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

REPLY BRIEF OF PLAINTIFF-APPELLANT

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INTRODUCTION TO REPLY

A correctional officer — acting with impunity and subject to no constitutional limits — may maliciously seize a Muslim prisoner's personal Quran, throw it to the floor, trample on it in the presence of multiple witnesses, and kick it aside, desecrating it and making it unusable. So argues Defendant-Appellee. Indeed, in his Answering Brief (at 18), Officer Escamilla dismisses this episode as merely something that "might *offend* Harris's individual religious beliefs" and which thus fails "to state a free exercise claim" (emphasis in original).

Officer Escamilla contends that a prison officer is exempt from the Supreme Court's rulings in *Church of the Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 534 (1993), and *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2025 (2017). Answering Brief at 16-19. These Supreme Court decisions hold that official action targeting a religious believer is — in itself — a violation of the Free Exercise Clause of the First Amendment.

Resisting the standard for summary judgment, Officer Escamilla repeatedly contradicts sworn declarations supporting Harris as the non-moving party and impugns the credibility of eyewitnesses. For example, Officer Escamilla brushes off the assertion that he stepped on and kicked the Quran as contrived, Answering Brief at 7, while ignoring the sworn statements of multiple eyewitnesses, ER82-83, 85, 88, 251. Similarly, Officer Escamilla contends that Harris failed to prove that

his cell-mate was not the person actually responsible for the vandalism, Answering Brief at 7, again failing even to mention the sworn declarations of the cell-mate himself, ER251, and three other eyewitnesses to Officer Escamilla's repugnant behavior, ER82-83, 85, 88.

Denying that the loss of his Quran imposed any substantial burden on Harris, Officer Escamilla asks this Court to elevate his own theological conjectures above what he calls Harris's "blind insistence" on venerating and reading daily from the Quran. *See* Answering Brief at 25. Sadly, for the first time — with no support in the record and contradicting Harris's vehement rejection of extremist deviations from mainstream Islam, FER6-7 — appellee suggests that Harris adheres to a radical, supremacist "version" of the Quran. *See* Answering Brief at 25-26 & n.6. Officer Escamilla argues that Harris's traditional Islamic beliefs — and apparently his Quran — are undeserving of protection under the Free Exercise Clause.

As discussed in the Opening Brief (at 6-7, 11, 21-22, 33-35) and confirmed by leading Muslim organizations in the United States in their Amicus Brief (at 13-14, 22-23), Harris's views about the Quran and his religious duties fall comfortably within the mainstream of traditional Islam. Moreover, Muslims believe there is only one "version" of the Quran, which was revealed by God in Arabic to the Prophet Muhammad. Like Sunni Muslims around the world, Harris venerates that Arabic scripture as the genuine presence of the Divine.

ARGUMENT IN REPLY

I. Officer Escamilla's Malicious Defilement of Harris's Quran Violated the Free Exercise Clause Both in Itself and Because of the Substantial Burden Imposed on Religious Exercise

A. Under the Supreme Court's *Lukumi-Trinity Lutheran* Line of Cases, Targeted Action by a Government Officer Against a Religious Believer — In Itself — Violates the Free Exercise Clause, Without a Required Showing of Substantial Burden

When the government "single[s] out the religious" for adverse treatment, this hostile action "is odious to our Constitution." *Trinity Lutheran Church v. Comer*, 137 S. Ct. 2012, 2019-20, 2025 (2017). By crossing the constitutional line from enforcement of neutral policies that may have a collateral impact on religious practice to official action that targets the religious, a government officer violates the core "nonpersecution principle" of Free Exercise of Religion. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 523, 534 (1993).

The Free Exercise Clause suffers a dead-center strike when a correctional officer deliberately vandalizes a prisoner's most sacred article. Not only does such a malicious act impose an immediate burden on the prisoner's religious exercise, *see* Part I.C.1 of this Reply Brief, but this non-neutral official action is, by definition, a violation of the Free Exercise Clause — with or without any additional showing of consequential burdens.

Officer Escamilla turns aside the *Lukumi-Trinity Lutheran* line of decisions, insisting that a separate showing of burden on religious practice is required in *every* Free Exercise case, Answering Brief at 16-19, even when no neutral government purpose can be adduced. And in response to the Supreme Court's express direction that non-neutral official action against a religious believer "must withstand the strictest scrutiny," *Trinity Lutheran*, 137 S. Ct. at 2022, Officer Escamilla asks this Court to carve out a special rule sparing correctional officers from constitutional scrutiny, Answering Brief at 19.

To be sure, First Amendment strict scrutiny ordinarily does not apply in the prison setting. Prison regulations that are "reasonably related to legitimate penological interests" may pass constitutional muster. *Turner v. Safley*, 482 U.S. 78, 89 (1987); *see also O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987).

However, such cases involve neutral prison regulations that are supported by legitimate penological interests. *McCabe v. Arave*, 827 F.2d 634, 637-38 (9th Cir. 1987) (observing that *Turner* and *O'Lone* emphasize "the government objective must be a legitimate and neutral one"). That stands in sharp contrast with malicious conduct directed against a religious believer by an angry correctional officer. No "legitimate" and "reasonable" penological purpose could be advanced — and Officer Escamilla suggests none — to justify grabbing a prisoner's holiest text, throwing it to the floor, trampling on it, and kicking it.

