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UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA

American Muslims for Palestine and Dr.
Hatem Bazian,

Plaintiffs,

vs.

Arizona Board of Regents for and on
behalf of Arizona State University; and
Mark Brnovich, in his official capacity
as Attorney General Of Arizona,
Defendants.

Case No: 2:18-cv-00670-PHX-JJT

**DEFENDANTS' REPLY TO RESPONSE
IN SUPPORT OF THEIR MOTION TO
DISMISS**

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INTRODUCTION

Plaintiffs’ Opposition brief is—much like this suit itself—far more germane to Plaintiffs’ public relations campaign than the legal issues actually presented here. For example, Plaintiffs remarkably devote more than 7 *pages* of their 17-page brief to issues not actually raised by Defendants’ motion to dismiss (*i.e.*, the merits of their First Amendment claim). *See* Doc. 28 (“Opp.”) at 5-11. But that constitutional argumentation is utterly irrelevant for resolving the motion to dismiss at issue here—which raises mootness, ripeness and other procedural issues alone.

As to the arguments that Defendants actually *did* make in their motion to dismiss, Plaintiffs have precious little—and often nothing at all—to say. In particular, Defendants asserted prudential mootness as an entirely sufficient ground for dismissal. *See* Doc. 24 (“MTD”) at 10-13. That argument would be hard to miss: it was more than four pages long and an entire subsection (I.D) of the motion to dismiss. But Plaintiffs do not offer *any* response to this dispositive argument. Not one word. Plaintiffs thus offer no basis on which this Court could decline to dismiss this action under the doctrine of prudential mootness, and this Court should dismiss on that conceded ground alone.

Plaintiffs similarly offer no response to Defendants’ equally unmissable and dispositive argument that this case should be dismissed as unripe—*i.e.*, Roman II of the argument. *See* MTD at 13-14. This Court should therefore dismiss this action on that fully sufficient and conceded ground as well.

Plaintiffs’ unwillingness or inability to address these dispositive issues ultimately makes resolution of Defendants’ motion to dismiss supremely simple: this Court can—and should—grant the motion on those conceded grounds alone, and avoid reaching any other (actually contested) issue. Indeed, because Plaintiffs’ silence concedes lack of subject matter jurisdiction *at least twice*, there is nothing for this Court to do but “‘announc[e] th[at] fact and dismiss[] the cause,’” since “[w]ithout jurisdiction the court cannot proceed at all.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998).

Even as to the issues that Plaintiffs do address—which are irrelevant in light of

1 Plaintiffs’ dispositive concessions—their arguments cannot withstand scrutiny. Although
 2 Plaintiffs attempt to rely on the “voluntary cessation” exception to mootness, they neither
 3 dispute that (1) the fact that “time has passed and Plaintiffs have given their speech”
 4 (MTD at 9) is not voluntary cessation, but rather ordinary mootness (since time marches
 5 on no matter what actions Plaintiffs or Defendants take), nor (2) Defendants’
 6 demonstration that “the voluntary cessation exception does not apply where, as here,
 7 Defendants had already ceased the relevant conduct before this action was filed.” MTD
 8 at 9. Both of these grounds preclude application of the voluntary cessation exception.

9 Plaintiffs similarly cannot satisfy their burden in asserting the capable-of-
 10 repetition, yet-evading-review exception to mootness. Plaintiffs never deny that their
 11 constitutional challenges will not evade review because “a virtually identical First
 12 Amendment challenge to the Act is pending before this Court in *Jordahl v. Brnovich*, No.
 13 17-cv-8263 (D. Ariz. filed Dec. 6, 2017).” MTD at 9. Plaintiffs simply ignore that
 14 argument entirely. Plaintiffs similarly have not established any genuine likelihood of
 15 repetition where ASU—the only university in Arizona named in Plaintiffs’ complaint—
 16 changed its policy even before this suit was filed. There is thus no reason to believe that
 17 Plaintiffs will ever encounter the ASU policy that they challenged again. And to the
 18 extent that Plaintiffs have issues with other universities, those issues can and must wait
 19 for a new suit that satisfies the requirements of Article III.

20 ARGUMENT

21 I. PLAINTIFFS HAVE CONCEDED THIS ACTION IS PRUDENTIALY 22 MOOT AND UNRIPE

23 Ultimately *everything* that Plaintiffs say in their Opposition is rendered irrelevant
 24 by what they do not say—*i.e., anything* in response to Defendants’ prudential mootness
 25 and ripeness arguments, both of which mandate dismissal if accepted by this Court. And
 26 Plaintiffs have failed to offer any basis on which those arguments could be rejected. This
 27 Court should therefore dismiss on the bases of prudential mootness and/or ripeness,
 28 which Plaintiffs have conceded is appropriate.

1 **A. Prudential Mootness Is Both Appropriate And Conceded Here**

2 Defendants’ motion argued—as an entirely independent and sufficient ground—
3 that this case should be dismissed under the doctrine of prudential mootness, citing
4 numerous precedents applying the doctrine. *See* MTD at 10-13. In response, Plaintiffs
5 argue, well, *nothing*. Plaintiffs do not even acknowledge Defendants’ prudential
6 mootness argument, let alone address any aspect of it. Indeed, the word “prudential”
7 does not even appear *anywhere* in their brief. Nor do Plaintiffs address in any genuine
8 detail the extensive evidence that Defendants cited in support of their argument—
9 including Defendants’ demonstration that the representations made by Plaintiffs to this
10 Court about their willingness to sign the applicable contracts if the anti-Israel-boycott
11 clauses were removed ultimately proved to be false. *See* MTD at 11-12.

