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

OPENING BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION

Under the teaching of Sunni Islam, nothing is more sacred than the Holy Quran, which is regarded as the literal word of God. The Quran must be treated with utmost reverence. The Quran must never be allowed to touch filth. Multiple eyewitnesses agreed that Correctional Officer Escamilla desecrated inmate Darrell Harris's Quran by throwing it on the floor of the cell, stomping on it, and kicking it under the bed. ER82-83, 85, 88, 248, 251. The District Court correctly recognized this evidence created a genuine dispute of material fact. ER15-16. Indeed, the Magistrate Judge later described these acts, if proven, as "disrespectful and even repugnant," saying that the case "was by no means easy." ER74.

The Magistrate Judge acknowledged the case "raises questions regarding the respect due another's spiritual beliefs and the treatment to be afforded inmates who practice Islam, a minority religion." ER74. Nonetheless, the District Court ruled that stepping on the Quran was "insufficient to rise to the level" of a First Amendment violation. ER6. The court evaluated this disturbing episode as, at most, a matter of inconvenience for "a day or so," which would not constitute a substantial burden on the exercise of religion. ER17-18; *see* ER6.

But under the Supreme Court's decision in *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2019-20, 2022 (2017), when the government "single[s] out the religious" for mistreatment, the Free Exercise Clause is violated *regardless*

of any direct burden on worship. *See also Brown v. Borough of Mahaffey*, 35 F.3d 846, 849-50 (3rd Cir. 1994) (explaining that applying a "burden test" "would make petty harassment of religious institutions and exercise immune from the protection of the First Amendment"). Even if required, the District Court erred by ruling that Harris suffered no substantial burden. Not only did Harris suffer the anguish of finding his treasured Quran defiled, but he could not continue daily reading and thereby lost the reward of intercession by the Quran for each of those days.

The District Court also erred in dismissing Harris's Equal Protection claim for failure to exhaust the prison grievance process. As a threshold matter, the prison accepted Harris's grievance and rendered a decision on the merits, ER187-188, 240-41, thereby estopping any post hoc failure-to-exhaust argument. *See Reyes v. Smith*, 810 F.3d 654, 658 (9th Cir. 2016). The District Court mistakenly ruled that Harris's Equal Protection claim rested on the allegation that Officer Escamilla made religious and racial slurs against Harris, which had not been quoted in Harris's grievance. ER20, 27. But the heart of Harris's claim of prejudicial misconduct lies in the malicious degrading of the most holy text of his Muslim faith. ER222-223, 226-228, 265. Harris described the desecration of his Quran in his grievance and specifically asserted denial of "equal protection." ER236; *see* ER238. As history teaches all too well, no threat is more menacing to a member of a minority religion than the vandalism of a sacred religious article.

JURISDICTIONAL STATEMENT

The District Court properly exercised federal question jurisdiction under 28 U.S.C. § 1331 over plaintiff-appellant Darrell E. Harris's civil rights action under 42 U.S.C. § 1983, which alleged violations of the Free Exercise Clause of the First Amendment of the Constitution, the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq.*, and the Equal Protection Clause of the Fourteenth Amendment of the Constitution. ER223, 226-227, 230. The District Court had supplemental jurisdiction under 28 U.S.C. § 1367 over Harris's claim under California's Bane Civil Rights Act, Cal. Civ. Code § 52.1. ER223, 228-230.

On April 30, 2014, the District Court dismissed Harris's Bane Act claim for failure to state a claim. ER56. On March 13, 2015, the District Court dismissed Harris's RLUIPA claim for failure to state a claim. ER34, 41-42. On July 29, 2016, the District Court granted partial summary judgment, dismissing Harris's Fourteenth Amendment Equal Protection claim. ER20-21. On January 19, 2017, the District Court granted summary judgment, dismissing Harris's remaining First Amendment Free Exercise claim, ER5-7, and entered a final judgment, ER1.

On February 1, 2017, Harris filed a notice of appeal, ER76-78, which was timely under Federal Rule of Appellate Procedure 4(a)(1)(A).

This Court has jurisdiction under 28 U.S.C. § 1291.

ISSUES PRESENTED FOR REVIEW

I. Religious Liberty Claims: As reported by eyewitnesses in sworn declarations, Officer Escamilla grabbed inmate Darrell Harris's personal Quran, threw it on the floor of the cell, trampled on it, and kicked it under the bed. This Court should reverse the District Court's (1) summary judgment against Harris's claims under the Free Exercise Clause of the First Amendment; and (2) dismissal on the pleadings of Harris's claims under the Religious Land Use and Institution-alized Persons Act (RLUIPA) and California's Bane Civil Rights Act:

A. Officer Escamilla's desecration of Harris's personal Quran was a direct violation of the Free Exercise Clause, regardless of any consequential burden on religious practice, because this non-neutral official act of vandalism of a sacred religious article was unconstitutional religious harassment.

B. Harris made a prima facie evidentiary showing that Officer Escamilla imposed a substantial burden on religious exercise under both the Free Exercise Clause and RLUIPA by (1) deliberately vandalizing Harris's personal Quran, making it unusable for worship, and (2) maliciously interfering with Harris's sincerely-held belief that he must read from the Quran daily.

C. Harris stated a claim under the Bane Act because the desecration of a sacred article is readily recognized as a threat or act of intimidation to interfere

with or attempt to interfere with protected rights. Harris did not need to allege or prove a threat of violence under the Bane Act.

II. Equal Protection Claim: Harris filed a timely prison grievance, which asserted the desecration of his Quran and claimed a violation of the Fourteenth Amendment and the equal protection of the law. Harris exhausted his remedies through all levels of review. This Court should reverse the District Court's summary judgment for failure to exhaust the Equal Protection claim:

A. The prison accepted Harris's grievance, including the Fourteenth Amendment claim; decided it on the merits; and notified him that he had exhausted all remedies, thereby estopping any post hoc failure-to-exhaust argument.

B. Harris satisfied this Court's low-floor requirement that a prison grievance alert the prison to a problem, by highlighting Officer Escamilla's patently prejudicial act of deliberately desecrating the sacred text of a minority religion.

C. Harris's Equal Protection claim in his amended complaint is further and properly supported by allegations that Officer Escamilla made anti-religious and racist comments, which Harris did not learn of until after he had filed the prison grievance.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

Pursuant to Circuit Rule 28-2.7, pertinent constitutional provisions, statutes, and regulations are included in the Addendum to this brief.

STATEMENT OF THE CASE

When a "case arises in the posture of a motion for summary judgment, [the Court is] required to view all facts and draw all reasonable inferences in favor of the nonmoving party," which here is plaintiff-appellant Darrell Harris. *See Brosseau v. Haugen*, 543 U.S. 194, 195 n.2 (2004) (per curiam). Accordingly, the recitation of the facts below is based on the sworn statements of Harris and other witnesses, along with exhibits, viewed in the light most favorable to Harris.

A. Factual Background

1. Darrell Harris, a Longtime Muslim and Religious Leader, Reveres and Faithfully Reads Daily From the Holy Quran

Darrell Harris is a practicing Sunni Muslim and has been throughout his adult life (40 years). ER107, 113, 118, 224. He completed his spiritual journey to Mecca, ER107, regularly attends Islamic religious services, ER123-125, 224, and reads the Quran daily, ER224. As a man of faith, he is respectful of prison staff and other inmates and has never been disciplined while in prison. ER130, 224.

Harris is a leader among his fellow Muslim inmates. ER85, 107, 119, 224. At the time of the search in this case and until 2014 when he was transferred from

the California State Prison at Corcoran, Harris served as the inmate Imam. ER107. Because there was no Islamic chaplain during those years at Corcoran, Harris performed those duties and conducted services for Muslim inmates. ER108, 163.

As a Sunni Muslim, Harris maintains the utmost reverence for the Quran as the literal word of God. *See* ER140. He is responsible for ensuring that the Quran is not defiled. ER144. If the Quran is dropped on an unclean surface or falls into filth — and especially if it is stepped on, because boots or shoes carry traces of filth — then it has been desecrated and made unusable. ER112, 147, 168-169.

Having learned to read Arabic fairly well, ER107, 161, Harris took to heart the direction from Islamic etiquette "not to let a day go by without looking at least once at the pages of the Qur'an," ER151. Hadith 38 in the *Faza'il-e-A'maal*, grounded on a saying from the Prophet Muhammad, says that "[i]t takes only a few minutes to recite ten ayaat [verses from the Quran]. Doing so saves a man from being included in the list of the neglectful, for that night. It is really a great reward." ER137; *see also* ER110.

As Harris explained in the District Court, if a person wants to "talk to 'God' he prays," but "[i]f one wants 'God' to talk to him, he reads the Quran!" ER112.

2. Correctional Officer Escamilla Angrily Searched Harris's Cell, Tearing Down Islamic Religious Pictures, Throwing Harris's Quran to the Floor, and Stomping on and Kicking the Quran

On January 14, 2013, Correctional Officer Escamilla and Correctional Officer Sanchez searched Harris's cell. ER82, 224, 234. Harris was not there at the time, but at his regularly-scheduled vocational welding class. ER132, 225.

While Harris was absent, inmate Rudy Tellez was moved into the cell. ER225. Harris had not yet met his new cell-mate. ER225, 251. Tellez was present during the ensuing search of Harris's belongings and subsequently submitted a sworn declaration as to what he observed. ER251.

Officer Sanchez "thoroughly" searched the cell first.[1] ER82; *see* ER251.

Then, behaving in what Tellez described as an "abrasive" and "angry" manner, ER251, and appearing to another eyewitness to be "clouded by anger and malice," ER82, Officer Escamilla searched Harris's belongings again, ER82, 251. Before this episode, Officer Escamilla and Harris had never met and had never had any conflict, disciplinary problems, or other encounter. ER114, 129-130, 176.

[1] During the prison's investigation of Harris's grievance, Officer Sanchez was never asked about what she observed during Officer Escamilla's search, ER239, nor has the prison ever produced a statement from her. Although the investigation was not completed until some two months afterward, the prison reported that Officer Sanchez "was not interviewed" because of "her unavailability to interview." ER239. Harris was also unsuccessful in trying to contact Officer Sanchez after the search. ER173.

From the wall of Harris's cell, Officer Escamilla "forcefully" tore down pictures, ER82, which were of the Ka'bah (a Muslim shrine) and of Harris's family wearing religious clothes, ER113, 115. Officer Escamilla damaged the pictures, dropped them on the floor, and walked on them. ER82.

Tellez saw Officer Escamilla take Harris's Quran "which was in a gray cloth case and open it[,] dump the Quran on the floor[.] He said something then and kick[ed] it under the bed." ER251. Inmate Roberto Ballard also submitted sworn declarations, saying he saw Officer Escamilla throw the Quran on the floor and "forcefully stomp on it." ER82-83; *see* ER248. As related in another sworn declaration, inmate Arthur Weeks "personally witnessed" the search, seeing Officer Escamilla "pick up Harris's Holy Quran and throw it to the floor," which upset Weeks as a fellow Muslim. ER85. By sworn declaration, another neighboring inmate, Larry Banks, said he saw Officer Escamilla "walk on" the Quran for all the inmates to see. ER88.

