Case No.: 17-15230

IN THE

United States Court of Appeals for the Ninth Circuit

DARRELL EUGENE HARRIS,
Plaintiff-Appellant,

v.

S. ESCAMILLA,
Defendant-Appellee.

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

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

CORPORATE DISCLOSURE STATEMENT

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

STATEMENT OF AUTHORSHIP AND FUNDING

TABLE OF AUTHORITIES

Cases

Statutes

Books, Articles, and Other Sources

INTEREST OF *AMICI CURIAE*

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

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

The **Islamic Society of North America (ISNA)** is one of the oldest and largest Muslim umbrella organizations in the United States. Established in 1963 as the Muslim Students Association of the US and Canada, and restructured in 1981, ISNA is a membership-based not-for-profit corporation of Muslim individuals and affiliated Islamic organizations and mosques, including the Islamic Medical Association of North America (IMANA), Association of Muslim Scientists, Engineers and Technology Professionals (AMSET), Council of Islamic Schools of North America (CISNA), Muslim Students Association (MSA) and Muslim Youth of North America (MYNA). ISNA's mission is to foster the development of the Muslim community, interfaith relations, civic engagement, and a better understanding of Islam. Through its programs and activities, ISNA provides a common platform for presenting Islam (of which the Qur'an as the primary source of Islamic teachings is a major focus); supporting Muslim communities; developing educational, social

advocacy, KARAMAH promotes human rights worldwide, particularly the rights of Muslim women and girls in Islamic and civil law. KARAMAH aims to create a global network of advocates for the rights of Muslim women, educate the public with respect to the gender-equitable principles of Islam, and advance the cause of Muslim women's rights in legal and social environments. As an organization advocating for the rights of Mus

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

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

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

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

Because Harris holds his tenet of daily reading, the state, in the person of Officer Escamilla, imposed a substantial burden on him by absolutely preventing him from following his tenet. Harris, like other prisoners, inhabits an environment where government exerts an unparalleled degree of control; prisoners' religious exercise is at the mercy of t

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

Moreover, Escamilla specifically targeted Harris's Qur'an during the cell search. Another inmate, Roberto Ballard, stated that he saw Escamilla "remove [Harris's Qur'an] from its grey cloth case, deliberately throw it down to the floor, forcefully stomp on it, and deliberately kick it under the bed." ER 82-83. Tellez "saw [Escamilla] take Mr. Harris['s] Qur'an which was in a gray cloth case and open it [and] dump the Quran on the floor[.] He said something and kick[ed] it under the bed." ER 251. *See* Opening Br. of Plaintiff-Appellant 8-9 ("Appellant Br."). Harris personally saw the footprint that desecrated his Qur'an: "I discovered the Qur'an under the bed. And when I pulled it out, I saw the footprint on it and I started to cry." ER 176. Escamilla also tore down and damaged Harris's religious picturgilamedH ğ,r."% m o nt " ę p ' N a

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

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

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

[1] The magistrate judge, who reviewed the testimony, agreed that Officer Escamilla's actions, if proven, [illegible]

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

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

The substantial burden analysis "is inappropriate for a free exercise claim involving intentional burdening of religious exercise." *Brown v. Borough of Mahaffey, Pa.*

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

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

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

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

searching a Catholic church for evidence in investigating alleg

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

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

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

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

understanding’ of the Koran's importance as Islam's holy book,” according to the Afghan president. Emma Graham-Harrison,

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

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

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

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

However, in cases of intentional torts, the common law generally extends "liability for the resulting harm . . . to consequences which the defendants . . . could not reasonably have foreseen," on the "obvious basis that it is better for the uney io Ò a altentional di un hm

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

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

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

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

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

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

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

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

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

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

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

FAZA'IL-E-A'MAAL at 76). Accordingly, Harris concluded, "[a] Muslim must read 10 ayaats [sic] every day or be of the neglectful." ER 110. Sec

Despite these clear statements of Harris's specific belief in daily reading, the district court failed to give that belief the proper legal weight when it found that Harris suffered only an insubstantial burden. Before the magistrate judge, Escamilla introduced an affidavit filed by a prison chaplain who claimed (in the magistrate judge's words) that "I

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

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

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

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

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

residents' right to practice their faith is at the mercy of those running the institution." *Cutter v. Wilkinson*

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 6,452 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 27, 2017 /s/ Thomas C. Berg

PROOF OF SERVICE

I, Thomas C. Berg, hereby declare: I am employed in Minneapolis, State of Minnesota. I am over the age of