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

APPELLANTS' REPLY BRIEF

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I. ARGUMENT

A. APPELLEES' FAIL TO SHOW WHY APPELLANTS' ORIGINAL COMPLAINT WAS INSUFFICIENT TO STATE A CAUSE OF ACTION UNDER THE ESTABLISHMENT CLAUSE.

The Appellees' response briefs are not sufficient to stop this Court from overturning the district court's decision. Maricopa County Community College District ("MCCCD") attempts to argue that the Establishment Clause does not apply to teachers. (MCCCD p. 11 Dkt. 30.) However, there is no question that if Appellee Nicholas Damask ("Damask") were to include prayer in his curriculum this Court would be able to stop him from doing so because it violates the Establishment Clause by approving of religion. *Sch. Dist. Of Abington Twp. v. Schempp,* 374 U.S. 203, 223-25 (1963).

If on the other hand, Damask explicitly stated that he "disapproved" of Islam this Court would also be able to stop him because the primary effect of such a statement would be "disapproval" of Islam. *Lemon v. Kurtzman,* 403 U.S. 602, 612-13 (1971). Thus, the Establishment Clause applies to teachers, notwithstanding Damask's argument that he should be bound by it. (Damask p. 25 Dkt. 31 "shackled by the first amendment.")

Because the Establishment Clause applies, Appellants may prevail against a motion to dismiss by "stat[ing] 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). There is no question that a reasonable objective observer would conclude that learning that the only reasonable interpretation of a religion is that it promotes terrorism has the primary effect of disapproving of that religion. "To describe a man's faith as 'one of the most despicable pieces of rhetoric that people can use' is to disparage his religion." *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'm*.,138 S. Ct. 1719, 1729 (2018). Thus, the only question for this Court is whether Appellants have plausibly alleged that Damask's module teaches his students that the only reasonable interpretation of Islam is that it promotes terrorism.

Appellees have failed to show why Appellants have not met this standard. Appellees mischaracterize both Appellants' arguments and the actual statements made by the lesson module. First, MCCCD argues that Appellants' Establishment Clause violation stems from Damask teaching an interpretation of Islam that Appellants do not agree with. (MCCCD p. 48 Dkt. 30.) That is incorrect. Appellants' claim rests upon the assertion that Damask is teaching students that *his* interpretation, which posits that Islam promotes terrorism, is the *only* reasonable interpretation.

Appellees concede that Damask "makes broad statements regarding support of terrorism by Islamic legal authorities," but argue that these "broad statements" are attributed to what terrorist think and not to Islam generally. (MCCCD p. 53 Dkt.

30.) However, this characterization does not comport with the actual slides, taken in context with the entire module. For example, the statements on slides 28 and 33 are not limited by Damask to describing what terrorist believe. *ER_132,137*. These statements are Damask's conclusions of the religion, and not quotes by another scholar.

Further, there are no "prominent disclaimers" that could cure the disapproving statements. This is understandable because such disclaimers would be inherently antithetical to the interpretation Damask is forcing upon students. How could there possibly be a disclaimer when Damask's premise is that "contemporary Islamic legal authorities are unanimous in their approval of" "terrorism" and "suicide attacks." *ER_137*. If an interpretation is "unanimous," there are no other positions.

A further example exists on slide 25, where Appellees try to equate Damask's "warfare and violence" statement to include "self-defense." (MCCCD p. 52 Dkt. 30); *ER_129*. However, neither the term "self-defense" nor the underlying concept are used or discussed at any point in Damask's entire presentation.

Appellees also refer to slide 25 and Damask's statement that terrorists "sanctify" their actions through the Quran as proof that the entire lesson module framed Damask's interpretation of Islam as being only from the terrorist's perspective. However, none of the statements actually alleged as disapproving of Islam in Appellants' original Complaint are framed by this isolated statement.

Further, directly after this statement, which supposedly immunized Damask from liability for disapproving of a religion, Damask explicitly closes the door to any other interpretation of Islam by stating, "[c]ontentions that Islam does not promote warfare or violence cannot be supported on either theological or historical grounds." *Id.*

After this point, Appellees switch to an argument format wherein they simply beg the question for the remainder of the brief, arguing, without further satisfactory explanation, that it is "clear" that Damask's lesson module was only addressing the beliefs of terrorists. (MCCCD p. 52 Dkt. 30.) For example, Appellees use this tactic for the "theological mandate for jihad" statements on slide 23. *Id.* Yet, nothing on that slide or the entire module explains how it is "clear" that Damask is only presenting the beliefs of terrorists.

