Case No.: 17-15230

IN THE

United States Court of Appeals for the Ninth Circuit

DARRELL EUGENE HARRIS,
Plaintiff-Appellant,

v.

S. ESCAMILLA,
Defendant-Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BRIEF *AMICI CURIAE* OF THE CENTER FOR ISLAM AND RELIGIOUS FREEDOM, ISLAMIC SOCIETY OF NORTH AMERICA, KARAMAH, AND MUSLIM PUBLIC AFFAIRS COUNCIL IN SUPPORT OF PLAINTIFF-APPELLANT AND IN SUPPORT OF REVERSAL

Of counsel:
Asma T. Uddin
Center for Islam and Religious Freedom
1440 G Street NW, 8th floor
Washington, DC 20005
(305) 484-9926
auddin@islamandrf.org

Thomas C. Berg
Counsel of Record for Amici
Religious Liberty Appellate Clinic
University of St. Thomas School of Law
MSL 400, 1000 LaSalle Ave.
Minneapolis, MN 55403-2015
(651) 962-4918
tcberg@stthomas.edu

CORPORATE DISCLOSURE STATEMENT

None of these *amici curiae* has a parent corporation, and no publicly held corporation owns stock in any of these *amici*.

STATEMENT OF AUTHORSHIP AND FUNDING

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person – other than the *amici curiae*, their staff members, or their counsel – contributed money that was intended to fund preparing or submitting this brief.

STATEMENT OF CONSENT TO FILE

This brief is filed with the consent of all parties to this case.

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INTEREST OF *AMICI CURIAE*

Amici curiae are Muslim organizations committed to defending the rights of Muslim persons to religious equality and religious freedom. As the magistrate judge observed, this case presents allegations of "disrespectful and even repugnant" conduct by a prison officer; it raises "questions regarding the respect due another's spiritual beliefs and the treatment to be afforded inmates who practice Islam, a minority religion." ER 74. *Amici* believe it is vital that hostility and intentional discrimination by government officials be subject to stringent standards, not dismissed as an insubstantial matter. *Amici*'s specific interests are as follows:

The **Center for Islam and Religious Freedom (CIRF)** works at the intersection of Islam and religious freedom to support religious freedom for all. Founded to foster mainstream Muslim participation in religious freedom advocacy, CIRF educates Muslim audiences about the scope and value of religious liberty and the need to protect it for members of every faith and people of no faith, and educates Muslim and non-Muslim audiences alike about support for religious liberty in Islamic sources. To this end, CIRF engages in research, education, and advocacy on core issues like freedom from coercion in religion, equal citizenship for people of diverse faiths, a peaceful response to blasphemy, and opposition to and removal of regulations forbidding and penalizing blasphemy and apostasy.

The **Islamic Society of North America (ISNA)** is one of the oldest and largest Muslim umbrella organizations in the United States. Established in 1963 as the Muslim Students Association of the US and Canada, and restructured in 1981, ISNA is a membership-based not-for-profit corporation of Muslim individuals and affiliated Islamic organizations and mosques, including the Islamic Medical Association of North America (IMANA), Association of Muslim Scientists, Engineers and Technology Professionals (AMSET), Council of Islamic Schools of North America (CISNA), Muslim Students Association (MSA) and Muslim Youth of North America (MYNA). ISNA's mission is to foster the development of the Muslim community, interfaith relations, civic engagement, and a better understanding of Islam. Through its programs and activities, ISNA provides a common platform for presenting Islam (of which the Qur'an as the primary source of Islamic teachings is a major focus); supporting Muslim communities; developing educational, social and outreach programs; and fostering good relations with other religious communities, as well as with civic and service organizations. ISNA is a strong advocate of the First Amendment and civil rights for all and believes that the right to free exercise of religion must be vigilantly protected. For these reasons, it joins this brief.

KARAMAH is a non-profit organization that derives its name from the Arabic term for "dignity." Through education, legal outreach, and

advocacy, KARAMAH promotes human rights worldwide, particularly the rights of Muslim women and girls in Islamic and civil law. KARAMAH aims to create a global network of advocates for the rights of Muslim women, educate the public with respect to the gender-equitable principles of Islam, and advance the cause of Muslim women's rights in legal and social environments. As an organization advocating for the rights of Muslim women and children for nearly twenty-five years, KARAMAH has a direct and substantial interest in the outcome of this case. KARAMAH is therefore qualified to inform the Court of the devastating impact on Muslim women and children if the Court were to uphold the ruling that damaging a person's religious property was not a violation of the Free Exercise Clause.

The **Muslim Public Affairs Council (MPAC)**, founded in 1988, is a national public affairs nonprofit organization working to promote and strengthen American pluralism by increasing understanding and improving policies that impact American Muslims. Over the past 30 years, MPAC has built a reputation of being a dynamic and trusted American Muslim voice for policymakers, opinion shapers, and community leaders across the country.