Harris's belongings were "totally destroyed." ER171. During his ten years in prison, inmate Tellez declared that he had "never seen a cell search that bad." ER251. Harris described the destruction as "probably the worst I've ever seen." ER174.

Worried that Harris might think he was responsible for the vandalism, Tellez asked Officer Escamilla for a cell search slip. ER173, 251. Officer Escamilla

refused. ER173, 251. Officer Escamilla retorted "work it out with your [new cell-mate]." ER251. Officer Escamilla admitted in discovery that he did not provide a cell search slip until the following day, ER130, which the District Court said "suggests the search was not a routine search," ER54.

After Officer Escamilla and Officer Sanchez left, Tellez carefully made his way to the top bunk, ER225, trying to avoid further disturbing Harris's property, ER251, which Officer Escamilla had left scattered across floor, ER176. Tellez anxiously waited for Harris to return. ER176, 251. When Harris returned to his cell after his vocational welding class, he found his cell in "disarray, completely ramshack[l]ed." ER225. Tellez's first statement to Harris was "I didn't do this, it was that short cop." ER225; *see* ER176.

In his deposition, Harris testified: "In the process of searching the cell to find out what [Officer Escamilla] took, 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." ER176; *see also* ER133 (describing the "dirty boot print on my Quran").

The following day, Harris asked Officer Escamilla about the episode. ER174. Harris testified that Officer Escamilla "admitted he did it." ER174. Officer Escamilla said "Yeah, I searched your cell. Yes, you had a lot of stuff, and yes, I left it that way." ER174.

3. After Officer Escamilla Desecrated Harris's Quran, Harris Was Unable to Fulfill His Religious Duty to Read Daily From the Word of God

By throwing the Quran to the floor, Officer Escamilla desecrated it. ER111-112. As Harris explained, when Officer Escamilla "put[] his foot on it[, he] further desecrated it," making it "unus[]able." ER112.

Having been defiled, the Quran was no longer suitable for worship, prayer, and instruction by a faithful Muslim. ER112, 227. As a consequence, Harris could not continue the mandatory practice of reading at least ten ayaat each day, leaving him fearful that "the Qur'an will testify against him on the day of judgment." ER167; *see* ER110. For those lost days, the Quran would no longer be an "intercessor for the one who reads it daily." ER110.

Hoping to obtain another Quran the next day, Harris went to the chapel to have the Islamic library opened. ER153. He was told that he could not disturb another religious group's service and would "have to wait your turn." ER153. Between a lock-down of the prison for a day, his vocational classes, and the impermissibility of going to the chapel in the evening, Harris was not able to borrow another Quran for ten days. ER153; *see* ER162.

Having lost his cherished personal Quran, Harris was left to rely on a loaned book, ER158, which he will have to give back, ER182. Because Harris is indigent, he has "never had the opportunity to buy another one." ER158; *see* ER165.

4. Harris Immediately Initiated a Prison Grievance, Which He Exhausted Through All Three Required Levels

On January 14, 2013, the very same day as the search, Harris filed a CDCR 22 form complaining that Officer Escamilla had degraded his Quran.[2] ER245. On January 23, 2013, Harris submitted an inmate appeal. ER234. Harris used every line available on the CDCR 602 form and the CDCR 602-A attachment to describe Officer Escamilla's conduct, ER234, 236, including "[d]egrading the Muslim Holy book the Quran, by throwing it on the floor under the bed." ER236. He claimed that this conduct violated "Harris's 1st, 14th + 15th constitutional rights," ER234, and asserted violation of his "rights to equal protection under the law." ER236.

A few weeks after the search, Tellez was moved to a new cell. ER228. After Tellez was moved and after Harris had already filed his grievance, Tellez told Harris that Officer Escamilla had called Harris a rag-head black Muslim and a terrorist during the search. ER176. Tellez explained he had not come forward earlier because he did not want to get involved. ER175.

Over the next few months, Harris faithfully pursued his grievance. ER234-237. Each time his CDCR 602 was denied, Harris appealed to the next level of

[2] Although CDCR 22 is an "inmate/parolee request for interview, item, or service," Harris indicated on the form that "this is a staff complaint." ER245. On May 10, 2013, Harris received a letter "RE: Screening at the SECOND Level," with no indication as to why the form was being returned to him. ER246.

review. ER234-237. On July 30, 2013, Harris received a letter from the Office of Appeals explaining that his inmate appeal was "denied" at the third level, ER240, and that the decision "exhausts the administrative remedy available to the appellant within CDCR," ER241; *see also* ER187-188.

B. Court Proceedings

1. Harris Filed a Civil Rights Action Asserting Religious Liberty and Equal Protection Claims

After exhausting the prison grievance process, Harris brought this civil rights action under 42 U.S.C. § 1983 in the United States District Court for the Eastern District of California on August 26, 2013. ER264-273. In both his original and amended complaints, Harris sued Officer Escamilla in both his individual and official capacity, ER221, 264, and sought damages, a declaration that his civil rights were violated, and the equivalent of injunctive relief to "stop" unlawful acts and implement proper training. ER223; *see* ER266.

By his verified amended complaint, Harris provided a sworn statement about the background facts and attached sworn statements from other eyewitnesses. ER224-262. Harris asserted claims that Officer Escamilla's actions, especially the desecration of the Quran, violated his federal and state civil rights under the Free Exercise Clause of the First Amendment of the Constitution; the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et*

seq.; the California Bane Act, Cal. Civ. Code § 52.1; and the Equal Protection Clause of the Fourteenth Amendment. ER223, 225-230.

2. The District Court Dismissed Harris's RLUIPA and State Law Claims and Granted Summary Judgment Against Harris on His Free Exercise and Equal Protection Claims

On April 30, 2014, the Magistrate Judge dismissed Harris's state civil rights claim. ER56-57. California's Bane Act, Cal. Civ. Code § 52.1, prohibits interfering or attempting to interfere with civil rights by threat or coercion. Regarding any "threatened violence" as "speculative," the court ruled that nothing in the amended complaint "suggests a reasonably perceived threat." ER56.

On February 9, 2015, the Magistrate Judge recommended dismissal on the pleadings of Harris's claims under the Religious Land Use and Institutionalized Persons Act as failing to state a claim. ER41-42, 48. On March 15, 2015, the District Court adopted the recommendation and dismissed the RLUIPA claim. ER34-35.

On January 25, 2016, the Magistrate Judge recommended granting Officer Escamilla's motion for partial summary judgment on Harris's Equal Protection claim as not having been adequately exhausted through the prison grievance process. ER30. On July 29, 2016, the District Court adopted the findings and recommendation. ER21.

On September 22, 2016, the Magistrate Judge recommended granting Officer Escamilla's motion for summary judgment on Harris's remaining Free Exercise claim. ER18. On January 19, 2017, the District Court adopted the findings and recommendation and confirmed summary judgment. ER7.

On January 19, 2017, the District Court entered final judgment. ER1.

3. Harris Timely Appealed to This Court, and Pro Bono Counsel Was Appointed

On February 1, 2017, plaintiff Darrell Harris filed a timely notice of appeal from the District Court's final judgment. ER76-78.

On May 23, 2017, this Court issued an order stating that "the appointment of pro bono counsel in this appeal would benefit the court's review." ER71. On July 14, 2017, this Court appointed pro bono counsel to represent Harris on appeal. ER69. This opening brief is submitted pursuant to this Court's Order.

SUMMARY OF THE ARGUMENT

In the District Court, Officer Escamilla insisted that, even if it had occurred, desecration of a Muslim inmate's Quran during a search by a correctional officer raises no constitutional concerns. ER42-44. Officer Escamilla argued that Harris's inability to read from the Quran until it was replaced was a mere inconvenience and not a substantial burden on his religious exercise. ER16-17, 42-44.

By this reasoning, a California law enforcement officer conducting an otherwise lawful search of a Catholic school chapel could toss the Consecrated Host — which Catholics revere as the actual Body of Christ — onto the floor and step on it, without trespassing on constitutional religious liberty. After all, the wafers could be replaced almost immediately. Likewise, a California police officer searching a Rabbi's house could act with impunity and dump a Torah scroll on the floor — thereby disgracing the Torah — as long as an alternative version of the Jewish Scriptures could be easily obtained afterward.

Because the First Amendment protects against not only substantial burdens placed on religious exercise by government but also harassment of a believer, the desecration by a government agent of a sacred religious article offends fundamental constitutional principles. By his repugnant act of vandalism, Officer Escamilla trampled on Darrell Harris's religious rights, destroyed his most precious possession, and obstructed his faithful daily reading from the Quran. *See*

Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439, 450 (1988) ("[T]his Court has repeatedly held that indirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment."). Moreover, vandalism of religious objects has long been understood as a menacing threat against religious minorities, typically being investigated as a discriminatory hate crime.

I

Official mistreatment on religious grounds is "odious to our Constitution . . . and cannot stand." *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2025 (2017). When "[o]fficial action . . . targets religious conduct for distinctive treatment," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993), the plaintiff need not show a "substantial burden" on his religious exercise, *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849 (3rd Cir. 1994).

By maliciously degrading Harris's personal Quran, Officer Escamilla directly transgressed the protections of the Free Exercise Clause. Even if characterized as "petty harassment," *see Brown*, 35 F.3d at 849-50, this deliberate vandalism of Harris's Quran offends the First Amendment.

Even under a substantial burden analysis under either the Free Exercise Clause or the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc *et seq.*, desecration of a Muslim prisoner's Quran is the kind of activity that

"falls comfortably within the conduct prohibited from government action." *See Rasul v. Rumsfeld*, 433 F. Supp. 2d 58, 69 (D.D.C. 2006), *rev'd on other grounds*, 563 F.3d 527 (D.C. Cir. 2009). No legitimate or minimally-rational basis can be advanced to justify a correctional officer taking hold of a prisoner's holiest text, tossing it on the floor, stomping on it, and kicking it under the bed.

Deliberate vandalism of a sacred text or symbol is objectively understood as a menacing threat or act of intimidation against a member of a minority religion. Thus, the Quran-desecration episode plainly states a claim under California's Bane Civil Right Act Cal. Civ. Code § 52.1, which prohibits interfering or attempting to interfere with civil rights by threat or coercion. California law does not require the plaintiff to allege or prove a threat of actual violence to state a claim under the Bane Act. *Hearns v. Gonzales*, No. 1:14-cv-01177-DAD-MJS (PC), 2016 WL 110437, at *1 (E.D. Cal. Jan. 11, 2016).

II

By mischaracterizing Darrell Harris's Equal Protection claim as premised solely on the allegation in his amended complaint that Officer Escamilla made racial and religious slurs while searching Harris's cell, Officer Escamilla obtained summary judgment for failure to exhaust because Harris had not quoted those statements in his prison grievance. ER20, 27-28.

