No. 20-16774

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOHAMED SABRA and COUNCIL ON AMERICAN-ISLAMIC RELATIONS OF ARIZONA,

Plaintiff-Appellants,

v.

MARICOPA COUNTY COMMUNITY COLLEGE DISTRICT and NICHOLAS DAMASK

Defendant-Appellees.

On Appeal from the United States District Court
for the District of Arizona
No. CV-20-01080-PHX-SMB
Hon. Susan M. Brvnovich

APPELLANT'S OPENING BRIEF

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CORPORATE DISCLOSURE STATEMENT

Plaintiff-Appellant Council on American-Islamic Relations of Arizona is a non-profit entity that does not have parent corporations. No publicly held corporation owns 10 percent or more of any stake or stock in Plaintiff-Appellant Council on American-Islamic Relations of Arizona.

Date: January 22, 2021

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I. JURISDICTIONAL STATEMENT

The District of Arizona had subject matter jurisdiction under 28 U.S.C. § 1331 because Plaintiff-Appellants Mohamed Sabra ("Sabra") and Council on American-Islamic Relations of Arizona ("CAIR-AZ") (together as "Appellants") brought claims arising under federal law. *ER_177*. This Court has jurisdiction on appeal pursuant to 28 U.S.C. § 1291. The district court's judgment granting Defendant-Appellees Maricopa County Community College District ("MCCCD") and Nicholas Damask's ("Damask") (together as "Appellees") Motion to Dismiss is an appealable final decision. The district court issued its ruling and granted the motion to dismiss on August 18, 2020. *ER_3*. Appellants timely filed a Notice of Appeal on September 14, 2020. *ER_247*; *See* Fed.R.App.P. 4.(a)(2), Fed.R.App.P 4(a)(1)(A).

II. ISSUES PRESENTED

1. Whether the district court erred in finding that Appellants failed to allege facts sufficient to support claims under the Establishment and Free Exercise clauses of the First Amendment of the United States Constitution.
2. Whether the district court erred in finding that Appellant CAIR-AZ failed to plead facts sufficient to plausibly allege organizational standing.
3. Whether the district court erred in finding that Appellee Nicholas Damask's constitutional violations were covered by the doctrine of qualified immunity.

III. RELEVANT CONSTITUTIONAL PROVISION

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." U.S. Const. amend. I.

IV. STATEMENT OF THE CASE

Sabra and CAIR-AZ filed suit against Damask and MCCCD on June 2, 2020, alleging violations of their First Amendment rights under the Establishment and Free Exercise Clauses. *ER_177-189*. Appellant's allegations, as set forth in their complaint, are summarized here:

During the Spring 2020 semester, Sabra, a practicing Muslim, attended a "World Politics" class taught by Damask at Scottsdale Community College ("SCC") (overseen by MCCCD). *ER_178*. The course was divided into six separate modules, with the last module entitled, "Islamic Terrorism." *ER_179*. The Islamic Terrorism module was further divided into three components: (1) a PowerPoint presentation; (2) assigned reading excerpts; and (3) a quiz. *ER_179*.

Damask's PowerPoint presentation made multiple assertions regarding the relationship between Islam and terrorism (described in detail below), ultimately concluding that the only reasonable interpretation of the Quran and hadiths is one which "justifie[s]," "promote[s]," and even "mandate[s]," violent terrorism "against Non-Muslims." *ER_180-182*. Damask makes blatantly false and inflammatory

statements about Islam, while purporting them to be facts, including the claim that contemporary Islamic legal authorities are **unanimous** in their approval of terrorism generally and suicide attacks specifically and that "Muslim popular opinion has some sympathy for terrorism generally, and the ultimate goals of terror group (sharia) particularly." *ER_182* (emphasis added).

At the end of the Islamic Terrorism module, Damask assigned a quiz, comprised of twenty-five multiple choice questions, wherein Damask's personal hostilities against Islam were imposed upon Sabra, who faced the choice of either adopting Damask's Islamophobic view of his own religion or losing points on the quiz. *ER_183-185*.

Specifically, Question 9 asked, "[w]here is terrorism encouraged in Islamic doctrine and law?" *ER_184*. The available answer choices were "the Medina verses," "the Muhammad verses," the "Mecca verses," and "terrorism is not encouraged in Islamic doctrine and law." *ER_184*. The "correct" answer was "the Medina verses." *ER_184*. Similarly, Question 20 presented a "fill-in-the-blank," stating that "[t]errorism is ___ in Islam." *ER_185*. The answer choices were "justified within the context of jihad," "always forbidden," "justified under international law," and "always justified." *ER_185*. The "correct" answer was "justified within the context of jihad." *ER_185*.

Sabra made the decision to answer the questions according to his own personal beliefs, eschewing the Islamophobic interpretations being foisted upon him by Damask, and received a lower score as a result. *ER_185*.

Subsequent to taking the quiz, Sabra emailed Damask to express his "disgust" at having been subjected to class curriculum that painted his religion as inherently violent, with no disclaimer that such an interpretation was not the only one or only held by terrorist, and at having been forced to choose between denouncing his religious beliefs and accepting a lower score for the quiz. *ER_185*.

The following day, SCC contacted Sabra to state that an investigation would be undertaken. *ER_186*. However, after this communication, MCCCD (the community college school district of which SCC is a part) publicly defended Damask and further noted that any investigation would not involve Damask. *ER_186*. Furthermore, MCCCD had actual and constructive knowledge that the Islamic Terrorism module was going to be taught at SCC because MCCCD's own Regulation 3.6 requires that "a copy of the course syllabus [] be submitted to [MCCCD] no later than the end of the first week of class." *ER_186*. MCCCD not only had notice of the class material, but it condoned the same and approved its use in the classroom. *ER_186*. (Furthermore, despite any supposed "investigation,"

MCCCD allowed Damask to teach the "World History" course during the Fall 2020 semester and is currently accepting students for the Spring 2021 semester.[1])

On May 11, 2020, Damask released a public statement, asserting that he would "never apologize for teaching the content that I am, or the manner in which I'm teaching it." *ER_187*.

In an attempt to remedy the damage done by Damask and MCCCD to its organizational mission, CAIR-AZ was forced to divert resources towards contracting with a local religious scholar to create materials for a campaign to rebut Damask's Islamophobic indoctrination. *ER_187*.

Appellants' lawsuit in the District of Arizona followed. *ER_177*. Appellants alleged violations of the Establishment and Free Exercise Clauses of the First Amendment. *ER_187-188*. Specifically, Appellants argued that (1) Damask's class materials and quiz questions (approved by MCCCD) constituted a primary message of disapproval of Islam by a state actor (*ER_187-188*), and (2) Damask's quiz questions (approved by MCCCD) forced Sabra to adopt a position regarding his religion that was antithetical to his religious beliefs or suffer academically, constituting an undue burden on Sabra's free exercise rights (*ER_188*).

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[1] Maricopa Community Colleges, Find a Class, https://classes.sis.maricopa.edu/?keywords=POS120 (last visited Dec 15, 2020).

On June 26, 2020, Appellees filed their motion to dismiss Appellants' complaint. *ER_82*. On July 10, 2020, Appellants filed their opposition to Appellees' motion to dismiss (*ER_59*), to which Appellees filed a reply on July 17, 2020. *ER_47*.

