



May 7, 2020

Interim President Christina M. Haines  
Scottsdale Community College  
9000 East Chaparral Road  
Scottsdale, Arizona 85256

*Sent via Electronic Mail (chris.haines@scottsdalecc.edu)*

**URGENT**

Dear President Haines:

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to defending liberty, freedom of speech, due process, academic freedom, legal equality, and freedom of conscience on America's college campuses.

FIRE is deeply concerned by the state of freedom of expression and academic freedom at Scottsdale Community College (SCC). Our concerns arise from the college's insistence that Professor Nicholas Damask issue a pre-written apology concerning questions on a quiz he administered, its indication that the Maricopa County Community College District Governing Board (the MCCC Governing Board) is investigating the matter, and its warning that future content of Damask's course will be subject to review for "insensitivities," including by a religious leader.

The following is our understanding of the pertinent facts. We appreciate that you may have additional information to offer and invite you to share it with us. Please find attached a privacy waiver authorizing you to share information with FIRE. However, if the facts here are substantially accurate, SCC's insistence that Damask issue an apology—written for him by a member of the college's marketing team—and alter the content of his course is flatly inconsistent with the college's First Amendment obligations and the basic tenets of academic freedom. Further, the implication that Damask is being investigated by the college's governing board will have an impermissible chilling effect on faculty expression and teaching.

We urge SCC and the MCCC Governing Board to immediately cease any ongoing investigation into Damask, stop attempting to force him to issue a pre-written apology, and allow him to continue to determine his own course content.

## I. After Online Backlash Against Damask’s Course Content, SCC Promises an Apology and Alludes to an Investigation

Professor Damask is a professor and the chair of the Department of Political Science at SCC.<sup>1</sup> He has been employed by SCC for 23 years. He teaches, among other courses, classes that survey political ideas and belief systems, such as Political Ideologies (POS210), which explores arguments by supporters and critics of socialism and communism, libertarianism, fascism, religious fundamentalism, and Islamic fundamentalism.<sup>2</sup>

This spring semester, he taught POS120 World Politics, an introductory course focusing on international relations and its political, economic, national, and transnational elements and rationales.<sup>3</sup> The final module of the course material is “Islamic Terrorism.”<sup>4</sup>

As part of the course, Damask administered a quiz covering the content in the terrorism module, which related to reading material he had assigned. After Damask administered the quiz, a student emailed him to express his concern that three questions were “in distaste of Islam.”<sup>5</sup> Damask responded, indicating his “appreciat[ion] for [the student’s] heartfelt response” and explaining how the questions related to one of the broader objectives of the course, which was to consider “not that what [individual terrorists] believe is in fact a ‘true’ or ‘right’ or ‘wrong’ interpretation of a major religion,” but “the strongly held world view that *motivates* these [individuals].”<sup>6</sup> The student was not satisfied with this explanation,<sup>7</sup> and Damask emailed again to explain how the answer to each quiz question the student objected to related to the study of the religious justifications of terrorists, which was part of the content of the course.<sup>8</sup>

Before he heard back from the student again, Damask discovered that someone had shared their concern with his quiz questions online, and that his quiz was now the subject of a significant amount of negative attention on the school’s official Instagram account.<sup>9</sup> On May 1,

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<sup>1</sup> *Political Science*, SCOTTSDALE CMTY. COLL., <https://www.scottsdalecc.edu/programs/political-science> (last visited Apr. 5, 2020).

<sup>2</sup> Syllabus, POS210 Political Ideologies, *available at* [https://weba.scottsdalecc.edu/syllabus/4166/4166\\_POS210\\_27987.pdf](https://weba.scottsdalecc.edu/syllabus/4166/4166_POS210_27987.pdf).

<sup>3</sup> Syllabus, POS120 World Politics (on file with author).

<sup>4</sup> *Id.*

<sup>5</sup> Canvas message from Student to Nicholas Damask (Apr. 29, 2020, 7:09 PM) (on file with author). The quiz questions at issue read as follows: “(1) Question: Who do terrorists strive to emulate? Answer: Mohammed. (2) Question: Where is terrorism encouraged in Islamic doctrine and law? Answer: The Medina verses. (3) Question: Terrorism is \_\_\_\_\_ in Islam? Answer: Justified within the context of jihad.” Canvas is an online education platform that allows professors to communicate with students, administer quizzes, and disseminate course materials, among other functions. *Canvas LMS*, Instructure, <https://www.instructure.com/canvas/higher-education/platform/products/canvas-lms> (last visited May 7, 2020).

<sup>6</sup> Canvas message from Damask to Student (Apr. 30, 2020, 12:13 AM) (on file with author) (emphasis in original).

<sup>7</sup> Canvas message from Student to Damask (Apr. 30, 2020, 12:44 AM) (on file with author).