SUMMARY OF ARGUMENT

In the posture of this appeal from summary judgment, it must be accepted that prison officer Escamilla intentionally threw down, stepped on, and kicked plaintiff Darrell Harris's personal copy of the Qur'an. The damage and disrespect

rendered Harris's copy, in his view, unusable for religious purposes. As a result, Harris was prevented from reading the Qur'an, an act that he sincerely believes he must do daily, until he obtained another copy 10 days later. The district court did not dispute that Officer Escamilla's alleged conduct reflected hostility and discriminatory intent toward Muslims. The magistrate judge agreed that Escamilla's acts, if proven, were "despicable," "disrespectful and even repugnant."

Nevertheless, the district court held that the officer's conduct did not violate the Free Exercise Clause. The court stated that the deprivation of Harris's Qur'an for several days was not a "substantial burden" on his religious exercise. ER 5 (citing a case stating that the interference with religious exercise "must be more than an inconvenience"). The court also held that Escamilla could not be held responsible for the full 10 days that Harris was without a Qur'an, because it was not a "foreseeable consequence" of the officer's conduct. *Id.* The court erred in its judgment, for two reasons.

I. An official's intentional, hostile burdening of religion by damaging a person's religious property violates the Free Exercise Clause regardless of whether its further effects are deemed "substantial" or immediately foreseeable. The act of throwing down, stepping on, and kicking a Muslim's personal copy of the Qur'an displays discriminatory intent—not only because of the circumstances here, but because physical attacks on the Qur'an are a common sign of anti-Muslim animus

and discrimination. When a government action burdening religion is intentionally discriminatory, there should be no further requirement that the burden be "substantial." Other courts have correctly adopted that rule, reasoning that imposing a "substantial burden" threshold in such cases would immunize petty harassment by government officials. Such official harassment can cause serious social harms, as is shown by previous instances of actual and alleged desecration of Muslim persons' copies of the Qur'an.

Moreover, liability for hostile or intentionally discriminatory acts extends to the harms they produce regardless of whether the harms were immediately foreseeable. The common law on proximate causation, reflected in the *Restatement (Third) of Torts* and other authorities, generally extends liability in the case of intentional acts to a broader range of resulting consequences than in the case of negligent acts (which were the sort of acts in the cases on which the district court relied). The moral culpability involved in the official acts of destruction here, and the social harm such acts can cause, cut strongly against allowing the officer to escape liability by pleading that replacing the religious property took longer than he might have expected.

II. Even if Harris had to demonstrate a "substantial" burden on his religious exercise, he did so. The district court failed to give full effect to Harris's specific belief that he must read the Qur'an daily, a belief he was prevented from following

for several days. The Supreme Court and this Court have repeatedly held that a claimant's belief must be accepted if it is sincere and rooted in religious belief. Harris presented evidence that more than met that standard—evidence that *amici* explain further by discussing the background of the sources on which he relied in forming his belief.

Because Harris holds his tenet of daily reading, the state, in the person of Officer Escamilla, imposed a substantial burden on him by absolutely preventing him from following his tenet. Harris, like other prisoners, inhabits an environment where government exerts an unparalleled degree of control; prisoners' religious exercise is at the mercy of those in charge of the facility. It is erroneous to allow prison officers to destroy prisoners' religious property and then claim that the resulting burden is minor or is due to other causes—especially when those officers act with hostility and discriminatory intent toward the inmate's religion.

ARGUMENT

The district court did not dispute—nor could it on summary judgment—that Officer Escamilla's attack on Harris's copy of the Qur'an reflected hostility and discriminatory intent toward Muslims. Nevertheless, the court held that the conduct did not violate Harris's religious freedom rights. The court indicated that the deprivation of Harris's Qur'an for several days was not a "substantial burden" on his religious exercise. ER 6. The court relied on the proposition that to violate

religious freedom, the interference with religious practice "'must be more than an inconvenience.'" *Id.* (quoting *Freeman v. Arpaio*, 125 F.3d 732, 737 (9th Cir. 1997)). The court also held that Escamilla could not be held responsible for the full 10 days that Harris was without a Qur'an, because it was not a "foreseeable consequence" of the officer's conduct. ER 5-6. The district court's judgment rests on two legal errors.

I. An Official's Intentional, Hostile Damaging of a Person's Religious Property Violates the Free Exercise Clause Regardless of Whether Its Further Effects Are "Substantial" or Immediately Foreseeable.

Intentional government burdening or targeting of religion is unconstitutional regardless of whether a court finds the degree of burden "substantial," or finds the consequences immediately foreseeable.

A. The Act of Throwing Down, Stepping On, and Kicking a Muslim's Personal Copy of the Qur'an Displays Discriminatory Intent.