On August 6, 2020, the District of Arizona heard oral argument on Appellees' motion to dismiss. *ER_15*. On August 18, 2020, the District Court of Arizona entered an order granting the Appellees' motion and dismissing Appellants' case, finding (1) that Appellants had failed to state either of their First Amendment Claims, (2) that Appellant CAIR-AZ had failed to plead facts sufficient to allege organizational standing, and (3) that Damask was entitled to protection from civil liability under the doctrine of qualified immunity. *ER_3*. Appellants appealed the district court's order dismissing their complaint on September 14, 2020. *ER_254*.

V. SUMMARY OF THE ARGUMENT

The district court erred in granting the motion to dismiss for failure to state a claim, lack of standing, and qualified immunity. First, Appellants alleged a violation of the Establishment Clause because it is plausible that a reasonable objective observer would say the primary effect of Damask teaching that the only reasonable interpretation of Islam is that it promotes terrorism, and that Muslims support this is that it disapproves of religion.

Appellant, Mr. Sabra, also alleged a violation of the Free Exercise Clause because Damask "substantially burdened" his religious beliefs by making him choose either to select where in Islam is terrorism "justified" and "encouraged" or lose points on his quiz. Next, Appellant, CAIR-AZ, sufficiently pled organizational standing in the complaint and in the Motion to Dismiss hearing by explaining that they had to divert resources to contract with a religious scholar to create materials that debunk Damask's claim that Islam promotes terrorism, and that Muslims support it, which frustrated CAIR-AZ's mission. The district court specifically erred by not looking at the complaint in the light most favorable to the Appellant and did not assume all reasonable inferences.

Lastly, the district court did not examine whether Damask's module was an "obvious" violation of clearly established rights. Appellant, Mr. Sabra, pled an "obvious" violation because Damask's entire module states that the only reasonable interpretation of Islam is that it promotes terrorism against nonbelievers, and that Muslims not only agree, but also have **sympathy** for the terrorists. It is not only plausible that a reasonable objective observer would state the primary effect of this disapproves of Islam, but it is obvious.

VI. LEGAL STANDARD

Appellate courts review district court rulings on motions to dismiss for failure to state a claim on a de novo basis. *Am. Family Ass'n, Inc. v. City & City of San*

Francisco, 277 F.3d 1114, 1120 (9th Cir. 2002). In reviewing motions to dismiss, courts must view the complaint as true and construe the pleadings "in the light most favorable" to the Appellants. *Curtis v. Irwin Indus., Inc.*, 913 F.3d 1146, 1151 (9th Cir. 2019). In light of this favorable construction, and in order to defeat a Rule 12(b)(6) motion, Appellants must "state a claim to relief that is plausible on its face" that "allows the court to draw reasonable inferences that the defendant is liable." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). The allegations in Appellants' Complaint fulfilled this deferential standard and should not have been dismissed for failure to state a claim.

VII. ARGUMENT

A. APPELLEES VIOLATED APPELLANTS' FIRST AMENDMENT RIGHTS, AND APPELLANTS ALLEGED A PLAUSIBLE CLAIM FOR THE SAME.

The district court ("court" or "district court") incorrectly held that Appellants did not allege an Establishment Clause and a Free Exercise Clause claim for three reasons. First, the court ignored multiple statements by Damask, alleged and described in the complaint, explicitly asserting that the only interpretation of the teachings of Islam is one that is supportive of terrorism. In ignoring these statements, the court improperly construed the complaint in the defendants' favor, finding that the violative statements were descriptive of the beliefs of *terrorists*, and not the beliefs of *Muslims* generally. Second, the court incorrectly applied the second prong

of the *Lemon* test. Third, the court improperly construed the complaint in the defendants' favor by finding that Damask's questions on the quiz did not force Sabra to adopt the position that the only reasonable interpretation of Islamic texts are that they promote and encourage terrorism.

1. Appellees Disapproved of Islam Because Damask Taught That The Only Reasonable Interpretation Of Islam Is That It Unequivocally Mandates Terrorism; This Disapproval Constitutes A Violation Of The Establishment Clause.

The district court incorrectly held that Appellants failed to state an Establishment Clause claim when Damask taught his class that the only reasonable interpretation of Islam is that it mandates terrorism against nonbelievers, and that Muslims unanimously approve of terrorism. Under the Establishment Clause, the court asks whether a reasonable objective observer would view the primary effect of the government's action as disapproving of religion. *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971).

The district court based its decision to dismiss on the erroneous determination that a reasonable objective observer could only conclude that the class module was "anti-Islam" by "picking select quotes." *ER_11*. The court also erroneously determined that Damask's anti-Muslim statements "were taught in the context of explaining terrorism," and "[o]ne aspect of terrorism is Islamic terrorism." *Id.*

However, a review of the allegations in the complaint paints a much darker picture than the cheery gloss applied by the district court. To name a particularly egregious example, Damask's class slides expressly stated that:

> "[c]ontentions that Islam does not promote warfare or violence cannot be supported on either theological or historical grounds – indeed, such contentions would flatly contradict hundreds of Quranic passages and hadiths ("traditions") of Muhammad, as well as longstanding Islamic Jurisprudence."

ER_129 (emphasis in the original). This statement, by its own terms, is not cabined to express the beliefs of Islamic terrorists, but rather it purports to describe what Islam itself instills "theologic[ally]." Appellants' complaint clearly met the applicable "plausible" standard by including just this one quote because a reasonable objective observer could conclude that the primary effect of the class slide is to express disapproval of Islam.

Yet, Damask further emphasizes his condemnation of Islam when his slides continue on to posit that, not only are the "Islamic legal authorities unanimous in their approval of suicide attacks" but they are also fully supportive of "terrorism and jihad generally." *ER_137*. The slides further stated "that the legitimacy of terrorism is supported by nearly every Islamic legal authority of any significance." *ER_132*.

Damask precludes any interpretation of his class material as simply presenting one interpretation of Islam with the use of unambiguous, absolute language. There is no disclaimer that other authoritative interpretations exist. *See*

generally ER_105-146. Indeed, the district court's finding that this is just teaching "Islamic terrorism" does not fit unless "nearly every Islamic legal authority of any significance" supports terrorism. *ER_11*; *ER_132*. This clearly implies disapproval of Islam as a religion to any reasonable person.

Further on in the slides, Damask shifts from what Islamic "authorities" think about terrorism to a description of the Muslim population at large. He states, "Muslim popular opinion has some **sympathy** for terrorism generally, and the ultimate goals of terror group (**sharia**) particularly." *ER_144*. (emphasis in the original). In the hearing, Appellees attempted to attribute this line to a prior slide that includes a citation to an author. *ER_44*, at lines 14-18. However, there is no citation to which the "sympathy" line is attributed on the actual slide, and the court must look at the complaint in the "in the light most favorable" to the Appellants, which the court did not do. *Curtis*, 913 F.3d at 1151.

Additionally, the term "sympathy" is bolded and underlined. Even if the term was a reference to the prior slide, Damask made the editorial decision to emphasize the statement. The act of bolding or underlining a word is meant to bring attention to that word. In this instance, it is to bring attention to Damask's explicit statement that Muslims have sympathy for terrorism. It is plausible that a reasonable, objective observer could determine that the primary effect of bolding and underlining the word "sympathy" in describing the general Muslim population's feelings towards violent

terrorism is to disapprove of Islam. The court failed to give Appellants any deference to the plain meaning of the slides or the well-pled allegations in the complaint.