12 Plaintiffs’ non-response should resolve this case. By thoroughly defaulting on a
13 dispositive argument, dismissal for prudential mootness is amply warranted here.

14 **B. This Case Is Concededly Unripe**

15 Plaintiffs similarly ignore—entirely—Defendants’ ripeness argument, which is
16 another fully sufficient ground for dismissal. *See* MTD at 13-14. The only time any
17 form of the word “ripe” appears anywhere in their brief is in a case parenthetical for the
18 entirely separate point that Plaintiffs must produce ““affidavits or any other evidence
19 necessary to satisfy [their] burden of establishing . . . subject matter jurisdiction.”” *Opp.*
20 at 4 (citation omitted). Plaintiffs never acknowledge the necessity of Article III ripeness
21 at all, let alone attempt to satisfy the requisite “genuine threat of imminent prosecution”
22 requirement. This Court should therefore dismiss for lack of ripeness as well.

23 **II. PLAINTIFFS’ EXTENSIVE DISCUSSION OF THE CONSTITUTIONAL**
24 **MERITS AND FACTUAL NON SEQUITURS ARE IRRELEVANT**

25 **A. Plaintiffs’ Extensive Discussion Of The First Amendment Merits Is**
26 **Irrelevant and Unserious**

27 Plaintiffs’ Opposition engages in a lengthy and completely irrelevant discussion of
28 the merits of their First Amendment claim, which consumes nearly half of their brief.

1 *See* Opp. at 5-11. Plaintiffs appear to use this extensive non sequitur as the premise for
 2 their contention (at 4) that Defendants have not addressed the merits of Plaintiffs’ First
 3 Amendment claim because they “know it [the Act] cannot withstand judicial scrutiny.”
 4 That *ad hominem* attack is specious. The Attorney General and the State have not
 5 remotely been shy about defending the constitutionality of the Act when subject matter
 6 jurisdiction for such a challenge is even *arguably* present. In the *Jordahl* case the State
 7 extensively briefed the First Amendment claim. *See Jordahl v. Brnovich*, No. 17-cv-
 8 8263 (D. Ariz. filed Dec. 6, 2017) (Docs. 28, 46). Moreover, the State of Arizona
 9 voluntarily intervened as a defendant specifically so that it could defend the
 10 constitutionality of its statute. *See id.* (Doc. 24).

11 The Attorney General and the State are more than prepared to mount a robust
 12 defense of the constitutionality of the Act in any case where the merits of such arguments
 13 are even plausibly presented. But that is not remotely the case here. This action is
 14 patently moot and unripe, as Plaintiffs’ numerous concessions by silence concede.¹

15 **B. Plaintiffs’ Factual Red Herrings Are Irrelevant**

16 Plaintiffs’ Opposition is loaded up with numerous red-herring factual assertions,
 17 few of which Plaintiffs actually argue should have legal relevance. The bulk thus appear
 18 to serve little function aside from clouding the issues or throwing mud. But because
 19 those red herrings contain several none-too-subtle insinuations of impropriety,
 20 Defendants will address them briefly even though they have no legal relevance.

21 Plaintiffs cast various aspersions by alleging (at 3) that, with respect to ASU’s
 22 speaker contract, “the metadata of that document says it was created by an ASU
 23 administrative assistant on February 22, 2018.” That is both incorrect and irrelevant on
 24

25 ¹ Moreover, even on the First Amendment issues, Plaintiffs’ silence on dispositive issues
 26 is all-but deafening. Plaintiffs’ notably do not address the dispositive precedents of
 27 *Rumsfeld v. FAIR*, 547 U.S. 47 (2006), *International Longshoremen’s Ass’n, AFL-CIO v.*
 28 *Allied Int’l, Inc.*, 456 U.S. 212, 214, 223-26 (1982), and *Regan v. Taxation With*
Representation of Wash., 461 U.S. 540, 549 (1983). Plaintiffs’ discussion of the
 constitutional issues is thus deeply unserious, as the State will eagerly explain if this
 Court concludes that subject matter jurisdiction exists here.

multiple levels. *First*, Plaintiffs’ assertions relate to a version of the speaker contract not provided by ASU, or even a member of Muslim Students Association, but instead some unspecified “reporter.” It is far from clear why a version of the speaker form provided by a non-party after this suit was filed (and thus necessarily played no part in the events alleged in the Complaint) has any relevance whatsoever. *Second*, the metadata from the version omitting the anti-Israel-boycott clause shows a) that February 22, 2018 was simply the date that particular version was “saved;” and b) that it was actually created on December 13, 2017. 3d Cárdenas Decl. ¶3 & Ex. A. *Third*, the Defendants did not claim that the speaker form was never changed after December 2017—instead they expressly stated that “[t]he speaker form agreement has been revised since December 2017, but none of the revised versions included any certification with respect to boycotts of Israel.” 2d Cárdenas Decl. ¶5. The fact that a subsequent copy of the document floating around with some unnamed reporter may have a later creation date does not change the fact that the anti-Israel-boycott clause was removed in December 2017 and has never been added back into *any* subsequent version of the form. *Id.* ¶¶4-5. *Fourth*, even accepting Plaintiffs’ mistaken assertion of a February 22, 2018 “creation” date, that is still *before* this suit was filed, thus precluding any application of the voluntary cessation exception. *See infra* at 7-8. *Fifth*, Plaintiffs never make any argument concerning metadata in their argument section, effectively conceding its irrelevance with respect to Article III mootness.