To the contrary, the heart of Harris's complaint is that Officer Escamilla engaged in the prejudicial and repugnant behavior of throwing Harris's personal Quran on the floor, stomping on it, and kicking it under the bed. ER225, 227. In both his prison grievance and his original and amended complaints in District Court, Harris emphasized the desecration of his Quran. ER225, 227, 236, 265-266; *see* ER238, 240. By highlighting this patently biased conduct, Harris's Equal Protection claim was properly preserved and should be remanded for adjudication on the merits.

As a threshold matter, Officer Escamilla is estopped from raising a post hoc argument of failure to exhaust in District Court after the prison issued a decision on the merits of the grievance and asserted no deficiency. ER188, 240-241. By accepting Harris's grievance (raising both Free Exercise and Equal Protection claims), and by deciding it on the merits, the prison's interest in administrative exhaustion has been served. *See Reyes v. Smith*, 810 F.3d 654, 658 (9th Cir. 2016).

In any event, Officer Escamilla's comments were not discovered by Harris until after he had filed his grievance. ER175-178.

STANDARDS OF APPELLATE REVIEW

With respect to Darrell Harris's claims under the First Amendment Free Exercise Clause and the Fourteenth Amendment Equal Protection Clause, this

Court reviews a grant of summary judgment *de novo*. *Szajer v. City of Los Angeles*, 632 F.3d 607, 610 (9th Cir. 2011); *see also Albino v. Baca*, 747 F.3d 1162, 1173-1174 (9th Cir. 2014) (en banc) (holding that a grant of summary judgment for a prisoner's failure to exhaust the grievance process is reviewed *de novo*). In addition, failure to exhaust prison grievance procedures is "an affirmative defense the defendant must plead and prove." *Id.* at 1166 (citing *Jones v. Bock*, 549 U.S. 199, 204, 216 (2007)).

Summary judgment should be reversed when a genuine dispute of material fact exists or when the District Court incorrectly applied substantive law. *Galvin v. Hay*, 374 F.3d 739, 745 (9th Cir. 2004). The facts and all reasonable inferences from the evidence must be considered by the Court in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007).

Moreover, a court should "construe liberally motion papers and pleadings filed by *pro se* inmates and should avoid applying summary judgment rules strictly." *Thomas v. Ponder*, 611 F.3d 1144, 1150 (9th Cir. 2010).

With respect to Harris's claims under the Religious Land Use and Institutionalized Persons Act and California's Bane Act, this Court reviews *de novo* the dismissal of a prisoner complaint for failure to state a claim upon which relief can be granted. *Hamilton v. Brown*, 630 F.3d 889, 892 (9th Cir. 2011).

ARGUMENT

I. By Desecrating Harris's Quran, Officer Escamilla Violated Harris's Religious Liberty Rights Under the Free Exercise Clause, the Religious Land Use and Institutionalized Persons Act, and California's Bane Civil Rights Act

"There is no iron curtain drawn between the Constitution and the prisons of this country." *Wolff v. McDonnell*, 418 U.S. 539, 555-556 (1974). Although deprived of certain freedoms by a criminal conviction, a prison inmate is entitled to practice his religion and to be respected in his religious identity. *See generally Holt v. Hobbs*, 135 S. Ct. 853, 859-60 (2015); *Khatib v. Orange Cty.*, 639 F.3d 898, 900 (9th Cir. 2011) (en banc).

"The Qur'an as the direct speech of God 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., Routledge, 2010). Disrespect for the Quran strikes to the heart of a Muslim's faith and provokes intense grieving:

> The desecration of the Koran, or any other scripture, is an offense to that particular faith community because scripture represents core identity markers and it encapsulates guiding ethical principles for the believer. For Muslims, the Koran is a holy book which is understood as a divine revelation sent to humankind for guidance; it is memorized, recited regularly in the daily prayers, recited publically,

> aesthetically printed in classical Arabic, and a text which is very much integrated in the life of the believer.

U.S. Institute of Peace, Peace Brief No. 121, The Koran Desecration and the Role of Religion in Conflict (Mar. 20, 2012).

By physically attacking the core symbol and holiest text of Darrell Harris's faith, and leaving him to suffer the consequences of this repugnant vandalism, Officer Escamilla violated Harris's rights of religious liberty under both the Constitution and civil rights statutes.

A. By Defiling the Holy Quran, Officer Escamilla's Non-Neutral Harassment Violates the Free Exercise Clause of the First Amendment Without a Showing of Substantial Burden

1. When Official Action Treats a Religious Believer in a Non-Neutral Manner, It is "Odious to Our Constitution," Regardless of Any Burden on Religious Exercise

Prisoners retain the protections afforded by the First Amendment, "including its directive that no law shall prohibit the free exercise of religion." *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 348 (1987).

Although "neutral, generally applicable laws that incidentally burden the exercise of religion usually do not violate the Free Exercise Clause of the First Amendment," *Holt v. Hobbs*, 135 S. Ct. 853, 859 (2015), government action that is not neutral and generally applicable "must undergo the most rigorous of scrutiny," *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546

(1993); *see also Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2022 (2017) (non-neutral actions on religious grounds "must withstand the strictest scrutiny").

When "[o]fficial action . . . targets religious conduct for distinctive treatment," *Lukumi*, 508 U.S. at 534, the plaintiff need not further show a "substantial burden" on his religious exercise, *see Brown v. Borough of Mahaffey*, 35 F.3d 846, 849 (3rd Cir. 1994) (explaining that the substantial-burden "analysis is inappropriate for a free exercise claim involving intentional burdening of religious exercise"). Indeed, "[a]pplying such a burden test 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.

As the Third Circuit explained in *Brown*, "[t]he 'substantial burden' requirement was developed in the Supreme Court's free exercise jurisprudence . . . to balance the tension between religious rights and valid government goals advanced by 'neutral and generally applicable laws' which create an incidental burden on religious exercise." *Id.* at 849. This burden requirement applies only to "actions designed to achieve legitimate, secular purposes." *Id.* at 850. Accordingly, the substantial-burden requirement has no role to play in cases of purposeful anti-religious harassment. *See id.*

In *American Family Association v. City & County of San Francisco*, 277 F.3d 1114 (9th Cir. 2002), a divided panel of this Court pondered whether the

Lukumi exception to the substantial-burden-on-religious-exercise requirement might apply only to non-neutral "actual law" (that is, a codified statute or regulation) and not to "non-regulatory or non-compulsory governmental action." *Id.* at 1123-24. In the end, however, the majority's observation that "there does not appear to be any case in this circuit" supporting the conclusion, *id.* at 1124, fell well short of an unequivocal and precedential holding.

The *American Family Association* case bears no resemblance to this one. The Court there addressed whether a San Francisco City and County Board resolution disapproving of a religious group's advertising, which had characterized homosexuality as a sin, could be challenged on Establishment Clause or Free Exercise grounds. *Id.* at 1118. The government had passed no law and committed no act, but merely engaged in speech that was not alleged to affect "any specific religious conduct." *Id.* at 1124. As this Court subsequently observed in the similar case of *Catholic League for Religious and Civil Rights v. City & County of San Francisco*, 567 F.3d 595 (9th Cir. 2009), these episodes were part of the board's "extensive and persistent practice of passing non-binding resolutions denouncing discrimination against gays and lesbians. *Id.* at 606. As Judge Berzon clarified in a concurrence, "no regulation at all was attached to the resolutions — they were purely speech, albeit governmental speech." *Id.* at 609 (Berzon, J., concurring).

By contrast, Officer Escamilla did not merely express disapproval of Muslims, but took direct action to vandalize Harris's personal Quran.

Importantly, reading the *American Family Association* decision as holding that non-neutral action by government toward religion falls outside of the *Lukumi* standard would conflict with the Supreme Court's decision in that very case. Although the *Lukumi* Court invalidated an ordinance, the official action at issue in the case was not the text of the ordinance but the manner in which it was interpreted by state and local officials. The ordinance punished "whoever . . . unnecessarily . . . kills any animal." *Lukumi*, 508 U.S. at 537. But officials exempted secular activities such as hunting, slaughtering animals for food, and even using live rabbits to train greyhounds, while prohibiting animal sacrifices during Santeria religious ceremonies. *Id.* This singling out of religiously motivated conduct for negative treatment — by the individualized choices of officials rather than by the plain direction of the ordinance — offended the Free Exercise Clause.

Moreover, requiring a substantial burden on religious exercise to support a claim based on non-neutral harassment of religious believers by official conduct would raise a direct conflict with the Third Circuit. *See Tenafly Eruv Ass'n v. Borough of Tenafly*, 309 F.3d 144, 170 (3d Cir. 2002) (holding there is no burden requirement when a city selectively enforced an ordinance barring attachment of

items to utility poles to exclude religiously significant items); *Brown*, 35 F.3d at 849-50 (holding that a ministry did not need to show a substantial burden on religious exercise where a municipality erected and locked a gate to a public park to exclude people attending a religious revival on neighboring property).

Any lingering doubts about the different and stricter test that applies to non-neutral official action have been swept away by the Supreme Court's superseding decision in *Trinity Lutheran* earlier this year. In *Trinity Lutheran*, a state agency rejected a church's application for a public grant to purchase rubber playground surfaces made from recycled tires. *Trinity Lutheran*, 137 S. Ct. at 2017. As the Court held, the Free Exercise violation came through the official action to categorically deny grant-aid applications from churches and religious organizations, even though that judgment was not grounded in any codified statute or regulation. *See id.* The state decision to "exclude" a church from the program triggered "the strictest scrutiny." *Id.* at 2022.

The *Trinity Lutheran* Court did not look for any substantial burden on how the church "worships" or "view[s] the Gospel." *Id.* at 2022. The Court acknowledged that the state "has not subjected anyone to chains or torture on account of religion." *Id.* at 2024. Nor did the case involve something "so dramatic as the denial of political office." *Id.* Indeed, the denial of the state grant for playground

resurfacing would have a rather pedestrian consequence — "in all likelihood, a few extra scraped knees." *Id.* at 2024-25.

But the burden on religious practices or worship was not the issue in *Trinity Lutheran* — nor is it the central issue in the present case. In *Trinity Lutheran*, the constitutional offense was the official action of excluding the organization because it was religious. In our case, the constitutional offense was Officer Escamilla's official act of malicious vandalism of a prisoner's sacred text. In both cases, this official mistreatment "is odious to our Constitution all the same, and cannot stand." *See id.* at 2025.

2. Officer Escamilla's Malicious Vandalism of Harris's Personal Quran Offends the Free Exercise Clause

Officer Escamilla took hold of Darrell Harris's religious pictures and proceeded to tear them down, throw them on the floor, and trample over them. ER82, 115. Harris's new cell-mate and three neighboring inmates next watched an angry and malicious Officer Escamilla throw Harris's personal Quran on the floor. ER82, 85, 88, 251. Officer Escamilla then "forcefully stomp[ed]" on the Quran, ER82-83, "walk[ed] on" it for all the inmates to see, ER88, and kicked it under the bed, ER251. Discovering his prized Quran under the bed when he returned to his cell, and seeing the dirty boot print on its cover, Harris was heartbroken and began to cry. ER133, 176.