Finally, Damask cities to the primary sources of Islam, the Quran and the hadith, to say that they mandate both the physical act of "terrorism" and the support of a "war against unbelievers." *ER_126-131*. Damask further asserts that this Islamic terrorism mandate can be traced back to the Prophet Muhammad, who committed acts that "*unambiguously would be regarded as terrorism today.*" *ER_124*; *ER_131* (emphasis in the original). Yet again Damask fails to include any sort of disclaimer that his presented interpretation is not the only reasonable one. In fact, any such disclaimer would be directly antithetical to the thesis of Damask's presentation, which asserts that the only reasonable interpretation of Islamic texts mandates the support of terrorism. This fact is underscored by Damask's editorial decision to make light of any other possible interpretations. *ER_126*.

It is plausible that a reasonable objective observer could conclude that the primary effect of teaching that (1) the central sources of Islam, (2) the legal authorities, and (3) the average Muslim all support Damask's terrorism interpretation would be to indoctrinate students with the narrative that Islam is a fundamentally dangerous religion. Asserting carte blanche that an entire religion is fundamentally dangerous, and that, by extension, so are all of its adherents, is definitionally disapproval of that religion.

Turning to other components of the class module, Damask supported his absolute interpretation of Islam as being dangerous in the reading assignments. There, his students read that any other interpretation of the terrorism mandate is nothing more than a result of "forces [that] were mobilizing to insert a new meaning." *ER_202,* at page 19. This "new meaning" is described as a "terribly ironic" attempt to "confuse minds" and "blur the meaning." *Id.*, at page 18.

Damask also reinforced his absolute interpretation of Islam in the assigned quiz, which required students to conclude that any other interpretation of the terrorism mandate is for "gullible Westerners" because the overwhelmingly obvious meaning of the instructive language is that of "combat / war." *ER_166*. Furthermore, the "correct" quiz answers required Damask's students to adopt the position that "terrorism [is] *encouraged*" in Islam, and that there is an "official, religiously justified type of warfare waged by the Islamic community on non-belie[vers]," "justified within the context of jihad." *ER_156*; *ER*_158*; ER*_167 (emphasis in original).

It is a perfectly plausible contention that the primary effect of the entire violative module was **not** to present a discussion of what Islamic terrorists believe, but rather to indoctrinate students with the falsehood that the only reasonable interpretation of Islam is that it mandates terrorism, and that this interpretation is the interpretation supported by Muslims at large. No reasonable objective observer

could possibly conclude that promoting terrorism is anything other than an evil, dangerous attribute. Thus, construing the facts in the complaint in Appellant's favor, is it more than plausible that the primary effect of the module was to disapprove of Islam. Appellants' complaint surpassed the threshold necessary to defeat a 12(b)(6) motion.

As an aside, it should be noted that even under the district court's factual findings, Appellants' complaint met the 12(b)(6) standard. The court explicitly stated that "one [can] describe the module as anti-Islam" by "picking select quotes." *ER_11*. The district court's conclusion is important, as the Supreme Court has held, "[t]here are no de minimis violations of the Constitution—no constitutional harms so slight that the courts obliged to ignore them." *Elk Grove Uni. Sch. Dist. v. Newdow*, 542 U.S. 1, 36-37 (2004). Thus, pleading "select quotes" that could have the primary effect of being "anti-Islam" is sufficient to state a claim under the Establishment Clause because it "allows the court to draw reasonable inference that the defendant" made statements disapproving of Islam. *Iqbal*, 556 U.S. at 678.

This Court's previous religious disapproval cases support Appellants' claim that their complaint should have survived dismissal on a 12(b)(6) motion. As this Court has noted, *Vernon v. City of Los Angeles* (27 F.3d 1385 (9th Cir. 1994), is one of the two "most instructive cases" on this issue. *Vasquez v. Los Angeles Cty*., 487 F.3d 1246, 1256 (9th Cir. 2007). *Vernon* was decided on summary judgement (as

opposed to the current 12(b)(6) procedural stance) with only one alleged disapproving statement contained in a letter which indicated that there needed to be an investigation because the plaintiff was consulting "with religious elders on issues of public policy." *Id*. at 1398. This Court held, under the second *Lemon* prong, that the letter did not "primarily" disapprove of religious beliefs in part because of a "prominent disclaimers contained therein." *Id.* at 1399.

Although *Vernon* affirmed the lower court's summary judgment decision against the plaintiff, the core distinguishing feature of *Vernon* is supportive of Appellants' arguments that their claims should not have been dismissed under Fed.R.Civ.P. 12(b)(6). Instead of a single letter with "prominent disclaimers," Appellants in this case have alleged an entire violative class module, the primary effect of which was severely more disapproving than what was stated in the *Vernon* letter, and (more importantly) there was no disclaimer whatsoever to preclude a finding that the class module "primarily" disapproved of Appellants' religion. Thus, *Vernon* supports Appellants' position that their complaint met the 12(b)(6) threshold.

Regarding religious disapproval cases in schools specifically, this Court has also primarily considered cases on summary judgment that entailed less disapproving effects than the class module at issue. *See e.g. Grove v. Mead School Dist. No. 354*, 753 F.2d 1528 (9th Cir. 1985), *Brown v. Woodland Joint Unified Sch.*

Dist., 27 F.3d 1373 (9th Cir. 1994), *California Parents for Equalization of Educ. Materials v. Torlakson*, 973 F.3d 1010 (9th Cir. 2020) ("*Torlakson II*"). For example, in *Torlakson II*, the plaintiffs challenged how Hinduism was portrayed in the curriculum by arguing that the curriculum disapproved of Hinduism because it endorsed a theory that the religion was founded by "invaders." *Id.* at 1014. In declining to hold that the class disparaged religion, this Court found that the class only taught a historical analysis of migration in the region. *Id.* at 1017. Unlike the class module at issue, the class materials in *Torlakson II* acknowledged the existence of "competing" theories. *Id.* at 1017.

In Appellants' case, Damask's class materials explicitly ridiculed the idea that there was *any* interpretation of Islam other than one asserted by Damask, which promotes terrorism, and, worse, baldly asserted that Muslims in general have "sympathy" for terrorists. Appellants' complaint, including descriptions of Damask's violative statements, as well as the unequivocal, absolute manner in which they were presented, alleged a significantly more egregious effect of disapproval than any other case involving religious disapproval in school to be considered by this Court.

The other "most instructive" disapproval case in Ninth Circuit jurisprudence, *Am. Family Ass'n, Inc. v. City & City of San Francisco*, was, as in this case, decided on a motion to dismiss. 277 F.3d at 1120. Appellants' case is distinguishable from

American Family because Damask's statements and class material constituted a far more egregious condemnation of religion than the actions alleged in *American Family*.