Appellees also attempt to explain away Damask's obviously disapproving statements by asking this Court to ignore the plain language of the lesson module at issue. For example, on slide 22 Damask explicitly includes in the definition of jihad the assertion that it is "physical, [and] *not simply prayer* or introspection." *ER_126.* Appellees use mindless wordplay, twisting Damask's statement in an attempt to soften the obviously disapproving meaning and asserting that Damask did not necessarily preclude prayer or introspection. (MCCCD p. 52 Dkt. 30.) Not only does this linguistic silliness fail to obviate Damask's express statement that jihad is "physical" and *not* prayer, it purposefully ignores the context within which the

definition was given. On the very slide upon which jihad is defined, Damask further instructs his students that "to portray jihad as a spiritual effort…is to equate jihad with yoga" and that "jihad is a religiously-justified, communal mobilization of the resources and capabilities of the Muslim population for war against the unbelievers." *ER_126*. Even beyond the immediate context of the slide, it should be (re)noted that throughout the entire module it was explicitly argued that any other existing definition of jihad constituted a "terribly ironic" attempt to "confuse minds" and "blur the meaning." *ER_202.*, at page 18. Further, any student who believed any other such existing definition were called "gullible Westerners" because the "overwhelmingly obvious" meaning of jihad is that of "combat / war." *ER_166*.

Finally, Appellees argue that the emails Damask sent to Mr. Sabra after the module quiz obviated the disapproving effect of the module. (MCCCD p. 50 Dkt. 30.) This argument fails because the emails were sent *after* Mr. Sabra finished the course and thus, could not have acted as an effective disclaimer or cured the Constitutional violation that had already occurred.

Appellees underestimate the plausible primary effect of the subject module when they argue that "nowhere in any of the course materials is it ever stated that…'Muslims have a "theological mandate" to kill Non-Muslims.'" (MCCCD p. 53 Dkt. 30.) It is plausible that a reasonable observer would conclude, after learning about a "theological mandate" in Islam that requires a "physical" "war against

unbelievers" supported by the primary sources of Islam and "legal authorities of any significance," that Islam is dangerous. *ER_124-137*. Thus, Damask's module disapproved of Islam, and Appellants' original Complaint stated a claim under the Establishment Clause.

Regarding Appellees' assertion that the bolded and underlined formatting of the word "sympathy" on slide 40 was only the result of a hyperlink (MCCCD p. 20 Dkt. 30), even if this were accepted as true, it does not change the disapproving effect of Damask's message. First, the link goes to an error page.[1] Second, even without the emphasis, slide 40 unambiguously asserted that Muslims, as a whole, approve of terrorist activities in significant numbers. *ER_144*. This slide alone has the primary effect of disapproving of religion. Third, the assertion is not attributed to anyone other than Damask, which clearly indicates that it is Damask's own conclusion. *ER_143,44.* Along this line, Appellants note that the Court must view the complaint "in the light most favorable" to the Appellants. *Curtis v. Irwin Indus., Inc.*, 913 F.3d 1146, 1151 (9th Cir. 2019). In such a light, Damask's overarching conclusion that Muslims support terrorist activities could certainly convince a reasonable objective observer that Damask was purposefully disapproving of Islam.

[1] https://www.pewresearch.org/assets/pdf/muslim-americans.pdf (last visited May 28, 2021)

Appellees also fail to find applicable precedent supportive of their argument that Appellants have not alleged a plausible claim. First, Appellees confuse Appellants' use of *Vernon v. City of Los Angeles* as a reference point for framing an Establishment Clause claim, arguing that the differences between *Vernon* and the facts of this case somehow "reveals [Appellants'] position's lack of substance." (MCCCD p. 54 Dkt. 30.) (citing *Vernon v. City of Los Angeles*, 27 F.3d 1385 (9th Cir. 1994)). Appellants' citation to *Vernon* was not as to a comparative case, as is obvious to any objective reader of Appellants' original brief. Instead, the citation was a recognition that, as this Court has noted, *Vernon* is one of the two "most instructive cases" on the Establishment Clause disapproval issue. *Vasquez v. Los Angeles Cty*., 487 F.3d 1246, 1256 (9th Cir. 2007). Appellants did not attempt to conflate the factual underpinnings of *Vernon* with this case, but instead used *Vernon* to establish the baseline for an Establishment Clause disapproval claim.