The Magistrate Judge rightly described these actions as "disrespectful and even repugnant." ER74. But the District Court went astray by ruling that "the simple fact that defendant Escamilla stepped on plaintiff's Quran" did not "rise to the level" of a First Amendment violation. ER6. Rather than following the *Lukumi* line of strict analysis, the court below considered whether "prison officials substantially burden the practice of an inmate's religion" and whether the prison official's actions are "'reasonably related to legitimate penological interests.'" ER15 (quoting *Shakur v. Schriro*, 514 F.3d 878 (9th Cir. 2008)).

In so doing, the District Court missed the point. The degrading insult of vandalizing Harris's personal Quran was the action that transgressed the restraints of the Free Exercise Clause. That this was not an affirmative denial of religious exercise — like ordering Harris not to read from the Quran — does not change the analysis. "[I]ndirect coercion or penalties on the free exercise of religion, not just outright prohibitions, are subject to scrutiny under the First Amendment." *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 450 (1988); *see also Trinity Lutheran*, 137 S. Ct. at 2022 (same).

"[P]etty harassment" of religious exercise, regardless of any direct burden, is prohibited by the First Amendment. *Brown*, 35 F.3d at 849-50. Even aside from burdens imposed on his religious practice, which are discussed below, the primary Free Exercise violation was completed by the desecration of the Quran. By alleg-

ing the profound indignity suffered through a repugnant assault on the cornerstone of his religious identity, by the malicious acts of a correctional officer, ER82, 251, Harris has established a direct claim under the Free Exercise Clause.

B. Harris Established a Claim Under the Free Exercise Clause and RLUIPA by Demonstrating Penalties Imposed on His Muslim Religious Identity and Burdens on His Religious Practice Through the Desecration of His Personal Quran

1. Given the Absence of Any Penological Justification for Desecration of the Quran, Harris's Claims May Proceed Under Either the Free Exercise Clause or RLUIPA

Under the First Amendment Free Exercise Clause, prison officials may not infringe on an inmate's right to free exercise, unless the action is "'reasonably related to legitimate penological interests.'" *Shakur*, 514 F.3d at 883-84 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

Under the Religious Land Use and Institutionalized Persons Act (RLUIPA), prison officials may not "impose a substantial burden on the religious exercise of a person residing in or confined to an institution" unless the action advances "a compelling governmental interest" and does so by the "least restrictive means." 42 U.S.C. § 2000cc-1(a). RLUIPA provides "expansive protection for religious liberty." *Holt*, 135 S. Ct. at 860. Congress directed that all sections of RLUIPA "shall be constructed in favor of a broad protection of religious exercise, to the

maximum extent permitted by the terms of [RLUIPA] and the Constitution." 42 U.S.C. § 2000cc-3(g).

In this case, both the First Amendment and the RLUIPA standards lead to the same conclusion —Harris had a right to exercise his faith without Officer Escamilla's patently offensive interference. Whether applying the "reasonable-relation-to-legitimate-penological-interests" test under the Free Exercise Clause or the "compelling-governmental-interest" test under RLUIPA, a correctional officer's action in grabbing a prisoner's holiest text, dumping it on the floor, stomping on it, and kicking it under the bed is indefensible. No legitimate or mini-mally-rational basis can be advanced to justify malicious desecration of the Quran.

Harris has never questioned the prison's power to search a prisoner's cell, acknowledging in his deposition that "being searched is a natural consequence of being in prison." ER164. Standard prison practices such as the searching of inmates serve the prison's "compelling interest in prison safety and security." *See Holt*, 135 S. Ct. at 863.

But Officer Escamilla's conduct during the search of Harris's cell failed to satisfy even those penological standards set by the California Department of Corrections and Rehabilitation (CDCR) for ensuring prison safety and security. Although "cell and property inspections are necessary in order to detect and control serious contraband and to maintain institution security," prison officers are

required to take "every reasonable precaution . . . to avoid damage to personal property and to leave the inmate's quarters and property in good order upon completion of the inspection." Cal. Code Regs. tit. xv, § 3287(a)(2).

After Officer Escamilla's search, Harris described the condition of his cell: "The room was totally — totally destroyed." ER171. Harris's new cell-mate, Rudy Tellez, was also disturbed by Officer Escamilla's malicious behavior, saying: "I've been incarcerate[d] for over 10 years and have never seen a cell search that bad." ER251.

The District Court dismissed Harris's RLUIPA claims on the grounds that (1) damages against defendants in either public or private capacity are not available under RLUIPA, and (2) injunctive relief is unavailable against a state agent in official capacity because Harris failed to sufficiently allege that Officer "Escamilla acted in furtherance of CDCR policy and practice" or that the CDCR had "demonstrate[d] ratification" of Officer Escamilla's unconstitutional conduct. ER60-61. The preclusion of a damages claim against a state official in either official or individual capacity under RLUIPA was correct under this Court's decision in *Woody v. Yordy*, 753 F.3d 899, 903-04 (9th Cir. 2014). For injunctive or declaratory relief, however, the District Court erred in ruling, especially on the pleadings, that the CDCR is not responsible for Officer Escamilla's conduct and that his actions do not implicate CDCR policy or practice.

Contrary to the District Court's conclusion that no evidence "demonstrate[d] ratification" by the CDCR, ER60, the prison's report of the investigation, which is attached to the amended complaint, concluded that Officer Escamilla "**did not** violate CDCR policy." ER239 (bolding in original). Moreover, Officer Escamilla stated that he was "aware of no policy that requires officers to handle inmates' religious books any differently from non-religious property." ER184.

In this way, Officer Escamilla invokes CDCR policy to fend off a claim that desecration of the Quran offends prison policies and practices, thereby putting that defect in California prison policy directly in issue. As an example of a prison regulation that protects constitutional rights, the Oregon Department of Corrections provides by regulation that searches "shall be conducted in a manner that reflects an awareness of and sensitivity to individual religious beliefs, practices, and respect for the authorized objects, symbols, and hairstyles used in the religious practice." Oregon Admin. Rules 291-041-0016.

2. Harris's Claim of Obstruction of His Religiously-Mandated Reading of the Quran Was Improperly Disregarded as Insubstantial Based on a Failure to Connect the Disruption to the Defilement of His Quran

As another District Court stated when ruling on claims by federal prisoners under the Religious Freedom Restoration Act, harassment of Muslim prisoners, by conduct that included desecration of the Quran by placing it in the toilet, "falls

comfortably within the conduct prohibited from government action." *Rasul v. Rumsfeld*, 433 F. Supp. 2d 58, 69 (D.D.C. 2006), *rev'd on other grounds*, 563 F.3d 527 (D.C. Cir. 2009). The anguish caused by a correctional officer's vandalism of a prisoner's pillar of faith is, by itself, a substantial burden on religious exercise.

Even if Harris's views about the proper treatment of and daily reading from the Quran were contradicted by Sunni Islam teaching (and they are *not*), Harris was not required to show that his beliefs regarding the desecration of the Quran or his faithful daily reading were "central to a mainstream religion." *See United States v. Zimmerman*, 514 F.3d 851, 853 (9th Cir. 2007). The RLUIPA analysis focuses on the sincerity of the person's beliefs rather than alignment with traditional religious beliefs or tenets. *Id.* at 851. Moreover, RLUIPA "defines 'religious exercise' to include 'any exercise of religion, whether or not compelled by, or central to, a system of religious belief.'" *Cutter v. Wilkinson*, 544 U.S. 709, 715 (2005) (quoting 42 U.S.C. § 2000cc-5(7)(A)). On this point, the District Court rightly rejected Officer Escamilla's misguided (and also mistaken) theological arguments and correctly recognized that "it is the sincerity, and not the centrality, of Plaintiff's belief that controls." ER16.

And Harris's religious beliefs are hardly idiosyncratic in Islamic teaching and practice. After making his Shahada declaration of faith, Harris has been a devout Sunni Muslim for 40 years. ER155. He has served as a religious leader

and taken courses in Islam. ER119-127. In his deposition, Harris cited to a story about the second caliph Umar, who had been a violent opponent of the Prophet Muhammed. ER158. Umar had been prevented from touching the Quran until he bathed and then was so moved by what he read that he embraced Islam and became one of the greatest companions to the Prophet. ER158.

To maintain the sacredness of the Quran, Harris kept it inside a gray cloth cover with a zipper. ER82, 111, 115, 251. He adapted his daily routines to preserve the holiness of the Quran. For example, "the bathroom is not a place where you can read the Quran." ER170. Harris thus fashioned a sheet to the ceiling of his cell "to divide the bathroom from the living room area, because [he] prayed in the living area." ER170. Harris explained in his deposition that the Quran must be kept free of filth, which means that stepping on it counts as aggravated desecration because boots or shoes carry traces of filth. ER168-169; *see* ER147.

Harris cited to the *Sahih Al-Bukhari*, a collection of the teachings of the Prophet, for Harris's belief that a person who owns a Quran "must read a minimum of ten ayahs [verses] per day." ER167. Hadith 34 in the *Faza'il-e-A'maal* explains that when a Muslim reads from the Quran, the Quran itself will intercede for him at the Day of Judgment before Allah. ER136. But if the believer fails to read the Quran daily, the Quran instead will make a complaint against him, regarding him as among the neglectful for those days. ER110.

Demonstrating the broad acceptance of this view among Muslims, one can readily find Islamic websites that urge believers to maintain a close relationship with the Quran through daily reading. As explained in *Six Reasons Why Every Muslim Should Read the Quran* (2017), http://seekerselite.com/reasons-to-read-the-quran, there are several "golden reasons every Muslim should study and read the Quran each day." The first is that it fulfills a duty: "Upon fulfilling this obligation, the Qur'an then becomes a proof for him on the Day of Judgment." *Id.*

The District Court ruled that the evidence did not support a finding "that Defendant caused an extended delay in Plaintiff replacing his Quran and thus caused a substantial burden on Plaintiff's religious exercise." ER18; *see* ER5.

Mistakenly depriving a prisoner of a sacred text for a very short period, when the prison acts affirmatively to replace it, would not be a First Amendment violation. *See Greene v. Sneath*, 508 Fed. App'x 106, 110 (3d Cir. 2013) (finding no substantial burden when a prisoner was given a replacement Quran within one day after he left his behind when he was moved to a new cell).

But that is not what happened here. Officer Escamilla acted maliciously to desecrate Harris's personal Quran, ER82, 251, followed by a failure of the prison to replace it (even now years later). Officer Escamilla, at least for a time, directly impaired Harris's daily religious practice, taking from him the blessing of Quranic intercession for that period of time.

The District Court incorrectly focused on the length of time when evaluating whether Harris suffered a substantial burden on his faith when he was deprived of his Quran. Rather the court should have directed attention to Officer Escamilla's outrageous vandalism of Harris's Quran — as well as the consequential effect on Harris's ability to practice his religion.

