit**

**BENJAMIN W. ESPINOSA; AMERICAN HUMANIST ASSOCIATION,**  
*Plaintiffs-Appellants,*

v.

**JAMES DZURENDA, in his official capacity as Director of the Nevada Department of Corrections; JAMES STOGNER, in his official capacity as Head Chaplain of LCC,**  
*Defendants-Appellees.*

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

---

**BRIEF AMICUS CURIAE OF THE FREEDOM FROM  
RELIGION FOUNDATION AND AMERICANS UNITED FOR  
SEPARATION OF CHURCH AND STATE  
IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL**

---

**Andrew L. Seidel**  
*Counsel of Record*  
**Sam Grover**  
**Colin E. McNamara**  
*Freedom From Religion Foundation*  
10 N. Henry St  
Madison, WI 53703  
(608) 256-8900  
aseidel@ffrf.org

*Counsel for Amicus*  
*Freedom From Religion Foundation*

**Alex J. Luchenitser**  
*Americans United for*  
*Separation of Church and State*  
1310 L St. NW, Suite 200  
Washington, DC 20005  
(202) 466-3234  
luchenitser@au.org

*Counsel for Amicus*  
*Americans United for*  
*Separation of Church and State*

**TABLE OF CONTENTS**

TABLE OF CONTENTS.....i

TABLE OF AUTHORITIES ..... ii

CORPORATE DISCLOSURE STATEMENT .....vi

STATEMENT PURSUANT TO RULE 29.....vi

INTEREST OF *AMICI*..... 1

INTRODUCTION .....2

    I.    Humanism is entitled to constitutional protection as a religion.....4

        A.    Nontheistic belief systems are entitled to the same protection as theistic belief systems under the First and Fourteenth Amendments .....5

        B.    Case law does not support the conclusion that only theistic belief systems are protected as “religions” under the Constitution ..... 10

    II.   Humanism is a well-established belief system recognized by government bodies, including many prison systems ..... 17

        A.    Nontheistic ideologies are now commonly recognized as alternatives to mainstream religions ..... 17

        B.    There is considerable demand for Secular Humanist group meetings in prisons, which can have a significant, positive impact on nontheistic inmates .....20

CERTIFICATE OF SERVICE .....24

CERTIFICATE OF COMPLIANCE.....25

## TABLE OF AUTHORITIES

### CASES

<i>Africa v. Pennsylvania</i> , 662 F.2d 1025 (3d Cir. 1981) .....	12, 13, 14
<i>Alvarado v. City of San Jose</i> , 94 F.3d 1223 (9th Cir. 1996) .....	15, 16, 17
<i>Am. Humanist Ass’n v. United States</i> , 63 F. Supp. 3d 1274 (D. Or. 2014) .....	9, 10, 11, 12, 13
<i>Davis v. Beason</i> , 133 U.S. 333 (1890) .....	4
<i>Epperson v. Arkansas</i> , 393 U.S. 97 (1968) .....	12
<i>Equal Employment Opportunity Comm’n v. Townley Eng’g &amp; Mfg. Co.</i> , 859 F.2d 610 (9th Cir. 1988) .....	8, 9
<i>Everson v. Bd. of Educ. of Ewing</i> , 330 U.S. 1 (1947) .....	12
<i>Glassroth v. Moore</i> , 335 F.3d 1282 (11th Cir. 2003) .....	7
<i>Grove v. Mead Sch. Dist.</i> , 753 F.2d 1528 (9th Cir. 1985) .....	12
<i>Kaufman v. McCaughtry</i> , 419 F.3d 678 (7th Cir. 2005) .....	7
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971) .....	7
<i>Malnak v. Yogi</i> , 592 F.2d 197 (3d Cir. 1979) .....	14
<i>Mathis v. Christian Heating &amp; Air Conditioning, Inc.</i> , 158 F. Supp. 3d 317 (E.D. Pa. 2016) .....	9

<i>McCreary Cty. v. ACLU of Ky.</i> , 545 U.S. 844 (2005).....	7, 12
<i>Pelozo v. Capistrano Unified Sch. Dist.</i> , 37 F.3d 517 (9th Cir. 1994).....	10, 11, 12
<i>Theriacault v. Silber</i> , 547 F.2d 1279 (5th Cir. 1977).....	8
<i>Torcaso v. Watkins</i> , 367 U.S. 488 (1961).....	5, 7
<i>United States v. Moon</i> , 718 F.2d 1210 (2d Cir. 1983).....	8
<i>United States v. Seeger</i> , 380 U.S. 163 (1965).....	6
<i>Wallace v. Jaffree</i> , 472 U.S. 38 (1985).....	7, 12
<i>Wash. Ethical Soc’y v. District of Columbia</i> , 249 F.2d 127 (D.C. Cir. 1957).....	8
<i>Welsh v. United States</i> , 398 U.S. 333 (1970).....	13
<i>Williamson v. Brevard Cty.</i> , 276 F. Supp. 3d 1260 (M.D. Fla. 2017).....	9

**STATUTES**

42 U.S.C. § 2000e (“Title VII”).....	8, 9
I.R.C. § 170(b)(1)(A)(i).....	18

**CONSTITUTIONAL PROVISIONS**

U.S. CONST. amend I.....	<i>passim</i>
U.S. CONST. art. VI, cl. 3.....	3
U.S. CONST. amend XIV.....	5