Appellees move on from their meaningless factual analysis of *Vernon* and cite to *Gheta v. Nassau Cty. Cmty. Coll*., a district court case from outside the Ninth Circuit, as somehow supportive of Appellees' position. (MCCCD p. 55-58 Dkt. 30.) (citing *Gheta v. Nassau Cty. Cmty. Coll*., 33 F. Supp. 2d 179 (E.D.N.Y 1999)). Contrary to Appellees' arguments, *Gheta* provides support for Appellants' position.

The Establishment Clause allegation in *Gheta* was that a human sexuality course disapproved of religion. 33 F. Supp. 2d at 184. Prior to the 1999 New York

decision at *summary judgment*, the New York district court had denied a motion to dismiss, expressly rejecting the raised academic freedom defense. *See Mincone v. Nassau Cty. Cmty. Coll.*, 923 F. Supp 398, 402,04 (E.D.N.Y. 1996). The district court then entered summary judgement for the defendant because the discussion about religion was done from a *historical perspective* that did not have the effect of disapproving of the religion. 33 F. Supp. 2d at 185. Contrast *Gheta*, which involved a historical analysis of the topic of sex in the context of religion, to the instant case, where Appellants' allege an entire class module which taught students that the only reasonable interpretation of Islam is that of inherent violence against the nonbeliever, and that Muslims in general have some sympathy for terrorist activities. *Gheta* is unpersuasive as comparative case law, being both legally inapplicable (decided on summary judgment after the plaintiff was allowed to defeat a motion to dismiss) and factually distinctive (as discussed above).

B. APPELLEES FAIL TO SHOW WHY APPELLANTS' ORIGINAL COMPLAINT WAS INSUFFICIENT TO STATE A CAUSE OF ACTION UNDER THE FREE EXERCISE CLAUSE.

Turning to the Free Exercise Clause claim, Appellees' response fails because it misunderstands (or purposefully misstate) Appellants' underlying claim. Appellees misrepresent Mr. Sabra's Free Exercise Clause claim, arguing that he was simply required to learn material antithetical to his religious beliefs and to thereafter "click statements" on a quiz that he found offensive. (MCCCD p. 59-61 Dkt. 30.) In

reality, Mr. Sabra's claim arises because (1) Damask inarguably taught that his interpretation of Islam in general and jihad in particular (as inherently violent and sympathetic to terrorist activity) was the *only* reasonable interpretation; and (2) questions 9 and 20 of the module quiz expressly required the respondent to agree that terrorism is "encouraged" and "justified" in his religion. *ER_156*, *167*. Forcing a student to either agree to such a derogatory interpretation of his belief system or suffer academically (which is the natural and inescapable result of losing points on a quiz) is a plausible "substantial burden" to that student's free exercise rights.

In response, Appellees cite to *Wood v. Arnold*, 915 F.3d 308 (4th Cir. 2019) *Wood* (1) is not a Ninth Circuit case, and (2) discusses the Establishment Clause, not the Free Exercise Clause. *Id.* Even if this Court were to accept an out-of-circuit case analyzing a wholly separate constitutional provision as even persuasive support, *Wood* would still be factually inapplicable. The constitutional violation in *Wood* was that of a student simply being exposed to religions different than his own. *Id.* at 312. There are no factual or legal similarities between the two cases. Here, Damask taught that his interpretation of Islam and jihad as inherently violent and supportive of terrorism was the *only* reasonable interpretation and forced Mr. Sabra to agree to the same on a quiz module or suffer academically. *Wood* is incomparable to this case.

Appellees also argue that the government had a compelling interest in forcing Mr. Sabra to answer module quiz questions that required capitulation to an

inherently offensive and derogatory view of his own religion. (MCCCD p. 61 Dkt. 30.) Appellees conveniently leave out the fact that this interest must be narrowly tailored. *See Does v. Wasden*, 982 F.3d 784, 795 (9th Cir. 2020) ("At the motion to dismiss stage, Appellants only had to allege a substantial burden on their free exercise of religion, that is not the least restrictive means available.").