The Quran that was desecrated by Officer Escamilla was a personal treasure for Harris, intricately connected with his religious identity. As described above, he revered the Islamic scriptures, taking every possible measure to honor and respect the sacred text. When he discovered that the pillar of his faith had been defiled by Officer Escamilla, and observed the boot print on the cover, he was overcome and began to cry. ER176. In the more than three years since that day, Harris has never been able to replace his Quran, due to his indigency. ER158, 165.

The inquiry under RLUIPA "asks whether the government has substantially burdened religious exercise . . . not whether the . . . claimant is able to engage in other forms of religious exercise." *Holt*, 135 S. Ct. at 862. To be sure, after the incident, Harris eventually was able to borrow a Quran, but that did not erase the substantial burden on the free exercise of his religion that Harris experienced when Officer Escamilla deliberately vandalized Harris's own Quran.

C. Officer Escamilla's Malicious Vandalism of Harris's Quran — As a Threatening and Intimidating Act — States a Claim Under California's Bane Civil Rights Act

California's Tom Bane Civil Rights Act, Cal. Civ. Code § 52.1, creates a civil cause of action for damages and equitable relief, *id.* § 52.1(b), against anyone who "interferes" or "attempts to interfere" by "threat, intimidation, or coercion" with "the exercise or enjoyment by any individual of rights" under the Constitutions of the United States or California or federal or state law, *id.* § 52.1(a).

The District Court dismissed Harris's Bane Act claim on the pleadings, ruling as a matter of law that "threatened violence" from Officer Escamilla was "speculative" and that "[n]othing [in Harris's complaint] suggests a reasonably perceived threat." ER56. The District Court remarkably failed to appreciate that, historically and today, it is difficult to imagine a more menacing threat against a religious minority than deliberate vandalism of a sacred symbol.

In his amended complaint, Harris specifically alleged that Officer Escamilla violated the Bane Act "by putting his foot on the Quran" and thereby "interfering with Plaintiff[']s practice/exercise and enjoyment of the right to his faith afforded him by the Constitution of the United States and the laws of the State of Calif." ER227. After learning that an angry correctional officer had thrown his Quran on the ground, and walked over it for other inmates to see, ER82-83, 115, 251, any sensible prisoner would feel threatened and intimidated.

Because religious vandalism is an "expression of intimidation and hate," "the perpetrator does not just vandalize property; he or she directly attacks the victim's identity and sense of self." Rebecca Davis, Note, *Opportunistic Hate Crimes Targeting Symbolic Property: When Free Speech is Not Free*, 10 J. Gender Race & Just. 93, 103 (2006).

Moreover, the Bane Act forbids even an "attempt" to interfere with civil rights, rather than demanding a showing of an actual burden. *See* Cal. Civ. Code § 52.1(a). And the California Supreme Court has held that the Bane Act does not require plaintiffs to show that officials "had a discriminatory purpose in harassing them." *Venegas v. County of Los Angeles*, 87 P.3d 1, 14 (Cal. 2004).

Indeed, "[a]llegations of the threatening or committing of an act of violence [are] not necessary to state a cognizable claim under the Bane Act." *Hearns v. Gonzales*, No. 1:14-cv-01177-DAD-MJS (PC), 2016 WL 110437, at *1 (E.D. Cal. Jan. 11, 2016); *see also Venegas*, 87 P.3d at 3-4 (permitting Bane Act claim for unlawful search and seizure with no allegations of violence or threats of violence). As the court held in *Hearns*, by alleging that a correctional officer "destroy[ed] [the prisoner's] personal property," a prisoner's complaint asserted "'a knowing and blameworthy interference'" with constitutional rights and thereby "stated a cognizable Bane Act claim." *Id.* at *2 (quoting *Gant v. County of Los Angeles*, 772 F.3d 608, 623-24 (9th Cir. 2004)).

II. Harris Exhausted the Prison Grievance Process for His Equal Protection Claim by Placing the Prison on Notice of the Prejudicial Conduct of a Correctional Officer Who Desecrated a Minority Prisoner's Religious Scriptures

The heart of both Harris's original and amended complaints has always been the desecration of his Quran, ER222, 226-228, 265, an act that the Magistrate Judge aptly characterized as "repugnant," ER74. To borrow the tort law phrase of *res ipsa loquitur*, this degrading act speaks for itself and plainly raises an inference of bias. Vandalism of a sacred article strikes directly at religious identity and, for a non-Western minority religion like Islam, ethnic identity as well. By highlighting the desecration of the Quran in his prison grievance, ER236; *see* ER238, 240, Harris exceeded this Court's "low floor" standard for a prison grievance by "alert[ing]" the prison to the problem of discriminatory conduct. *See Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009) (citing *Strong v. David*, 297 F.3d 646, 650 (7th Cir. 2002)).

The District Court erred in accepting Officer Escamilla's narrow construction of Harris's Equal Protection claim as based solely on the allegation in his amended complaint that Officer Escamilla made racial and religious slurs while searching Harris's cell. ER20, 27-28. Because Harris had not quoted these comments in his prison grievance (and indeed had not yet learned of them), Officer Escamilla obtained summary judgment against Harris's Equal Protection claim for failure to exhaust. ER20, 27-28. While the derogatory comments by Officer

Escamilla provide further evidence of his discriminatory motive, the degrading of the Quran in and of itself was more than sufficient to "alert" the prison of a disturbing problem of prejudicial behavior by a correctional officer.

As a threshold matter, under CDCR regulations and this Court's precedent, because the prison accepted a grievance from Harris that specified an Equal Protection and Fourteenth Amendment violation, ER234, 236, and did not screen it out as procedurally deficient, ER188, 240-241, Officer Escamilla is estopped from asserting failure to exhaust in court. *See Reyes v. Smith*, 810 F.3d 654, 658 (9th Cir. 2016). The CDCR may not accept a grievance as sufficient to raise an issue and rule on the merits, only to later sandbag the prisoner with a post hoc assertion in court that the prisoner defaulted.

In any event, Harris did not learn of Officer Escamilla's derogatory remarks until after initiating the grievance process. ER178.

A. Because the Prison Accepted Harris's Grievance for Decision on the Merits of His Equal Protection Claim, Officer Escamilla is Now Estopped From Making a Post Hoc Argument of Failure to Exhaust

Under the Prison Litigation Reform Act, a prisoner must exhaust prison grievance procedures before filing suit. 42 U.S.C. § 1997e(a). The California Code of Regulations governing the prison grievance process states that "[t]he third level of review exhausts administrative remedies." Cal. Code Regs. tit. xv, §

3084.7(d)(3). In the District Court, Officer Escamilla submitted a declaration by the Acting Chief of the Office of Appeals for the CDCR that confirmed Harris's filing "was accepted for review and decided by the [Office of Appeals] at the third level of review." ER188. The CDCR denied his appeal and sent Harris written confirmation that he had exhausted his administrative remedies. ER241.

This Court holds that a prisoner exhausts administrative remedies "despite failing to comply with a procedural rule if prison officials ignore the procedural problem and render a decision on the merits of the grievance at each available step of the administrative process." *Reyes*, 810 F.3d at 658 (discussing the California prison grievance system). As this Court explained in *Reyes*, "[w]hen prison officials address the merits of a prisoner's grievance instead of enforcing a procedural bar, the state's interest in administrative exhaustion have been served. Prison officials have had the opportunity to address the grievance and correct their own errors and an administrative record has been developed." *Id.* at 657.

Moreover, basic principles of fairness preclude springing an argument of failure to exhaust on a prisoner when the prison accepted his inmate appeal without any suggestion of a deficiency. "[I]f an administrative grievance is not rejected on procedural grounds by the screening authority, the prisoner is not made aware that he is foreclosed from reliance on the grievance." *Real v. Soltanian-Zadeh*, No. 2:11-CV-1821, 2013 WL 858158, at *4 (E.D. Cal. Mar. 6, 2013).

On January 23, 2013, Harris initiated the grievance process by filing a staff misconduct complaint that described the degrading of his Quran, named Officer Escamilla, cited to "1st, 14th + 15th constitutional rights," and specifically invoked his "rights to equal protection under the law." ER234, 236.

On March 24, 2013, the prison authority mailed Harris a letter explaining the disposition of his inmate appeal at the second level of review. ER238-239. The letter summarized the "Appeal Issue" as follows: "[y]our complaint alleges Officer Escamilla violated your 1st, 14th, and 15th amendment rights by degrading your Quran." ER238. The letter also explained that the prison authority interviewed witnesses to the incident and determined that Officer Escamilla did not violate CDCR policy. ER239.

On July 30, 2013, the prison authority mailed Harris a letter explaining the disposition of his inmate appeal at the third level of review. The letter paraphrased "Appellant's Argument" as follows: "[Officer] Escamilla inappropriately searched his cell and left his Quran on the floor [and that] . . . [Officer] Escamilla's illegal search constitutes a violation of his rights and the regulation." ER240. The letter explained that Harris's appeal was denied at the third level of review and confirmed that "[t]his decision exhausts the administrative remedy available to the appellant within CDCR." ER241.

Under the California Code of Regulations, the appeals coordinator may reject an appeal if "[t]he appeal makes a general allegation, but fails to state facts or specify an act or decision consistent with the allegation." Cal. Code Regs. tit. xv, § 3084.6(b)(6). Moreover, if the appeal issue "[i]s obscured by pointless verbiage or voluminous unrelated documentation such that the reviewer cannot be reasonably expected to identify the issue under appeal . . . the appeal *shall* be rejected." *Id.* § 3084.6(b)(9) (emphasis added).

Harris's appeal was not rejected, but *accepted* by the CDCR and decided on the merits. As outlined above, the CDCR in writing (1) acknowledged the prison authority's understanding and investigation of the "Appeal Issue" as including not only a First Amendment but also a Fourteenth Amendment claim, and (2) confirmed exhaustion. At no time did the CDCR notify Harris that his grievance had failed to properly raise his Equal Protection claim. Because the CDCR's documents and evidentiary submissions contradict any argument that Harris failed to exhaust his Equal Protection claim, Officer Escamilla has failed as a matter of law to carry his burden of proof on failure to exhaust.

B. Under This Court's "Low Floor" Standard for Exhaustion, Harris's Description of the Inherently-Prejudicial Act of Desecrating the Quran Alerted the Prison to the Problem of Discriminatory Conduct by a Correctional Officer

Although the prison accepted Harris's grievance of an Equal Protection violation on the merits, as discussed above, Officer Escamilla injects a post hoc failure-to-exhaust argument. He complains that Harris's inmate appeal did not include information (which Harris only discovered later) that Officer Escamilla had called him a rag-head black Muslim and a terrorist during the search. Even if Officer Escamilla were not estopped from asserting failure to exhaust, Harris's grievance filings were more than sufficient to alert the prison to the problem of a correctional officer who was acting out with prejudicial motive.