Physically attacking the Qur'an is a common sign of anti-Muslim animus and discrimination. According to Islam, "[t]he Qur'an . . . is believed to have a physical connection to the Divine, which is a link that transfers power, merits respect, and demands careful handling." Jonas Svensson, *Relating, Revering, and Removing: Muslim Views on the Use, Power, and Disposal of Divine Words, in* THE DEATH OF SACRED TEXTS: RITUAL DISPOSAL AND RENOVATION OF TEXTS IN WORLD RELIGIONS 33 (Kristina Myrvold ed., 2010) (footnote omitted). Because

Muslims hold deep reverence for the Qur'an (see *infra* pp. 13-15), it is a target for anti-Muslim hostility.

To take a few illustrations from recent months, individuals in Santa Fe, New Mexico, urinated on the public library's Qur'ans to express animus toward Muslims. *CAIR Seeks Probe of Possible Bias Motive for Quran Vandalism at New Mexico Library*, CAIR (Mar. 15, 2017), https://www.cair.com/press-center/press-releases/14192-cair-seeks-probe-of-possible-bias-motive-for-quran-vandalism-at-new-mexico-library.html (last visited Oct. 26, 2017). Similarly, in Tucson, Arizona, an individual expressed anti-Muslim hatred by raiding a mosque, ripping pages out of several Qur'an copies, and throwing the copies on the floor. *CAIR Calls for Hate Crime Probe of Quran Desecration at Tucson Mosque*, CAIR (Mar. 14, 2017), https://www.cair.com/ press-center/press-releases/14187-cair-calls-for-hate-crime-probe-of-quran-desecration-at-tucson-mosque.html (last visited Oct. 26, 2017). This Court may take judicial notice that Qur'an desecration is a frequent expression of hostility and intentional discrimination toward Muslims.

In this case, the record contains ample evidence, in sworn declarations, from which a factfinder could conclude that Escamilla's actions were intentionally discriminatory. The general nature of the cell search signaled animus. Harris testified that the search "was probably the worst I've ever seen since I've been in C.D.C. I've never seen anyone else's cell done like that, and mine has never been

done like that by any other officer at any time ever." ER 174. Harris' cellmate Rudy Tellez, who personally witnessed the search, agreed that "I've been incarcerate[d] for over 10 years and have never seen a cell search that bad." ER 251.

Moreover, Escamilla specifically targeted Harris's Qur'an during the cell search. Another inmate, Roberto Ballard, stated that he saw Escamilla "remove [Harris's Qur'an] from its grey cloth case, deliberately throw it down to the floor, forcefully stomp on it, and deliberately kick it under the bed." ER 82-83. Tellez "saw [Escamilla] take Mr. Harris['s] Qur'an which was in a gray cloth case and open it [and] dump the Quran on the floor[.] He said something and kick[ed] it under the bed." ER 251. *See* Opening Br. of Plaintiff-Appellant 8-9 ("Appellant Br."). Harris personally saw the footprint that desecrated his Qur'an: "I discovered the Qur'an under the bed. And when I pulled it out, I saw the footprint on it and I started to cry." ER 176. Escamilla also tore down and damaged Harris's religious pictures. *See* Appellant Br. 9. He did this although he and Harris had never had any previous conflicts or encounters. *Id.* at 8. Such acts clearly support a reasonable inference that Escamilla acted with discriminatory intent, targeting Harris's Qur'an and his Muslim faith.

On a motion for summary judgment, of course, the court must accept these allegations as true. *Pavoni v. Chrysler Grp., LLC*, 789 F.3d 1095, 1098 (9th Cir.

2015). The credibility of the non-movant's witnesses must be accepted. *Harris v. Itzhaki*, 183 F.3d 1043, 1051 (9th Cir. 1999). And on summary judgment, all reasonable inferences should be resolved in favor of the non-movant.[1] *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 631 (9th Cir. 1987). There was ample evidence on which a reasonable jury could find hostility and discriminatory intent.

B. When a Government Action Burdening Religion Is Hostile or Intentionally Discriminatory, There Is No Further Requirement That the Burden Be "Substantial."

The district court erroneously engaged in an analysis of whether the burden on Harris's religious exercise was "substantial." When government agents have engaged in intentional religious discrimination, there should be no further requirement of showing that the burden they imposed was "substantial." Other courts have correctly recognized that imposing the "substantial burden" threshold is inappropriate for hostile or intentional discriminatory acts. Among other things, adopting that threshold allows government officials to engage in petty harassment without any checks on that power. Such official harassment can cause serious

[1] The magistrate judge, who reviewed the testimony, agreed that Officer Escamilla's actions, if proven, "certainly would qualify as despicable," "disrespectful and even repugnant." ER 74. He added that "this case is one of some public import. It raises questions regarding the respect due another's spiritual beliefs and the treatment to be afforded inmates who practice Islam, a minority religion." *Id.* All these words clearly imply the magistrate's conclusion that Harris's evidence, if proven, showed the defendant's hostility and animus.

social harms, as is shown by previous instances of desecration of Muslim individuals' copies of the Qur'an.