In *American Family*, this Court dismissed an allegation that the city of San Francisco disapproved of the plaintiffs' religious view that "homosexuality is sinful or immoral." 277 F.3d at 1122. In *American Family*, the plaintiffs created an advertising campaign asserting that homosexuality was a sin, included medical statistics about "homosexual behavior" and its connection with sexually transmitted diseases. *Id.* at 1119. The city responded by sending a letter to the plaintiffs and passing two resolutions. *Id.*

The letter asserted that it was not an "exaggeration to say" plaintiffs' advertisement could be directly correlated to hate-crimes perpetrated against members of the LGBTQ community. *Id.* The first resolution was to condemn the murder of a man who was killed because of his sexual orientation in Alabama. *Id.* It urged Alabama to expand their hate crime legislation. *Id.* The last part of the resolution called for the "Religious Right" to take "accountability" for their rhetoric denouncing LGBTQ members of the community. *Id.* The second resolution was directly targeted at an "anti-gay" television advertisement, and even named the plaintiffs. *Id.* at 1119-20. It called for a campaign to end commercials that encouraged people to change their sexual orientation. *Id.* It too made a connection

between violence to LGBTQ members and those who embarked upon "'defamatory and erroneous campaigns.'" *Id.*

This Court held that the first resolution's primary effect was not to disapprove of religion but to denounce the hate crime that occurred. *Id.* at 1122. The second resolution and the letter were a "closer question" for this Court. *Id.* This is because both included statements from which it could be "inferred that the [d]efendants are hostile towards the religious view that homosexuality is sinful." *Id.*

This Court ultimately held that the primary effect of all three documents was that of promoting equality for the LGBTQ community. *Id.* The Court reasoned that the defendants' possibly "hostile" statements were "not criticisms" but "merely rebuttals of medical and psychological evidence cited" by the plaintiffs against the LGBTQ community. *Id.* This Court found that a reasonable objective observer could determine that the primary effect of all three documents together was to "encourage[] equal rights" for the LGBTQ community. *Id.* at 1122-23.

In this case, Damask's statements throughout the entire class module were *explicitly* hostile. Further, the assertion that Islam is fundamentally dangerous, and that Muslims sympathize with terrorists and are called to engage in a war on nonbelievers, constitutes a significantly higher degree of condemnation than the "rebuttal" of the "Religious Right['s]" view of homosexuality in *American Family*. It is therefore much more "plausible" that the violative statements in this case

constitute an Establishment Clause. Not only is Appellants' case distinguishable from *American Family* by virtue of the existence of explicitly hostile statements, the Court's determination that *American Family* constituted a "close[] question" is supportive of Appellant's arguments. If criticizing the "Religious Right" for its anti-homosexuality position is a "close[] question," stating that the only interpretation of Islam is that it calls for violent terrorism, and that Muslims are sympathetic towards terrorists, surely crosses the line contemplated in *American Family*.

In a final effort to justify Appellees' actions, the district court mentions academic freedom in its opinion, but the same is inapplicable in this case. Academic freedom is not a defense to a Constitutional violation. *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 710 (9th Cir. 2010). In *Rodriguez*, this Court determined that a claim of academic freedom would not protect speech not otherwise protected by the First Amendment. *Id.* For example, "racial insults or sexual advances directed at particular individuals in the workplace" are meant to intrude on the listener in an "'especially offensive way.'" *Id.* (quoting *Frisby v. Schultz,* 487 U.S. 474, 486 (1988)). Such offensive language is not protected by the catchall assertion of "academic freedom."

Additionally, and for proper context, it should be noted that had Damask's violation been a requirement of class prayer, the defense of academic freedom would not have allowed him to escape judicial scrutiny. *Sch. Dist. Of Abington Twp. v.*

Schempp, 374 U.S. 203, 223-25 (1963). There is no practical difference between requiring a student to adopt a religious view when she has none (e.g., required prayer) and requiring a religious student to adopt an interpretation of his religion which violates that student's religious beliefs and implies sympathies towards violent extremism to that student.

Appellants have fully met their burden of alleging a "plausible" Establishment Clause claim, and the district court's reliance on the inapplicable defense of "academic freedom" to dismiss the complaint at the pleading stage was improper.

2. Appellants Alleged That Only The Islamic Terrorism Module Disapproved Of Islam, Not The Entire Course.

The district court incorrectly applied the second prong of the *Lemon* test when it included in its analysis the other five class modules (in addition to the Islamic Terrorism module). The *Lemon* test requires that the court determine if a reasonable informed observer could view the primary effect of the government's action as disapproving of religion. *Lemon*, 403 U.S. at 612-13. The district court conducted its analysis by "examining the course as a whole" and found that the "offending component" was "only a part of one-sixth of the entire course." *ER_11*. However, Appellants only challenged the Islamic Terrorism module, which is independent of the other five modules.

Because Appellants' complaint only alleged that the Islamic Terrorism module was violative of the Establishment Clause, under a proper analysis the

district court should have reviewed only the materials in the Islamic Terrorism module, and how the materials within the Islamic Terrorism module related to each other. This Court's decisions in *Grove v. Mead School Dist. No. 354* (753 F.2d 1528) and *Brown v. Woodland Joint Unified Sch. Dist.* (27 F.3d 1373) illustrate this principle. In *Grove,* this Court reviewed the primary effect of a portion of a book that was alleged to disapprove of Christianity by examining the book's effect as a whole and its effect within the specific lesson plan. 753 F.2d at 1534. In *Brown*, this Court reviewed the primary effect of 32 sections of a teaching aid that was alleged to disapprove of Christianity within the context of the entire teaching aid. 27 F.3d at 1381.

In both cases this Court did not frame the primary effect analysis to include unrelated materials as the district court did here. The district court improperly diluted the severity of the xenophobic statements made by Damask in the Islamic Terrorism module by including the other five, unrelated modules in the primary effect analysis. This was an incorrect application of the *Lemon* test, and this Court should vacate the ruling accordingly.

3. Forcing A Muslim Student To Agree That The Only Reasonable Interpretation Of Islam Is That It Encourages Terrorism Constitutes A Claim Under The Free Exercise Clause.

The district court incorrectly held that Mr. Sabra did not state a Free Exercise Clause claim by erroneously reasoning that questions 9 and 20 on the quiz did not

require Sabra to "adopt the views expressed" by Damask, and were "only to demonstrate an understanding of the material taught." *ER_13*. The court also incorrectly held that the quiz "merely offends religious beliefs" and Sabra "was simply exposed to 'attitudes and outlooks at odds' with his own religious perspective." *Id.* These factual determinations were inappropriately made by the court on a 12(b)(6) motion to dismiss where it was more than "plausible" that questions 9 and 20 forced Sabra to either agree with Damask (that the only reasonable interpretation of Islam is that it promotes terrorism) or be punished by losing points.

As shown above, the "material taught," referenced by the court, was nothing less than the uncompromising assertion that the only reasonable interpretation of Islam is one that promotes terrorism, which in itself constituted a violation of the Establishment Clause. These violative contentions are directly implicated by questions 9 and 20 and their respective answer choices.

Question 9 asked, "[w]here is terrorism *encouraged* in Islamic doctrine and law"" (Emphasis in original.) The answer choices were "the Medina verses," "the Muhammad verses," the "Mecca verses," and "terrorism is not encouraged in Islamic doctrine and law." Sabra selected the last choice and got the question wrong, losing points. *ER_156*.

Question 20 stated that "[t]errorism is ___ in Islam." The answer choices were "justified within the context of jihad," "always forbidden," "justified under international law," and "always justified." Sabra selected "always forbidden" and got the question wrong, losing points. *ER_167*.

Neither of these questions concerned the beliefs of terrorists, or even any of the various authors in the assigned readings. They explicitly asked the student to identify the teachings of Islam on terrorism, and the "correct" answers only allowed for an interpretation of Islam that was supportive of terrorism. The answer choices left no room for Sabra to express his religious belief without being punished. He had to either adopt the view that Islam promotes terrorism or get the question wrong. Sabra has therefore shown that it is "plausible" that the free exercise of his religious belief was "substantial[ly] burden[ed]" because he was forced to adopt Damask's view of his religion or be punished academically.