As we acknowledged in our Opening Brief (at 23-25) and as Officer Escamilla emphasizes in his Answering Brief (at 18-19), dicta in a Ninth Circuit decision queried whether the *Lukumi* exception to the substantial-burden-on-religious-exercise requirement might apply only to non-neutral "actual law" in the form of a codified statute or regulation. *See American Family Association v. City & County of San Francisco*, 277 F.3d 1114, 1123-24 (9th Cir. 2002). But the divided panel did not render an unequivocal holding on this point, and the case involved purely governmental speech without any accompanying action that affected "any specific religious conduct." *Id.* at 1124. Nothing in *American Family Association* could be twisted to say that anti-religious harassment by a government agent that culminates in the direct action of vandalism of a person's sacred religious article falls outside the scope of the Free Exercise Clause.

The argument that a government officer may engage in non-neutral conduct that singles out a religious believer for mistreatment and still evade the Free Exercise Clause runs hard against the Supreme Court's own words. In *Lukumi*, the Court expressly stated that the "most rigorous of scrutiny" applies whenever "[o]fficial action . . . targets religious conduct for distinctive treatment." *Lukumi*, 508 U.S. at 534, 546. In *Trinity Lutheran*, the Court held that a decision by a state agency to exclude religious organizations from a grant program triggered "the strictest scrutiny." *Trinity Lutheran*, 137 S. Ct. at 2022.

Moreover, Officer Escamilla is asking this Court to enter into conflict with the Third and Sixth Circuits, which hold that willful and "petty harassment" of religious exercise, regardless of any direct burden, is prohibited by the First Amendment. *Brown v. Borough of Mahaffey*, 35 F.3d 846, 849-50 (3rd Cir. 1994); *see also Hartmann v. Stone*, 68 F.3d 973, 978 (6th Cir. 1995). And the Third Circuit's ruling came in a case involving, not a regulation or policy, but a spiteful decision to lock the gate to a public park next to a church gathering. *Brown*, 35 F.3d at 849-50.

In sum, the remarkable argument that government agents are without constitutional boundaries when vandalizing the most sacred article of a person of faith is without support in precedent, the animating protective principles of the Free Exercise Clause, or public policy. *See also* Amicus Brief at 10-18.[1]

[1] Even though appellee's counsel graciously consented to the filing of the amicus brief by leading Muslim organizations, we wish here to address any curiosity that might follow because one of the co-counsel for amici is a law professor at the same law school where counsel for appellant teaches. Counsel for appellant maintains an independent appellate practice and clinic. He is not a participant in the separate religious liberty practice of counsel for amici. As counsel for appellant Harris, we did not solicit amicus participation and have had no communication with the amici organizations. To avoid even the appearance of undue collaboration, we decided not to share any advance draft of our opening brief. Amici saw appellant's opening brief only after it was filed with this Court. And we, likewise, did not see the amicus brief until it had been filed.

B. Despite Officer Escamilla's Resistance to the Standard for Summary Judgment, Multiple Witnesses Testified That He Angrily Took Harris's Quran, Threw It to the Floor, Stomped on It, and Kicked It Away

Multiple eyewitnesses presented sworn declarations that Correctional Officer Escamilla, "clouded by anger and malice," ER82, 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 acknowledged that this evidence created a genuine dispute of material fact. ER15-16.

Nonetheless, throughout his Answering Brief, Officer Escamilla resists the standard for summary judgment, impugns the credibility of witnesses, takes statements out of context, and draws dubious inferences against the non-moving party, frequently mislabeling these negative speculations as "admissions" or "concessions" by Harris. On a motion for summary judgment, "a court ordinarily must look at the record in the light most favorable to the party opposing the motion, drawing all inferences most favorable to that party." *Harlow v. Fitzgerald*, 457 U.S. 800, 816 n.26 (1982). Nor may credibility of witnesses be questioned; rather, on summary judgment, "[t]he evidence of the non-movant is to be believed." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

While we address additional examples elsewhere, we respond here to three striking departures by appellee from black-letter principles of summary judgment when addressing the evidentiary record on the central episode.

First, Officer Escamilla characterizes as contrived the assertion that he stepped on and kicked the Quran. Answering Brief at 7. Officer Escamilla dismisses Harris's description of how he found the Quran under his bed with a dirty boot-print on the cover. ER133, 176; SER11-13. He ignores altogether the sworn statements of eyewitnesses who saw Officer Escamilla "forcefully stomp" on, ER82-83, "walk on," ER88, and "kick [Harris's Quran] under the bed," ER251, for all the prisoners in the cell block to observe, ER 88.