1. Other courts have held that when the burden on religion is intentionally discriminatory, there is no further requirement that the burden be "substantial."

The substantial burden analysis "is inappropriate for a free exercise claim involving intentional burdening of religious exercise." *Brown v. Borough of Mahaffey, Pa.*, 35 F.3d 846, 849 (3d Cir. 1994). At least two circuits have adopted this rule, as have other courts. *See Brown*, 35 F.3d at 849; *Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995); *Rader v. Johnston*, 924 F. Supp. 1540, 1555-56 (D. Neb. 1996). The Supreme Court has said that "if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral and it is invalid unless it" satisfies strict scrutiny—with no mention of a further requirement that the infringement be "substantial." *Church of the Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 533 (1993); *see also Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2019-20, 2022 (2017). Thus the question in a case of targeting or hostility is simply "whether the defendants intentionally impeded the plaintiffs' religious activity" (*Brown*, 35 F.3d at 850)—not whether

the defendants can escape liability by pleading that the harm they succeeded in imposing was minimal. This Court should join others in adopting that rule.[2]

The "substantial burden" analysis is inappropriate in cases of targeting because the Supreme Court and Congress adopted it for a quite different purpose: to address the tension created by "neutral and generally applicable laws which create an incidental burden on religious exercise." *Brown*, 35 F.3d at 848; *accord Hartmann*, 68 F.3d at 978. As the Third Circuit explained (*Brown*, 35 F.3d at 850):

> A burden test is only necessary to place logical limits on free exercise rights in relation to laws or actions designed to achieve legitimate, secular purposes. Because government actions intentionally discriminating against religious exercise *a fortiori* serve no legitimate purpose, no balancing test is necessary to cabin religious exercise in deference to such actions.

Indeed, applying the substantial-burden threshold "to non-neutral government actions would make petty harassment of religious institutions and exercise immune from the protection of the First Amendment." *Brown*, 35 F.3d at 849-50; *accord Rader*, 924 F. Supp. at 1555 n.28. Such intentional harassment, even if it might be described as "petty," "serve[s] no legitimate purpose," and there is no reason to create a zone of deference protecting it from constitutional challenge. *Brown*, 35 F.3d at 850.

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[2] Alternatively, a court can phrase this rule as saying that the showing of targeting or discriminatory intent makes the burden "substantial." The key point is that officials who act from hostility should not escape liability by claiming that the harms they impose are insubstantial.

Moreover, it is error to conclude that the only effects of intentional government harassment are "inconvenience" to an individual religious adherent (as the district court suggested). As we will now discuss, such government harassment can cause serious social harm even when the material consequences might be viewed as small.

2. A rule immunizing intentional, hostile desecration of the Qur'an by government officials would cause serious social harms.

The rule that subjects all intentional burdens to strict scrutiny, refusing to immunize supposedly insubstantial instances of them, is solidly grounded in social reality. When a government officer, acting with hostile intent, damages and renders unusable an individual's religious property, the act is not a mere inconvenience. Such acts frequently cause social harm, and a rule that immunizes them—and thus incentivizes them—would have very harmful consequences.

In this case, the government officer's attack was on an item of religious property that Muslims particularly revere: a physical copy of the text of the Qur'an. Muslims "display enormous reverence for the Qur'an." Tamara Sonn, *Introducing*, *in* THE BLACKWELL COMPANION TO THE QUR'AN 12 (Andrew Rippin ed., 2006). Religion scholars observe that the Qur'an's place in Islam "may be usefully compared with" Jesus Christ's place in Christianity, "in that it is believed to be God's Word that has miraculously come down into the world in history and humankind." Frederick Mathewson Denny, AN INTRODUCTION TO ISLAM 135 (4th

ed. 2011); *see* Mahmoud M. Ayoub, 1 THE QUR'AN AND ITS INTERPRETERS 11 (1984) ("The Qur'an is for Muslims what Christ the Logos is for Christians."). This reverence extends to the *mushaf*, the physical "written corpus of the Qur'an": "the individual's copy." Harold Motzki, *Mushaf*, in 3 ENCYCLOPEDIA OF THE QURAN 463, 463 (Jane Dammen McAuliffe gen. ed., 2003). Because the Qur'an is considered to be God's revealed word, sources going back centuries emphasize the "consensus [among Muslims] that it is obligatory to protect and respect the *mushaf*." Abu al-Nawawi, ETIQUETTE WITH THE QURAN 112 (Musa Furber trans., 2003).

