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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
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9 Mohamed Sabra and Council on American-
10 Islamic Relations of Arizona,

11 Plaintiffs,

12 v.

13 Maricopa County Community College
14 District and Nicholas Damask,

15 Defendants.

No. CV-20-01080-PHX-SMB

ORDER

16 Pending before the Court is Defendants' Motion to Dismiss. (Doc. 25) Although a
17 preliminary injunction motion is also pending, the Court has postponed its ruling on that
18 motion until resolving this one because of the dispositive legal issues raised. (Doc. 27) Oral
19 argument was heard on August 6, 2020 for this motion. (Doc. 33) After considering the
20 pleadings and oral argument, the Court will grant the motion for the reasons explained
21 below.

22 **I. BACKGROUND**

23 Arising out of an Islamic Terrorism module in an online World Politics course
24 taught by Dr. Nicholas Damask, this case tests the limits of the First Amendment's Religion
25 Clauses. Mohamed Sabra enrolled in this spring semester course at Scottsdale Community
26 College ("SCC") in 2020. (*Id.* ¶ 7.) Its syllabus describes it as one that will provide an
27 "[i]ntroduction to the principles and issues relating to the study of international relations.
28 Evaluation of the political, economic, national, and transnational rationale for international

1 interactions.” (*Id.*)

2 The course is organized into six modules, each containing multiple components to
3 explore various topics concerning world politics. (*Id.* ¶ 8.) The Islamic Terrorism module
4 challenged by Mr. Sabra and the Council on American-Islamic Relations of Arizona
5 (“CAIR-AZ”) had three components: a PowerPoint presentation, excerpts from *Future*
6 *Jihad*, and a quiz. (*Id.* ¶¶ 8-9.) The PowerPoint presentation explored world politics
7 through three sub-topics: (1) “Defining Terrorism”; (2) “Islamic Terrorism: Definition”;
8 and (3) “Islamic Terrorism: Analysis.” (*Id.* ¶¶ 10-32.) The second component required
9 students to read excerpts from *Future Jihad*, a book published by Walid Phares, and the
10 quiz evaluated students on their comprehension of course material with twenty-five
11 multiple choice questions. (*See id.* ¶¶ 33-53.)

12 Plaintiffs take issue with Dr. Damask’s instruction throughout these various Islamic
13 Terrorism module components, alleging that his teachings violate the Establishment Clause
14 and Free Exercise Clause of the First Amendment to the United States Constitution. (*Id.* ¶¶
15 64-74.) Plaintiffs allege his instruction unconstitutionally “conclude[es] that Islam
16 ‘mandates’ terrorism and the killing of Non-Muslims, and that this is the only interpretation
17 of religious texts, but without any disclaimer to inform students that this is one-perspective
18 and that Islam itself does not condone terrorism.” (*Id.* ¶ 67.) They further allege that Dr.
19 Damask “is not teaching that only some extremists espouse these beliefs, but rather that
20 literally, Islam itself teaches the mandates of terrorism.” (*Id.* ¶ 68.) And “[t]he only
21 objectively reasonable construction of [Dr.] Damask’s actions,” Plaintiffs allege, “is that
22 his primary message is the disapproval of Islam.” (*Id.* ¶ 69.) As it specifically concerns the
23 quiz, Plaintiffs allege “[it] forced [Mr.] Sabra to agree to [Dr. Damask’s] radical
24 interpretation of Islam.” (*Id.* ¶ 74.) And when Mr. Sabra refused to answer questions in
25 accordance with what he learned in the course, his answers were marked wrong, and his
26 course grade was negatively impacted. (*Id.*)

27 Plaintiffs’ Establishment Clause and Free Exercise Clause claims are brought
28 against Dr. Damask in his individual and official capacities and the Maricopa County

1 Community College District (“MCCCD”) under 42 U.S.C. § 1983.¹ Each Plaintiff requests
2 declaratory and injunctive relief, nominal damages, and attorneys’ fees and costs. Dr.
3 Damask and MCCCD move to dismiss both Plaintiffs’ claims under Federal Rules of Civil
4 Procedure 12(b)(1) and 12(b)(6).