Moreover, Officer Escamilla asserts that "Harris conceded that there was no boot print on his Quran." Answering Brief at 7. To the contrary, Harris's forth-rightly acknowledged that the dusty print could no longer be discerned when the Quran was examined nearly *three years* later at his deposition — after the CDCR had moved Harris and his belongings from one prison to another and many times within the same prison. FER7; SER22. As Harris explained in his sworn opposition to the motion for summary judgment, "[t]he dirt simply wore off." FER7.

Second, Officer Escamilla says that "Harris admitted that he had no way of knowing that [his cell-mate] Tellez did not mess up his property." Answering Brief at 7. But Harris *did* have a "way of knowing" who was responsible for trashing his cell, because he confronted Officer Escamilla the very next day, at which time Officer Escamilla "admitted that he did it." ER174.

And, again, no fewer than four inmates who watched from inside the cell or nearby provided sworn statements about Officer Escamilla's outrageous behavior, including throwing Harris's Quran to the floor, stomping on it, and kicking it away. ER82-83, 85, 88, 248, 251. The only other eyewitness — Correctional Officer Sanchez who had already searched the cell before Officer Escamilla angrily intervened, ER82 — was never interviewed by the prison, ER239, and the CDCR has never produced any statement from her.

Third, Officer Escamilla claims that "Harris admitted that several items of contraband belonging to Harris were confiscated during the search," Answering Brief at 7, listing such things as a zipper and a broken bowl lid.[2] While Harris did admit that the items had been *taken* from his cell, SER 38-39, he never admitted that they were justifiably removed or constituted contraband. To the contrary, he explained that he was allowed additional clothing and other items as part of his vocational training, ER114, and that other correctional officers in conducting numerous random searches had never removed these same items as contraband,

[2] Officer Escamilla oddly says Harris admitted that his cell-mate Tellez "did not have any items confiscated," Answering Brief at 7, thus simultaneously ignoring that this new cell-mate's property had not yet been delivered, SER39, and highlighting that Officer Escamilla's destructive actions were targeted at the Muslim prisoner's belongings.

FER69. After the search, Officer Escamilla issued no disciplinary ticket to Harris for possessing contraband. FER69, 71.

This dubious accusation that Harris harbored contraband is a distraction. Harris has readily acknowledged that "being searched is a natural consequence of being in prison." ER164; SER7. Even assuming that the second search by Officer Escamilla was legitimate when it began, *but see* ER54, 82, Officer Escamilla's malicious conduct in targeting Harris's Quran for an abusive tirade served no legitimate penological purpose and remains indefensible.

C. With the Malicious Desecration of His Quran as the Central and Triggering Event, Harris Established Both an Immediate Impact and an Ongoing Burden on His Religious Exercise

1. Officer Escamilla's "Repugnant" Defilement of Harris's Quran Constituted a Direct and Devastating Burden on Religious Exercise

Officer Escamilla's willful degradation of Harris's personal Quran has been the core of Harris's prison grievance, ER236, 245, and is at the heart of his original and amended complaints, ER222, 227, 265, 267. But Officer Escamilla strives mightily to change the subject. He treats the case as involving nothing more than the temporary and inadvertent unavailability of Islamic scripture to a prisoner. He

even asks to censor the Magistrate Judge's forthright description of this behavior as "disrespectful and even repugnant."[3] ER74.

By artificially separating the deliberate desecration of Harris's Quran from the after-effect of Harris being unable to engage in daily reading from the Quran, Officer Escamilla misses the point.

If a substantial burden on religious exercise is required in this case, the willful defilement of Harris's Quran by throwing it the floor, trampling on it, and kicking it — in and of itself — certainly qualifies. Harris's heartbreaking experience, ER176; FER71, of finding his most sacred article to have been maliciously vandalized by a correctional officer would be a traumatic offense to any faithful Muslim, *see* Opening Brief at 21-22, Amicus Brief at 14-17.

To this central point, Officer Escamilla offers no response.

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[3] Appellee asserts that the Magistrate Judge's plain-spoken description of Officer Escamilla's alleged conduct as "repugnant" in the later costs ruling is not properly cited to this Court. Answering Brief at 15. Even aside from the fact that it is a public document included in the Excerpts of Record, appellee is mistaken. *See Draper v. Rosario*, 836 F.3d 1072, 1086-87 (9th Cir. 2016) (holding that an appeal from a final judgment incorporates a later cost award). And the question addressed by the Magistrate Judge was whether the closeness of the legal question and the substantial public importance of the case, particularly in light of the outrageousness of the official behavior at issue, justified a reduction in court costs imposed on Harris. ER73-75. Attempting to sanitize the record, appellee asked the District Court not merely to impose higher court costs but to strike these very passages with which Officer Escamilla took exception. FER3-4. Not surprisingly, the District Court rejected both requests. FER1-2 & n.1.