Plaintiffs also (at 3) point to other contracts used by ASU and suggest they are somehow relevant to Article III mootness. But *none* of those contract forms are used for student-group-invited speakers, 3d Cárdenas Decl. ¶2—*i.e.*, the only dispute presented by Plaintiffs’ Complaint. Because there is no indication that Plaintiffs intend to perform any function at ASU other than speaking, those other contract forms are irrelevant.

Plaintiffs further point to the speaker forms used by University of Arizona (“UofA”) and Northern Arizona University (“NAU”). None of those forms have any

1 relevance because Plaintiffs' Complaint only challenged the speaker form used by ASU.
 2 Indeed, Plaintiffs' Complaint does not even mention either institution.

3 In addition, Plaintiffs cannot retroactively reframe their Complaint (particularly
 4 without amending it formally) to evade mootness.² In any event, Plaintiffs attempt to
 5 bolster their likelihood-of-recurrence argument by alleging that they are "exploring
 6 opportunities" to potentially speak at University of Arizona at some future unspecified
 7 date does not satisfy Article III. *See, e.g., Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564
 8 (1992) ("Such 'some day' intentions—without any description of concrete plans, or
 9 indeed even any specification of when the some day will be—do not support [Article III
 10 jurisdiction.]"). Moreover, UofA and NAU have now revised their speaker forms to
 11 eliminate the no boycott clause. Tribbensee Decl. ¶¶ 2-5. Plaintiffs are therefore now
 12 free to speak at any of the three universities under ABOR's jurisdiction without fear that
 13 they will have to sign a contract with an anti-Israel-boycott clause.

14 **III. THIS SUIT IS CONSTITUTIONALLY MOOT**

15 In addition to being prudentially moot, this case is also moot as a matter of Article
 16 III. The fact that Plaintiffs' April 3 speeches have come and gone, as well as the change
 17 in ASU's policy (the *only* policy challenged by the Complaint) each independently render
 18 this suit moot. Nor can Plaintiffs squeeze within any exception to Article III mootness.

19 **A. This Case Is Moot Unless It Falls Within An Exception**

20 Plaintiffs' Complaint only identifies a single instance where the challenged policy
 21 of ASU would ever be applied against Plaintiffs—Plaintiffs' April 3, 2018 speaking
 22 engagements. Complaint ¶ 37. No other potential application of the challenged speaker

23
 24 ² *See Shoshone-Bannock Tribes v. Fish & Game Comm'n, Idaho*, 42 F.3d 1278, 1282
 25 (9th Cir. 1994) (request for declaratory judgment in challenge to order prohibiting certain
 26 fishing during summer of 1991 was moot once the summer was over because the claims
 27 were "narrowly focused on a single past event"); *Center for Biological Diversity v. Lohn*,
 28 511 F.3d 960, 964 (9th Cir. 2007) (claim seeking endangered listing for the Southern
 Resident killer whale was mooted when the agency listed the population; possibility that
 the government policy "might adversely affect ... the Service's listing determination of
 certain other killer whale populations at some indeterminate time in the future is too
 remote and too speculative a consideration to save this case from mootness").

1 contract/Act would ever be applied to them; nor was another other university’s speaker
 2 contract identified—let alone challenged. Accordingly, this case was mooted (subject to
 3 possible exceptions not applicable here as discussed next) both when (1) ASU changed
 4 its speaker contract in December 2017, and (2) Plaintiffs gave their April 3 speeches
 5 without any hindrance by Defendants whatsoever. *See* MTD at 5-7.

6 Plaintiffs appear to argue that this case is not moot because this Court could issue
 7 declaratory relief. *See* Opp. at 16 (“This Court can grant relief by declaring that the anti-
 8 BDS Act violates the First Amendment[.]”). But there is no exception to mootness for
 9 declaratory relief: “[a] federal court cannot issue a declaratory judgment if a claim has
 10 become moot.” *Public Utilities Comm’n v. FERC*, 100 F.3d 1451, 1459 (9th Cir. 1996);
 11 *accord Native Vill. of Noatak v. Blatchford*, 38 F.3d 1505, 1514 (9th Cir. 1994). Thus,
 12 even if the parties “continue to dispute the lawfulness of the [law/Defendants’ policy],” a
 13 case is moot when it is “no longer embedded in any actual controversy about the
 14 plaintiffs’ particular legal rights.” *Alvarez v. Smith*, 558 U.S. 87, 93 (2009). That is
 15 precisely the case here. Now that the concrete dispute about Plaintiffs’ April 3 speaking
 16 engagement has vanished, Plaintiffs’ suit is moot unless it falls within an exception to
 17 mootness. As explained next, neither exception identified by Plaintiffs applies here.

18 **B. The Voluntary Cessation Exception Does Not Apply**

19 Plaintiffs rely heavily on the voluntary cessation exception to mootness. Their
 20 supporting arguments fail for four reasons, however.

21 *First*, the voluntary cessation exception could apply (if at all) only to ASU’s
 22 change in its speaker form, not the fact that Plaintiffs’ April 3, 2018 speaking event is
 23 now in the rear-view mirror. It could hardly be disputed that Defendants do not control
 24 the flow of time, and the fact that April 3 has now come and gone is not “voluntary
 25 cessation” by Defendants, but rather the product of immutable laws of science. This
 26 aspect of mootness is effectively identical to *DeFunis v. Odegaard*, 416 U.S. 312, 318
 27 (1974), where simple passage of time rendered the dispute moot. And because the April
 28 3 speaking event is the *only* application of the speaker form/statute even alleged in

1 Plaintiffs' Complaint (Complaint ¶¶ 4-5, 37), Plaintiffs cannot rely on the voluntary
 2 cessation exception to overcome the fact that April 3, 2018 is now in the past rather than
 3 the future.