## OTHER AUTHORITIES

- 7 Journal of Proceedings of the Senate of Maryland,  
2015 Regular Session 30, <http://bit.ly/2o2bK7k>.....20
- A Secular Invocation Maine House 2 7 2017*,  
YouTube (May 15, 2017), <http://bit.ly/2BpQGjb>.....20
- Available Emblems of Belief for Placement on Government Headstones and  
Markers*, National Cemetery Administration, <http://1.usa.gov/1ElvZM8>.....18
- Become a Humanist Celebrant*, The Humanist Society,  
<http://thehumanistsociety.org/celebrants/apply/> .....18
- History of Unitarian Universalism*, Unitarian Universalist Association,  
[www.uua.org/beliefs/who-we-are/history](http://www.uua.org/beliefs/who-we-are/history) .....5
- House – 3rd Day of Regular Session*, Fla. Senate (Jan. 11, 2018),  
<http://bit.ly/2HaIxjo>.....20
- House Journal, Seventy-First General Assembly, State of Colorado,  
First Regular Session 1177 (2017), <http://bit.ly/2BTqY83> .....20
- House Video (2017-04-05)*, Iowa Legislature  
(April 5, 2017), <http://bit.ly/2o53XWq>.....20
- Humanism and Its Aspirations: Humanist Manifesto III, a Successor to the  
Humanist Manifesto of 1933*, American Humanist Association,  
<https://americanhumanist.org/what-is-humanism/manifesto3/>.....14
- Humanist Chaplaincies*, Humanist Chaplaincies,  
<http://tinyurl.com/humanistchaplains>..... 19-20
- Invocations We've Given in Central FL and Invocations from Other Areas*,  
Central Florida Freethought Community <http://cflfreethought.org/invocations/> ....20
- Letter from Holly O. Paz, Director, Exempt Organizations Rulings and  
Agreements, Internal Revenue Service, to American Ethical Union  
(Mar. 22, 2013) (on file with counsel).....19

Letter from Robert C. Padilla, Manager, Customer Service,  
Internal Revenue Service, to Humanist Society of Friends  
(Dec. 28, 1999), <http://bit.ly/2HDqyIO>.....18, 19

*Meet Our Leaders*, American Ethical Union,  
<https://aeu.org/meet-our-leaders/> .....18

Memorandum from Lernes J. Hebert, Acting Deputy Assistant  
Sec’y of Def. for Military Pers. Policy, to various Dep’t of Def. officials  
(Mar. 27, 2017), <http://bit.ly/2qk8vYu> .....18

*Mission & Vision*, American Ethical Union,  
<https://aeu.org/who-we-are/mission-vision/> .....5

*Religions Approved to Operate in DOC Facilities*, Virginia Department of  
Corrections (July 1, 2015) (revised Sept. 25, 2017), available at  
[https://ffrf.org/images/841-3\\_A3.pdf](https://ffrf.org/images/841-3_A3.pdf).....19

*Secular Invocation Resources*, The Humanist Society,  
<http://thehumanistsociety.org/invocations/resources/> .....20

Steven DuBois, *Federal Prisons Agree to Recognize Humanism as Religion*,  
AP (July 28, 2015), <http://bit.ly/2EANnnJ> .....19

*The Amsterdam Declaration*, International Humanist and Ethical Union,  
<http://iheu.org/humanism/the-amsterdam-declaration/>.....15

*The Happy Human Symbol*, Humanists UK,  
<https://humanism.org.uk/humanism/the-happy-human-symbol/> .....15

*The Seven Principles*, Unitarian Universalist Association,  
[www.uua.org/beliefs/what-we-believe/principles](http://www.uua.org/beliefs/what-we-believe/principles) .....5

Thomas Jefferson, *Notes on the State of Virginia* (1784).....4

*We Welcome People with Many Beliefs*, Unitarian Universalist Association,  
[www.uua.org/beliefs/what-we-believe/beliefs](http://www.uua.org/beliefs/what-we-believe/beliefs) .....5

Webster’s II New Riverside University Dictionary 993 (1988).....10

## **CORPORATE DISCLOSURE STATEMENT**

The Freedom From Religion Foundation and Americans United for Separation of Church and State are 501(c)(3) nonprofit corporations that have no parent corporations or stock held by any publicly held corporation.

## **STATEMENT PURSUANT TO RULE 29**

All parties in this case have consented to the filing of this brief. No party or counsel thereof authored this brief in whole or in part; no person other than *amici* contributed money that was intended to fund preparing or submitting this brief.

## INTEREST OF AMICI

The Freedom From Religion Foundation (“FFRF”) is a 501(c)(3) educational non-profit organization incorporated in 1978. FFRF’s primary purposes are to protect the constitutional principle of separation between state and church and to educate the public on the rights and views of atheists, agnostics, and other nontheists, including Humanists. FFRF has over 32,000 members nationally, including more than 250 members in Nevada.

FFRF has been a litigant in approximately 70 First Amendment cases principally involving the Establishment Clause. FFRF is committed to protecting the rights of conscience of nontheistic inmates and has worked with nontheistic inmates in multiple states to form secular study groups. The results of those efforts are described in Section II of this brief.