2. Denying a Sacrosanct and Essential Religious Text to a Prisoner is a Substantial Burden on Free Exercise

Leaving a prisoner without his central sacred text, which is essential to his daily religious exercise, imposes the most fundamental of burdens on a prisoner. Officer Escamilla argues that an inmate has no First Amendment right to "insist[] that he *must* have a specific book source" for his religious practice. Answering Brief at 24 (emphasis in original). Appellee cites to *O'Lone*, 482 U.S. at 351-52, for the extreme proposition that a prison could withhold the central sacred text of a prisoner's faith. But *O'Lone* addressed the "extraordinarily difficult" logistical problems of assuring that all prisoners of a faith attend the same religious service. *Id.* at 351. *O'Lone* did not speak to sacred texts or hint that a Christian prisoner could be deliberately denied access to the Bible or a Muslim prisoner to the Quran.

As the Third Circuit explained in *Sutton v. Rasheed*, 323 F.3d 236 (3d Cir. 2003), with direct reference to *O'Lone*, "while we believe that a Christian inmate could practice his religion generally even if prevented from attending Christmas or Easter services, we do not believe he could practice his religion if deprived of access to the Bible." *Id.* at 257.

Moreover, under the Free Exercise Clause, the availability of "alternative means" of practicing religion goes not to the question of burden, but rather becomes relevant only when the prison is asked to "sacrifice legitimate penological objectives." *O'Lone*, 482 U.S. at 351-52. Officer Escamilla has not suggested any

legitimate penological purpose for maliciously vandalizing a prisoner's sacred religious text. And under RLUIPA, that a prisoner who is deprived of his essential sacred text might still have access to other religious books is even less relevant to the inquiry, which "asks whether the government has substantially burdened religious exercise . . ., not whether the . . . claimant is able to engage in other forms of religious exercise." *See Holt v. Hobbs*, 135 S. Ct. 853, 862 (2015).

In sum, it cannot be "seriously dispute[d]" that "[d]enying prisoners access to their holy text or ritual items is a substantial burden on free-exercise rights." *Garner v. Muenchow*, No. 15-C-0777, 2017 WL 5172142, at *2 (7th Cir. Nov. 8, 2017); *see also Sutton*, 323 F.3d at 253-57 (upholding the First Amendment right of prisoners to "sacrosanct and fundamental" religious texts).

3. Because the Evidence Shows Harris's Inability to Replace the Quran for Ten Days, Caused by Officer Escamilla's Intentional Misconduct, a Substantial Burden is Established

Darrell Harris had to wait ten days before he could borrow a replacement for the vandalized Quran. ER153; SER16-18. *See Howard v. Connett*, No. 2:11–cv–01402, 2017 WL 4682300, at *10 (D. Nev. Oct. 17, 2017) (a prisoner's "sincerely held religious belief was substantially burdened by confiscation of his faith's holy book [the Quran] and other religious texts," with no evidence that the twelve-day deprivation "was reasonably related to a legitimate penological interest").

Officer Escamilla tries to collapse the ten-day loss of the Quran down to a single day. Answering Brief at 22-24. He accomplishes this magical feat by turning the summary judgment standard upside down, drawing every possible inference against Harris, rejecting Harris's explanations, and excusing himself from any responsibility for the consequences of his malicious actions.

As the greatest stretch, Officer Escamilla contends that Harris would have obtained an instant replacement if only he had asked community resource manager Smith/Robicheaux. Answering Brief at 21. In fact, Harris did submit a staff complaint to this manager on the very day that his Quran was found on the floor. ER245. Harris never received a response. ER95; SER4. Moreover, given that communications with this manager often took two weeks or more, SER4, Harris explained his reasonable decision to take more direct action by going to the chaplain's library, SER4.

Office Escamilla also asserts that the delays — caused by Harris's responsibilities to attend training during the day time hours when the chaplain's library was open and later by a prison lock-down, ER153 — were not foreseeable. Answering Brief at 20-22. But, as we said in the Opening Brief (at 35-36), because malicious vandalism triggered this chain of events, Officer Escamilla's responsibility is inescapable.

Under the *Restatement (Second) of Torts* (1965), "responsibility for harmful consequences should be carried further in the case of one who does an intentionally wrongful act than in the case of one who is merely negligent." *Id.* § 435B cmt. a. When the "invasion" is intentional, when the actor commits a "moral wrong," and when the harm is serious, the scope of liability is widened. *Id.* § 435B. *See also City & Cty. of San Francisco v. Philip Morris, Inc.*, 957 F. Supp. 1130, 1141 (N.D. Cal. 1997) (holding there is a "different proximate cause standard for intentional torts.").

4. Officer Escamilla's Misguided Theological Conjectures and Mischaracterization of Harris's Mainstream Islamic Views May Not Override Harris's Sincere and Well-Grounded Description of the Burdens on His Religious Exercise

As set out in our Opening Brief (at 6-7, 11, 32-36), Darrell Harris — a Muslim for forty years and a religious leader — thoroughly described his orthodox Islamic views about the Quran to the District Court. ER110, 136, 158, 167. He diligently cited to sayings of the Prophet (Hadith) and other leading works in Sunni Islam. ER110, 136-37 (citing to Hadiths 34 and 38 in the *Faza'il-e-A'maal*).