4 *Second*, Plaintiffs never dispute the State's argument that "the voluntary cessation
 5 exception does not apply where, as here, Defendants had already ceased the relevant
 6 conduct before this action was filed." MTD at 9 (citing *Public Utilities*, 100 F.3d at
 7 1460). Nor do Plaintiffs genuinely dispute that ASU had removed the anti-Israel-boycott
 8 clause from its speaker contracts *before* this suit was filed. *Id.* at 3, 9. Invocation of the
 9 voluntary cessation exception is thus concededly barred by controlling precedent here.

10 *Third*, Plaintiffs have no response *at all* to Defendants' argument that "because
 11 ABOR/ASU had already stopped using a speaker contract with the anti-boycott clause
 12 before this suit was filed, Plaintiffs also cannot satisfy the requirements of Article III
 13 standing." *See* MTD at 9. Indeed, the word "standing" does not appear whatsoever in
 14 Plaintiffs' brief at all, thereby conceding that dispositive ground as well.

15 *Fourth*, Plaintiffs never dispute that the Ninth Circuit applies a presumption of
 16 good faith with respect to governmental cessation of conduct—a presumption that
 17 Plaintiffs do not even acknowledge, let alone rebut successfully.

18 For all of these reasons, the voluntary cessation exception cannot save Plaintiffs'
 19 action from dismissal based on Article III mootness.

20 **C. Plaintiffs Have Not Satisfied The Requirements Of The Capable-Of-** 21 **Repetition, Yet-Evading-Review Exception**

22 Plaintiffs also cannot satisfy the "narrow" capable of repetition, yet evading
 23 review exception to mootness, which "applies only in 'exceptional situations.'" *Headwaters, Inc. v. BLM*, 893 F.2d 1012, 1016 (9th Cir. 1989). Indeed, Plaintiffs cannot
 24 satisfy their burden as to either prong of the exception.
 25

26 Most tellingly, Plaintiffs do not even *attempt* to respond to Defendants' argument
 27 (at 9) that the constitutional arguments advanced here "will not evade review [because] a
 28 virtually identical First Amendment challenge to the Act is pending before this Court in

1 *Jordahl v. Brnovich*, No. 17-cv-8263 (D. Ariz. filed Dec. 6, 2017).” Plaintiffs’ complete
 2 non-response to this argument precludes any conclusion that Plaintiffs have satisfied their
 3 burden on the evading-review prong.

4 Similarly, Plaintiffs’ arguments as to the likelihood of repetition fall far short of
 5 the mark. As Defendants explained, Plaintiffs “must demonstrate a ‘reasonable
 6 expectation or a demonstrated probability that the same controversy will recur involving
 7 the same complaining party.’” MTD at 8 (quoting *FEC v. Wisconsin Right to Life, Inc.*,
 8 551 U.S. 449, 463 (2007)) (quotation marks omitted). But even Plaintiffs can only bring
 9 themselves to argue that “it is not absolutely clear Plaintiffs will not encounter the No
 10 Boycott of Israel clause on their next visit to Arizona.” Opp. at 14. But “absolute
 11 certainty” of non-repetition is *not* the governing standard, and Plaintiffs apparently
 12 cannot even mouth that they satisfy the Supreme Court’s standard.

13 **IV. THE INDIVIDUAL DEFENDANTS MUST BE DISMISSED**

14 **A. The Attorney General Enjoys Sovereign Immunity**

15 As the State’s motion demonstrated, the exception of *Ex Parte Young*—the only
 16 possible exception to sovereign immunity here—only applies where state officers act in
 17 an unconstitutional manner or threaten to do so.³ See MTD at 15-16 & nn.6-7. Because
 18 the “Attorney General is not alleged to have done *anything*, or to have threatened to
 19 initiate *any* enforcement action,” *id.* at 16, Plaintiffs cannot satisfy that standard here.

20 Rather than pointing to any actual *action* or *threatened action* by the Attorney
 21 General, the Complaint only alleges that he “is responsible for enforcing and defending
 22 the constitutionality of Arizona law.” Complaint ¶ 10. But the Ninth Circuit has made
 23 plain that “a generalized duty to enforce state law or general supervisory power over the
 24 persons responsible for enforcing the challenged provision will not subject an official to
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26
 27 ³ The State reserves the right to intervene to defend the constitutionality of the Act if this
 28 case proceeds past this Motion to Dismiss, see 28 U.S.C. § 2403(b); Fed. R. Civ. P.
 24(a)(1).

suit.” *Snoeck v. Brussa*, 153 F.3d 984, 986-87 (9th Cir. 1998). And that is all that Plaintiffs allege here.⁴

B. Plaintiffs’ Claim Against The Attorney General Fails For Lack of Standing And Ripeness

Plaintiffs also fail to establish Article III standing and ripeness with respect to the Attorney General. *See, e.g., Calzone v. Hawley*, 866 F.3d 866, 869 (8th Cir. 2017) (“Article III standing to sue each defendant also requires a showing that each defendant caused his injury and that an order of the court against each defendant could redress the injury.”). The failure to allege any actual action by the Attorney General necessarily precludes Plaintiffs from satisfying this standard. *See, e.g., Arizona Attorneys for Criminal Justice v. Ducey*, No. 17-cv-1422, 2018 WL 1570244, at *5 (D. Ariz. Mar. 30, 2018) (“Because Plaintiffs set forth no facts which show that they have suffered an injury as a result of some conduct of the Attorney General, it follows that it is not likely, much less plausible, that an injunction against him would redress their injury.”).