"'The least restrictive-means standard is exceptionally demanding,' and the government bears the burden of showing 'that it lacks other means of achieving its desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y].'" *Id.* (quoting *Holt v. Hobbs*, 574 U.S. 352, 364-65 (2015)). Appellees have not met this "exceptionally demanding" standard. Damask could have *easily* included in the module any of the many mainstream interpretations of Islam and jihad, or an effective disclaimer that his interpretation was simply one of many, or written more specific questions from the perspective of where the Islamic terrorist finds justification without requiring answers that inherently belittled Mr. Sabra's religious beliefs.

Appellees final throw of the dice relies on the concept of academic freedom. However, as this Court has made clear, 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 noted that academic freedom would not protect against speech not 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.'") (quoting *Frisby v. Schultz*, 487 U.S. 474, 486 (1988)).

If "academic freedom" was not available to shield an academic institution from liability for forcing students to engage in prayer to a deity in which they did not believe, it is not available to shield Appellees where Damask forced a student to align his quiz answers to an interpretation of his own religion that was both antithetical to the student's religious beliefs and inherently offensive to the student as an adherent to Islam.

C. APPELLANTS' ORIGINAL COMPLAINT ALLEGED SUFFICIENT FACTS TO SUPPORT STANDING

"At 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). In insufficiently arguing that Appellants did not meet this low standard, Appellees rely on cases that (1) are not from the Ninth Circuit, (2) were decided at different procedural stages requiring a more stringent factual showing, or (3) have nothing to do with organizational standing.

The first two cases Appellees cite do not analyze or otherwise contend with the issue of organizational standing. In *Catholic League for Religious and Civil*

Rights v. City and City of S.F., this Court found standing because plaintiff's injury was due to the defendant's Establishment Clause violation. 624 F.3d 1043 (9th Cir. 2010). *Valley Forge Christian College v. American United for Separation of Church & State, Inc.* dealt with taxpayer standing and an attempt to create a special standing doctrine from the Establishment Clause. 454 U.S. 464 (1982). These two cases are in no way supportive of Appellees' argument that CAIR-AZ does not have organizational standing.

Appellees' underlying argument relies on the district court's erroneous holding that Appellants have not shown a frustration of mission or a diversion of resources. Appellants have sufficiently shown that the district court erred in this holding. First, regarding diversion of resources, Appellants explicitly asserted, in their complaint, a specific re-routing of financial resources to a local scholar to create instructional material to counteract Damask's misrepresentation of Islam. *ER_187.* The district court was required to accept this assertion as true (*Curtis,* 913 F.3d at 1151), but failed to do so, committing reversible error. In arguing that the district court's failure to comply with Ninth Circuit law is not reversible, Appellees assert that CAIR-AZ's asserted diversion was "business as usual" and therefore not a true diversion of resources. This argument fails. As was clearly explained at the hearing on Appellees' motion to dismiss, because of the severity of Damask's disapproval, CAIR-AZ was forced to create an educational campaign unlike any of the campaigns

which are normally created, and unlike any other campaign created before. *ER_187.* The district court, at the motion to dismiss stage, was required to accept this allegation as true. *Curtis,* 913 F.3d at 1151.

Appellant's diversion is similar to this Court's decision in *Fair Hous. Council of San Fernando Valley v. Roommate.com, LLC,* 666 F.3d 1216 (9th Cir. 2012). In that case, this Court granted organizational standing to a plaintiff who created a "new education and outreach campaign" targeting the discriminatory advertisement by the defendant. *Id.* at 1219. The plaintiff found the discriminatory advertisement through an "investigat[ion]" of the defendant and was not directly discriminated by them. *Id.*

Similarly, CAIR-AZ found the module after the organization "investigat[ed]" not only Mr. Sabra's complaint, but the numerous other complaints from the community CAIR-AZ serves. Appellees' attempt to argue that CAIR-AZ cannot have standing because the module was "not directed" at them contradicts this Court's precedent in *Roommate*. (MCCCD p. 33 Dkt. 30.)