Leading Muslim organizations as amici also present a documented discussion of Islamic sources that support Harris's sincere "belief, rooted in his Muslim faith, that he must read the Qur'an daily." Amicus Brief at 22. Given

Harris's "reliance on known sources," amici confirms that Harris's "tenet of daily reading" from the Quran is hardly idiosyncratic. *Id.*

Without any citation to the Quran, Hadith, or other Islamic literature,[4] and displaying unfamiliarity with Islamic teaching on the nature of the Quran, Officer Escamilla devotes several pages of his Answering Brief (at 22-25) to his assertion that Harris has misinterpreted his own religion and should accede to alternative practices. *But see Ben-Levi v. Brown*, 136 S. Ct. 930, 934 (2016) (Alito, J., dissenting from denial of cert.) ("The argument that a plaintiff's own interpretation of his or her religion must yield to the government's interpretation is foreclosed by our precedents.").

Indeed, Officer Escamilla characterizes Harris's faithful reverence for the genuine Quran as "blind insistence." Answering Brief at 25. For an orthodox Sunni Muslim like Harris, the adoration of the Quran is not an act of "blindness,"

[4] In the District Court, Officer Escamilla presented a declaration from a state-employed prison chaplain. SER45-46. Belonging to a different branch of Sunni Islam, this chaplain failed to address the Hadith of the Prophet (on which Harris specifically relies, ER136, 167) or cite other Islamic literature. Nor does the declaration address sincerity, which is the central (and only) question. *See United States v. Zimmerman*, 514 F.3d 851, 853 (9th Cir. 2007). Moreover, the chaplain said he had been informed by defense counsel that there was no evidence that the Quran had been desecrated by Officer Escamilla. SER46.

but rather confirms that the believer has opened the eyes of faith to the teachings of the Prophet and the traditions of Islam.

Suggesting that Harris should have been content with other religious books that contain Quranic ayaat, *see* Answering Brief at 26, could be compared to telling a Christian that a religious book containing extraneous Bible verses is a suitable replacement for the Bible itself. But that analogy still falls short, as "[t]he Quran is not really a Muslim Bible." Nathan B. Oman, *How to Judge Shari'a Contracts: A Guide to Islamic Marriage Agreements in American Courts*, 2011 Utah L. Rev. 287, 297. Rather, Muslims regard the Quran as "God's Word that has miraculously come down into the world in history and humankind." Frederick Mathewson Denny, *An Introduction to Islam* 135 (4th ed. 2011). "In Christianity, the closest analogy to the Quran is not the Bible, but Jesus Christ, whom the Gospel of John declares to be the Word that 'was in the beginning with God.'" Oman, *supra*, 2011 Utah L. Rev. at 297.

A more apt comparison would be expecting a Catholic to be satisfied with a plate of toast and a glass of grape juice rather than the consecrated host and wine that has been transubstantiated through a priest into the genuine Body and Blood of Christ. As Harris said below, "there is no [substitute] for the Quran!" FER8. *See also Sutton*, 323 F.3d at 257 (upholding First Amendment right of prisoners to essential religious texts "having the sacrosanct and fundamental quality").

To pour salt into the wound, for the first time on appeal, appellee interjects the inflammatory suggestion that Harris adhered to a radical and "supremacist" "version" of the Quran, promoting discrimination against Christians and Jews. Answering Brief at 25 & n.6. No evidence was presented in the District Court about the supposedly deviant character of any text or that Harris's use of his Quran departed from the practices of tens of millions of Muslims.

Quite to the contrary, Harris carefully explained in sworn statements that for forty years he has adhered to the centuries-old teachings of Islam followed by Sunni Muslims around the world. ER107, 113, 118, 224. Harris vehemently condemns divisive or racist deviations from Islam. FER6-7.

Moreover, Officer Escamilla repeatedly and mistakenly refers to different "versions" of the Quran. Answering Brief at 25-26. Under Sunni Islam, there is only one "version" of the Quran. "The text of the Quran is fixed and no competing versions of the scripture exist." Liaquat Ali Khan, *Jurodynamics of Islamic Law*, 61 Rutgers L. Rev. 231, 266 (2009).

By referring to different "versions," Officer Escamilla confuses *translations* into various other languages with the Quran itself:

> For Muslims, the divine Word assumed a specific, Arabic form, and that form is as essential as the meaning that the words convey. Hence only the Arabic Koran is the Koran, and translations are simply interpretations.

Sachiko Murata & William C. Chittick, *The Vision of Islam* 9 (1994).

The Quran which Harris adored — and which Officer Escamilla desecrated — contained the essential, sacred Arabic (as well as an English translation). ER 158. This "one and the same Quran," Khan, *supra*, 61 Rutgers L. Rev. at 266, is the voice of Allah spoken in Arabic to the Prophet Muhammad.

D. Officer Escamilla's Other Arguments Contradict the Record and are Mistaken as a Matter of Law

1. Harris Presented the Full Deposition in Response to the Motion for Summary Judgment, and the District Court Cited to Deposition Pages Submitted by Harris

As the first argument pressed in his Answering Brief (at 14), Officer Escamilla asks the Court to ignore Harris's sworn testimony in the deposition taken by defense counsel, on the mistaken ground that the deposition was not submitted by Harris in opposition to summary judgment.