Similarly, Plaintiffs’ complete failure to address ripeness at all, *supra* at 3, necessarily means that they have not established ripeness with respect to their claim against the Attorney General.

C. Plaintiffs Have Not Stated A Valid Section 1983 Claim

Contrary to Plaintiffs’ apparent position, Section 1983 is not an absolute liability (*i.e.*, liability-without-fault) provision. *See Vance v. Peters*, 97 F.3d 987, 991 (7th Cir. 1996) (“Section 1983 creates a cause of action based on personal liability and predicated

⁴ Plaintiffs cite (at 17) to A.R.S. § 35-301 in their Opposition. That argument is both (1) waived for failure to include it in the Complaint and (2) unavailing, because it merely provides the Attorney General with a *general duty* to enforce Arizona law in the expenditure of public funds that is insufficient under *Snoeck*. For the same reasons, Plaintiffs citation of *Planned Parenthood of Idaho, Inc. v. Wasden*, 376 F.3d 908, 920 (9th Cir. 2004) is unavailing. There the court found that the Idaho attorney general was not immune because he had the statutory authority to deputize himself into the role of county prosecutor, and then prosecute *plaintiffs* on the basis of a *criminal* enforcement provision in the *challenged* Idaho law. *Id.* at 912, 920. But the Attorney General possesses no such authority here.

1 upon fault; thus, liability does not attach unless the individual defendant caused or
2 participated in a constitutional deprivation”); *Taylor v. List*, 880 F.2d 1040, 1045 (9th
3 Cir. 1989) (stating that “[l]iability under section 1983 arises only upon a showing of
4 personal participation by the defendant”). Instead, Section 1983 requires actual wrongful
5 conduct by a party to impose substantive liability on it. Plaintiffs have not alleged such
6 conduct for either Defendant.

7 As to the Attorney General, Plaintiffs never deny that they have not alleged *any*
8 action by him, let alone wrongful conduct. Because Section 1983 cannot impose liability
9 without fault, Plaintiffs necessarily have failed to allege a viable claim against the
10 Attorney General.

11 Similarly, Plaintiffs’ Complaint does not allege a viable claim against ABOR.
12 Plaintiffs notably do not deny Defendants’ arguments that “the Complaint does not allege
13 that ABOR/ASU provided to Plaintiffs the speaker form to which Plaintiffs objected, and
14 Plaintiffs’ own documents establish it was the student group that did so.” MTD at 17.
15 Because the allegedly unconstitutional—and outdated—contract was circulated
16 negligently by a third party, not ABOR/ASU, Plaintiffs’ Complaint thus unlawfully seeks
17 to impose liability without fault on ABOR as well. Moreover, because Plaintiffs have not
18 alleged that ABOR took any actions against *them* under color of law that violate federal
19 law, Plaintiffs cannot validly name ABOR as a Section 1983 defendant.

20 CONCLUSION

21 Because Plaintiffs have conceded that dismissal is appropriate on grounds of
22 prudential mootness and ripeness, Defendants’ motion to dismiss should be granted.
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1 Respectfully submitted this 14th day of June, 2018.

2 MARK BRNOVICH
3 ATTORNEY GENERAL

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20 University*
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CERTIFICATE OF SERVICE

I hereby certify that on this 14th day of June, 2018, I caused the foregoing document to be electronically transmitted to the Clerk's Office using the CM/ECF System for Filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

American Muslims for Palestine and Dr.
Hatem Bazian,

Plaintiffs,

vs.

Arizona Board of Regents for and on behalf
of Arizona State University; and Mark
Brnovich, in his official capacity as
Attorney General Of Arizona,
Defendants.

Case No: 2:18-cv-00670-PHX-JJT

DECLARATION OF JOSÉ A. CÁRDENAS

I, José A. Cárdenas, declare as follows:

1. I am an attorney licensed to practice law in Arizona. I am Senior Vice President and General Counsel for Arizona State University (“ASU”). I have personal knowledge of the matters referred to herein and if called upon to testify could and would testify truthfully thereto.

2. Neither the ASU “Independent Contractor Agreement for Consulting, Services, Deliverables” nor the ASU “Supplemental Terms and Conditions” documents apply to student-group-invited guest speakers at ASU. Instead, the “Speaker / Artist / Performer Agreement” is used for such speakers. Since December 2017, that form has not contained an anti-Israel-boycott clause. The “Speaker / Artist / Performer Agreement” is one of five specific use form contracts available at the Office of General

Counsel website for use in recurring situations. The other form contracts are Independent Contractor Agreement for Consulting, Services, Deliverables; Facilities Use Agreement; Participation Agreement; and Student Placement Agreements. Users of these form contracts do not need to, nor should they, refer back to the “Supplemental Terms and Conditions,” as they already contain all of the provisions that my office has determined are necessary.

3. Attached hereto as Exhibit A is a true screenshot indicating the metadata of the February 9, 2018 version of the speaker form. The metadata says “Date last saved 2/22/18” and “Content created 12/13/2017.” That speaker form omitted any anti-Israel-boycott clause, as have all subsequent versions. A comparison of the February 9, 2018 version with the December 13, 2017 version shows the changes made to the earlier document, and is attached as Exhibit B. None of those changes had anything to do with the anti-Israel-boycott clause, which is absent from both.