Regarding the court's determination that Sabra was simply being exposed to different attitudes, the court implicitly assumes that Damask's class module and quiz allowed for any other interpretations of Islam other than one which encourages terrorism. *ER_13*. Underlying the violative quiz questions is the obvious assumption that the only reasonable interpretation of Islam is it promotes terrorism. *ER_156*; *ER_167*. That message further emphasized at slides 25, 28, and 33. *ER_129*; *ER_132*; *ER_137*. The quiz questions, based on the information contained in the

slides, explicitly asked the student to identify how Islam requires terrorism, not how terrorists believe Islam requires terrorism.

Damask could have easily written more specific questions asking where terrorists find justification in Islam without forcing Sabra to agree that his religion supported violence, but he failed to do so. Sabra was not simply being exposed to "different attitudes" about his faith, he was forced to adopt Damask's interpretation of his religion, including statements that were antithetical to Sabra's personal beliefs, or risk damaging his class score. Thus, Sabra sufficiently pled a "plausible" Free Exercise Clause claim.

Regarding relevant Ninth Circuit authority, the burden Sabra faced to the exercise of his religion was altogether different than the "chilling effect" found to be insufficient by this Court in *American Family* (cited in the district court's order as supportive of the "substantial burden" test under the Free Exercise Clause [*ER_12*]) (specific facts discussed above). First, the plaintiffs in *American Family*, did not even allege a "substantial burden." 277 F. 3d at 1123. Instead, the plaintiffs alleged that the letter and resolutions had a "chilling effect" on their Free Exercise rights. *Id.* at 1123-24. This Court rejected this argument on a determination that some sort of compulsion by government action was required to state a claim. *Id.*

In this instance, Sabra does allege a substantial burden in the complaint. Furthermore, it is a "plausible" assertion that forcing Sabra to agree that the only

reasonable interpretation of his religion is one which promotes terrorism on a quiz with the threat of academic harm constitutes "compulsory" government action. Thus, Sabra's claim is distinguishable from *American Family*.

In support of its order dismissing Sabra's claims, the district court compares the instant fact pattern to the facts addressed in *California Parents for Equalization of Education Materials v. Torlakson*, 267 F. Supp.3d 1218 (N.D. Cal. 2017) ("*Torlakson I*") (holding that the plaintiffs did not state a Free Exercise Clause claim at the motion to dismiss stage) (affirmed by this Court at *Torlakson II*, 973 F.3d at 1020). However, the plaintiffs in *Torlakson* (both I and II) did not plead any burden on their religious exercise. 973 F.3d at 1019. Further, in *Torlakson II*, this Court reasoned that "[o]ffensive content that does not penalize, interfere with, or otherwise burden religious exercise does not violate Free Exercise rights." *Id.* at 1020. In this case, Sabra explicitly pled that being forced to disavow his religious belief that Islam does not promote terrorism in order to avoid being punished by Damask burdened his free exercise right. Even further, the severity of Sabra's burden alone fully distinguishes this case from *Torlakson* (I and II). By the inverse of this Court's reasoning in *Torlakson II*, "[o]ffensive content that does [] penalize, interfere with, or otherwise burden exercise does [] violate Free Exercise rights." *Id.* at 1020. This is precisely what Sabra alleged in his complaint.

The district court also cites to *Parker v. Hurley* (514 F.3d 87 (1st Cir. 2008)) as supportive of its holding. Yet again, this case is distinguishable. First, the students in *Parker* were only required to read a book that expressed tolerance of the LGBTQ community. *Id.* at 106. This is incomparable to the burden placed upon Sabra in being required to agree with Damask that the only reasonable interpretation of his religion is that it promotes terrorism or suffer academically. Additionally, a key aspect considered by the First Circuit was that one of the plaintiffs was not even required to read the allegedly offensive book. *Id.* at 106. Again, this is incomparable to Sabra's case where he was forced to adopt the position that his religion supports terrorism. When he refused to do so, he was punished academically by losing points on a quiz. *Parker* is simply not applicable.

Finally, this Court's rejection of the Free Exercise claim in *Grove* on summary judgment actually supports Sabra's argument that he has stated a claim because it illustrates the difference in severity between Sabra's burden and most other cases this Court has considered. 753 F.2d at 1528. In *Grove*, the Court did not find the requisite "coercion" or "burden" because the alleged "violation" was simply learning about information that the plaintiff objected to on religious grounds. *Id*. at 1533-34. In stark contrast, Sabra was forced to agree that his religion promotes terrorism by adopting the "correct" answer on a quiz or be punished academically. This difference

in severity of the burden supports a finding that the district court erred in dismissing Sabra's Free Exercise claim. This Court should reverse the district court's decision.

B. APPELLANT CAIR-AZ PLED SUFFICIENT FACTS TO PLAUSIBLY ALLEGE ORGANIZATIONAL STANDING.

The district court incorrectly held that CAIR-AZ did not sufficiently plead organizational standing for two reasons. First, the court did not accept CAIR-AZ's allegations as true. Second it did not draw all reasonable inferences in favor of CAIR-AZ. This Court reviews the dismissal for lack of Article III standing de novo. *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1039 (9th Cir. 2015).

To plead organizational standing, CAIR-AZ had to have alleged in the complaint that the defendants' actions frustrated its mission and caused it to divert resources in response to the frustration. *La Asociacion de Trabajadores de Lake Forest v. Lake Forset*, 624 F.3d 1083, 1088 (9th Cir. 2010).

CAIR-AZ met this standard by alleging (1) that it is a civil-rights "non-profit committed to advocacy and protecting the civil rights of American Muslims while promoting justice" (*ER_178*), and (2) that it was forced to "divert" resources to create a campaign that would respond "to the damage done by Damask" by correcting the Islamophobiac information (*ER_187*), and (3) that the diversion caused damages in the form of the cost of paying a local scholar to create materials for the campaign (*ER_187*).

Ignoring CAIR-AZ's sufficient pleadings, the district court held that CAIR-AZ did not sufficiently describe how the creation of campaign materials was not just "business as usual," and did not allege what resources were diverted. *ER_9*. The Court also held that CAIR-AZ's mission was not frustrated because it only faced a "mere social setback." *ER_9*.

This holding does not reflect what is in Appellants' complaint. On a motion to dismiss for lack of standing, the district court must accept as true the allegations in the complaint and construe the complaint in favor of the complaining party. *Cegavske*, 800 F.3d at 1039. This includes drawing all reasonable inferences in favor of the nonmoving party. *Ass'n for L.A. Deputy Sheriffs v. Cnty. of L.A.*, 648 F.3d 986, 991 (9th Cir.2011).

Additionally, a plaintiff will defeat a motion to dismiss for lack of standing even if it "'broadly allege[s]'" that the defendants' acts impaired its abilities to provide services. *Cegavske*, 800 F.3d at 1040, (quoting *Havens Realty Corp v. Coleman*, 455 U.S. 363, 379 (1982)). CAIR-AZ's complaint allegations met this standard.

Beginning with resource diversion, the district court was required to take it as true that CAIR-AZ diverted its resources in response to Appellees' actions. *Curtis*, 913 F.3d at 1151; *ER_187*. The court can also make the reasonable inference that the resources diverted were financial in nature because CAIR-AZ alleged a contract

for services with a local scholar. *ER_187*. Not explicitly describing the financial resources that were diverted is simply not a sufficient basis to dismiss CAIR-AZ's case.

Regarding whether the response was "business as usual," CAIR-AZ's counsel specifically explained at the hearing on the motion to dismiss that CAIR-AZ's actions did not constitute "business as usual" because of the severity of damage Damask had done. *ER_35*, at lines 3 – 15. Counsel also represented to the court that the information campaign initiated was "something [CAIR-AZ] has never done before." *ER_40*, at lines 15 – 19. These statements, along with the allegations in the complaint that CAIR-AZ diverted resources because of Appellees' actions, were sufficient to show that CAIR-AZ's response was different in both kind and degree.