To show such respect, Muslims engage in a ritual washing before using the Qur'an. Abdullah Saeed, THE QUR'AN: AN INTRODUCTION 88-89 (2008). The Qur'an must always be "plac[ed] in a clean and exalted place, never under anything else." Frederick M. Denny, ISLAM AND THE MUSLIM COMMUNITY 63 (1987). The Qur'an "should never be placed on the floor." Neal Robinson, DISCOVERING THE QUR'AN: A CONTEMPORARY APPROACH 21 (2003). Rather, when not in use, "it is usually wrapped or kept in a box." *Id*. In sum, the Qur'an must be "treated with immense respect." *Id*.

Given Muslims' reverence for the Qur'an, they interpret an official's intentional damaging of a copy of the Qur'an as official hostility toward their faith. One might "usefully compare" the attack here to a situation where police officers,

searching a Catholic church for evidence in investigating allegations of sexual abuse, come across and intentionally destroy consecrated communion wafers and wine, which Catholics regard as the real body and blood of Jesus Christ. Surely, the Catholic community would interpret this as an aggressive statement of official hostility, even a threat, and would react in sorrow and anger. Muslims, like Harris in this case, react with similar sorrow or anger at official assaults on items of religious significance.[3]

The district court's ruling would permit prison guards to flush an inmate's copy of the Qur'an down a toilet as long as the prison provided another copy within a few days. In 2002 and 2003, detainees at Guantanamo Bay alleged that U.S. military guards had committed such acts; there were also "a dozen allegations that the Koran was kicked, thrown to the floor, or withheld as punishment." Dan Eggen and Josh White, *Inmates Alleged Koran Abuse*, WASH. POST (May 26, 2005), 2005 WLNR 27750406. The federal government found that these allegations of abuse "sparked riots overseas" that left several people dead. *Id.*

[3] Although private individuals who desecrate their own copies of the Qur'an cause significant offense as well, *amici* emphasize that our argument does not cover their conduct. *Amici* acknowledge the free speech interests involved in such acts, however hateful they may be. But there are no free speech interests involved when a person purposefully attacks and damages another's religious property, as in this case. And free speech is especially irrelevant when the attack is by a government official acting under color of his duties. This is not a case where government simply acted with respect to its own property in "its own internal affairs." *Bowen v. Roy*, 476 U.S. 693, 699 (1986).

When a plaintiff proves that official acts of anti-religious hostility occurred—as Harris should have the chance to prove—their effects both on individuals and on the relations among religious groups in our diverse society cannot be dismissed as mere "inconveniences."[4]

The district court's ruling would likewise permit a prison guard, acting with hostility, to take an inmate's Qur'an and use it for recreational "target practice" as long as the prison provided a new copy within a few days. When a U.S. soldier in Iraq used a Qur'an for target practice in 2008, the U.S. commander had to head off rising anger by apologizing for what he called "criminal behavior." Kim Gamel, *U.S. sniper who fired at Quran is out of Iraq*, ST. LOUIS POST-DISPATCH (May 19, 2008), 2008 WLNR 9432263.

The district court's order would allow government officers to burn confiscated copies of the Qur'an as an act of official hostility if they provide replacements. In 2011 U.S. soldiers in Afghanistan burned such copies as part of a security action, apparently not out of malice but "'out of ignorance and with poor

[4] To be sure, there was substantial debate over the accuracy of several of the allegations at Guantanomo. *See* Eggen and White, *supra* in text. But the accuracy of those allegations is not the issue here. The case before this Court involves competent testimony, by Harris and other declarants, from which a factfinder could conclude that Officer Escamilla acted with anti-Muslim animus and discriminatory intent. Under the rules of summary judgment, Harris should have the chance to prove his case at trial. Our point is that when intentional acts of desecration are proven, their effects cannot be dismissed as insubstantial.

understanding' of the Koran's importance as Islam's holy book," according to the Afghan president. Emma Graham-Harrison, *Qur'an Burning Protests: Two US Soldiers Shot Dead by Afghan Colleague*, THE GUARDIAN (Feb. 23, 2012), https://www.theguardian.com/world/2012/feb/23/quran-burning-afghanistan-us-soldiers-dead. Even so, an Afghan soldier serving alongside the U.S. military at the same base took such offense that he killed two U.S. soldiers, and riots followed for several days. *Id.* Both the killings and the rioting are, of course, unacceptable and must be condemned in the strongest terms. But they illustrate the harms that follow when government officers destroy or damage persons' copies of the Qur'an—harms to the individual owner and to society. Surely, when officials commit such acts with animus or discriminatory intent, it ignores reality to say that the only result is an insubstantial burden on the individual owner.