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization that is committed to preserving the constitutional principles of religious freedom and separation of church and state. Since its founding in 1947, Americans United has participated as a party, counsel, or *amicus curiae* in many of the leading church-state cases decided by the U.S. Supreme Court and by federal and state appellate and trial courts across the country. Americans United represents more than 125,000 members and supporters,

including many within the Ninth Circuit. Americans United believes that people's rights and privileges should never be linked to whether they believe in God.

## **INTRODUCTION**

The disparate treatment of Humanists by the Nevada Department of Corrections (“NDOC”) and Lovelock Correctional Center (“LCC”) defies any innocent explanation. NDOC currently recognizes 28 distinct “Faith Groups.” Inmates belonging to any of these exclusively theistic “Faith Groups” are allowed to meet with one another to discuss their faith virtually as a matter of course. They are also permitted to keep certain “religious items” in their cells and the prison chapel, take time off from work duty to observe their holidays, and meet with volunteer chaplains, among other advantages.

And yet, inexplicably, NDOC denies Humanists these same privileges. NDOC has routinely ignored plaintiff-appellant Espinosa's requests to recognize Humanism as a Faith Group. As a result, Espinosa has been unable to form a Humanist study group. NDOC's decision to deny recognition of Humanism flies in the face of constitutional law and sound penological policy. NDOC and LCC have established a policy or practice that discriminates against nontheistic belief systems, such as Humanism, and others who are nonreligious. Espinosa seeks to reverse this policy and vindicate the constitutional rights of nontheistic NDOC inmates. Yet his efforts have thus far been thwarted by an order of the district court

that stands in opposition to freedom of conscience as protected by the First Amendment and the overwhelming weight of case law.

To conclude that nontheists, including nontheistic Humanists, do not enjoy the same rights of conscience as theistic citizens would be to misinterpret and rewrite the very meaning of the Establishment and Free Exercise Clauses. Our country's Founders adopted an entirely secular Constitution, in which the only references to religion limit governmental power and protect individual conscience, like the prohibition on any religious test for public office, *see* U.S. CONST. art. VI, cl. 3, and later, the Establishment and Free Exercise Clauses of the First Amendment. The framers of our Constitution abhorred and repudiated the idea of a theocracy, or of a government in which theistic citizens would be insiders and nontheistic citizens outsiders. Omitting references to a divinity from the Constitution was a revolutionary and deliberate act. This founding document was the first in the world to give sovereignty not to a divinity, but to "We, the People."

Adopting an entirely secular Constitution was not meant as an attack on theistic beliefs. It was intended both to ensure that religion would not interfere with government operation and that the government would not interfere with religious institutions and citizens' rights of conscience, whether they were theists or nontheists. As Thomas Jefferson famously argued, "The legitimate powers of government extend to such acts only as are injurious to others. But it does me no

injury for my neighbour to say there are twenty gods, or no god. It neither picks my pocket nor breaks my leg. . . . Reason and free enquiry are the only effectual agents against error.” Thomas Jefferson, *Notes on the State of Virginia* (1784) (William Peden, ed., Chapel Hill: University of North Carolina Press for the Institute of Early American History and Culture 1954), *available at* <http://bit.ly/2GDvpC4>.

As explained below, Humanists and other nontheists are entitled to the same constitutional protections as their theistic counterparts. This brief first argues that Humanists’ lack of belief in a deity is no bar to full constitutional protection. Second, we argue that Humanism is neither new nor idiosyncratic but rather is a belief system shared by people around the world, including in cellblocks across the country. *Amicus* FFRF’s work with atheist and Humanist inmates makes apparent the harm that would result if the district court’s decision in this case is upheld. The district court’s judgment should be reversed.

**I. Humanism is entitled to constitutional protection as a religion.**

Rolling back the clock to a time when the term “religion” referred only to “one’s views of his relations to his Creator,” *Davis v. Beason*, 133 U.S. 333, 342 (1890), the district court’s view apparently was that only theistic belief systems are entitled to the Constitution’s protections against religious discrimination. This

anachronistic interpretation runs counter to more than half a century of well-established legal precedent.

**A. Nontheistic belief systems are entitled to the same protection as theistic belief systems under the First and Fourteenth Amendments.**

Nontheistic belief systems, like Humanism, Ethical Culture, and Unitarian Universalism,<sup>1</sup> are protected by the Constitution to the same extent as monotheistic belief systems, like Christianity, Judaism, and Islam, and polytheistic belief systems like Hinduism and Shintoism. The Supreme Court definitively established that belief in a god or gods is not required for one to be protected by the Constitution’s prohibitions against religious discrimination, when the Court held that government must not “aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.” *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961). And the Court has specifically identified Humanism, the

---

<sup>1</sup> Ethical Culture, also known as Ethical Humanism, “is a humanist Movement focusing on human goodness and building ethical relationships with each other and the Earth.” *Mission & Vision*, American Ethical Union, <https://aeu.org/who-we-are/mission-vision/> (last visited Feb. 22, 2018). Unitarian Universalism is a “liberal religious tradition” that welcomes both theists and nontheists, while “affirm[ing] and promot[ing] seven Principles” that in themselves are nontheistic. *See History of Unitarian Universalism*, Unitarian Universalist Association, [www.uua.org/beliefs/who-we-are/history](http://www.uua.org/beliefs/who-we-are/history) (last visited Feb. 22, 2018); *We Welcome People with Many Beliefs*, Unitarian Universalist Association, [www.uua.org/beliefs/what-we-believe/beliefs](http://www.uua.org/beliefs/what-we-believe/beliefs) (last visited Feb. 22, 2018); *The Seven Principles*, Unitarian Universalist Association, [www.uua.org/beliefs/what-we-believe/principles](http://www.uua.org/beliefs/what-we-believe/principles) (last visited Feb. 22, 2018).