Additionally, this Court was not prevented from granting standing to the plaintiff in *Roommate* because the plaintiff decided to make an educational campaign or because they have done housing educational campaigns before. *See Nat'l Council of La Raza v. Cegavske* 800 F.3d 1032, 1040-41 (9th Cir. 2015) ("[e]ven though [plaintiff's] ordinary business includes investigating and raising awareness about housing discrimination.") This is because the campaign was

created to specifically address the defendant's discriminatory advertisement. *Roommate*, 666 F.3d at 1219. Just like the plaintiff, CAIR-AZ explained to the district court that the organization was forced to respond in an unprecedented way with the production of a campaign that directly responded to the condemnation and misinformation Damask disseminated. *ER_40* line 15 – 25. CAIR-AZ also explained that the "know your rights" services that the organization does is not the same as the materials that it contracted for. *ER_35* line 5 – 9. Thus, this Court should follow its own precedent in *Roommate* and reverse the district court's decision.

The case cited by Appellees as supportive of the argument that CAIR-AZ did not suffer a legitimate diversion of resources, *American Diabetes Ass'n v. United States Dep't of the Army*, 938 F.3d 1147 (9th Cir. 2019), is easily distinguishable. In *American Diabetes*, the organization's only alleged diversion was the time an attorney took to "handle a single intake call" that explained the caller's rights under a new policy that it alleged frustrated its mission. *Id.* at 1155. This Court described this diversion as "business as usual" because the attorney's inherent job description included the very intake call of which the organization complained. *Id.*

However, in this instance, CAIR-AZ was forced to go well beyond what it normally does to counteract the harmful effects of Damask's misinformation. While CAIR-AZ does regularly produce *general* "know your rights" materials (*ER_35* line 5 – 9), because of the seriousness of Damask condemnation, CAIR-AZ was forced

to respond in an unprecedented way with the production of a campaign that directly responded to the condemnation and misinformation Damask disseminated. *ER_40* line 15 – 25. This different response is sufficient to support CAIR-AZ's well-pleaded allegation that it was not carrying out "business as usual" (like the plaintiff in *American Diabetes*) and the district court was required to accept CAIR-AZ's allegation as true (*Curtis,* 913 F.3d at 1151). *American Diabetes* is therefore unpersuasive in Appellees' arguments.

Appellees then attempt to draw nonexistent comparisons between this case and *Rodriguez v. City of San Jose,* 930 F.3d 1123 (9th Cir. 2019). *Rodriguez* was decided on summary judgement, not a motion to dismiss, and therefore has very little persuasive value. *Id.* Additionally, the Court denied standing in *Rodriguez* because the plaintiff could not show any diversion other than "incurring litigation costs." *Id.* at 1135-36. There is no comparison between the incurring of litigation costs, a normal and understood cost of doing business in a litigious society, and that of being forced to create an unprecedent campaign to refute hateful misinformation.

Next, Appellees cite to *Jacobson v. Fla Sec'y of State,* 974 F.3d 1236 (11th Cir. 2020). Beyond the obvious fact that an Eleventh Circuit decision is not binding precedent, the *Jacobson* court decided the standing issue at the permanent injunction stage, and not, as in this case, on a motion to dismiss. *Id.* Additionally, the Eleventh

Circuit failed to find a diversion because the plaintiffs were unable to specify from what normal activates they had diverted resources. *Id.* at 1250.

This case is still in its infancy, unlike *Jacobson*, and Ninth Circuit precedent requires that, at this stage, if a plaintiff even "'broadly allege[s]'" that the defendant's acts impaired its abilities to provide services, the plaintiff will defeat a motion to dismiss for lack of standing. *See Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015) (quoting *Havens Realty Corp v. Coleman*, 455 U.S. 363, 379 (1982)). CAIR-AZ met this standard when it alleged that it was forced to divert resources from normal "know your rights" campaigns towards contracting with a local religious scholar to create materials for an unprecedented campaign to rebut Damask's Islamophobic indoctrination. *ER_187. Jacobson* is neither binding nor persuasive.