Turning to the frustration of CAIR-AZ's mission, the district court had enough information to make the reasonable inference that Damask's condemnation of Islam was more than a "mere social setback." A plaintiff can show that the frustration was more than a just "mere social setback" if it can demonstrate that the "'challenged practices impaired [their] ability to provide services [they were] formed to provide.'" *E.Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 765 (9th Cir. 2018) (quoting *Havens*, 455 U.S. at 379).

CAIR-AZ pled that it was a civil-rights nonprofit that "advocates" for and "protects the civil rights" of Arizona Muslims. *ER_178*. One of the ways that CAIR-

AZ does this is by offering general presentations on Islamophobia. During the hearing, CAIR-AZ's counsel alluded to this service, as well as other services which "enhance the understanding of Islam." *ER_35*, at lines 5 – 9.) From the allegations in the complaint and the statements made at the hearing, the court should have made the reasonable inference that a government employee indoctrinating students at a public college with the view that Muslims support the killing of non-Muslims frustrates this work. This is especially true where, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 561 (1992).

It is not unreasonable to infer that Damask's indoctrination puts Muslim lives at risk of being targeted by those who want to eliminate a threat. It is also not unreasonable to infer that CAIR-AZ had to create and publish more targeted educational material because of this government sponsored Islamophobia.

Further, one of the general civil-rights which CAIR-AZ is involving in defending is the general right of Arizona Muslims not to be discriminated against by the government. *ER_178*. Upon noticing Damask's condemnation of Islam, Arizona Muslims immediately turned to CAIR-AZ and demanded a response. It is a reasonable inference that it became more difficult for CAIR-AZ to protect the rights

of the community when Damask was spreading dangerous misinformation about Islam. This inference is especially reasonable where, as here, Appellants pled that the other Appellee, MCCCD (a government entity responsible for regulating Maricopa County's community colleges), publicly announced that any investigation undertaken into the Islamophobic class materials would not even involve Damask. *ER_186*. CAIR-AZ made the organization decision to address Damask's misinformation by diverting resources to the creation of an information campaign. *ER_40*, at lines 17 – 19.

A finding that CAIR-AZ sufficiently pled frustration of its mission is supported by the district court's own prior decisions. In *We Are Am./Somos Am., Coal of Arizona v. Maricopa City Bd. Of Supervisors*, the court found organizational standing for three out of the four organizations whose ability to provide social services were impaired by having to focus on unlawful detainment of immigrants. 809 F. Supp.2d 1085, 1099 (D. Ariz. 2011). The district court found that fourth organization did not have standing because they only pled a setback to their "abstract social interests." *Id.* at 1101.

The fourth organization did not provide any services to the community, and their diversion was just the visiting of detained immigrants and the "offer[ing] [of] encouragement and moral support." *Id.* Unlike the fourth organization, CAIR-AZ pled a diversion of resources far more burdensome than offering "encouragement

and moral support," including the hiring of a scholar to create an information campaign addressing Damask's disparaging teachings.

Further, like the three organizations which all had standing, CAIR-AZ provides services to the community that are being directly frustrated because of government sponsored attacks on Islam. These services include educational presentations on Islamophobia to the general public the effectiveness of which are directly impaired by Damask's violative class module. *ER_35*, at lines 5 – 9. CAIR-AZ pled a diversion of resources far more burdensome than the fourth organization's offering "encouragement and moral support." Thus, CAIR-AZ's mission was frustrated more than what the district court has held to be just a setback to "abstract social interests."

Furthermore, this Court has found the creation of education materials sufficient to show a diversion of resources in prior cases. *See e.g. Valle del Sol Inc. v. Whiting,* 732 F.3d 1006, 1018 (9th Cir. 2013) (finding organizational standing where plaintiffs "had to divert resources to educational programs to address" the challenged law's effect); *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC,* 666 F.3d 1216, 1219 (9th Cir. 2012) (finding organizational standing where plaintiff responded to allegations of discrimination by starting "new education and outreach campaigns target[ing] the discrimination"); *Smith v. Pac. Properties & Dev. Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004) (finding organizational

standing where plaintiff "educate[d]" the public regarding the discrimination at issue.); *Cegavske*, 800 F.3d at 1039.

To take just one example from the list above, in *Cegavske*, this Court reversed the district court's order of dismissal without leave to amend and held that three organizations had sufficiently pled standing. 800 F.3d at 1039. All three organizations alleged they were involved in voter registration efforts, and one of the organizations pled that they "encourage[ ] participation in federal and state elections by traditionally underrepresented groups." *Id.* at 1036-37.

The organizations alleged that Nevada was violating Section 7 of the National Voter Registration Act by "systematically failing to provide the voter registration services" at its "public assistance office." *Id.* at 1035. Because of this, the organizations pled that it forced them to provide more resources to conduct voter registration drives. *Id.* at 1036. The district court held that the organizations did not show how they suffered an injury "fairly traceable to the State" because they did not allege how the State's failure to comply with Section 7 "changed their behavior." *Id.* at 1038-39. This Court disagreed, finding the district court's holding as a "misreading of the complaint." *Id.* at 1040. The Court reasoned that the complaint showed a connection between the State's noncompliance and the organizations diverted resources. *Id.*

Like the organizations in *Cegavske,* CAIR-AZ alleged that it provides services to the community. *ER_178*. CAIR-AZ also alleged that, because of Damask's government-sponsored condemnation of Islam, it had to "divert" resources to "remedy the damage done." *ER_187*. These resources utilized to "contract[] with a religious scholar to create materials" that would correct the misinformation. *ER_187*.

This causal chain of frustration of mission and diversion of resources was determined to be sufficient in *Cegavske* by this Court. CAIR-AZ may not have explicitly described exactly why Damask's government-sponsored class module (asserting that the only reasonable interpretation of Islam is one that requires Muslims to kill non-Muslims) frustrated CAIR-AZ's mission to "advocate[]" and "protect[] the civil rights" of Muslims. However, this is a reasonable inference that the court should have made, especially as the court was required to review the complaint "in the light most favorable" to the Appellants. *Curtis*, 913 F.3d at 1151. Additionally, CAIR-AZ's counsel explained this causal chain in the hearing. *ER_35*; *ER_40*.

At the very least, this Court's analysis in *Cegavske* supports a decision that CAIR-AZ should have been granted leave to amend. In *Cegavske,* this Court held that the three organizations should have been allowed to amend the complaint. *Id.* at 1041. As the Court noted, "it is black-letter law that a district court must give plaintiffs at least one chance to amend a deficient complaint, absent a clear showing

that amendment would be futile." *Id.* at 1041. If the only aspect missing from CAIR-AZ's standing assertions in the complaint was a specific explanation of how a public college teaching its students that Muslims are terrorists would result in CAIR-AZ needing to devote more resources than normal to create and publish educational resources, the court should have given CAIR-AZ the opportunity to provide such an explanation.