belief system that appellant Espinosa identifies as his own, as one of the many “religions in this country which do not teach what would generally be considered a belief in the existence of God.” *Id.* at 495 n.11. *See also United States v. Seeger*, 380 U.S. 163, 165–66 (1965) (applying draft exemption that expressly covered those with a “belief in a relation to a Supreme Being” to any nontheistic belief “that is sincere and meaningful[ly] occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God . . .” because “[w]here such beliefs have parallel positions in the lives of their respective holders we cannot say that one is ‘in a relation to a Supreme Being’ and the other is not”); *id.* at 188, 191 (Douglas, J., concurring) (noting that if a statute were interpreted to provide an exemption only to those who hold an orthodox belief in God while excluding faiths such as Buddhism, which sometimes has been characterized as “atheistic,” “that kind of discrimination . . . would violate the Free Exercise Clause of the First Amendment. It would also result in a denial of equal protection by preferring some religions over others . . .”). Whether one semantically refers to Humanism as a “religion,” a “belief system,” or something else entirely, Supreme Court precedent definitively establishes that one need not be a theist to enjoy full and equal constitutional protections.

In the prison context, atheism, agnosticism, Humanism, Ethical Culture, and Unitarian Universalism must receive the same constitutional protections as theistic

belief systems. In a case with facts remarkably similar to those of the one at bar, the Seventh Circuit held that a state prison violated the Establishment Clause by denying an atheist inmate the right to form an atheist study group, for “[t]he Supreme Court has recognized atheism as equivalent to a ‘religion’ for purposes of the First Amendment on numerous occasions . . . .” *Kaufman v. McCaughtry*, 419 F.3d 678, 682 (7th Cir. 2005) (“[T]he Court understands the [Establishment Clause’s] reference to religion to include what it often calls ‘nonreligion.’” (citing and discussing *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844 (2005); *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Torcaso*, 367 U.S. 488)). The court went on to rule that because the prison had “failed even to articulate—much less support with evidence—a secular reason why a meeting of atheist inmates would pose a greater security risk than meetings of inmates of other faiths,” the denial of an atheist study group violated the Establishment Clause. *Id.* at 684 (citing *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971)).

Numerous other federal courts of appeals have similarly recognized that nontheists, including atheists, Buddhists, Ethical Culturists, Unitarians, and Humanists, receive the same protections as adherents to theistic belief systems for purposes of the Constitution, civil-rights laws, and tax laws. *See, e.g., Glassroth v. Moore*, 335 F.3d 1282, 1294 (11th Cir. 2003) (“The Supreme Court has instructed us that for First Amendment purposes religion includes non-Christian faiths and

those that do not profess belief in the Judeo-Christian God; indeed, it includes the lack of any faith.”); *United States v. Moon*, 718 F.2d 1210, 1227 (2d Cir. 1983) (characterizing the 1890s definition of “religion”—“having reference to a person’s views of his relations to his Creator”—as “unduly narrow today”; and offering, in the First Amendment context, “Buddhism and the Unitarian Church” as examples of “religions which do not positively require the assumption of a God”); *Theriault v. Silber*, 547 F.2d 1279, 1281 (5th Cir. 1977) (“To the extent that [a test of what constitutes a “religion” includes] the requirement that one possess a ‘ . . . belief in a Supreme being . . . ’ and such a criterion excludes, for example, agnosticism or conscientious atheism, from the Free Exercise and Establishment shields, that requirement is too narrow.”); *Wash. Ethical Soc’y v. District of Columbia*, 249 F.2d 127, 129 (D.C. Cir. 1957) (applying tax exemption for “a religious corporation or society” to an Ethical Culture congregation and noting “[t]o construe exemptions so strictly that unorthodox or minority forms of worship would be denied the exemption benefits granted to those conforming to the majority beliefs might well raise constitutional issues”).

In keeping with the well-established precedent outlined above, this Court has recognized that atheists are equally protected by Title VII’s prohibitions against religious discrimination in employment. *Equal Employment Opportunity Comm’n v. Townley Eng’g & Mfg. Co.*, 859 F.2d 610, 621 n.18 (9th Cir. 1988). The Court

described Title VII as protecting “employees who have religious objections to attending [a company’s mandatory] devotional services” and applied that protection to an atheist. *Id.* at 621 n.18. Judge Noonan, though he dissented as to how the principle should be applied in *Townley*, agreed that the right of atheists to equal treatment “must find its roots in the First Amendment.” *Id.* at 622 (Noonan, J., dissenting) (“The right to believe necessarily implies the right not to believe. Conscience cannot be governmentally coerced. The Free Exercise Clause embraces the atheist with the orthodox.”).