5 II. LEGAL STANDARD

6 “Federal courts are courts of limited jurisdiction. They possess only that power
7 authorized by Constitution and statute[.]” *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511
8 U.S. 375, 377 (1994). As a result, “[i]t is to be presumed that a cause lies outside this
9 limited jurisdiction and the burden of establishing the contrary rests with the party asserting
10 jurisdiction.” *Id.* (internal and external citations omitted). Under Federal Rule of Civil
11 Procedure 12(b)(1), a party may move to dismiss for lack of subject-matter jurisdiction.
12 *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1227 (9th Cir. 2011). Motions to
13 dismiss under this Rule “may attack either the allegations of the complaint as insufficient
14 to confer upon the court subject matter jurisdiction, or the existence of subject matter
15 jurisdiction in fact.” *Renteria v. United States*, 452 F.Supp.2d 910, 919 (D. Ariz. 2006)
16 (citing *Thornhill Publ’g Co., Inc. v. Gen. Tel. & Elec. Corp.*, 594 F.2d 730, 733 (9th Cir.
17 1979)). And “unlike a motion under Rule 12(b)(6), the moving party may submit ‘affidavits
18 or any other evidence properly before the court.’” *Assoc. of Am. Med. Colleges v. United*
19 *States*, 217 F.3d 770, 778 (9th Cir. 2000) (quoting *St. Clair v. City of Chico*, 880 F.2d 199,
20 201 (9th Cir. 1989)). If the moving party submits evidence showing a lack of subject matter
21 jurisdiction, “[i]t then becomes necessary for the party opposing the motion to present
22 affidavits or any other evidence necessary to satisfy its burden of establishing that the court,
23 in fact, possesses subject matter jurisdiction.” *St. Clair*, 880 F.2d at 201. But “[w]hen the
24 motion to dismiss attacks the allegations of the complaint as insufficient[.]” like here, “all
25 allegations of material fact are taken as true and construed in the light most favorable to
26 the nonmoving party.” *Renteria*, 452 F.Supp.2d at 919 (citing *Fed’n of African Am. Contr.*

27 ¹ MCCCD is alleged to have had constructive knowledge of Dr. Damask’s allegedly
28 unconstitutional conduct. (*Id.* ¶¶ 57, 58, 70.) In addition, Dr. Damask is alleged to be a
policymaker for MCCCD. (*Id.* ¶¶ 59, 71.)

1 *v. City of Oakland*, 96 F.3d 1204, 1207 (9th Cir. 1996)).

2 In addition to moving to dismiss for lack of subject-matter jurisdiction, a party may
3 move to dismiss for failure to state a claim under Fed. R. Civ. P. 12(b)(6). When evaluating
4 a complaint under Rule 12(b)(6), well-pled factual allegations are presumed true and
5 construed in the light most favorable to the nonmoving party. *Cousins v. Lockyer*, 568 F.3d
6 1063, 1067 (9th Cir. 2009). To survive a Rule 12(b)(6) motion to dismiss, a complaint must
7 meet Rule 8(a)(2)'s minimum requirements. Rule 8(a)(2) requires a "short and plain
8 statement of the claim showing that the pleader is entitled to relief," so that the defendant
9 has "fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atl.*
10 *Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47
11 (1957)). A complaint setting forth a cognizable legal theory survives a motion to dismiss
12 if it contains enough factual allegations stating a claim to relief that is "plausible on its
13 face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570).
14 Facial plausibility only exists if the pleader sets forth "factual content that allows the court
15 to draw the reasonable inference that the defendant is liable for the misconduct alleged."
16 *Id.* "Threadbare recitals of the elements of a cause of action, supported by mere conclusory
17 statements, do not suffice." *Id.* Plausibility does not equal "probability," but requires "more
18 than a sheer possibility that a defendant has acted unlawfully." *Id.* "Where a complaint
19 pleads facts that are 'merely consistent' with a defendant's liability, it 'stops short of the
20 line between possibility and plausibility of entitlement to relief.'" *Id.* (quoting *Twombly*,
21 550 U.S. at 557).

22 **III. DISCUSSION**

23 The Court begins with Defendants' challenges to the Court's power to hear this case.
24 Just because Plaintiffs allege First Amendment claims does not necessarily mean the Court
25 can render a judgment affecting the parties' rights.² Rather, only if the Court has

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27 ² At the preliminary injunction evidentiary hearing that was ultimately vacated pending the
28 Court's ruling on this motion, Plaintiffs' counsel argued that "the Court has jurisdiction to
hear a First Amendment Establishment Clause [case]." (Doc. 27.) This is of course only
partially true. Although Congress can, and has limited the Court's jurisdiction by statute,

1 jurisdiction can the parties' grievances be heard. If that is the case, the Court will turn to
2 the remaining arguments under Rule 12(b)(6).