In its final attempt to justify the district court's reversible error in ignoring Appellants' well-pleaded allegations regarding diversion of resources, Appellees cite to *Young Advocs. for Fair Educ. v. Cuomo*, 359 F. Supp. 3d 215 (E.D.N.Y. 2019) and argue that CAIR-AZ's diversion was just "pure issue advocacy." (MCCCD p. 36 Dkt. 30.) Beyond being an untested district court decision from outside the Ninth Circuit, *Young* dealt with the situation where (1) the plaintiff organization did not normally provide services to the general public, and (2) the "diversion" of resources was simply the funding of legal and lobbying costs. *Young,* 359 F. Supp. 3d at 231-

235. These facts could not be more dissimilar to the instant case. CAIR-AZ has explicitly alleged that it provides services to the general Muslim public both in the original complaint and during the hearing on Appellees' motion to dismiss. *See ER_178; ER_35,* at lines 5 – 9. CAIR-AZ also explicitly alleged a diversion from the normal course of business to create an unprecedented educational campaign, not an investment in lobbying or litigation. *ER_187; ER_40* line 15 – 25. Thus, *Young* is not persuasive.

Turning to frustration of mission, Appellees do not substantially counter the argument presented in response to the original motion to dismiss or the Appellants' opening brief. They simply cite to case law, without including any legal analysis, and assert that CAIR-AZ's frustration was a "mere setback." (MCCCD p. 36 Dkt. 30.) Such conclusory argument is not sufficient to support the lower court's reversible error in refusing to accept CAIR-AZ's allegations as true on a motion to dismiss.

Appellees assert various additional other arguments in favor of upholding the district court's decision, but these all fail for a plethora of reasons. First, Appellees mischaracterize *Havens* and misstate the legal principles set forth by that case and its progeny. For example, Appellees argue that *Havens* and its progeny do not allow plaintiffs who have organizational standing to seek and receive an injunction. (MCCCD p. 36 Dkt. 30.) This is false. Just two months ago this Court approved of

an injunction for a plaintiff with organizational standing. *E Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 681 (9th Cir. 2021).

Appellees also confuse how organizational standing works when they argue, without citation to *any* supportive case law, that *Havens* and its progeny are incompatible with a First Amendment violation. (MCCCD p. 35 Dkt. 30.) This Circuit has recognized organizational standing for all types of cases and in all areas where an organization's mission was frustrated. *See E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640 (9th Cir. 2021) (mission was frustrated due to a change in the immigration law); *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1039 (9th Cir. 2015) ((mission was frustrated due to violations of the National Voter Registration Act); *Valle del Sol Inc v. Whiting*, 732 F.3d 1006,1018 (9th Cir. 2013) (mission was frustrated due to a new criminal statue). Why First Amendment claims are so fundamentally distinct from every other type of claim, requiring a denial of organizational standing where the organization seeks an injunction, is unclear. Nothing in the *Havens* decision precludes the Court from recognizing CAIR-AZ's organizational standing, stemming from the frustration of its mission, where that frustration arises from Damask's violation of the First Amendment.[2]

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[2] It is also unclear what other remedies would be available and effective in Establishment and Free Exercise Clause cases, or why an injunction itself is inherently incompatible with organizational standing. An injunction against violative behavior is often the only practical

Appellants have sufficiently shown that the district court erred by not following precedent when it did not "accept as true the allegations in the complaint and construe the complaint in favor of the complaining party" (*Cegavske*, 800 F.3d at 1039) failed to "draw[] 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)). Appellees have failed to persuasively show why the Court should ignore the district court's reversible error, and, notwithstanding Appellees' ineffective arguments, the Court should reverse the district court's decision to grant Appellees' motion to dismiss.

D. APPELLEES ARE NOT ENTITLED TO QUALIFIED IMMUNITY

Appellees' arguments regarding qualified immunity are unpersuasive for two reasons. First, Appellants sufficiently alleged that Appellees' constitutional violation was obvious in the original complaint. Second, Appellees misrepresent Appellants' underlying arguments.

Contrary to Appellees' misrepresentations, Appellants' underlying argument that Damask's violations were so obvious that an exact case on point is not needed was not presented "for the first time on appeal." (Damask p. 22 Dkt. 31.) Appellants'

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remedy in such cases. Disallowing standing to organizations whose primary missions involve freedom of religion because such cases would involve a request that religious freedoms be protected would be nonsensical.

argument in the lower court was clearly as follows: Despite the fact that this Court has not yet been presented with a situation as patently violative of the First Amendment, where a teacher so blatantly communicated a disapproval of religion, there was sufficient precedent at the time of Damask's violation to give any reasonable person notice that such violations were unconstitutional. *ER_78-79*. That Appellants did not use the word "obvious" in their argument does not render Appellants' argument on appeal a novel position, and certainly did not entitle the lower court to skip an entire factor in the qualified immunity analysis.