Other federal courts have likewise concluded that atheism and Humanism receive the same constitutionally rooted protections as theistic belief systems. *See, e.g., Williamson v. Brevard Cty.*, 276 F. Supp. 3d 1260, 1281 (M.D. Fla. 2017) (recognizing atheism and Humanism as “religions entitled to First Amendment protection”), *appeal docketed*, No. 17-15769 (11th Cir. Dec. 29, 2017), *cross-appeal docketed*, No. 18-10109 (11th Cir. Jan. 11, 2018); *Mathis v. Christian Heating & Air Conditioning, Inc.*, 158 F. Supp. 3d 317, 329–30 (E.D. Pa. 2016) (holding atheism protected under Title VII); *Am. Humanist Ass’n v. United States*, 63 F. Supp. 3d 1274, 1283 (D. Or. 2014) (holding Secular Humanism protected under Establishment Clause and Equal Protection Clause). The *American Humanist Association* decision is particularly relevant to this case, as both cases involve a Humanist inmate’s claims that a prison denied him permission to identify

as a Humanist for his official religious designation and thus denied him equal opportunity to form a Humanist study group. The court concluded that alleging such denials established a *prima facie* case under both the Establishment Clause and the Equal Protection Clause. *Id.* at 1283–84. The district court in this case should have held likewise.

**B. Case law does not support the conclusion that only theistic belief systems are protected as “religions” under the Constitution.**

In dismissing Espinosa’s claims, the district court concluded that ““religion is the “belief in and reverence for a supernatural power accepted as the creator and governor of the universe.””” Plaintiffs-Appellants’ Record Excerpts, EOR 5 (quoting *Pelozza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 521 n.4 (9th Cir. 1994) (quoting Webster’s II New Riverside University Dictionary 993 (1988))). This rigid definition of religion improperly requires belief systems to meet a theistic doctrinal test as a prerequisite for First Amendment protection, excluding any belief system that does not both acknowledge and revere some form of deity. Upholding the theistic requirement imposed by the district court would resuscitate a long-dead concept of what “religion” means for the purposes of the First Amendment. This Court should decline to revive that outdated, discriminatory interpretation, which runs contrary to the well-established precedent cited in Section I.A above.

The cases upon which the district court based its limited analysis do not support discrimination based on such an outdated, narrow definition of “religion.” For example, the district court relied on *Pelozo*, in which a biology teacher alleged that a school district had violated the Establishment Clause by forcing him to teach “evolutionism,” which he claimed was a religious belief system. 37 F.3d at 519. The district court quoted *Pelozo* for the proposition that “neither the Supreme Court, nor this circuit, has ever held that evolutionism or secular humanism are ‘religions’ for Establishment Clause purposes.” EOR 5 (quoting 37 F.3d at 521). But this off-hand reference to secular humanism in *Pelozo* was in response to the teacher’s argument that “the school district’s actions establish a state-supported religion of evolutionism, or more generally of ‘secular humanism.’” 37 F.3d at 521. The court held that “evolutionism” is a scientific theory, not a religion, and therefore teaching it could not violate the Establishment Clause. *Id.* (“‘Evolution’ and ‘evolutionism’ define a biological concept: higher life forms evolve from lower ones.”). *Pelozo* stands for the proposition that if the teaching the government is promoting is not a religion, then the government is not violating the Establishment Clause. That conclusion has no bearing on the instant case, as one federal court has already observed.

In the *American Humanist Association* decision, discussed above, the court grappled directly with the argument that Secular Humanism is not a “religion” for

Establishment Clause purposes and expressly addressed the inapplicability of the Ninth Circuit’s decision in *Peloza*. The *American Humanist Association* court rightly noted that reliance on *Peloza* in this context “is misplaced.” 63 F. Supp. 3d at 1283. The *Peloza* case “focused primarily on whether the teaching of evolutionary biology violated the Establishment Clause and the Ninth Circuit held that it did not. In fact, the Ninth Circuit has cast doubt on defendants’ broad interpretation of *Peloza*.” *Id.* (comparing *Peloza* with *Grove v. Mead Sch. Dist.*, 753 F.2d 1528, 1534 (9th Cir. 1985) (“Secular humanism may be a religion.”)).

The district court in this case also cited *Africa v. Pennsylvania*, 662 F.2d 1025 (3d Cir. 1981), in support of limiting constitutional protections to theistic belief systems. But unlike this case, *Africa* was a Free Exercise case, not an Establishment Clause or Equal Protection Clause case. The court asserted that *in the Free Exercise context*, “two threshold requirements must be met before particular beliefs, alleged to be religious in nature, are accorded First Amendment protection. A court’s task is to decide whether the beliefs avowed are (1) sincerely held, and (2) religious in nature.” *Id.* at 1029–30. But the Establishment Clause “mandates governmental neutrality between religion and religion, *and between religion and nonreligion.*” *McCreary Cty. v. ACLU*, 545 U.S. 844, 860 (2005) (citing *Wallace v. Jaffree*, 472 U.S. 38, 53 (1985); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15-16 (1947))

(emphasis added). Thus, as in *American Humanist Association*, determining whether Humanism is “religious in nature” is unnecessary, since “whether Humanism is a religion or a nonreligion, the Establishment Clause applies.” 63 F. Supp. 3d at 1286. Nevada prison officials have violated the Establishment Clause if they favored religion over “nonreligion,” a term that encompasses atheists and agnostics, or if they favored theistic religions over Humanism.