First, the full deposition *was* introduced into evidence as part of Harris's responses to Officer Escamilla's motion for summary judgment. Harris responded directly to the motion for summary judgment by asking for a stay to allow him time to assemble evidentiary materials while complying with prison restrictions on communicating with other inmates. FER63-64. Harris requested a stay because of unanticipated difficulties in navigating Byzantine prison rules for communicating with other inmate eyewitnesses at other locations, FER34-42, 44-62 — a process that imposed months of delay, FER41, and that continued to obstruct Harris

throughout the summary judgment proceedings, FER 12-13, 17-20. Complaining that defense counsel had chosen when to depose him, while Harris was stymied by the CDCR in communicating with his own witnesses, FER37-38, 43, 64, Harris attached the complete deposition, ER154-182.

In denying the motion to stay, the Magistrate Judge reviewed the evidence and expressly cited the deposition testimony (to which appellee now objects, Answering Brief at 14) about how Harris's cell-mate had told him "weeks after the search that he heard Defendant Escamilla refer to Plaintiff as a 'Black raghead Muslim terrorist' while he was searching Plaintiff's belongings." FER27 (citing ER175). In light of this and other evidence already in the record, the Magistrate Judge concluded that Harris did not need further corroborating evidence. FER32.

Thus, the deposition had been introduced into the record as an integral part of Harris's pro se response to the motion for summary judgment. Having been assured by the Magistrate Judge that this and other evidence was already in the record, Harris did not duplicate submissions by attaching the same deposition, yet again, with his later filing of the document formally denominated as the opposition. *See also Rand v. Rowland*, 154 F.3d 952, 957 (9th Cir. 1998) (en banc) (explaining, in context of summary judgment procedures, that "we tolerate informalities from civil pro se litigants").

And, indeed, the District Court accepted the full deposition submitted by Harris as part of the summary judgment record. In the summary judgment recommendation, the Magistrate Judge relied on the deposition, citing to pages provided by Harris on the motion to stay and beyond the excerpts submitted by Officer Escamilla. ER9-10 (citing deposition pages 44, 46 [ER162]).

Second, because Harris was a pro se litigant, the Court will consider "as evidence in his opposition to summary judgment[,] all of [the] contentions offered in motions and pleadings, where such contentions are based on personal knowledge[,] set forth facts that would be admissible in evidence, and where . . . attested under penalty of perjury." *Jones v. Blanas*, 393 F.3d 918, 923 (9th Cir. 2004).

Finally, nothing in this appeal hangs on a particular page of the deposition. Most of the citations to the deposition are accompanied by parallel citations to other parts of the record, *see* Opening Brief at 7-11, 27, 34, 51-52, or are citations to the same deposition excerpts that Officer Escamilla himself introduced into the record in his motion for summary judgment, *see* SER1-2, 9-43. Most importantly, because Harris was not present at the search, the sworn declarations of multiple eyewitnesses are dispositive on this key episode. *See* ER81-83, 85, 88, 248, 251.

2. Harris Sought Prospective Relief as Well as Damages in His Complaint and Properly States a Claim Under RLUIPA

With no citation to the record, Officer Escamilla asserts that Harris "pleaded no claim for injunctive or declaratory relief under RLUIPA." Answering Brief at 46. While, as a pro se litigant, Harris did not label the relief sought in the original and amended complaints as "injunctive" or "declaratory," he sought both money damages and non-monetary equitable relief.

In his amended complaint, under the section for relief, Harris begins by seeking the equivalent of declaratory relief, asking the court to "find a violation of the Plaintiff's 1st and 14th amendment United States Constitutional rights." ER223; *see also* ER230. Harris's third request asks that the "Defendant stop discriminatory acts and retaliation against Plaintiff and any other relief the Court deems appropriate." *Id.* Harris's request for this prospective equitable relief is directed to the absence of proper supervision and regulatory constraints, which resulted in the prison ratifying Officer Escamilla's outrageous conduct as not violating CDCR policy. ER239. Officer Escamilla justifies his conduct by citing the absence of any CDCR policy on the proper handling of religious items. ER184.

By suing Officer Escamilla in his official capacity, ER221, and seeking injunctive relief in the form of institutional changes, Harris was effectively seeking relief from the CDCR as an agency and the Director of the CDCR who establishes agency policy. *See Pettit v. Smith*, 45 F. Supp. 3d 1099, 1106 (D. Ariz. 2014)

(holding that a corrections department "is not a disinterested third party" in a suit against a correctional officer, because the state "funds the defense and pays any judgment"); *see also Ramos v. Swatzell*, No. ED CV 12-1089, 2017 WL 2857523, at *6-7 (E.D. Cal. June 5, 2017) (same). On remand, Harris should be permitted to clarify this by amending his complaint to seek this injunctive relief under RLUIPA against the Director of the CDCR.

Finally, it is especially appropriate that Harris's RLUIPA claim go forward, as it directly implicates one of the express motivations of Congress in enacting the statute: the concern that prisoners' religious items "such as the Bible, the Koran, the Talmud or items needed by Native Americans[,] . . . were frequently treated with contempt and were confiscated, damaged or discarded" by prison officials." *Cutter v. Wilkinson*, 544 U.S. 709, 717 n.5 (2005).