Harris's Equal Protection claim is informed by, but does not depend on, his allegation that Officer Escamilla uttered racist and anti-religious slurs. The Equal Protection violation occurred when Officer Escamilla engaged in the patently prejudicial act of desecrating Harris's personal Quran. Indeed, abusive language alone, even if directed at prisoner's religious and ethnic background, may fall short of a Fourteenth Amendment violation. *See Freeman v. Arpaio*, 125 F.3d 732, 737 (9th Cir. 1997), *abrogated on other grounds by Shakur v. Schriro*, 514 F.3d 878 (9th Cir. 2008); *Zavala v. Barnik*, 545 F. Supp. 2d 1051, 1055 (C.D. Cal. 2008). But such remarks are additional evidence of the discriminatory animus behind Officer Escamilla's acts of vandalism. *See Cordova v. State Farm Ins. Companies*,

124 F.3d 1145, 1149 (9th Cir. 1997); *Monetti v. City of Seattle*, 875 F. Supp. 2d 1221, 1230 (W.D. Wash. 2012).

Officer Escamilla's discriminatory intent is also evidenced by his admitted failure to provide a cell search receipt immediately after the search. ER130. Harris specifically noted this failure in his grievance, ER234, which the prison acknowledged in response to the grievance, ER238. As the District Court observed, this failure "suggests the search was not a routine search." ER54.

The California Code of Regulations instructs inmates to "state all facts known and available to him/her . . . at the time of submitting [the inmate appeal]." Cal. Code Regs. tit. xv, § 3084.2(a)(4). Then it explains that "[t]he inmate or parolee is limited to the space provided on the Inmate/Parolee Appeal form [CDCR 602] and one Inmate/Parolee Appeal Form Attachment [CDCR 602-A] to describe the specific issue and action requested." *Id.* § 3084.2(a)(2). CDCR 602 provides 4 lines to "explain your issue." ER234. CDCR 602-A provides an additional 19 lines to "[e]xplain your issue." ER236. CDCR Form 602-A states that "[o]nly one CDCR 602-A may be used" and that the appeal may be rejected "if one row of text per line is exceeded." ER236.

The Code thereby expressly limits the inmate to 23 lines within which to describe the issue to be grieved. Thus, the California rule places the inmate in a Catch-22 situation: (1) state all the facts necessary to fully describe the issue, but

(2) keep any description strictly limited to 23 lines. As Harris testified, "they're not giving you terrific amounts of space to write down everything." ER178.

Not surprisingly, the courts have recognized that the California grievance process is subject to the general low standard that "'a grievance suffices if it alerts the prison to the nature of the wrong for which redress is sought.'" *Reyes*, 810 F.3d at 659 (discussing post-2011 revisions to California's grievance policy).

Harris more than satisfied the requirement of placing the prison on notice of "the nature of the wrong," *Griffin*, 557 F.3d at 1120 — namely, Officer Escamilla's outrageous act of degrading Harris's personal Quran. At the first level of prison review, Harris stated that Officer Escamilla violated his "14th . . . constitutional rights" and did so "by degrading the Muslim Holy book the Quran, by throwing it on the floor under the bed." ER234, 236. At the second level of review, the prison authority summarized the "Appeal Issue" as follows: "[Officer] Escamilla violated [Harris's] 1st, 14th, and 15th amendment rights by degrading [Harris's] Quran." ER238. At the third level of review, the prison authority summarized the "Appellant's Arguments" as follows: "[Officer] Escamilla inappropriately searched his cell and left his Quran on the floor . . . [which] constitutes a violation of his rights and the regulation." ER240.

It cannot be seriously contested that desecration of the Quran gives rise to a reasonable inference of prejudice, especially when viewed in the light most favor-

able to Harris as required under the standard for summary judgment. Indeed, in any other context, this act of vandalism against a religious symbol would be investigated as a hate crime. *See* Cal. Code Regs., tit. v, § 700(b)(9) (defining "hate crime" for safe schools as including "vandalism" and the "destruction of religious symbols"). In just the past two years in California alone, hate crime investigations have been spurred by (1) vandalism of a statue of Buddha in Los Angeles, (2) vandalism of mosques in southern California, and (3) vandalism of Catholic statues in West Covina.[3] As an inference of bias, these actions speak loudly. *See generally Kadish ex rel. Kadish v. Jewish Community Centers of Greater Los Angeles*, 5 Cal. Rptr. 3d 394, 404 (Cal. App. 2003) (citing 2003 FBI statistics on hate crimes, reporting that "two-thirds of incidents motivated by religion involved a property offense, most commonly vandalism").

[3] Angie Crouch & Troy McLaurin, *Buddha Vandalism Investigated as Possible Hate Crime*, (Jul. 13, 2017), http://www.nbcsandiego.com/news/california/Buddha-Vandalism-Investigated-as-Hate-Crime_Los-Angeles-434177653.html; Liam Stack, *California Police and F.B.I. Open Hate Crimes Inquiry Into Vandalism of Mosques*, N.Y. TIMES (Dec. 13, 2015), https://www.nytimes.com/2015/12/14/us/california-police-and-fbi-open-hate-crimes-inquiry-into-vandalism-of-mosques.html?mcubz=0&_r=0; Cindy Von Quednow, Sarah Welch, & Kareen Wynter, *West Covina Police Investigate Church Vandalism as Possible Hate Crime*, (Feb. 27, 2017), http://ktla.com/2017/02/27/west-covina-police-investigate-church-vandalism-as-possible-hate-crime.

In his amended complaint, Harris added Officer Escamilla's discriminatory remarks as further evidence of his prejudicial attitudes on both religion and race. ER223, 225. The complaint stated that Officer Escamilla "violat[ed] . . . Plaintiff's constitutional rights by discriminating against Plaintiff, because of his race and religion by calling Plaintiff a Black Muslim and Terr[]ori[]st [and by] throwing his Quran on the floor, putting his boot on it and kicking it under the bunk." ER223.

Even if Harris had known of these slurs at the time he initiated the prison grievance process, a grievance "need not contain every fact necessary to prove each element of an eventual legal claim." *Griffin*, 557 F.3d at 1120. Nor must a prison grievance include "every factual detail that might be relevant." *Gomez v. Winslow*, 177 F. Supp. 2d 977, 983 (N.D. Cal. 2001). "Perfect overlap between the grievance and a complaint is not required by the PLRA as long as there is a shared factual basis between the two." *Bredbenner v. Malloy*, 925 F. Supp. 2d 649, 658 (D. Del. 2013).

In sum, the major premise of Officer Escamilla's failure-to-exhaust argument is flawed. The heart of Harris's Equal Protection claim is the desecration of his Quran — *not* Officer Escamilla's derogatory remarks. Harris described the desecration of his Quran at every stage of his prison grievance and in his original and amended complaints. Because Harris properly exhausted his Equal Protection

claim by highlighting the objectively prejudicial desecration of his Quran, this Court should reverse the summary judgment.

C. Because Harris Did Not Learn of Officer Escamilla's Racial and Religious Slurs Until After Filing His Grievance, This Omission Cannot Prevent Exhaustion

In any event, Harris did not learn that Officer Escamilla had called him a "rag-head black Muslim" and a terrorist until *after* he submitted his inmate appeal. ER178. While Officer Escamilla may argue that Harris failed to supplement his prison grievance by a new filing, the California prison rule does not require this and indeed does not permit filing a new inmate appeal. *First*, the California Code of Regulations specifies that the prisoner is only required to include those facts "known and available to him/her regarding the issue being appealed at the time of submitting the" grievance. Cal. Code Regs. tit. xv, § 3084.2(a)(4). *Second*, the California Code of Regulations states that an appeal may be canceled if it "duplicates . . . [a] previous appeal upon which a decision has been rendered or is pending." Cal. Code Regs. tit. xv, § 3084.6(c)(2).

The prison authorities also may have learned about the derogatory remarks during its investigation, but Harris was denied access to its findings. ER239; *see* Cal. Code Regs. tit. xv, § 3084.9(i)(3)(B)(1) ("A confidential report shall summarize the review and include a determination of the findings concerning the allegation. This document shall not be provided to the appellant.").

Officer Escamilla argued below that Harris was precluded from explaining the later discovery of the racist and anti-religious slurs because Harris's amended complaint purportedly said that he learned of those remarks simultaneously with learning about the search itself, from his cell-mate immediately after the event. The District Court accepted this argument, ruling that "Plaintiff's operative pleading contradicts his claim that he did not learn of the derogatory remark until after he submitted his January 23, 2013 grievance." ER28; *see* ER20.

The pertinent passage in Harris's amended complaint states that his new cell mate, Rudy Tellez, was in the top bunk when Harris returned to his cell: "His first statement was 'I didn't do this, it was that short cop.' He became later, to be known as Rudy Tellez. He went on to explain 'He hates you for some reason, he called you a Rag-head Black Muslim And a Terr[]or[]ist.'" ER225.

The passage certainly attributes to Tellez both (1) Harris's learning of the cell search with its desecration of the Quran and (2) Harris's learning of Officer Escamilla's derogatory comments. But the passage does not unambiguously say that both discoveries occurred simultaneously and immediately. Indeed, by inserting the word "later" and the phrase "he went on to explain," ER225, Harris interposed a pause into the narration and suggested a shift in time. And the pro se amended complaint as a whole, including this passage, is hardly organized as a daily journal, setting each allegation into a delineated time record.

During his deposition, Harris explained his awkward relationship with Tellez, which resulted in drawing information from him over a period of weeks. Tellez had been moved into the cell the very morning of Officer Escamilla's search, only to find himself in the dangerous position of meeting his new cell-mate when Harris arrived to find his Quran had been desecrated. ER226, 251. Being disturbed by the Officer Escamilla episode and explaining to Harris that he had previously beaten inmates who had Harris's commitment offense, Tellez said immediately he wanted to move to another cell. ER172-173.

Two or more weeks later, after Tellez had been moved, Harris happened to come across Tellez in the prison yard when Harris was on his way to Islamic services. ER175. When Harris explained that he was planning to file a lawsuit, Tellez told him that he had not wanted "to get involved" and had feared persecution because Officer Escamilla was threatening Harris. ER175. Indeed, Tellez revealed that Officer Escamilla tried to goad him into a fight with Harris, telling Tellez that he then would be moved to another cell. ER173, 181, 228. As Harris observed, "it isn't like we became friends." ER175.

Now that weeks had passed and having been removed from the situation, Tellez volunteered to Harris that during the search Officer Escamilla called him "a rag-head, black Muslim and a terrorist." ER175. By this point, Harris had already

initiated his prison grievance. ER178. He could not initiate another one on the same matter. ER176; Cal. Code Regs. tit. xv, § 3084.6(c)(2).

The District Court gave a literalist and crabbed reading to Harris's amended complaint as contradicting his sensible explanation of later discovery of information obtained in an awkward inmate-to-inmate interaction. In so doing, the District Court failed to uphold the basic principle that "'where the petitioner is *pro se*, particularly in civil rights cases, courts should construe the pleadings liberally and afford the petitioner the benefit of any doubt.'" *Wilhelm v. Rotman*, 680 F.3d 1113, 1121 (9th Cir. 2012) (quoting *Hebbe v. Pliler*, 627 F.3d 338, 342 (9th Cir. 2010)).

Under this Court's precedent, pro se civil rights complaints may be dismissed only when "'it appears *beyond doubt* that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief.'" *Id*. at 1121 (quoting *Silva v. Di Vittorio* ,658 F.3d 1090, 1101 (9th Cir.2011)) (emphasis added).