But even if Humanism needed to qualify as “religious in nature” in order to receive constitutional protections, it is not automatically disqualified for being nontheistic. The *Africa* court identified three guidelines that the Third Circuit has since used to determine what belief systems are “religions” for constitutional purposes. 662 F.2d at 1032. Theistic belief is not a requirement under this test. *See id.* The Third Circuit explained that although “the Supreme Court has never announced a comprehensive definition of religion . . . [t]here can be no doubt . . . that the Court has moved considerably beyond the wholly theistic interpretation of that term . . . .” *Id.* at 1031. The Third Circuit further noted that in *Welsh v. United States*, 398 U.S. 333 (1970), a conscientious-objector case similar to the *Seeger* decision cited above, “the four justices who considered the constitutional question . . . either expressly or implicitly defined religion to include non-theistic ideologies.” *Id.*

The three *Africa* guidelines, which the district court in this case did not apply, are: “First, a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters. Second, a religion is comprehensive in nature; it consists of a belief-system as opposed to an isolated teaching. Third, a religion can often be recognized by the presence of certain formal and external signs.” *Id.* at 1032. These factors do not serve as a universal gauge of what qualifies as a “religion” for constitutional purposes; the Third Circuit made clear that they are “ ‘useful indicia,’ ” not the “only possible factors.” *Id.* at 1032 & n.13 (quoting *Malnak v. Yogi*, 592 F.2d 197, 207–08 (3d Cir. 1979) (Adams, J., concurring)). Nonetheless, plaintiff Espinosa’s Humanism certainly qualifies as a religion under the *Africa* guidelines.

Humanism addresses fundamental questions, such as the existence of a god or gods (which Humanists reject), the underlying nature of the universe (which they assert contains no supernatural dimension), and the nature of morality (which they assert is derived from each person’s inherent dignity). *See Humanism and Its Aspirations: Humanist Manifesto III, a Successor to the Humanist Manifesto of 1933*, American Humanist Association, <https://americanhumanist.org/what-is-humanism/manifesto3/> (last visited Feb. 22, 2018). Humanism is comprehensive, with statements such as the Humanist Manifesto outlining Humanist aspirations in the fields of science, ethics, political order, and individual human rights. *See id.*;

*The Amsterdam Declaration*, International Humanist and Ethical Union, <http://iheu.org/humanism/the-amsterdam-declaration/> (last visited Feb. 22, 2018).

Humanism also has several “external signs” of adherence, such as the “happy human” symbol (an internationally recognized symbol of Humanism); several recognized holidays; clergy (often called “Celebrants”); chaplains; and several formal entities dedicated to the cultivation of Humanistic beliefs, such as the American Humanist Association, Humanists UK, the American Ethical Union. *See* Appellants’ Brief at 5–10 and record citations therein; *The Happy Human Symbol*, Humanists UK, <https://humanism.org.uk/humanism/the-happy-human-symbol/> (last visited Feb. 22, 2018).

The final case upon which the district court relied for its conclusion that Humanism is not a religion is *Alvarado v. City of San Jose*, which the district court quoted at length: “We are hard put to imagine a more unworkable definition of religion or religious symbol or believer for the purposes of the Establishment Clause than that which is offered here. Few governmental activities could escape censure under a constitutional definition of ‘religion’ which includes any symbol or belief to which an individual ascribes ‘serious or almost-serious’ spiritual significance. . . .” EOR 5 (quoting 94 F.3d 1223, 1230 (9th Cir. 1996) (internal citations omitted)). Given the context in which the district court cited this passage,

one would assume that the court in *Alvarado* was referring to a nontheistic belief system, but that is not the case.

*Alvarado* was an Establishment Clause case brought by several San Jose residents who sought to enjoin the city from erecting a statue of the Plumed Serpent (known as Quetzalcoatl) on city property. The plaintiffs contended that the Plumed Serpent, a symbol of the ancient Aztec religion, had religious significance to both Mormons and those identified as adherents of the “New Age” movement, and that its construction on city property thus violated the Establishment Clause. 94 F.3d at 1226. On appeal, this Court affirmed the district court’s grant of summary judgment to the city, holding that while the Plumed Serpent may have had “religious significance” to some *individuals*, it was not associated with any recognizable, cohesive religion or ideology, and so its presence on city property did not violate the Establishment Clause. *Id.* at 1232. This Court’s reference to an “unworkable definition of religion” concerned the *Alvarado* plaintiffs’ argument that because two authors associated with the fractious “New Age” movement expressed their subjective, personal beliefs concerning the mystic and cultural significance of the Plumed Serpent, Quetzalcoatl was somehow imbued with objective religious significance. *Id.* at 1230.

This line of reasoning simply has no application to the present case. Espinosa’s Humanist beliefs are not merely subjective, personal reflections on a

spiritual relic from an ancient culture; rather, they are a comprehensive set of principles and rules that inform his everyday experiences, morals, and answers to the most fundamental questions typically addressed by religions. Furthermore, these beliefs are not isolated to Espinosa or a small band of adherents—they are shared by people all across the globe. The *Alvarado* quote, ripped from its relevant context and laid bare without discussion, cannot undo over half a century of well-established case law holding that nontheistic belief systems, including Humanism, receive constitutional protections.

**II. Humanism is a well-established belief system recognized by government bodies, including many prison systems.**

If the district court’s decision is allowed to stand, it will not only cut against a considerable, long-standing body of case law, but it will also run counter to the policies and practices now embraced by numerous government bodies, including state prison systems. As many prison systems have recognized, to deny Humanist and atheist inmates equal opportunity to meet as a group to discuss their beliefs would take away a unique opportunity for beneficial communal reflection on secular values and the concomitant potential for positive personal growth.