I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge, and that this declaration was issued on June 14, 2018 in Flagstaff, Arizona.

s/ José A. Cárdenas
José A. Cárdenas

Exhibit A

General Security Details Previous Versions

Property	Value
Origin	
Authors	Cynthia Leedom
Last saved by	Cynthia Leedom
Revision number	14
Version number	
Program name	Microsoft Office Word
Company	Arizona State University
Manager	
Content created	12/13/2017 1:41 PM
Date last saved	2/22/2018 11:01 AM
Last printed	
Total editing time	01:34:00
Content	
Content status	
Content type	application/vnd.openxmlformats-offi...
Pages	5
Word count	2168
Character count	12361

[Remove Properties and Personal Information](#)

OK Cancel Apply

Exhibit B



SPEAKER/ARTIST/PERFORMER AGREEMENT

This Agreement is entered into as of _____, 20____, between the Arizona Board of Regents acting for and on behalf of Arizona State University (ASU) and _____¹ (Speaker), or _____, a(n) _____, ² as the authorized agent for Speaker. If Speaker is represented by an authorized agent, then references to Speaker herein will also refer to the authorized agent, where appropriate.

1. Engagement; Event. ASU hereby engages Speaker to personally provide the following services, and Speaker agrees to personally provide to ASU the following services (the Presentation) at the following Event (the Event): ¶

Event/Location: —

Dates and times of Event:—

Speaker's Presentation schedule: _____

Title of Speaker's Presentation: —

Speaker's hospitality requirements: _____

Speaker's technical requirements: _____

2. Notice. Any communication or notice required under this Agreement will be in writing and may either be given by personal delivery or sent, in all cases, against receipt, addressed to the following:¶

If to ASU:

Attn: _____

Email: _____

If to Speaker:

Attn: _____

Email: _____

Notice will be deemed to be received upon actual receipt (or refusal of receipt) by the receiving party.

3. Speaker Warranty. Speaker warrants that at all times during the Event, Speaker will personally provide Speaker's best professional efforts. Speakers' professional credentials are such that Speaker can provide the Presentation in a knowledgeable and professional manner.

4. Payment. ASU will pay Speaker the all-inclusive fee of \$_____ upon completion of the Presentation. Speaker will complete a Substitute W-9 Form, which must be

¹ If an authorized agent is signing, please be sure to fill in the speaker name as well.

² Include full legal name of authorized agent, state of formation, and type of entity (i.e.: ABC, Inc., an Arizona Corporation.)

signed by the person or entity to whom payment is to be issued. ASU will issue all payment in accordance with the information on the completed and signed Substitute W-9 Form.

5. Acceptance of Agreement. Speaker will accept and return this Agreement to ASU no later than _____, 20__. In all events, this Agreement must be fully signed and received at ASU at least one week prior to the Event to allow on-time payment. This Agreement must be fully signed before payment can be processed. Please return a signed copy of this Agreement to ASU at the address set forth in Section 2.

6. Compliance with Law. Speaker will comply with all applicable ASU, City, County, State, and Federal laws, acts, codes, regulations and policies, including all applicable federal immigration laws and regulations that relate to employment.

7. Press Materials. Speaker will timely supply all press/promotion material requested by ASU.

8. Indemnity. Speaker will indemnify, defend, save and hold ~~ASU~~ harmless the State of Arizona, its departments, agencies, boards, commissions, universities, and its and their officials, agents, and employees (collectively, Indemnatee) for, from, and against, any and all claims, ~~demands, suits, costs and actions, liabilities, damages, losses, or expenses~~ (including ~~reasonable attorneys' fees~~) that ASU may incur by reason of any: (a) actual or alleged infringement or violation of any copyright, or other proprietary right by Speaker; (b) claim for damages arising from Speaker's Presentation; or (c) any of Speaker's costs and liabilities arising out of the Presentation or Event, including without limitation: travel and meal expenses; union dues; taxes; agents' commissions or other expenses or obligations; damages to Speaker's equipment or materials; compensation to third parties engaged by Speaker; compensation for lost or stolen equipment or materials; workers compensation or other insurance; and any expenses not preapproved by ASU in writing ~~court costs, attorneys' fees, and costs of claim processing, investigation, and litigation~~) for bodily injury or personal injury (including death), or loss or damage to tangible or intangible property to the extent caused, or alleged to be caused, by: (i) the negligent or willful acts or omissions of Speaker, or any of its owners, officers, directors, members, managers, agents, employees, contractors or subcontractors (the Speaker Parties); (ii) a breach of this Agreement; or (iii) failure to comply with any applicable law, rule, or regulation. Speaker will be responsible for primary loss investigation, defense, and judgment costs where this indemnification is applicable.

9. Indemnification and Liability Limitation. Because ASU is a public institution, any indemnification, liability limitation, releases, or hold harmless provisions are limited as required by Arizona law, including Article 9, Sections 5 and 7 of the Arizona Constitution and ~~Arizona Revised Statutes (ARS)~~ §§ 35-154 and 41-621. ASU's liability under any claim for indemnification is limited to claims for property damage, personal injury, or death to the extent caused by acts or omissions of ASU.

10. Force Majeure. Neither Speaker nor ASU shall be liable to each other for failure to perform hereunder if failure is caused by civil tumult, strike, epidemic, or any other cause beyond the reasonable control of the parties (Force Majeure). The ingestion of alcohol, opioids, illegal substances, or the like, will not be deemed an event of Force Majeure. If the Event or Presentation is cancelled due to an event of Force Majeure, the parties will make reasonable efforts to reschedule, if feasible.