3 **A. Article III Standing**

4 The Court's jurisdiction is limited to cases and controversies. *Raines v. Byrd*, 521
5 U.S. 811, 818 (1997). "Without jurisdiction the court cannot proceed at all in any cause.
6 Jurisdiction is power to declare the law, and when it ceases to exist, the only function
7 remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte*
8 *McCardle*, 74 U.S. 506, 514 (1868); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341
9 (2006) ("If a dispute is not a proper case or controversy, the courts have no business
10 deciding it, or expounding the law in the course of doing so."). To show a case or
11 controversy exists, each plaintiff must establish that he, she, or it has standing to bring its
12 alleged claims. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). To show such a
13 thing, "[each] plaintiff must demonstrate (1) that [he, she, or it] suffered an injury in fact
14 that is concrete, particularized, and actual or imminent, (2) that the injury was caused by
15 the defendant[s], and (3) that the injury would likely be redressed by the requested judicial
16 relief." *Thole v. U.S. Bank N.A.*, 140 S.Ct. 1615, 1618 (2020).

17 Here, Dr. Damask and MCCCCD argue that Plaintiffs lack standing to bring their
18 First Amendment claims because Mr. Sabra finished the World Politics course at SCC
19 before bringing this action and no "official policy" is alleged to have caused their injuries.
20 (Doc. 25 at 2, 7-12.) Without meaningfully disputing that Mr. Sabra lacks standing because
21 his claims are moot—Plaintiffs merely state "Mr. Sabra is requesting money damages"—
22 they argue that CAIR-AZ has organizational standing. (Doc. 29 at 8-12.) They further
23 argue that the complaint alleges a municipal policy that caused their injuries and permits
24 their lawsuit against MCCCCD and Dr. Damask in his official capacity. (*Id.* at 10-12.)

25 i. Mr. Sabra's Has Standing for His Constitutional Claims.

26 Standing for each claim must continue to exist throughout the course of litigation,
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28 *see e.g.* 28 U.S.C. § 1331, the standing requirement in Article III of the United States
Constitution is an entirely separate inquiry. *See Lujan*, 504 U.S. at 560–61.

1 or the claim becomes moot. *Doe v. Madison School Dist. No. 321*, 177 F.3d 789, 797-98
2 (9th Cir. 1999); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 549 (9th Cir. 1998) (“Generally,
3 an action is moot when the issues presented are no longer ‘live’ or the parties lack a legally
4 cognizable interest in the outcome.”).

5 Here, it is undisputed Mr. Sabra completed the World Politics course; therefore, it
6 does not appear that the Court could remedy his alleged injuries by declaratory or
7 injunctive relief. However, Plaintiffs request nominal damages on Mr. Sabra’s behalf,
8 which permits the Court to provide relief. Thus, Mr. Sabra’s request for declaratory and
9 injunctive relief are moot, but his request for nominal monetary damages survives. *See*
10 *Doe*, 177 F.3d at 798.

11 ii. CAIR-AZ lacks standing

12 An organization may have Article III standing to sue on its own behalf when “it can
13 demonstrate: (1) frustration of its organizational mission; and (2) diversion of its resources
14 to combat the particular [conduct] in question.” *Am. Diabetes Ass’n v. United States Dep’t*
15 *of the Army*, 938 F.3d 1147, 1154 (9th Cir. 2019) (quoting *Smith v. Pac. Properties & Dev.*
16 *Corp.*, 358 F.3d 1097, 1105 (9th Cir. 2004)).³ “An organizational plaintiff must allege
17 ‘more than simply a setback to the organization’s abstract social interests.’” *Mecinas v.*
18 *Hobbs*, No. CV-19-05547-PHX-DJH, 2020 WL 3472552, at *9 (D. Ariz. June 25, 2020)
19 (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S.Ct. 1114, 71 L.Ed.2d
20 214 (1982)). “It must instead show that it would have suffered some other injury if it had
21 not diverted resources to counteracting the problem.” *La Asociacion de Trabajadores de*
22 *Lake Forest v. Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). Courts have found

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24 ³ Alternatively, “[a]n organization has standing to sue on behalf of its members where: ‘(a)
25 its members would otherwise have standing to sue in their own right; (b) the interests it
26 seeks to protect are germane to the organization’s purposes; and (c) neither the claim
27 asserted nor the relief requested requires the participation of individual members in the
28 lawsuit.’” *Am. Diabetes Ass’n*, 938 F.3d at 1154 (quoting *Ecological Rights Found.*, 230
F.3d at 1147). Plaintiffs do not argue for associational standing under this theory. “CAIR-
AZ’s organizational standing stems from Defendants’ [conduct], not from Mr. Sabra’s
separate injuries.” (Doc. 29 at 10.)