Appellants used case law and the Department of Education "Fact Sheet" to show that Damask's statements went beyond any prior-considered statements in scope and inherent offensiveness. Appellants underlying argument is, and always has been, that this case is one in which the "constitutional violation 'is so 'obvious' that [the Ninth Circuit] must conclude ... qualified immunity is inapplicable, even without a case directly on point.'" *Hernandez v. City of San Jose*, 897 F.3d 1125, 1138 (9th Cir. 2018) (quoting *A.D. v. Cal. Highway Patrol*, 712 F.3d 446, 455 (9th Cir. 2013)) (citing *Brosseau v. Haugen*, 543 U.S. 194, 199, 125 S.Ct. 596, 160 L.Ed.2d 583 (2004) (per curiam) ("[I]n an obvious case, [highly generalized standards] can clearly establish [a constitutional violation], even without a body of relevant case law.")).

Appellants' basic claims are (1) that Damask's curriculum, funded by tax dollars, which indoctrinated students into believing that the only reasonable interpretation of Islam is one that promotes terrorism, was violative of the Establishment Clause, and (2) that forcing a Muslim student to agree to such an offensive and derogatory interpretation or suffer academically was violative of the Free Exercise Clause. Both of these claims involve actions on the part of a public employee that had the foreseeable primary effect of disapproving Islam and creating a substantial burden, not narrowly tailored, on the free exercise of a Muslim's religion. Such actions were (and are) so obviously violative of Appellants' constitutional rights, as established by the general Ninth Circuit framework regarding the Establishment and Free Exercise Clauses, that even "without a case directly on point," a reasonable person should have been aware of the violative nature of the actions. *Hernandez v. City of San Jose*, 897 F.3d 1125, 1138 (9th Cir. 2018).

Turning to Appellees' second argument, it is indisputable that the district court's decision did not include an analysis of whether Appellees' violations of Appellants' constitutional rights were obvious. As explained in Appellants' brief, the district court ignored many of Damask's disapproving statements, improperly applied the second prong of the *Lemon* test, and improperly construed the complaint in Appellees' favor. (Appellants p. 8-9 Dkt. 15.) Thus, even beyond failing to

expressly address the "obvious" factor, the district court opinion cannot even be said to have passively determined that Damask's violations were not obvious.

Next, Appellees once again attempt to employ the concept of academic freedom as supportive of Damask's receiving qualified immunity. Appellants have already explained why academic freedom is not a defense to an actual constitutional violation. *Rodriguez v. Maricopa Cty. Cmty. Coll. Dist.*, 605 F.3d 703, 710 (9th Cir. 2010). Further, the cases Appellees cite in favor of their academic freedom argument, such as *Grove v. Mead School Dist. No. 354*, and *Brown v. Woodland Joint Unified Sch. Dist.*, do not stand for the proposition that teachers are immune from constitutional guarantees. 753 F.2d 1528 (9th Cir. 1985); 27 F.3d 1373 (9th Cir. 1994). Appellees concede this point by stating that, "[i]n essence, *Farnan* establishes that […] it is *conceivable someday* […] [a] teacher's critical statements about religion […] *might* cross the line to violate the Establishment Clause." (Damask p. 18 Dkt. 31.) Damask's case is the example of someone crossing that line, and doing so in such a sever manner as to render his violations of the constitution patently obvious. 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 (10th Cir. 2015) (Gorsuch, J.)) (internal quotation marks omitted).

Finally, Appellees argue that asserting qualified immunity requires meeting only a low bar of proof. However, that is not the case at the motion to dismiss stage. 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. *Hernandez,* 897 F.3d at 1132. In so doing, the court must view the complaint "in the light most favorable" to the Appellants. *Id*. 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 have met this standard.

II. CONCLUSION

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

Date: June 11, 2021

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III. 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 5,400 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.

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IV. CERTIFICATE OF SERVICE

I hereby certify that on June 11, 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.

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