11. Cancellation. If either party cancels this Agreement or the Presentation, other than due to an event of Force Majeure, the other party will have all remedies afforded by law and in equity. In

addition, if ASU cancels the Event or the Presentation, ASU will reimburse Speaker for reasonable expenses incurred in preparation for the Presentation up to the date ASU provides notice of cancellation.

12. Liability; Insurance. Speaker, at its expense, will procure and maintain, for the duration of the Event, a policy of commercial general liability insurance in an amount of not less than \$1,000,000, single limit, against claims for bodily injury, death and property damage occurring in connection with the Event and the Presentation. This insurance must name the Arizona Board of Regents, Arizona State University, and the State of Arizona as additional insureds. Speaker must provide ASU with a certificate evidencing this insurance coverage no later than 10 days prior to the Presentation.

13. No Assignment. ~~Neither party~~ Speaker may not transfer or assign ~~any~~ this Agreement or any of Speaker's rights or obligations ~~under this Agreement without the~~ hereunder, either directly or indirectly, or by operation of law, without ASU's prior written consent ~~of the other party, and any attempt to the contrary will be void.~~

14. Entire Agreement. This Agreement constitutes the entire agreement and understanding of the parties with respect to its subject matter. No prior or contemporaneous agreement or understanding will be effective.

15. Governing Law and Venue. This Agreement will be governed by the laws of the State of Arizona without regard to any conflicts of laws principles. ASU's obligations are subject to the regulations/policies of the Arizona Board of Regents. Any proceeding arising out of or relating to this Agreement will be conducted in Maricopa County, Arizona. ~~Speaker~~ Each party consents to such jurisdiction, and waives any objection it may have to venue or convenience of forum. ¶

16. Independent Contractor. Speaker is an independent contractor and is not an employee of ASU. Neither Speaker nor any personnel of Speaker will for any purpose be considered employees or agents of ASU. Speaker assumes full responsibility for the actions of Speaker's personnel, and is solely responsible for their supervision, direction and control, payment of salary and expenses (including withholding income taxes and social security), worker's compensation, and disability benefits.

17. Recordings; Use of Name and Likeness. Both parties may record the Presentation for internal records. No recording of the Presentation, either visual or audio, will be made by or on behalf of Speaker for the purposes of profit or significant distribution without prior written approval from ASU. ASU may require an additional payment for the privilege, and may require Speaker to sign a filming/recording agreement. ASU may record the Presentation on video tape, audio tape, film, photograph or any other medium, use Speaker's name, likeness, voice and biographical material in connection with these recordings for purposes within the ASU mission, including education and research, and exhibit or distribute the recording in whole or in part without restrictions or limitation for any educational or promotional purpose that ASU deems appropriate.

18. No Revenue Sharing. Speaker will not participate in any revenues associated with the Presentation or Event. This includes: sponsorship, ticketing, ticketing fees, ASU concessions revenues, and any other revenue streams that may be associated with the Event.

19. Non-discrimination. The parties will comply with all applicable laws, rules, regulations, and executive orders governing equal employment opportunity, immigration, and nondiscrimination,

including the Americans with Disabilities Act. **If applicable, the parties will abide by the requirements of 41 CFR §§ 60-1.4(a), 60-300.5(a) and 60-741.5(a). These regulations prohibit discrimination against qualified individuals based on their status as protected veterans or individuals with disabilities, and prohibit discrimination against all individuals based on their race, color, religion, sex, or national origin. Moreover, these regulations require that covered prime contractors and subcontractors take affirmative action to employ and advance in employment individuals without regard to race, color, religion, sex, national origin, protected veteran status or disability.**

20. Conflicts of Interest. If within 3 years after the execution of this Agreement, Speaker hires as an employee or agent any ASU representative who was significantly involved in negotiating, securing, drafting, or creating this Agreement, then ASU may cancel this Agreement as provided in Arizona Revised Statutes (ARS) § 38-511. ~~Notice is also given of ARS §§ 41-2517 and 41-753.~~

21. ~~Arbitration in Superior Court~~. The parties agree to arbitrate disputes filed in Arizona Superior Court that are subject to mandatory arbitration pursuant to ARS § 12-133. ARS § 12-1518 requires this provision in all ASU ~~agreements~~contracts.

22. Records. To the extent required by ARS § 35-214, the non-ASU parties to this Agreement (jointly and severally, Speaker) will retain all records relating to this Agreement. Speaker will make those records available at all reasonable times for inspection and audit by ASU or the Auditor General of the State of Arizona during the term of this Agreement and for 5 years after the completion of this Agreement. The records will be provided at ASU in Tempe, Arizona, or another location designated by ASU on reasonable notice to Speaker.

23. Failure of Legislature to appropriate. In accordance with ARS § 35-154, if ASU's performance under this Agreement depends on the appropriation of funds by the Arizona Legislature, and if the Legislature fails to appropriate the funds necessary for performance, then ASU may provide written notice of this to Speaker and cancel this Agreement without further obligation of ASU. Appropriation is a legislative act and is beyond ~~ASU's~~the control of ASU.~~¶¶¶~~

24. Weapons, Explosives, and Fireworks. ~~ASU~~ASU's Weapons, Explosives, and Fireworks Policy prohibits the use, possession, display, or storage of any weapon, explosive device, or fireworks on all land and buildings owned, leased, or under the control of ASU or its affiliated entities, in all ASU residential facilities (whether managed by ASU or another entity), in all ASU vehicles, and at all ASU or ASU affiliate sponsored events and activities, except as provided in ARS § 12-781, or unless written permission is given by ASU's Police Chief or a designated representative. Speaker will notify all persons or entities who are employees, officers, subcontractors, consultants, agents, guests, invitees, or licensees of Speaker of this policy, and Speaker will enforce this policy against all such persons and entities. ~~ASU's policy is at~~ asu.edu/aad/manuals/pdp/pdp201-05.html.