Finally, the district court's ruling would permit prison guards to engage in a range of hostile acts of harassment toward inmates of a particular faith. For example, guards might intentionally place a Jewish inmate in solitary confinement at a particular time solely for the purpose of barring him from attending a Sabbath worship service. Yet the district court's ruling here would permit such an act, presumably, if the prisoner only had to miss worship once, or occasionally. *Cf. Pierce v. La Vallee*, 293 F.2d 233, 234-35 (2d Cir. 1961) (holding that prisoner stated legal claim by alleging that he "ha[d] been subjected to solitary confinement

because of his religious beliefs," since "freedom of religion and of conscience is one of the fundamental 'preferred' freedoms guaranteed by the Constitution").

For all of these reasons, acts of intentional hostility toward religious property and religious exercise should not be immunized on the ground that their effects are deemed "insubstantial."

C. Because the Acts Here Were Intentionally Discriminatory, Liability Extends to the Harms They Produced Regardless of Whether the Harms Were Immediately Foreseeable.

The intentional discriminatory nature of the official acts here also undercuts the district court's ruling that Harris should lose because he produced "no evidence on summary judgment suggesting that the ten days he allegedly went without a Quran was a foreseeable consequence of Defendant Escamilla's conduct." ER 5. The court's premise was that "defendant can only liable for harms he directly caused or knew or should have known would result from his actions." *Id.* The court cited cases applying general common-law principles of proximate causation to constitutional cases. *Id.* (citing, e.g., *Stevenson v. Koskey*, 877 F.2d 1435, 1438-39 (9th Cir. 1989)).

However, in cases of intentional torts, the common law generally extends "liability for the resulting harm . . . to consequences which the defendants . . . could not reasonably have foreseen," on the "obvious basis that it is better for the unexpected losses to fall upon the intentional wrongdoer than upon the innocent

victim." PROSSER AND KEETON ON TORTS, § 9, at 40 (5th ed. 1984); *see id.* § 43, at 293 ("the 'foreseeability' limitation" is "especially likely" to "be cast aside . . . in cases of intentional torts"). The *Restatement (Third) of Torts*, § 33(b) (2010), states that "[a]n actor who intentionally or recklessly causes physical harm is subject to liability for a broader range of harms than the harms for which that actor would be liable if only acting negligently."[5]

The Third Restatement provides that "[i]n general, the important factors in determining the scope of liability are the moral culpability of the actor, as reflected in the reasons for and intent in committing the tortious acts, the seriousness of harm intended and threatened by those acts, and the degree to which the actor's conduct deviated from appropriate care." *Id.* § 33(b).

Here, these factors point strongly in the direction of holding the defendant liable for all the harms that Harris suffered. If the factfinder concludes (as it reasonably could) that Escamilla damaged Harris's Qur'an out of animus and

[5] Consistent with this distinction, the cases that the district court cited for restricting causation to reasonably foreseeable consequences (ER 5) involved claims of negligence. *See Stevenson*, 877 F.2d at 1441 (distinguishing negligence from "abuse of power," and stating that plaintiff inmate "has not shown, based on this record, that [defendant officer's] conduct concerning plaintiff's mail rose beyond the level of mere negligence"); *Van Ort v. Estate of Stanewich*, 92 F.3d 831, 837 (9th Cir. 1996) (holding, under foreseeability principles, that the "private actions" of an off-duty sheriff's deputy "were intervening causes which preclude any County liability *for alleged negligent hiring or supervision*") (emphasis added).

discriminatory intent, the "moral culpability" of his official actions would be great. And as we have discussed (*supra* pp. 13-18), the "harm . . . threatened by those acts" is very serious indeed—to the individual and community targeted, and to society as a whole. Accordingly, a prison officer who intentionally damages or destroys an inmate's religious property should not escape constitutional scrutiny by pleading that replacing the property took longer than expected.

II. In Any Event, Harris Was Substantially Burdened by Being Prevented from Following His Specific Religious Belief that He Must Read the Qur'an Daily.

Even if Harris had to demonstrate a "substantial burden" on his religious exercise, he did so by showing that he sincerely believes he must read the Qur'an daily. The loss of his Qur'an clearly prevented him from carrying out that belief for several days. The district court erred in holding this burden insubstantial and suggesting that it failed to count as "'more than an inconvenience.'" ER 6 (quoting *Freeman*, 125 F.3d at 737). The court failed to give real effect to Harris's belief that he must read the Qur'an daily. Because of Escamilla's intentional attack, Harris was unable to follow his specific belief in daily Qur'an reading for several days; that is a substantial burden.