Yet another Ninth Circuit case supportive of CAIR-AZ's standing arguments is *Smith v. Pac Properties & Dev. Corp.*, 358 F. 3d 1097. In *Smith*, the court reversed an order dismissing for lack of organizational standing. *Id.* at 1104. The plaintiff organization alleged a "principal purpose of helping to eliminate discrimination against individuals with disabilities." *Id.* at 1105. The organization further alleged that a certain housing property was violating the Fair Housing Amendment Act against disabled people. *Id.* at 1099. Finally, the organization alleged that "in order to monitor the violations and educate the public regarding the discrimination at issue, [the organization] [] had…to divert its scarce resources." *Id.* at 1105. This Court held that this showed both a frustration of mission and a diversion of resources. *Id.*

Additionally, the Court stressed that the organization should have at least been allowed leave to amend to cure the issues found by the district court. *Id.* at 1106. "The court's denial was particularly egregious in light of the fact that the [organization] had indicated, in good faith, that it was willing and able to establish

with greater specificity the diversion of its own resources from non-litigation activities as a result of the [properties'] discrimination." *Id.* In this instance, CAIR-AZ pled a similar causal chain of frustration of mission and diversion of resources, and showed an ability to describe with more specificity the diversion required. *ER_178*; *ER_187*. Thus, *Smith* supports CAIR-AZ organizational standing position, or at minimum, that CAIR-AZ should have been granted leave to amend.

In dismissing CAIR-AZ for lack of organizational standing, the district court purported to rely on *Havens Realty Corp v. Coleman* (455 U.S. 363), widely considered to be a seminal case for organizational standing. *ER_8-10*. In *Havens,* the Supreme Court held that a fair housing organization had standing under the Fair Housing Act to sue defendants whose alleged discrimination frustrated their mission of "equal access to housing." 455 U.S. at 379. The Supreme Court focused its frustration of mission analysis on the fact that it was harder for the organization to operate because of the discrimination, even if it was "broadly alleged." *Id.*

In this instance, CAIR-AZ is a civil rights nonprofit organization "committed to educate, advocate, and protect the civil rights of American Muslims while promoting justice." *ER_178*. CAIR-AZ offers multiple services such as pro bono legal representation, general "know your rights" and Islamophobia presentations, and monitors anti-Muslim discrimination that occurs in Arizona. Just like the fair housing organization in *Havens* which faced difficulty in operating when

discrimination occurred, it became difficult for CAIR-AZ to properly educate the populace about Islam when a government employee promoted anti-Islam rhetoric in an introductory politics class. CAIR-AZ was forced to divert general education resources, usually used in connection with assisting Arizona Muslim's directly, to the creation of an additional information campaign specifically on Islam's teachings regarding terrorism. CAIR-AZ pled enough in its complaint to have allowed the district court to make the reasonable inference that the Islamophobic class frustrated CAIR-AZ's primary mission. Instead of making this reasonable inference (as it was required to do on consideration of a motion to dismiss), the district court attempted to distinguish *Havens* from this case, holding that CAIR-AZ did not show a "concrete and demonstrable injury." *ER_9.* As described above, CAIR-AZ pled the same type of injury as that upheld in *Havens*, and the district court's holding to the contrary is unsupportable.

Finally, the other primary case relied upon by the district court in finding that CAIR-AZ did not have organizational standing was this Court's decision in *La Asociacion de Trabajadores de Lake Forest*, 624 F.3d 1083. However, *Lake Forest* is distinguishable because the plaintiff in that case completely failed to assert a "frustration of its purpose or diversion of its resources." *Id.* at 1089. In contrast, CAIR-AZ pled that it was forced to contract with a scholar to create materials for an educational campaign because its mission was being frustrated by a public college

teaching its students that Muslims support and sympathize with terrorists. *ER_187*. The analysis in *Lake Forest* does not preclude a finding that CAIR-AZ had standing.

As described above, all of this Court's prior relevant decisions either directly support a finding that CAIR-AZ had organizational standing to sue Damask and MCCCD, or they are distinguishable in key aspects. The district court erred when it construed the complaint against CAIR-AZ, refused to make reasonable inferences in CAIR-AZ's favor, ignored precedential case law, relied upon Ninth Circuit cases with distinguishable fact patterns, and refused to allow CAIR-AZ leave to amend in dismissing CAIR-AZ's claims for lack of standing. The Court should therefore overturn the district court's order.

C. APPELLEE DAMASK'S CONSTITUTIONAL VIOLATIONS ARE NOT COVERED BY THE DOCTRINE OF QUALIFIED IMMUNITY.

The Court reviews a granting of qualified immunity in a motion to dismiss de novo. *Hernandez v. City of San Jose,* 897 F.3d 1125, 1131 (9th Cir. 2018). When qualified immunity is raised in a motion to dismiss, the court must determine whether the complaint alleges either a violation of a constitutional or statutory right, and whether that right was clearly established at the time of the violation. *Id.* at 1132. In so doing, the court must view the complaint "in the light most favorable" to the Appellants. *Id.* at 1132. If the complaint "contains even one allegation of a harmful act that would constitute a violation of a clearly established constitutional right,"

Appellants are "entitled to move forward." *Keates v. Koile,* 883 F.3d 1228, 1235 (9th Cir. 2018) (internal citations omitted).

Appellants alleged violations of not one, but two constitutional rights in their complaint: an Establishment Clause violation and a Free Exercise Clause violation. As explained above, Appellants adequately pled that Damask taught an entire class module asserting that Islam mandates terrorism against nonbelievers, there are no other reasonable interpretations, that legal scholars support this position, and that Muslims both support Damask's interpretation and have **sympathy** for terrorists. A reasonable observer could determine that the primary effect of the violative class module was disapproval of Islam. Thus, Appellants' complaint alleged an Establishment Clause violation.

Similarly, Appellants also pled a constitutional violation of the Free Exercise Clause. Damask's questions "substantially burdened" Sabra's religious expression by punishing him academically when he refused to adopt the position, antithetical to his personal religious beliefs, that "terrorism" is "encouraged" in "Islamic doctrine and law" (*ER*_156) and that "terrorism is justified" in Islam (*ER_167*). Thus, Appellants' complaint alleged a Free Exercise Clause violation.

As Appellants' complaint properly alleged violations of two separate constitutional rights, the analysis should have progressed on to whether such rights were clearly established at the time of the violation. *Hernandez,* 897 F.3d at 1132.

A right is "clearly established" when it is "sufficiently clear that every reasonable official would understand what he is doing violates that right." *Id.* at 1137. There are two accepted ways of showing this. First, pre-existing case-law which establishes the unlawfulness of the action beyond reasonable debate. *Id.* at 1137-38. This does not require a case directly on point, but the unlawfulness of the action taken must be apparent. *Id.* Second (as an exception to the first), a right may be clearly established where the constitutional violation is so "obvious" that prior case law is not needed. *Id.* at 1138.

The district court erred in only exploring the first avenue available in finding a "clearly established" constitutional right. It found that the existing precedent is not clear on whether a teacher can have an entire class module that asserts the only reasonable interpretation of Islam is one that mandates terrorism, or if a teacher may force a student to disavow his religious beliefs on a quiz. *ER_13-14*. However, the district court's analysis was incomplete because it failed to address whether Damask's violations fit the aforementioned "obvious" exception.

As this Court has noted,

> [s]ome things are so obviously unlawful that they don't require detailed explanation and sometimes the most obviously unlawful things happen so rarely that a case on point is itself an unusual thing. Indeed, it would be remarkable if the most obviously unconstitutional conduct should be the most immune from liability only because it is so flagrantly unlawful that few dare its attempt.

Sharp v. Cty. of Orange, 871 F.3d 901, 911 n.7 (9th Cir. 2017) (quoting *Browder v. City of Albuquerque*, 787 F.3d 1076, 1082–83 (10th Cir. 2015) (Gorsuch, J.)) (internal quotation marks omitted).