25. Privacy; Educational Records. Student educational records are protected by the U.S. Family Educational Rights and Privacy Act, 20 U.S.C. § 1232g (FERPA). Speaker will not require any ASU students or employees to waive any privacy rights (including under FERPA or the European Union's General Data Protection Regulation (GDPR)) as a condition for receipt of any educational services, and any attempt to do so will be void. Speaker will comply with FERPA and will not access or make any disclosures of student educational records to third parties without prior notice to and consent from ASU or as otherwise provided by law. If this Agreement contains a scope of work or other provision that requires or permits Speaker to access or release

any student records, then, for purposes of this Agreement only, ASU designates Speaker as a “school official” for ASU under FERPA, as ~~defined~~that term is used in FERPA and its implementing regulations. In addition, any access or disclosures of student educational records made by Speaker or any Speaker Parties must comply with ASU’s definition of legitimate educational purpose in SSM 107-01: Release of Student Information. If Speaker violates the terms of this section, Speaker will immediately ~~notify~~provide notice of the violation to ASU.

26. Authorized Presence Requirements. As required by ARS § 41-4401, ASU is prohibited from awarding a contract to any contractor or subcontractor that fails to comply with ARS § 23-214(A) (verification of employee eligibility through the e-verify program). Speaker warrants that it and its subcontractors comply fully with all applicable immigration laws, rules, and regulations that relate to their employees and their compliance with ARS § 23-214(A). A breach of this warranty will be a material breach of this Agreement that is subject to penalties up to and including termination of this Agreement. ASU retains the legal right to inspect the papers of any contractor or subcontractor employee who works hereunder to ensure ~~compliance with this~~that the contractor or subcontractor is complying with the above warranty.

27. Tobacco-Free University. ASU is tobacco-free. For details visit asu.edu/tobaccofree.

28. Authority. If an individual or entity signs below on behalf of Speaker, such signatory represents and warrants that he/she/it has full and current authority to act and contract on behalf of Speaker and obligate Speaker, and that this Agreement is binding upon and enforceable against Speaker and the undersigned (if not Speaker) in accordance with its terms. ¶

¶

¶

¶ PRINT NAME OF SPEAKER OR
AGENT OF SPEAKER

Date Signed ¶
ARIZONA BOARD OF REGENTS FOR AND ON
BEHALF OF ARIZONA STATE UNIVERSITY ¶

¶

Signature

Signature

Signatory Name

Signatory Name

Signatory Title

Signatory Title

Date Signed

¶

Document comparison by Workshare 9 on Thursday, June 14, 2018 7:56:41 AM

Input:	
Document 1 ID	file:///R:/SpkrArtstPrmrAggrmt/Blacklines/SpeakerArtistPerformerAgreement 12.13.17.docx
Description	SpeakerArtistPerformerAgreement 12.13.17
Document 2 ID	file:///R:/SpkrArtstPrmrAggrmt/Blacklines/S-A-P Feb2018.DOCX
Description	S-A-P Feb2018
Rendering set	Standard

Legend:	
<u>Insertion</u>	
Deletion	
Moved from	
<u>Moved to</u>	
Style change	
Format change	
Moved deletion	
Inserted cell	
Deleted cell	
Moved cell	
Split/Merged cell	
Padding cell	

Statistics:	
	Count
Insertions	56
Deletions	42
Moved from	0
Moved to	0
Style change	0
Format changed	0
Total changes	98

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

American Muslims for Palestine and Dr.
Hatem Bazian,

Plaintiffs,

vs.

Arizona Board of Regents for and on behalf
of Arizona State University; and Mark
Brnovich, in his official capacity as
Attorney General Of Arizona,
Defendants.

Case No: 2:18-cv-00670-PHX-JJT

DECLARATION OF NANCY E. TRIBBENSEE

I, Nancy E. Tribbensee, declare as follows:

1. I am an attorney licensed to practice law in Arizona. I am Senior Vice President and General Counsel for the Arizona Board of Regents. I have personal knowledge of the matters referred to herein and if called upon to testify could and would testify truthfully thereto.

2. The University of Arizona “Contracting FAQs” available at https://pacs.arizona.edu/contracting_faqs now expressly provide that anti-Israel-boycott provisions derived from A.R.S. § 35-393 *et seq.* do not apply to speaker or performer agreements at the University of Arizona.

3. Neither the University of Arizona “Performance Contract for Entertainers at University Events” nor the University of Arizona “Performance Arrangement for

Entertainers at University Events” currently contain any requirement for anti-Israel-boycott provisions derived from A.R.S. § 35-393 *et seq.*

4. Northern Arizona University’s “Standard Terms and Conditions” for contracting currently apply to procurements, not to student-group-invited guest speakers.

5. Northern Arizona University does not now require student-group-invited guest speakers to sign agreements containing anti-Israel-boycott provisions derived from A.R.S. § 35-393 *et seq.*

I declare under penalty of perjury that the foregoing is true and correct, to the best of my knowledge, and that this declaration was issued on June 14, 2018 in Flagstaff, Arizona.

s/ Nancy E. Tribbensee
Nancy E. Tribbensee