The District Court's chosen interpretation of Harris's pro se amended complaint is hardly "beyond doubt." Harris's pleading need not and should not be read in conflict with his forthright and reasonable explanation that he did not learn of Officer Escamilla's discriminatory remarks until after the prison grievance process had already been invoked.

CONCLUSION

For the foregoing reasons, plaintiff-appellant Darrell Eugene Harris asks this Court to reverse the District Court's judgment and remand the case for trial on his claims for damages, a declaratory judgment, and injunctive relief under the Free Exercise Clause of the First Amendment; the Religious Land Use and Institutionalized Persons Act; the California Bane Act; and the Equal Protection Clause of the Fourteenth Amendment.

Date: October 20, 2017 Respectfully submitted,

UNIVERSITY OF ST. THOMAS SCHOOL OF LAW
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STATEMENT OF RELATED CASES

We are aware of no related cases.

CERTIFICATE OF COMPLIANCE WITH RULE 32 TYPE-VOLUME, TYPEFACE AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,938 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(ii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared using a proportionally spaced typeface in 14 point Times New Roman.

Date: October 20, 2017

s/
Gregory C. Sisk

PROOF OF SERVICE

I, Gregory C. Sisk, 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 20, 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:

OPENING BRIEF OF PLAINTIFF-APPELLANT

I also electronically filed the **EXCERPTS OF RECORD** in two volumes.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF system. I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this declaration was executed on October 20, 2017 at Minneapolis, Minnesota.

/s/ Gregory C. Sisk

Addendum

ADDENDUM TABLE OF CONTENTS

CONSTITUTIONAL PROVISIONS

Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES

Civil Rights Act, 42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Prison Litigation Reform Act, 42 U.S.C. § 1997e(a)

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§ 2000cc-1, 2000cc-2, 2000cc-5(7)(A)

§ 2000cc-1. Protection of religious exercise of institutionalized persons

(a) General rule

No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, as defined in section 1997 of this title, even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—

(1) is in furtherance of a compelling governmental interest; and

(2) is the least restrictive means of furthering that compelling governmental interest.

(b) Scope of application

This section applies in any case in which—

(1) the substantial burden is imposed in a program or activity that receives Federal financial assistance; or

(2) the substantial burden affects, or removal of that substantial burden would affect, commerce with foreign nations, among the several States, or with Indian tribes.

§ 2000cc-2. Judicial relief

(a) Cause of action

A person may assert a violation of this chapter as a claim or defense in a judicial proceeding and obtain appropriate relief against a government. Standing to assert a claim or defense under this section shall be governed by the general rules of standing under Article III of the Constitution.

(b) Burden of persuasion

If a plaintiff produces prima facie evidence to support a claim alleging a violation of the Free Exercise Clause or a violation of section 2000cc of this title, the government shall bear the burden of persuasion on any element of the claim, except that the plaintiff shall bear the burden of persuasion on whether the law (including a regulation) or government practice that is challenged by the claim substantially burdens the plaintiff's exercise of religion.

(c) Full faith and credit

Adjudication of a claim of a violation of section 2000cc of this title in a non-Federal forum shall not be entitled to full faith and credit in a Federal court unless the claimant had a full and fair adjudication of that claim in the non-Federal forum.

(d) Omitted

(e) Prisoners

Nothing in this chapter shall be construed to amend or repeal the Prison Litigation Reform Act of 1995 (including provisions of law amended by that Act).

(f) Authority of United States to enforce this chapter

The United States may bring an action for injunctive or declaratory relief to enforce compliance with this chapter. Nothing in this subsection shall be construed to deny, impair, or otherwise affect any right or authority of the Attorney General, the United States, or any agency, officer, or employee of the United States, acting under any law other than this subsection, to institute or intervene in any proceeding.

§ 2000cc-3. Rules of Construction

(g) Broad construction

This chapter shall be construed in favor of a broad protection of religious exercise, to the maximum extent permitted by the terms of this chapter and the Constitution.

* * *

§ 2000cc-5. Definitions

* * *

(7) Religious exercise

(A) In general

The term "religious exercise" includes any exercise of religion, whether or not compelled by, or central to, a system of religious belief.

Bane Civil Rights Act, California Civil Code § 52.1

§ 52.1. Civil actions for protection of rights; damages, injunctive and other

(a) If a person or persons, whether or not acting under color of law, interferes by threat, intimidation, or coercion, or attempts to interfere by threat, intimidation, or coercion, with the exercise or enjoyment by any individual or individuals of rights secured by the Constitution or laws of the United States, or of the rights secured by the Constitution or laws of this state, the Attorney General, or any district attorney or city attorney may bring a civil action for injunctive and other appropriate equitable relief in the name of the people of the State of California, in order to protect the peaceable exercise or enjoyment of the right or rights secured. An action brought by the Attorney General, any district attorney, or any city attorney may also seek a civil penalty of twenty-five thousand dollars ($25,000). If this civil penalty is requested, it shall be assessed individually against each person who is determined to have violated this section and the penalty shall be awarded to each individual whose rights under this section are determined to have been violated.

(b) Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (a), may institute and prosecute in his or her own name and on his or her own behalf a civil action for damages, including, but not limited to, damages under Section 52, injunctive relief, and other appropriate equitable relief to protect the peaceable exercise or enjoyment of the right or rights secured, including appropriate equitable and declaratory relief to eliminate a pattern or practice of conduct as described in subdivision (a).

(c) An action brought pursuant to subdivision (a) or (b) may be filed either in the superior court for the county in which the conduct complained of occurred or in the superior court for the county in which a person whose conduct complained of resides or has his or her place of business. An action brought by the Attorney General pursuant to subdivision (a) also may be filed in the superior court for any county wherein the Attorney General has an office, and in that case, the jurisdiction of the court shall extend throughout the state.

(d) If a court issues a temporary restraining order or a preliminary or permanent injunction in an action brought pursuant to subdivision (a) or (b), ordering a defendant to refrain from conduct or activities, the order issued shall include the following statement: VIOLATION OF THIS ORDER IS A CRIME PUNISHABLE UNDER SECTION 422.77 OF THE PENAL CODE.

(e) The court shall order the plaintiff or the attorney for the plaintiff to deliver, or

the clerk of the court to mail, two copies of any order, extension, modification, or termination thereof granted pursuant to this section, by the close of the business day on which the order, extension, modification, or termination was granted, to each local law enforcement agency having jurisdiction over the residence of the plaintiff and any other locations where the court determines that acts of violence against the plaintiff are likely to occur. Those local law enforcement agencies shall be designated by the plaintiff or the attorney for the plaintiff. Each appropriate law enforcement agency receiving any order, extension, or modification of any order issued pursuant to this section shall serve forthwith one copy thereof upon the defendant. Each appropriate law enforcement agency shall provide to any law enforcement officer responding to the scene of reported violence, information as to the existence of, terms, and current status of, any order issued pursuant to this section.

(f) A court shall not have jurisdiction to issue an order or injunction under this section, if that order or injunction would be prohibited under Section 527.3 of the Code of Civil Procedure.

(g) An action brought pursuant to this section is independent of any other action, remedy, or procedure that may be available to an aggrieved individual under any other provision of law, including, but not limited to, an action, remedy, or procedure brought pursuant to Section 51.7.

(h) In addition to any damages, injunction, or other equitable relief awarded in an action brought pursuant to subdivision (b), the court may award the petitioner or plaintiff reasonable attorney's fees.

(i) A violation of an order described in subdivision (d) may be punished either by prosecution under Section 422.77 of the Penal Code, or by a proceeding for contempt brought pursuant to Title 5 (commencing with Section 1209) of Part 3 of the Code of Civil Procedure. However, in any proceeding pursuant to the Code of Civil Procedure, if it is determined that the person proceeded against is guilty of the contempt charged, in addition to any other relief, a fine may be imposed not exceeding one thousand dollars ($1,000), or the person may be ordered imprisoned in a county jail not exceeding six months, or the court may order both the imprisonment and fine.

(j) Speech alone is not sufficient to support an action brought pursuant to subdivision (a) or (b), except upon a showing that the speech itself threatens violence against a specific person or group of persons; and the person or group of persons against whom the threat is directed reasonably fears that, because of the speech, violence will be committed against them or their property and that the person threatening violence had the apparent ability to carry out the threat.

(k) No order issued in any proceeding brought pursuant to subdivision (a) or (b) shall restrict the content of any person's speech. An order restricting the time, place, or manner of any person's speech shall do so only to the extent reasonably necessary to protect the peaceable exercise or enjoyment of constitutional or statutory rights, consistent with the constitutional rights of the person sought to be enjoined.

(*l*) The rights, penalties, remedies, forums, and procedures of this section shall not be waived by contract except as provided in Section 51.7.

REGULATIONS

California Code of Regulations, Title V, § 700(b)(9) (Definitions)

(b) Crime classifications

(9) Hate Crime

"Hate crime" means an act or attempted act against the person or property of another individual or institution which in any way manifests evidence of hostility toward the victim because of his or her actual or perceived race, religion, disability, gender, nationality, or sexual orientation. This includes, but is not limited to, threatening telephone calls, hate mail, physical assault, vandalism, cross burning, destruction of religious symbols, or fire bombings. This paragraph shall include those threats or hate mail sent by electronic communication.

California Code of Regulations, Title XV, § 3084.2(a)
Appeal Preparation and Submittal.

(a) The appellant shall use a CDCR Form 602 (Rev. 08/09), Inmate/Parolee Appeal, to describe the specific issue under appeal and the relief requested. A CDCR Form 602-A (08/09), Inmate/Parolee Appeal Form Attachment, which is incorporated by reference, shall be used if additional space is needed to describe the issue under appeal or the relief requested.

(1) The inmate or parolee is limited to one issue or related set of issues per each Inmate/Parolee Appeal form submitted. The inmate or parolee shall not combine unrelated issues on a single appeal form for the purpose of circumventing appeal filing requirements. Filings of appeals combining unrelated issues shall be rejected and returned to the appellant by the appeals coordinator with an explanation that the issues are deemed unrelated and may only be submitted separately.

(2) The inmate or parolee is limited to the space provided on the Inmate/Parolee Appeal form and one Inmate/Parolee Appeal Form Attachment to describe the specific issue and action requested. The appeal content must be printed legibly in ink or typed on the lines provided on the

appeal forms in no smaller than a 12-point font. There shall be only one line of text on each line provided on these forms.

(3) The inmate or parolee shall list all staff member(s) involved and shall describe their involvement in the issue. To assist in the identification of staff members, the inmate or parolee shall include the staff member's last name, first initial, title or position, if known, and the dates of the staff member's involvement in the issue under appeal. If the inmate or parolee does not have the requested identifying information about the staff member(s), he or she shall provide any other available information that would assist the appeals coordinator in making a reasonable attempt to identify the staff member(s) in question.

(4) The inmate or parolee shall state all facts known and available to him/her regarding the issue being appealed at the time of submitting the Inmate/Parolee Appeal form, and if needed, the Inmate/Parolee Appeal Form Attachment.