3. Harris Stated a Proper Claim Under the Bane Act of a Threat to Interfere with Rights and Will Document Exhaustion of Administrative Remedies on Remand

On the Bane Act, we need add little to the argument in the Opening Brief (at 37-38) that the menacing message of a state officer angrily vandalizing the most sacred text of a minority prisoner's religion plainly counts as an "attempt[] to interfere by threat, intimidation, or coercion, with the exercise or enjoyment" of Harris's federal and state rights to religion. *See* Cal. Civ. Code § 52.1.

The Bane Act does *not* require "threats, intimidation, or coercion" independent of the alleged constitutional violation. *Morse v. County of Merced*, No. 1:16-cv-00142, 2016 WL 3254034, at *11-12 (E.D. Cal. June 13, 2016); *Adamson v. City of San Francisco*, No. 13-cv-05233, 2015 WL 5467744, at *9 (N.D. Cal. Sept. 17, 2015). Nor does the Bane Act require allegation of a threat of violence. *Venegas v. County of Los Angeles*, 87 P.3d 1, 3-4, 13 (Cal. 2004). In any event, willful destruction by a correctional officer of a prisoner's personal property — and Officer Escamilla's vandalism readily falls into that category — states a Bane Act claim. *See Hearns v. Gonzales*, No. 1:14-cv-01177-DAD-MJS (PC), 2016 WL 110437, at *1-2 (E.D. Cal. Jan. 11, 2016).

For the first time on appeal, Officer Escamilla objects that Harris did not establish below that he had filed a prior administrative claim under California's Government Claims Act, Cal. Gov. Code § 810 et seq. Answering Brief at 44-46. But the District Court dismissed Harris's Bane Act claim on the pleadings on the substantive merits, ER56, without placing Harris on notice of any need to document administrative exhaustion. On remand, even assuming such a requirement under the Bane Act, Harris will present documentation of prior administrative filings so that the Bane Act cause of action may proceed to the merits.

II. By Describing Officer Escamilla's "Degrading" of His Quran, Harris Placed Prison Officials on Notice of the Manifestly Discriminatory Conduct of a Correctional Officer as an Equal Protection Violation

Harris's prison grievance was pointedly clear, exceeding the "low floor" notice standard by "alert[ing]" the prison of his claim of discrimination. *See Griffin v. Arpaio*, 557 F.3d 1117, 1120 (9th Cir. 2009). Harris's grievance said that his rights were violated "by degrading the Muslim Holy book the Quran, by throwing it on the floor under the bed." ER236.

In the Opening Brief (at 46), we said that "[i]t cannot be seriously contested that desecration of the Quran gives rise to a reasonable inference of prejudice." Officer Escamilla weakly responds by protesting that Harris's grievance spoke of "degrading" rather than "desecrating" his Quran. Answering Brief at 34. Officer Escamilla fails to explain how Harris's use of a synonym impaired the clarity of the notice provided to the prison. *Merriam-Webster's Collegiate Dictionary* 303 (10th ed, 2001) defines "degrade" as "to lower in grade, rank, or status" or "to bring to low esteem or into disrepute." The same dictionary defines "desecrate" as "to violate the sanctity of" and "to treat disrespectfully, irreverently, or outrageously." *Id.* at 312. When a Muslim inmate complains that a correctional officer has "degraded" the Quran, no reasonable prison authority could claim to be oblivious to the discriminatory implications.

Nor was the prison so oblivious, as Harris's grievance was accepted and decided on the merits of both the First and Fourteenth Amendment claims. ER188, 240-241. The post hoc argument that Harris's grievance failed to provide proper notice of the equal protection claim is thus estopped. *See Reyes v. Smith*, 810 F.3d 654, 658 (9th Cir. 2016). Officer Escamilla argues that *Reyes* does not apply because this case does not involve a procedural requirement. Answering Brief at 35-36. But the CDCR has directed otherwise, establishing procedures that a grievance may be rejected for "fail[ing] to state facts or specify an act or decision," Cal Code Regs. tit. xv, § 3084.6(b)(6), and "shall" be rejected if the reviewer cannot "reasonably . . . identify the issue under appeal," *id.* § 3084.6(b)(9).

The CDCR cannot have it both ways. It may not define lack of specificity as a procedural defect for rejecting a grievance, but then, after accepting a grievance for decision on the merits, later reframe the issue as non-procedural.

As for the corroborating allegation in the amended complaint that Officer Escamilla called Harris a rag-head Black Muslim and terrorist during the search, ER223, 225, we will not repeat here the extended argument in the Opening Brief (at 48-52) that the grievance already provided ample notice and that Harris learned only later of these derogatory words, ER178.

Officer Escamilla now complains that "the record contains no admissible, competent evidence that Escamilla made this statement." Answering Brief at 9.