The Religious Land Use and Institutionalized Persons Act (RLUIPA), under which Harris brought a claim, requires that the burden on religion be "substantial" in order to trigger the government's obligation to show a compelling interest. 42

U.S.C. § 2000cc-1(a). But in assessing whether the conflict between government's conduct and Harris's religious exercise met that standard, a court must accept Harris's specific belief about what his Muslim faith required. RLUIPA defines religious exercise as "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A); *Holt v. Hobbs*, 135 S. Ct. 853, 860 (2015). This case is governed by *Thomas v. Review Board*, 450 U.S. 707 (1981), where a Jehovah's Witness objected to working in a factory producing steel used in tank turrets; when he was fired from work, he sought unemployment benefits. The state denied them on the ground that he had not shown his refusal was required by the Jehovah's Witness faith. But the Supreme Court ruled for the claimant, saying that "Thomas drew a line" as to how close a connection to making armaments violated his understanding of the faith, "and it is not for us to say that the line he drew was an unreasonable one." *Id.* at 715; *accord Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2778 (2015). "The narrow function" of a court, *Thomas* said, "is to determine whether . . . petitioner terminated his work because of an honest conviction that such work was forbidden by his religion." 450 U.S. at 716.

This Court has followed the principles of RLUIPA, *Thomas*, and *Hobby Lobby*, refraining from determining whether a claimant's belief is a central or compulsory tenet of the faith, or a correct interpretation of it. The governing

question here is simply whether Harris's belief is (1) "sincerely held" and (2) "rooted in religious belief." *Shakur v. Schriro,* 514 F.3d 878, 884 (9th Cir. 2008); *Malik v. Brown*, 16 F.3d 330, 333 (9th Cir. 1994). This focus on the claimant's own particular belief fits with the RLUIPA section stating that the statute "shall be construed in favor of a broad protection of religious exercise." 42 U.S.C. § 2000cc-3(g).

Here Harris sincerely holds the belief, rooted in his Muslim faith, that he must read the Qur'an daily. ER 167 (Harris deposition) ("So it is every believer who is a Muslim, he must read the Qur'an daily. He must read the Qur'an every single day"). In his opposition to summary judgment, Harris grounded this belief in the book *Faza'il-e-a'maal*, attaching pages from the book. ER 100, 136-37 (relying on and attaching Muhammad Zakariyya, FAZA'IL-E-A'MAAL: Virtues of the Holy Qur'aan 73, 76 (Waterval Islamic Institute ed., Aziz-ud-Din trans., 2000)).

Harris specifically grounded his belief in two *hadiths* from *Faza'il-e-a'maal*.[6] ER 110. Hadith 38 provides that a Muslim must "recit[e] ten ayat [Qur'an verses] in a night" so as to not be "reckoned amongst the neglectful." ER 137 (Zakariyya,

[6] A *hadith* is "a report describing the words, actions, or habits of the Prophet," Muhammad. Jonathan A.C. Brown, HADITH: MUHAMMAD'S LEGACY IN THE MEDIEVAL AND MODERN WORLD 3 (2009). They provide "the lens through which the [Qur'an] is interpreted and understood." *Id.*

FAZA'IL-E-A'MAAL at 76). Accordingly, Harris concluded, "[a] Muslim must read 10 ayaats [sic] every day or be of the neglectful." ER 110. Second, Hadith 34 states that on a Muslim's judgment day, the "Holy Qur'an is an intercessor" for those who read from it but may also be "a complainant against us." ER 136 (Zakariyya, FAZA'IL-E-A'MAAL at 73). From these passages, Harris concluded that if he fails to read the Qur'an daily, the book—instead of interceding for him—will be "a complaint against [him]." ER 110.

Faza'il-e-a'maal, whose title means "virtues of everyday actions," provides information about the daily discipline that is important to a Muslim. Marieke J. Winkelmann, *Women Studying for the Afterlife*, *in* STUDYING ISLAM IN PRACTICE 214 (Gabriele Marranci ed., 2013). The book sets forth a process "of sanctifying everyday life," under which "certain virtues displayed in daily behavior are valuable for the accumulation of religious merit (*sawab*) for the Hereafter." *Id*. It is no surprise for a Muslim believer—especially a prison inmate, who may be seeking to redirect his life—to adopt an interpretation of the faith that heavily emphasizes daily discipline aimed at personal holiness.[7]

[7] All Muslims recite passages from Qur'an, often from memory, as part of the five daily prayers (*salat*). "Nonetheless, the majority of scholars have recommended that a reciter should look at a written text so that he may have the reward of recitation and the sight or blessings of the voice and vision." Ayoub, *supra*, at 15.

Despite these clear statements of Harris's specific belief in daily reading, the district court failed to give that belief the proper legal weight when it found that Harris suffered only an insubstantial burden. Before the magistrate judge, Escamilla introduced an affidavit filed by a prison chaplain who claimed (in the magistrate judge's words) that "Islamic law does not require Plaintiff to read the Quran every day." ER 16. The magistrate judge correctly found that assertion irrelevant to the key question: "the sincerity, not the centrality, of Plaintiff's belief" in daily Qur'an reading. *Id.* However, as we will now discuss, the district court effectively minimized the importance of Harris's belief by concluding that he suffered no substantial burden when he was kept from his daily reading for several days.