California Code of Regulations, Title XV, § 3084.6(a) to (c)
Rejection, Cancellation, and Withdrawal Criteria.

a) Appeals may be rejected pursuant to subsection 3084.6(b), or cancelled pursuant to subsection 3084.6(c), as determined by the appeals coordinator.

(1) Unless the appeal is cancelled, the appeals coordinator shall provide clear and sufficient instructions regarding further actions the inmate or parolee must take to qualify the appeal for processing.

(2) An appeal that is rejected pursuant to subsection 3084.6(b) may later be accepted if the reason noted for the rejection is corrected and the appeal is returned by the inmate or parolee to the appeals coordinator within 30 calendar days of rejection.

(3) At the discretion of the appeals coordinator or third level Appeals Chief, a cancelled appeal may later be accepted if a determination is made that cancellation was made in error or new information is received which makes the appeal eligible for further review.

(4) Under exceptional circumstances any appeal may be accepted if the appeals coordinator or third level Appeals Chief conclude that the appeal should be subject to further review. Such a conclusion shall be reached on the basis of compelling evidence or receipt of new information such as documentation from health care staff that the inmate or parolee was medically or mentally incapacitated and unable to file.

(5) Erroneous acceptance of an appeal at a lower level does not preclude the next level of review from taking appropriate action, including rejection or cancellation of the appeal.

(b) An appeal may be rejected for any of the following reasons, which include, but are not limited to:

(1) The appeal concerns an anticipated action or decision.

(2) The appellant has failed to demonstrate a material adverse effect on his or her welfare as defined in subsection 3084(c).

(3) The inmate or parolee has exceeded the allowable number of appeals filed in a 14 calendar day period pursuant to the provisions of subsection 3084.1(f).

(4) The appeal contains threatening, obscene, demeaning, or abusive language.

(5) The inmate or parolee has attached more than one CDCR Form 602-A (08/09), Inmate/Parolee Appeal Form Attachment.

(6) The appeal makes a general allegation, but fails to state facts or specify an act or decision consistent with the allegation.

(7) The appeal is missing necessary supporting documents as established in section 3084.3.

(8) The appeal involves multiple issues that do not derive from a single event, or are not directly related and cannot be reasonably addressed in a single response due to this fact.

(9) The appeal issue is obscured by pointless verbiage or voluminous unrelated documentation such that the reviewer cannot be reasonably expected to identify the issue under appeal. In such case, the appeal shall be rejected unless the appellant is identified as requiring assistance in filing the

appeal as described in subsection 3084.1(c).

(10) The inmate or parolee has not submitted his/her appeal printed legibly in ink or typed on the lines provided on the appeal forms in no smaller than a 12-point font or failed to submit an original.

(11) The appeal documentation is defaced or contaminated with physical/organic objects or samples as described in subsection 3084.2(b)(4). Appeals submitted with hazardous or toxic material that present a threat to the safety and security of staff, inmates, or the institution may subject the appellant to disciplinary action and/or criminal charges commensurate with the specific act.

(12) The appellant has attached dividers or tabs to the appeal forms and/or supporting documents.

(13) The appeal is incomplete; for example, the inmate or parolee has not provided a signature and/or date on the appeal forms in the designated signature/date blocks provided.

(14) The inmate or parolee has not submitted his/her appeal on the departmentally approved appeal forms.

(15) The inmate or parolee has submitted the appeal for processing at an inappropriate level bypassing required lower level(s) of review, e.g., submitting an appeal at the third level prior to lower level review.

(16) The appeal issue or complaint emphasis has been changed at some point in the process to the extent that the issue is entirely new, and the required lower levels of review and assessment have thereby been circumvented.

(c) An appeal may be cancelled for any of the following reasons, which include, but are not limited to:

(1) The action or decision being appealed is not within the jurisdiction of the department.

(2) The appeal duplicates an inmate or parolee's previous appeal upon which a decision has been rendered or is pending.

(3) The inmate or parolee continues to submit a rejected appeal while disregarding appeal staff's previous instructions to correct the appeal

including failure to submit necessary supporting documents, unless the inmate or parolee provides in Part B of the CDCR Form 602 (Rev. 08/09), Inmate/Parolee Appeal, a reasonable explanation of why the correction was not made or documents are not available.

(4) Time limits for submitting the appeal are exceeded even though the inmate or parolee had the opportunity to submit within the prescribed time constraints. In determining whether the time limit has been exceeded, the appeals coordinator shall consider whether the issue being appealed occurred on a specific date or is ongoing. If the issue is ongoing, which may include but is not limited to, continuing lockdowns, retention in segregated housing, or an ongoing program closure, the inmate or parolee may appeal any time during the duration of the event; however, the inmate or parolee is precluded from filing another appeal on the same issue unless a change in circumstances creates a new issue.

(5) The appeal is submitted on behalf of another person, unless it contains allegations of sexual violence, staff sexual misconduct, or sexual harassment of another inmate.

(6) The issue is subject to a department director level review independent of the appeal process such as a Departmental Review Board decision, which is not appealable and concludes the appellant's departmental administrative remedy pursuant to the provisions of section 3376.1.

(7) The appellant is deceased before the time limits for responding to an appeal have expired and the appeal is not a group appeal.

(8) The appellant refuses to be interviewed or to cooperate with the reviewer.

(A) The appellant's refusal to be interviewed or to cooperate with the reviewer shall be clearly articulated in the cancellation notice.

(B) If the appellant provides sufficient evidence to establish that the interviewer has a bias regarding the issue under appeal, the appeals coordinator shall assign another interviewer.

(9) The appeal is presented on behalf of a private citizen.

(10) Failure to correct and return a rejected appeal within 30 calendar days of the rejection.

(11) The issue under appeal has been resolved at a previous level.

California Code of Regulations, Title XV, § 3084.7(a) to (d)
Levels of Appeal Review and Disposition.

(a) All appeals shall be initially submitted and screened at the first level unless the first level is exempted. The appeals coordinator may bypass the first level for appeal of:

(1) A policy, procedure or regulation implemented by the department.

(2) A policy or procedure implemented by the institution head.

(3) An issue that cannot be resolved at the division head level such as Associate Warden, Associate Regional Parole Administrator, CALPIA manager or equivalent.

(4) Serious disciplinary infractions.

(b) The second level is for review of appeals denied or not otherwise resolved to the appellant's satisfaction at the first level, or for which the first level is otherwise waived by these regulations. The second level shall be completed prior to the appellant filing at the third level as described in subsection 3084.7(c).

(1) A second level of review shall constitute the department's final action on appeals of disciplinary actions classified as "administrative" as described in section 3314, or of minor disciplinary infractions documented on the Counseling Only Rules Violation Report, pursuant to section 3312(a)(2), and shall exhaust administrative remedy on these matters.

(2) Movies/videos that have been given a rating of other than "G", "PG", or "PG-13" by the Motion Picture Association of America are not approved for either general inmate viewing pursuant to section 3220.4 or for viewing within the classroom, and will not be accepted for appeal at any level. The first level shall be waived for appeals related to the selection or exclusion of a "G", "PG", or "PG-13" rated or non-rated movie/video for viewing and the second level response shall constitute the department's final response on appeals of this nature.

(c) The third level is for review of appeals not resolved at the second level, or:

(1) When the inmate or parolee appeals alleged third level staff misconduct or appeals a third level cancellation decision or action.

(2) In the event of involuntary psychiatric transfers as provided in subsection 3084.9(b).

(d) Level of staff member conducting review.

(1) Appeal responses shall not be reviewed and approved by a staff person who:

(A) Participated in the event or decision being appealed. This does not preclude the involvement of staff who may have participated in the event or decision being appealed, so long as their involvement with the appeal response is necessary in order to determine the facts or to provide administrative remedy, and the staff person is not the reviewing authority and/or their involvement in the process will not compromise the integrity or outcome of the process.

(B) Is of a lower administrative rank than any participating staff. This does not preclude the use of staff, at a lower level than the staff whose actions or decisions are being appealed, to research the appeal issue.

(C) Participated in the review of a lower level appeal refiled at a higher level.

(2) Second level review shall be conducted by the hiring authority or designee at a level no lower than Chief Deputy Warden, Deputy Regional Parole Administrator, or the equivalent.

(3) The third level review constitutes the decision of the Secretary of the California Department of Corrections and Rehabilitation on an appeal, and shall be conducted by a designated representative under the supervision of the third level Appeals Chief or equivalent. The third level of review exhausts administrative remedies; however, this does not preclude amending a finding previously made at the third level.

California Code of Regulations, Title XV, § 3084.9(i)(3)(B)(1)
Exceptions to the Regular Appeal Process

A confidential report shall summarize the review and include a determination of the findings concerning the allegation. This document shall not be provided to the appellant. It shall be kept in the appeal file in the Appeals Office and no other copies shall be kept or maintained except as herein described or as needed for Third Level review or litigation. This document is strictly confidential to all inmates and any staff except those involved in the inquiry process or litigation involving the department.

California Code of Regulations, Title XV, § 3287(a)
Cell, Property, and Body Inspections

(a) Insofar as possible, a cell, room, or dormitory bed area and locker will be thoroughly inspected immediately upon its vacancy and again, if there is a significant time lapse, before another inmate is assigned to the same cell, room or dormitory bed and locker. Such inspections are required and must be recorded for segregation, isolation and security housing unit cells. The purpose of such inspections is to fix responsibility or the absence of responsibility for security and safety hazards and serious contraband found in the cell, room or dormitory area.

(1) Occupied cells, rooms and dormitory areas, including fixtures and lockers, and any personal and state-issued property of the occupant will be inspected on an infrequent and unscheduled basis. More frequent inspections will be conducted in specialized housing units, depending upon the security requirements of the unit and the risk an individual inmate presents to that security.

(2) Cell and property inspections are necessary in order to detect and control serious contraband and to maintain institution security. Such inspections will not be used as a punitive measure nor to harass an inmate. Every reasonable precaution will be taken to avoid damage to personal property and to leave the inmate's quarters and property in good order upon completion of the inspection.

(3) An inmate's presence is not required during routine inspections of living quarters and property when the inmate is not or would not otherwise be present. During special inspections or searches initiated because the inmate

is suspected of having a specific item or items of contraband in his or her quarters or property, the inmate should be permitted to observe the search when it is reasonably possible and safe to do so.

(4) The inmate will be given a written notice for any item(s) of personal and authorized state-issued property removed from his or her quarters during an inspection and the disposition made of such property. The notice will also list any contraband picked up or any breach of security noted during the inspection, and the follow-up action intended by the inspecting officer.

Oregon Administrative Rules 291-041-0016
Religious Activity Areas and Religious Items

In accordance with these rules and the rules on Religious Activities (OAR 291-143), searches of inmate religious activity areas and authorized religious or spiritual items (including hair and garments worn) shall be conducted in a manner that reflects an awareness of and sensitivity to individual religious beliefs, practices, and respect for the authorized objects, symbols, and hairstyles used in the religious practice.