No motion for summary judgment directly challenged whether this statement had actually been made, but only whether the failure to quote it in the grievance prevented exhaustion. ER20, 22, 27. Harris was not obliged to present evidence in response to a different motion never filed.

III. Officer Escamilla Cannot Establish Qualified Immunity from Damages on This Record for His Manifestly-Wrongful and Unjustified Conduct, and Qualified Immunity is Not Available for Other Claims

Although the District Court did not address the question, Officer Escamilla presses the affirmative defense of qualified immunity on appeal. Answering Brief at 26-30. He claims immunity because "no Ninth Circuit or Supreme Court precedent had clearly established in 2013 that a correctional officer's alleged mishandling of inmates' religious books during a search" violated an inmate's First Amendment or Fourteenth Amendment rights. Answering Brief at 30. Not only is that an unduly narrow framing of the question, both factually and legally, but given the evidentiary record at summary judgment, he is not entitled to immunity. At the least, the question should be addressed in the first instance by the District Court. *Richardson v. Runnels*, 594 F.3d 666, 672 (9th Cir. 2010).

"Qualified immunity is an affirmative defense that the government has the burden of pleading and proving." *Frudden v. Pilling*, 877 F.3d 821, 831 (9th Cir. 2017). Qualified immunity is lost if it would have been "clear to a reasonable

officer that his conduct was unlawful in the situation he confronted." *Saucier v. Katz*, 533 U.S. 194, 202 (2001). While precedents on the precise point are most informative, "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful." *United States v. Lanier*, 520 U.S. 259, 271 (1997) (citations omitted).

Because of the repugnant, illegitimate, and manifestly wrongful nature of the act, Officer Escamilla cannot escape responsibility. Contrary to his euphemistic restatement, this case is not about "a correctional officer's alleged *mishandling* of inmates' religious books," Answering Brief at 30 (emphasis added). Rather, this case is about a correctional officer's malicious vandalism of a prisoner's most sacred article without any possible justification. Malice or bad faith alone may not preclude qualified immunity, but those factors combined with the outrageousness of the act and the absence of any legitimate penological purpose defeat any claim that a reasonable correctional officer could have thought the behavior lawful.

While Officer Escamilla may dispute the key episode, the qualified immunity question at the summary judgment stage must be decided based on "the *plaintiff's* version of the facts." *Lee v. Ferraro*, 284 F.3d 1188, 1194 (11th Cir. 2002) (emphasis in original); *see also KRL v. Estate of Moore*, 512 F.3d 1184, 1189 (9th Cir. 2008) (holding that, on a motion for summary judgment on the

qualified immunity defense, "we assume that the version of the material facts asserted by Plaintiffs, as the non-moving party, is correct").

By definition, qualified immunity cannot be a defense to a Free Exercise claim that a government officer deliberately targeted a religious believer for mistreatment. The patent illegitimacy of such an act is established under the *Lukumi-Trinity Lutheran* line of cases. Because no "legitimate purpose" is served by an intentional deprivation of the right to religious exercise, *see Brown*, 35 F.3d at 850, no reasonable government officer could think such behavior was lawful. *See Lukumi*, 508 U.S. at 523 (explaining that the "fundamental nonpersecution principle of the First Amendment" that bars government from acting purposely to "suppress religious belief or practice is so well understood that few violations are recorded in our opinions").

This simply is not a case in which a prisoner asserted a prison's failure to properly accommodate his religious practices or complained about negligent official conduct. Harris had a clearly established right to exercise his religious beliefs free from intentional pressure and oppression. *See Warsoldier v. Woodford*, 418 F.3d 989, 996 (9th Cir. 2005). "Because the case law clearly prohibits prison officials from intentionally preventing religious practice without penological justification, the free exercise claim may proceed." *Garner*, 2017 WL 5172142, at *4 (denying qualified immunity to prison officials who intentionally prevented

religious practice by denying access to a holy text); *see also Boles v. Neet*, 486 F.3d 1177, 1184 (10th Cir. 2007) (holding in a free exercise case that the qualified immunity defense is not available if the correctional officer's action was not "reasonably related to a legitimate penological interest").

Officer Escamilla is not entitled to "one free" Quran desecration. "[O]fficials committing outrageous, yet sui generis, constitutional violations ought not to shield their behavior behind qualified immunity simply because another official has not previously had the audacity to commit a similar transgression." *Jones v. Hunt*, 410 F.3d 1221, 1230 (10th Cir. 2005).

Finally, qualified immunity "does not bar actions for declaratory or injunctive relief," *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 527 (9th Cir. 1989), and is not available under California's Bane Act, *Cousins v. Lockyer*, 568 F.3d 1063, 1072 (9th Cir. 2009).

CONCLUSION

For the foregoing reasons and those in the Opening Brief, plaintiff-appellant Darrell Eugene Harris asks this Court to reverse the District Court's judgment and remand the case for trial.

Date: January 29, 2018 Respectfully submitted,

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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 6989 words, excluding the portions of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(ii).

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Date: January 29, 2018

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 January 29, 2018, I electronically filed the following with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the Appellate CM/ECF System:

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/s/ Gregory C. Sisk