<sup>8</sup> Canvas message from Damask to Student (Apr. 30, 2020, 9:31 AM) (on file with author).

<sup>9</sup> It is unclear where concerns about Damask’s quiz were first shared on social media, but many individuals who took issue with the questions started expressing their offense on several of the most recent posts on SCC’s official

SCC responded with an Instagram post including a message attributed to you, reading, in pertinent part:

SCC administration has addressed with the instructor the offensive nature of the quiz questions and their contradiction to the college's values. The instructor will be apologizing to the student shortly, and the student will receive credit for the three questions. The questions will be permanently removed from any future tests.<sup>10</sup>

Last week, Damask had three phone calls with SCC Dean of Instruction Kathleen Iudicello, a senior administrator at SCC,<sup>11</sup> concerning this situation. During these calls, Iudicello implied that the MCCC Governing Board was reviewing the matter, that there may be “paperwork” forthcoming from the Board, and that Damask would need to work with a leader in the Islamic faith to ensure that his course content is appropriate. Damask left these calls feeling that his job security was in jeopardy. In response to an inquiry from the *Scottsdale Independent*, SCC refused to answer questions about the possibility of disciplinary action.<sup>12</sup>

On May 3, Damask received an email from Eric Sells, Marketing and Public Relations Manager at SCC, including an apology—drafted by Sells—that Damask was to send to the student involved.<sup>13</sup> Sells sent the draft to Damask, Iudicello, and another administrator, requesting that they “review and edit . . . so the overall message and tone is authentic.”<sup>14</sup> He also indicated that “senior leadership would likely want to review the final draft.” In addition to apologizing to the student, the apology drafted for Damask states: “Not only will the three questions be removed from all future courses, I will be reviewing all of my material to ensure there’s no additional insensitivities.”<sup>15</sup> Damask has not issued such an apology. On May 5, Sells wrote again to check in because “[w]e need to circle back to the student soon with the apology (this was stated in our communication on Friday).”<sup>16</sup>

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Instagram account. Scottsdale Community College (@scottsdalecc), INSTAGRAM, [https://www.instagram.com/p/B\\_kt2-xnI-1/?utm\\_source=ig\\_web\\_copy\\_link](https://www.instagram.com/p/B_kt2-xnI-1/?utm_source=ig_web_copy_link).

<sup>10</sup> Scottsdale Community College (@scottsdalecc), INSTAGRAM, [https://www.instagram.com/p/B\\_qf69bndl2](https://www.instagram.com/p/B_qf69bndl2). This statement was also posted as a comment on a previous post on the SCC account.

<sup>11</sup> Scottsdale Community College, Leadership & Administration, <https://www.scottsdalecc.edu/about/leadership-administration> (describing the “President’s Cabinet”) (last visited May 7, 2020).

<sup>12</sup> Melissa Rosequist, *Scottsdale Community College apologizes for discriminatory Islamic questions on quiz*, SCOTTSDALE INDEPENDENT, May 6, 2020, <https://www.yourvalley.net/scottsdale-independent/stories/scottsdale-community-college-apologizes-for-discriminatory-islamic-questions-on-quiz,157208>.

<sup>13</sup> Email from Eric Sells, Marketing and Public Relations Manager to Damask, Iudicello, and Mike Mader (May 3, 2020, 10:44 AM) (on file with author).

<sup>14</sup> *Id.*

<sup>15</sup> Draft Apology (on file with author).

<sup>16</sup> Email from Sells to Damask, Iudicello, and Mader (May 5, 2020, 8:35 AM) (on file with author) (presumably referring to the Instagram post of Friday, May 1).

## II. SCC Must Not Require Damask to Issue an Apology or Punish Him for His Course Content

SCC's decision to publicly commit Damask to apologizing and to mandate that the content at issue will be removed from his course is alarming, and inconsistent with his rights to freedom of expression and academic freedom under both the First Amendment and Arizona law. SCC must cease its efforts to force Damask to apologize to the student, recognize Damask's pedagogical autonomy—protected by the basic tenets of academic freedom—to determine the language of quizzes related to his course content, and disavow its investigation into the exercise of his protected rights.

### A. *SCC is a public institution bound by the First Amendment, and the protection of academic freedom is essential to its accreditation.*

It has long been settled law that the First Amendment is binding on public colleges like Scottsdale Community College. *Healy v. James*, 408 U.S. 169, 180 (1972) (“[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, ‘the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’”) (internal citation omitted); *see also DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008) (on public campuses, “free speech is of critical importance because it is the lifeblood of academic freedom”).