1 organizational standing is present where an organization is not simply going about their
2 business as usual, but where the organization “had altered their resource allocation to
3 combat the challenged practices.” *Am. Diabetes Ass’n*, 938 F.3d at 1154. Further, in
4 *Havens Realty*, the Supreme Court found organizational standing after determining that the
5 organization had established a “concerted and demonstrable injury to [its] activities.” *Id.*
6 (citing *Havens Realty*, 455 U.S. at 379, 102 S.Ct. 1114).

7 “[CAIR-AZ] is an Arizona-based 501(c)(3) non-profit organization committed to
8 advocacy and protecting the civil rights of American Muslims while promoting justice.”
9 (Doc. 1 ¶ 2.) “To remedy the damage done by Damask, CAIR-AZ has had to divert their
10 resources to create a campaign correcting the Islamophobic information. CAIR-AZ has
11 contracted with a religious scholar to create materials for this campaign. (Doc. 1 ¶ 63.)”
12 CAIR-AZ has not stated how hiring a religious scholar to create materials to advocate
13 against Islamophobic information is anything out of the realm of the normal advocacy that
14 they do.

15 Here, CAIR-AZ, unlike the organization in *Havens*, has not established a concrete
16 and demonstrable injury that would allow them to have standing against the Defendants.
17 CAIR-AZ has not effectively shown that it would have suffered an injury if it had not
18 diverted resources to counteract Dr. Damask’s allegedly “Islamophobic” teachings.
19 Instead, the module of Dr. Damask’s course that contained the materials and quiz at issue
20 are akin to a mere social setback for CAIR-AZ’s abstract social interest of advocacy and
21 protecting the civil rights of American Muslims while promoting justice. Although the
22 Complaint alleges that CAIR-AZ created a campaign to combat the misinformation and
23 contracted with a religious scholar to create material for the campaign (Doc. 1 ¶ 63.), the
24 Plaintiffs do not allege that creating material to correct Islamophobic information is not a
25 normal function of their advocacy and not “business as usual.” *See Amer. Diabetes Ass’n*,
26 938 F.3d at 1154. The Complaint also fails to specify from which source CAIR-AZ
27 diverted resources to create the campaign. Thus, the Court finds that CAIR-AZ does not
28 allege a concrete and demonstrable injury and has not effectively shown a diversion of

1 resources that is not a normal part of the organization’s activities. Thus, CAIR-AZ lacks
2 organizational standing under Article III to bring claims against the Defendants, and their
3 claims must be dismissed pursuant to Rule 12(b)(1).

4 **B. Failure to State a Claim Under Rule 12(b)(6)**

5 Mr. Sabra has standing so the Court addresses Defendants’ alternative argument that
6 the complaint alleges no First Amendment claim as a matter of law and must be dismissed.
7 (Doc. 25 at 2, 12-17.) Defendants also argue that even if it adequately alleges these claims,
8 no claim can be brought against Dr. Damask in his individual capacity under the doctrine
9 of qualified immunity. (*Id.* at 2, 17-19.) Plaintiffs disagree, arguing that the complaint
10 plausibly alleges First Amendment claims, (Doc. 29 at 12-20), and that clearly established
11 law prohibited Dr. Damask’s allegedly unconstitutional instruction. (*Id.* at 20-22). The
12 Court addresses each claim in turn before Dr. Damask’s claim to qualified immunity.

13 i. Establishment Clause

14 “The Religion Clauses of the First Amendment provide that ‘Congress shall make
15 no law respecting an establishment of religion, or prohibiting the free exercise thereof.’”
16 *Espinoza v. Montana Dept. of Rev.*, 140 S.Ct. 2246, 2254 (June 30, 2020). This includes
17 not only government approval of religion, but its disapproval of or hostility toward religion.
18 *American Family Association, Inc. v. City & Cty. of San Francisco*, 277 F.3d 1114, 1121
19 (9th Cir. 2002); *C.F. ex rel. Farnan v. Capistrano Unified Sch. Dist.*, 654 F.3d 975, 985
20 (9th Cir. 2011).