**A. Nontheistic ideologies are now commonly recognized as alternatives to mainstream religions.**

The federal government has demonstrated that atheism, agnosticism, Humanism, Ethical Culture, and Unitarian Universalism are equally recognized

and protected under its policies regarding religions. The Department of Defense recognizes atheism, agnosticism, Humanism, and Unitarian Universalism as among the “faith and belief groups” in its code meant to protect “the rights of conscience of members of the Armed Forces.” *See* Memorandum from Lernes J. Hebert, Acting Deputy Assistant Sec’y of Def. for Military Pers. Policy, to various Dep’t of Def. officials 1, 6–7 (Mar. 27, 2017), <http://bit.ly/2qk8vYu>. The Department of Veterans Affairs recognizes atheist, Humanist, and Unitarian Universalist symbols as unique “emblems of belief” available for placement on government-furnished headstones for deceased veterans. *See Available Emblems of Belief for Placement on Government Headstones and Markers*, National Cemetery Administration, <http://1.usa.gov/1ElvZM8> (last visited Feb. 21, 2018). And the I.R.S. recognizes the Humanist Society (which ordains Humanist clergy) and the American Ethical Union (which ordains Ethical Humanist/Ethical Culture clergy) as religious organizations. *See Become a Humanist Celebrant*, The Humanist Society, <http://thehumanistsociety.org/celebrants/apply/> (last visited Feb. 22, 2018); *Meet Our Leaders*, American Ethical Union, <https://aeu.org/meet-our-leaders/> (last visited Feb. 22, 2018); Letter from Robert C. Padilla, Manager, Customer Service, Internal Revenue Service, to Humanist Society of Friends (Dec. 28, 1999) (stating that Humanist Society is classified as an organization described in I.R.C. § 170(b)(1)(A)(i), which provides tax-exempt status to “church[es] or . . .

convention[s] or association[s] of churches”), <http://bit.ly/2HDqylO>; Letter from Holly O. Paz, Director, Exempt Organizations Rulings and Agreements, Internal Revenue Service, to American Ethical Union (Mar. 22, 2013) (similar letter for American Ethical Union) (on file with counsel).

Even more relevant to this case, the Federal Bureau of Prisons recognizes Humanism as an equally protected belief system for inmates. *See* Steven DuBois, *Federal Prisons Agree to Recognize Humanism as Religion*, AP (July 28, 2015), <http://bit.ly/2EANnnJ>. The Virginia Department of Corrections similarly recognizes “Humanism (Religious and Secular)” and “Unitarian Universalist” on its list of “Religions Approved to Operate in DOC Facilities.” *See Religions Approved to Operate in DOC Facilities*, Virginia Department of Corrections (July 1, 2015) (revised Sept. 25, 2017), available at [https://ffrf.org/images/841-3\\_A3.pdf](https://ffrf.org/images/841-3_A3.pdf).

The need to foster a safe space for Humanists and other nontheistic people to congregate and discuss their shared values and beliefs is becoming more widely recognized in other contexts as well, as the percentage of Humanists and other nontheistic citizens continues to grow. A number of major U.S. universities—including Stanford, Harvard, Yale, Columbia, New York University, University of Central Florida, Rutgers, and American University—now have Humanist chaplaincies. *See Humanist Chaplaincies*, Humanist Chaplaincies,

<http://tinyurl.com/humanistchaplains> (last visited Feb. 21, 2018). Moreover, atheists, Humanist chaplains, and other nontheistic individuals now regularly provide opening secular invocations at government meetings around the country where a government entity has a policy of allowing theistic individuals to give opening invocations.<sup>2</sup>

**B. There is considerable demand for Secular Humanist group meetings in prisons, which can have a significant, positive impact on nontheistic inmates.**

*Amicus* FFRF has defended the rights of Humanist and atheist inmates seeking equal treatment in prison facilities around the country. As part of that

---

<sup>2</sup> One of *amicus* FFRF's chapters, the Central Florida Freethought Community, has a non-comprehensive list, with references, of nontheistic invocations given at government meetings across the country, including in Alabama, Arizona, Colorado, Florida, Georgia, Illinois, Louisiana, Maine, Michigan, New York, Nevada, North Carolina, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Washington, and Wisconsin. As of January 2016, the group is only tracking its own nontheistic invocations—of which there have been over 50 since 2014—because nontheistic invocations given by others across the country have become too commonplace for their group to track effectively. See *Invocations We've Given in Central FL* and *Invocations from Other Areas*, Central Florida Freethought Community (last visited Feb. 22, 2018), <http://cflfreethought.org/invocations/>; see also *Secular Invocation Resources*, The Humanist Society, <http://thehumanistsociety.org/invocations/resources/> (last visited Feb. 22, 2018); House Journal, Seventy-First General Assembly, State of Colorado, First Regular Session 1177 (2017), <http://bit.ly/2BTqY83>; House – 3rd Day of Regular Session, Fla. Senate (Jan. 11, 2018), <http://bit.ly/2HaIxjo>; House Video (2017-04-05), Iowa Legislature (April 5, 2017), <http://bit.ly/2o53XWq>; A Secular Invocation Maine House 2 7 2017, YouTube (May 15, 2017), <http://bit.ly/2BpQGjb>; 7 Journal of Proceedings of the Senate of Maryland, 2015 Regular Session 30, <http://bit.ly/2o2bK7k>.

effort, FFRF has advocated for inmates within both the Virginia DOC and the South Dakota DOC who were unable to form study groups or meeting groups for likeminded nontheistic inmates.