Appellants' case fits this exception. Damask went further in disapproving of Appellants' religion than the defendants in every relevant Ninth Circuit case (the majority of which have been analyzed and distinguished above). He should not be permitted to hide behind qualified immunity simply because this Court has never been presented with a case involving violations as blatant as those alleged by Appellants. If Damask, in his capacity as a government employee, had explicitly stated that he disapproved of Islam, that would have unquestionably been an "obvious" violation because the primary effect of such a statement is the disapproval of Islam. This "obvious" disapproval does not change when, instead of outright stating his disapproval, Damask uses the module to teach a caricature of Islam, asserting that it mandates terrorism on nonbelievers and that this is the only reasonable interpretation.

The "obvious" nature of Damask's violation is further supported by the Supreme Court's language in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'm,* noting that "[t]o describe a man's faith as 'one of the most despicable pieces of rhetoric that people can use' is to disparage his religion." 138 S. Ct. 1719, 1729 (2018). Damask forced Sabra to disavow his faith and adopt the antithetical

position that it "encourages" and "justifies" terrorism. If describing a man's faith as "despicable" is an obvious violation, so too is describing a man's faith as supportive of murdering nonbelievers.

As an aside, it should be noted that the "obviousness" of Damask's violation in prior case law is not a dispositive consideration in determining if the violation was clearly established. In *Hardwick v. Cty of Orange,* this Court noted that courts may also look at agency guidance and statements to determine if a violation is clearly established for purposes of finding qualified immunity. 844. F.3d 1112, 1117 (9th Cir. 2017). *See also Hope v. Pelzer*, 536 U.S. 730, 745 (2002). Relevant to this case, in June 2016 the Department of Education ("DOE") and the Department of Justice ("DOJ") published a joint statement entitled "*Combating Discrimination Against Asian American, Native Hawaiian, and Pacific Islander and Muslim, Arab Sikh, South Asian Students*" ("Joint Statement").[2]

In the Joint Statement, the agencies gave explicit examples of what "could violate laws enforced by" the DOJ's Civil Rights Division and the Department of Education's Office for Civil Rights. One of the examples given is instructive in its

[2]Fact Sheet: Combating Discrimination Against AANHPI and MASSA Students, The United States Department of Justice (2018), https://www.justice.gov/hci/resource/fact-sheet-combating-discrimination-against-aanhpi-and-massa-students (last visited Dec 15, 2020).

similarity to Damask's actions: "During a lesson about 9/11, classmates of a Muslim middle school student call him a terrorist and tell him to go back to his country. The teacher tells the class that only some Muslims are terrorists, and asks the student why Muslims have not denounced the terrorist attacks of 9/11."

Similarly, Damask literally asked his students to identify where in Islam terrorism is "encouraged" and "justified," and explicitly included as a "wrong answer" the response that Islam does not encourage or justify terrorism. *ER_156*. Damask's Islamic Terrorism class module included precisely the questions and rhetoric noted by the DOJ and DOE as violative of constitutional rights, and therefore a "reasonable official would understand" that including such questions and rhetoric in public curriculum was violative of Appellants' rights. *Hernandez,* 897 F.3d at 1138.

Finally, this case is distinguishable from both of the cases cited by the district court as supportive of its order finding that Damask was entitled to qualified immunity. *ER_13-14* (citing *C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 982 (9th Cir. 2011); *Smith v. Arizona*, No. CV 11-1437-PHX-JAT, 2012 WL 3108818, at *7 (D. Ariz. July 31, 2012)).

In *Farnan*, this Court held that a teacher was protected by qualified immunity at summary judgement, vacating the district court's ruling that the teacher's

statements describing the inconsistencies of certain religious beliefs with modern scientific knowledge was a violation of the Establishment clause. 654 F.3d at 982.

Unlike Damask, at no point did the teacher in *Farnan* make absolute statements asserting that the plaintiff's religion supporting violent extremism. The statements made during class (held by the lower court to be a violation of the Establishment Clause) were not even directed specifically at the plaintiff's religion. They were comprised mainly of the teacher opining on perceived inconsistencies between religion in general and scientific knowledge. The Court reasoned that it was not "clearly established" that the teacher's statement violated the constitution. *Id.* at 978. *Farnan* is incomparable to this case, where, instead of opining generally on religious inconsistencies, Damask explicitly taught that Islam supports violent terrorism, and that Muslims have sympathy for the same.

In holding that the defendant in *Farnan* had not violated the plaintiff's constitutional rights, the Court noted that teachers should be given "leeway to challenge students to foster critical thinking skills and develop their analytical abilities." *Id.* at 988. The Court further noted that "[t]his balance is hard to achieve, and we must be careful not to curb intellectual freedom by imposing dogmatic restrictions that chill teachers from adopting the pedagogical methods they believe are most effective." *Id.* However, directly prior to these statements, the Court stressed that, "[i]n broaching controversial issues like religion, teachers must be

sensitive to students' personal beliefs and take care not to abuse their positions of authority." *Id.* The Court also foreshadowed that a violation like the one described in Appellant's complaint could occur, stating that, "[a]t some point a teacher's comments on religion might cross the line and rise to the level of unconstitutional hostility." *Id.* Simply put, this case is distinguishable from *Farnan* because Damask "abused [his] position of authority" by teaching that Appellants' religion encourages violence, and in so doing "cross[ed] the line" into "unconstitutional hostility." *Id.*

In *Smith v. Arizona*, the student plaintiff alleged that a teacher's decision to include her personal religious views in teaching a philosophy class violated the student's First and Fourteenth Amendment rights. 2012 WL 3108818, at *2. The district court held that such general allegations did not amount to a "clearly established Establishment Clause violation." *Id.* at *6. *Smith v. Arizona* is even more dissimilar to the instant case than *Farnan*. At no point in *Smith v. Arizona* is it alleged that the plaintiff's religion is disparaged by the teacher. To the contrary, it was the teacher's religious beliefs that the plaintiff took issue with, not the other way around. There is simply no comparison between *Smith v. Arizona* and the case at bar, where there are specific allegations that Damask taught his students that Appellants' religion is violent and dangerous. The district court erred in relying upon *Smith v. Arizona* as supportive of Damask being entitled to qualified immunity .

As stated above, to defeat a motion to dismiss wherein qualified immunity is raised, all that is requires is allegations of facts that allow the Court "'to draw a reasonable inference that [Damask is] liable for the misconduct alleged.'" *Keates,* 883 F.3d at 1240 (quoting *Iqbal,* 556 U.S. at 678.). If such allegations are pled, Appellants are "entitled to move forward." *Keates,* 883 F.3d at 1235. Appellants' complaint included allegations sufficient to fulfill the test described in *Keates.* Therefore, the Court should reverse the district court's order finding that Damask is protected by qualified immunity, and should allow Appellants case to move forward.

VIII. CONCLUSION

For the foregoing reasons, the order of the district court dismissing Appellants' claims should be reversed and remanded for further proceedings.

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IX. STATEMENT OF RELATED CASES

The undersigned is unaware of any related cases currently pending before this Court.

Date: January 22, 2021

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X. CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that:

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,411 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 this brief has been prepared in a proportionately spaced typeface using Microsoft Word Version 2021, Times New Roman 14-point font.

Date: January 22, 2021

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XI. CERTIFICATE OF SERVICE

I hereby certify that on January 22, 2021, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Date: January 22, 2021

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