21 Courts are directed to apply the “Lemon test” in cases challenging government
22 conduct under the Establishment Clause. *Id.* at 1121. Government action regarding religion
23 only satisfies the Establishment Clause if it (1) has a secular purpose; (2) does not have the
24 principle or primary effect of advancing or inhibiting religion; and (3) does not foster
25 excessive entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971).

26 Plaintiffs argue that the challenged module fails under the second prong of the
27 *Lemon* test. “Under the second prong of the Lemon test, [the Court] must consider whether
28 the government action has the principal or primary effect of advancing or inhibiting

1 religion.” *Am. Family*, 277 F.3d at 1122 . When making this determination, courts decide
2 whether it would be “objectively reasonable for the government action to be construed as
3 sending primarily a message of either endorsement or disapproval of religion.” *Vernon v.*
4 *City of L.A.*, 27 F.3d, 1385, 1398 (9th Cir. 1994); *Am. Family*, 277 F.3d at 1122 (“A
5 reasonable, informed and objective observer would not the view the primary effect of this
6 resolution as inhibition of religion.”). The analysis is whether the government action
7 “‘primarily’ disapproves” of religious beliefs notwithstanding the fact that one may infer
8 possible government disapproval of religious beliefs. *Vernon*, 27 F.3d at 1398. Under this
9 objective standard, even where the government practice reflects “some disapproval” of
10 religion, this alone is not enough to run afoul of the Establishment Clause. *California*
11 *Parents for Equalization of Educ. Mat. v. Torlakson*, 370 F.Supp.3d 1057, 1079 (N.D. Cal.
12 2019). “Courts have long emphasized the importance of academic freedom in deciding the
13 appropriate curriculum for the classroom.” *Smith v. Arizona*, No. CV 11-1437-PHX-JAT,
14 2012 WL 3108818, at *7 (D. Ariz. July 31, 2012).

15 Examining the course as a whole, a reasonable, objective observer would conclude
16 that the teaching’s primary purpose was not the inhibition of religion. The offending
17 component was only a part of one-sixth of the course and taught in the context of explaining
18 terrorism. One aspect of terrorism is Islamic terrorism. Only in picking select quotes from
19 the course can one describe the module as anti-Islam. Dr. Damask also quotes Peter Bergen
20 for the view that the terrorist threat comes from radical terror groups that represent a
21 “twisted” variant of Islam as a whole.⁴ Thus, the Court finds that the primary effect of Dr.
22 Damask’s course is not the inhibition of the practice of Islam. Therefore, the Plaintiffs’
23 Establishment Clause claims must be dismissed pursuant to Rule 12(b)(6).

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26 ⁴ Further, as Plaintiff’s counsel misstated in oral argument, Question 19 of Dr. Damask’s
27 quiz on terrorism states: “Walid Phares notes that although ‘gullible’ Westerners are taught
28 that jihad can have two meanings, people in the Arabic world understand that its
overwhelmingly obvious meaning is_____.” (Doc. 1, Ex. 3). This question merely asks
students to identify the opinion of Walid Phares regarding Islam, not to adopt his position
on Islam.

1 ii. Free Exercise Clause

2 “The Free Exercise Clause, which applies to the States under the Fourteenth
3 Amendment, ‘protects religious observers against unequal treatment’ and against ‘laws that
4 impose special disabilities on the basis of religious status.’” *Espinoza*, 2020 WL 3518364,
5 at *5 (quoting *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 137 S.Ct. 2012, 2021
6 (2017)). In order to demonstrate a violation of the Free Exercise Clause, “a litigant must
7 show that challenged state action has a coercive effect that operates against the litigant’s
8 practice of his or her religion.” *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1533
9 (9th Cir. 1985). Put another way, the challenged government conduct must substantially
10 burden a religious practice. *Am. Family*, 277 F.3d at 1123. The factors to consider in a Free
11 Exercise challenge are: “(1) the extent of the burden upon the exercise of religion, (2) the
12 existence of a compelling state interest justifying that burden, and (3) the extent to which
13 accommodation of the complainant would impede the state's objectives. *Id.* (citing
14 *Callahan v. Woods*, 736 F.2d 1269, 1273 (9th Cir. 1984)).