The Supreme Court, of course, has repeatedly made clear that what matters in a RLUIPA or free exercise case is the claimant's belief: differing interpretations by others inside or outside the faith are irrelevant. In *Holt v. Hobbs*, where the Muslim inmate believed he must wear a half-inch beard as a matter of faith, the Court rejected the state's effort to rely on evidence that "not all Muslims believe that men must grow beards." *Holt*, 135 S. Ct. at 862. The Court held that the inmate's belief was "by no means idiosyncratic[,] . . . [b]ut even if it were, the protection of RLUIPA, no less than the guarantee of the Free Exercise Clause, is 'not limited to beliefs which are shared by all of the members of a religious sect.'"

Id. at 862-63 (quoting *Thomas*, 450 U.S. at 715-16). In *Thomas* itself, the Court rejected the state's effort to dispute whether the Jehovah's Witness faith forbade Thomas's participation in steel production. "[I]n this sensitive area," the Court said, "it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation." 450 U.S. at 716; *accord Hobby Lobby*, 134 S. Ct. at 2777-79.[8]

Here too, Harris has a belief that is "by no means idiosyncratic" (*Holt*, 135 S. Ct. at 862), given his reliance on known sources. "But even if it were" (*id.*), it reflects his "honest conviction" (*Thomas*, 450 U.S. at 716), "rooted in" his study of Islamic teaching (*Shakur*, 514 F.3d at 884; *Malik*, 16 F.3d at 333).

The district court did not explicitly reject Harris's belief in daily Qur'an reading. But it effectively gave that belief little or no weight, by holding that the state could block Harris from following his belief for several days.

Because Harris holds a tenet of daily reading, the state, in the person of Officer Escamilla, imposed a substantial burden on him by absolutely preventing

[8] Focus on the individual believer's understanding is consistent not only with constitutional principles, but with the nature of Islam. Scholars state that "there is more than one way to approach God, all equally valid and acceptable to God." Feisal Abdul Rauf, ISLAM: A SACRED LAW 49 (2000). Similarly, Muslims are "free to peruse the Qur'an and Hadith and come up with [their] own sincere and conscientious opinion." *Id.* at 59.

him from following that tenet. In *Holt*, *Thomas*, and *Hobby Lobby*, the laws in question conflicted with the claimants' sincere beliefs (wearing a beard, avoiding contributing to armaments, avoid facilitating certain contraceptives), and the claimants suffered substantial penalties (prison discipline, loss of unemployment benefits, fines and penalties under the contraceptive mandate) for adhering to their beliefs. Here the effective destruction of Harris's Qur'an clashed with his belief in reading the scripture daily. And the state did not merely penalize him for acting on his belief. It absolutely prevented him from doing so, by rendering his Qur'an unusable in a situation where multiple barriers prevented him from obtaining another for 10 days.

Amici, like plaintiff Harris, do not claim there would be a substantial burden if the government caused a one- or two-day deprivation of religious property through mistake or inadvertence and promptly replaced the property. Appellant Br. 35. But in this case, the deprivation was caused by acts of hostility and discrimination; it lasted significantly longer; and under general causation principles (pp. 18-20 *supra*), a defendant whose intentionally hostile act caused the deprivation cannot escape liability by pleading that other factors delayed the provision of a replacement.

Harris, like other prisoners, inhabits an environment where "government exerts a degree of control unparalleled in civilian society"; "[i]nstitutional

residents' right to practice their faith is at the mercy of those running the institution." *Cutter v. Wilkinson*, 544 U.S. 709, 720-21 (2005). "RLUIPA thus protects institutionalized persons who are unable freely to attend to their religious needs." *Id.* at 721. When government deprives an inmate of the religious property he believes he must use daily, it cannot plead that it is hard to get a replacement—especially when the deprivation stems from hostility to the inmate's religion.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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/s/ Thomas C. Berg

Of counsel:
Asma T. Uddin
Center for Islam and Religious Freedom
1440 G Street NW, 8th floor
Washington, DC 20005
(305) 484-9926
auddin@islamandrf.org

Thomas C. Berg
Counsel of Record
Religious Liberty Appellate Clinic
University of St. Thomas School of Law
MSL 400, 1000 LaSalle Ave.
Minneapolis, MN 55403-2015
(651) 962-4918
tcberg@stthomas.edu

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Date: October 27, 2017 /s/ Thomas C. Berg

PROOF OF SERVICE

I, Thomas C. Berg, hereby declare: I am employed in Minneapolis, State of Minnesota. I am over the age of 18 years, and not a party to the action. My business address is University of St. Thomas School of Law, 1000 LaSalle Ave., MSL 400, Minneapolis, MN 55403-2015.

I hereby certify that on October 27, 2017, I electronically filed the following with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF System:

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