On June 22, 2016, in response to FFRF's advocacy on the issue, the Virginia DOC approved Humanism as a "religion" and added it to its list of "Religions Approved to Operate in DOC facilities." After Humanism gained this recognition, an inmate was subsequently able to launch a successful Secular Humanist meeting group at the Coffeewood Correctional Center in Mitchells, Virginia.

The Secular Humanist study group at Coffeewood Correctional has been in operation for over eighteen months. During this time, it has grown to approximately thirty-five members. The Virginia DOC provides the Humanist study group with two weekly timeslots, one for study-group meetings on Wednesdays and one for a "Humanist celebration" every Friday evening. About half of the group's members—approximately fifteen, on average—are able to participate in any given meeting, though attendance varies and has been as high as twenty-one. Members of the study group are also eligible to celebrate two secular holidays each year: Darwin Day (on February 12) and the National Day of Reason (on the first Thursday in May). FFRF has donated eleven freethought books on how to be "good without god" to the Secular Humanist study group at Coffeewood

Correctional. There has been a similar demand for freethought literature and Humanist study groups at multiple prisons around the country.

The South Dakota Department of Corrections also recognizes and authorizes a “Secular Humanist Study Group” at the Mike Durfee State Prison in Springfield, South Dakota. FFRF first wrote to the South Dakota DOC in May 2014 on behalf of an inmate who was seeking to form this group within the South Dakota State Penitentiary. In May 2017, after the inmate’s transfer to Mike Durfee, a Secular Humanist study group was approved at that facility. The group had four members at its first meeting in June 2017, but it has grown considerably since then. The group now has approximately twenty members, with meetings averaging between ten and twelve participants.

The Secular Humanist study group at Mike Durfee has been given a ninety-minute weekly time slot for group meetings in a semi-private classroom. They have been allowed to establish two official secular holidays, which they observe with special meals, on or about February 12 (for Darwin Day) and September 17 (in honor of the signing of the entirely secular U.S. Constitution). They have also been provided a group account to which money can be donated for group events and the purchasing of reading materials. FFRF has donated eleven freethought books to the group. The organizer of the group estimates that he has spent close to

\$1,000 on materials, which now include about fifty books, seventy-five to one hundred freethought magazines, and five videos, with ten more on the way.

The Mike Durfee Secular Humanist study group has included among its members a physicist, musicians, artists, and a former Lutheran minister. Currently they are lecturing on the concepts of positive, humanistic psychology and self-actualization as a human need, as developed by Carl Rogers and Abraham Maslow. The group's organizer reports that these group discussions are as close to positive, nontheistic self-help as any of their members can find while in prison. Most importantly, after less than a year, the group reports that the stigma and animosity they initially experienced for holding Humanist beliefs has diminished. Secular Humanist group meetings have become an accepted part of the prison culture and they are "mostly comfortable now." The group's organizer is confident that the study group will outlive his time at the prison. He is scheduled for release in less than a year and has a very positive outlook on the prospect of reintegration.

Yet if the district court's decision is upheld in this case, the Nevada Department of Corrections and Lovelock Correctional Center will be able to continue to arbitrarily and unjustly deny Nevada's nontheistic inmates an equal opportunity to pursue similar beneficial group study and self-help.

DATED: February 27, 2018

Respectfully submitted,

/s/ Andrew L. Seidel

Andrew L. Seidel

*Freedom From Religion Foundation*

10 N. Henry St.

Madison, WI 53703

Phone: (608) 256-8900

Email: [aseidel@ffrf.org](mailto:aseidel@ffrf.org)

*Attorney for Amici*

**CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the foregoing brief with the U.S. Court of Appeals for the Ninth Circuit using the CM/EMF system on February 27, 2018. I certify that all the participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

/s/Andrew L. Seidel

Andrew L. Seidel

**Form 8. Certificate of Compliance Pursuant to 9th Circuit Rules 28.1-1(f), 29-2(c)(2) and (3), 32-1, 32-2 or 32-4 for Case Number 17-17522**

Note: This form must be signed by the attorney or unrepresented litigant *and attached to the end of the brief*.  
I certify that (*check appropriate option*):

- This brief complies with the length limits permitted by Ninth Circuit Rule 28.1-1.  
The brief is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the length limits permitted by Ninth Circuit Rule 32-1.  
The brief is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the length limits permitted by Ninth Circuit Rule 32-2(b).  
The brief is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable, and is filed by (1)  separately represented parties; (2)  a party or parties filing a single brief in response to multiple briefs; or (3)  a party or parties filing a single brief in response to a longer joint brief filed under Rule 32-2(b). The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the longer length limit authorized by court order dated   
The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6). The brief is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable.
- This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 32-2 (a) and is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32 (f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief is accompanied by a motion for leave to file a longer brief pursuant to Ninth Circuit Rule 29-2 (c)(2) or (3) and is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).
- This brief complies with the length limits set forth at Ninth Circuit Rule 32-4.  
The brief is  words or  pages, excluding the portions exempted by Fed. R. App. P. 32(f), if applicable. The brief's type size and type face comply with Fed. R. App. P. 32(a)(5) and (6).

Signature of Attorney or Unrepresented Litigant

Date

("s/" plus typed name is acceptable for electronically-filed documents)