15 Curriculum that merely conflicts with a student’s religious beliefs does not violate
16 the Free Exercise Clause. *Parker v. Hurley*, 514 F.3d 87, 106 (1st Cir. 2008) (requirement
17 that public school students to read a book featuring gay couples did not violate
18 constitutional rights of Christian parents or children); *California Parents for Equalization*
19 *of Educ. Materials v. Torlakson*, 267 F. Supp.3d 1218, 1225-27 (N.D. Cal. 2017) (ruling
20 that requiring students to learn class material that the plaintiffs viewed as “derogatory
21 towards Hinduism” did not violate the Free Exercise Clause). “[D]istinctions must be
22 drawn between those governmental actions that actually interfere with the exercise of
23 religion, and those that merely require or result in exposure to attitudes and outlooks at
24 odds with perspective prompted by religion.” *Torlakson*, 267 F.Supp.3d at 1226-27
25 (quoting *Grove*, 753 F.2d at 1543). Government action that merely offends religious beliefs
26 do not violate the Free Exercise Clause, “‘actual burden on the profession or exercise of
27 religion is required.’” *Id.* at 1227 (quoting *Groves*, 753 F.2d at 1543).

28 Here, Mr. Sabra alleges that he was forced to choose between denouncing his

1 religion by selecting the “correct” answer or receiving a lower grade. That is simply not
2 correct. As Defendants point out, Mr. Sabra was not required to adopt the views expressed
3 by Dr. Damask or the authors Dr. Damask cited to in his course, but only to demonstrate
4 an understanding of the material taught. Dr. Damask’s course did not inhibit Mr. Sabra’s
5 personal worship in any way. Instead, Mr. Sabra was simply exposed to “attitudes and
6 outlooks at odds” with his own religious perspective. *See Torlakson*, 267 F.Supp.3d at
7 1226-27. Therefore, as a matter of law, the Court finds that the Plaintiff’s allegations do
8 not amount to a violation of the Free Exercise Clause by the Defendants, and these claims
9 must be dismissed pursuant to Rule 12(b)(6).

10 iii. Dr. Damask’s Qualified Immunity

11 Government officials are entitled to qualified immunity from civil damages unless
12 their conduct violates “clearly established statutory or constitutional rights of which a
13 reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).
14 Officials are not entitled to qualified immunity if “(1) they violated a federal statutory or
15 constitutional right, and (2) the unlawfulness of their conduct was ‘clearly established at
16 the time.’” *District of Columbia v. Wesby*, — U.S. —, 138 S. Ct. 577, 589 (2018) (quoting
17 *Reichle v. Howards*, 566 U.S. 658, 664, (2012)). Courts may address either prong first
18 depending on the circumstances in the case. *Pearson v. Callahan*, 555 U.S. 223, 230–32,
19 235-36 (2009).

20 In determining whether a constitutional right was clearly established at the time of
21 the alleged violation, “a case directly on point” is not required, “but existing precedent
22 must have placed the statutory or constitutional question beyond debate.” *Mullenix v. Luna*,
23 136 S. Ct. 305, 308 (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 741 (2011)). Both
24 Defendants and Plaintiffs have cited to numerous cases surrounding what constitutes an
25 Establishment Clause violation in a college classroom. An analysis of those cases
26 demonstrates that existing precedent is anything but clear. This is especially true in the
27 context of teaching topics that surround and /or incorporate religion. *See, e.g., C.F. ex rel.*
28 *Farnan*, 654 F.3d at 986 (finding that the law on Establishment Clause violations by

1 teachers in the classroom “was not clearly established at the time of the events in
2 question”). *See also Smith v. Arizona*, 11-1437-PHX-JAT, 2012 WL 3108818, at *7
3 (refusing to conclude that a community college professor would have been aware that
4 conduct was in violation of “clearly established constitutional right.”).

5 The Court cannot conclude that Dr. Damask would have been on notice that his
6 actions might be unconstitutional and therefore finds that he would be entitled to qualified
7 immunity if Plaintiff’s claims had not been dismissed on other grounds.

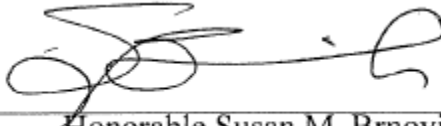
8 **IV. CONCLUSION**

9 For the reasons discussed above,

10 **IT IS ORDERED granting** Defendants’ Motion to Dismiss (Doc. 25).

11 **IT IS FURTHER ORDERED** directing the Clerk of the Court to terminate this
12 case.

13 Dated this 18th day of August, 2020.

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18 Honorable Susan M. Brnovich
19 United States District Judge
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