The protection of freedom of expression and academic freedom is also important to SCC's accreditation by the Higher Learning Commission. One of the core criteria for accreditation by the commission is that “[t]he institution is committed to academic freedom and freedom of expression in the pursuit of truth in teaching and learning.”<sup>17</sup> The commission defines academic freedom as follows:

The ability to engage in difference of opinion, evaluate evidence and form one's own grounded judgments about the relative value of competing perspectives. This definition implies not just freedom from constraint but also freedom for faculty, staff and students to work within a scholarly community to develop intellectual and personal qualities.<sup>18</sup>

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<sup>17</sup> HIGHER LEARNING COMM'N, CRITERIA FOR ACCREDITATION 3 (effective Sept. 2020), [http://download.hlcommission.org/policy/updates/AdoptedCriteriaRevision\\_2019\\_INF.pdf](http://download.hlcommission.org/policy/updates/AdoptedCriteriaRevision_2019_INF.pdf).

<sup>18</sup> *Id.* at 8.

Violating these commitments has previously exposed the Maricopa Community College District to liability, reflected by a settlement that required district administrators to undergo training on freedom of expression and academic freedom.<sup>19</sup>

**B. *The First Amendment protects academic freedom.***

Numerous courts have recognized that the First Amendment’s protection of freedom of speech is closely intertwined with academic freedom; indeed, “free speech is of critical importance [at universities] because it is the lifeblood of academic freedom[.]” *DeJohn v. Temple Univ.*, 537 F.3d 301, 314 (3d Cir. 2008). Universities “occupy a special niche in our constitutional tradition,” (*Grutter v. Bollinger*, 539 U.S. 306, 329 (2003)) and “academic freedom” is an area “in which government should be extremely reticent to tread.” (*Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)). As the Supreme Court explained in overturning legal barriers to faculty members with “seditious” views:

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern to the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.

*Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967).

As Justice Souter has noted, the “ostensible domain” of speech that government employers cannot control “is spacious enough to include even the teaching of a public university professor,” and the right of employers to regulate employee expression must not “imperil First Amendment protection of academic freedom in public colleges and universities. . . .” *Garcetti v. Ceballos*, 547 U.S. 410, 438 (2006) (Souter, J., dissenting).<sup>20</sup>

Indeed, “the argument that teachers have no First Amendment rights when teaching, or that the government can censor teacher speech without restriction” is “totally unpersuasive.” *Hardy v. Jefferson Cmty. College*, 260 F.3d 671, 680 (6th Cir. 2001). Expression that, “however repugnant,” is “germane to the classroom subject matter” is “protected by the First

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<sup>19</sup> Anne Ryman, *Maricopa Community Colleges settles faculty lawsuit over bargaining for \$112,000*, AZCENTRAL (June 26, 2019), <https://www.azcentral.com/story/news/local/arizona-education/2019/06/26/maricopa-community-colleges-settles-faculty-lawsuit-over-meet-and-confer-process-112-000/1567791001/>.

<sup>20</sup> Following Justice Souter’s invitation, a number of courts—including the Ninth Circuit—have recognized an academic freedom exception to *Garcetti*’s general rule that public employers may regulate employees when they speak pursuant to their official duties. *Garcetti*, 547 U.S. at 421. See, e.g., *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014), *Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011), *Van Heerden v. Bd. of Supervisors of La. State Univ.*, No. 3:10-cv-155, 2011 U.S. Dist. LEXIS 121414, at \*19–20 (M.D. La. Oct. 20, 2011), *Sheldon v. Dhillon*, No. C-08-03438, 2009 U.S. Dist. LEXIS 110275, at \*14 (N.D. Cal. Nov. 25, 2009) (terminated community college instructor’s lecture on heredity and homosexuality was protected by the First Amendment if it was “within the parameters of the approved curriculum and within academic norms” and the punishment was “not reasonably related to legitimate pedagogical concerns.”).

Amendment.” *Hardy*, 260 F.3d at 683. The United States Court of Appeals for the Ninth Circuit, the decisions of which are binding on SCC, has held that the First Amendment protects not only speech in a classroom, but also expression that is “*related to scholarship or teaching[.]*” *Demers v. Austin*, 746 F.3d 402, 406 (9th Cir. 2014) (emphasis added).

**C. *SCC may not exercise impermissible oversight of Damask’s course content, or punish him for it.***

As a public institution bound by the First Amendment, SCC may not investigate or punish Damask for the pedagogically-relevant content of his course, which is shielded by the First Amendment’s embrace of academic freedom.

The principle of freedom of speech does not exist to protect only non-controversial expression. Rather, it exists precisely to protect speech that some or even most members of a community may find controversial or offensive. Speech cannot be restricted simply because it offends others, on or off campus. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 414 (1989) (“If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable”).

This is particularly so on the campus of a public college, which the court has identified as “peculiarly the marketplace of ideas,” where the “essentiality of freedom . . . is almost self-evident.” *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). For example, in holding that a student newspaper’s political cartoon depicting the Statue of Liberty and Goddess of Justice being raped by police officers was protected speech, the Supreme Court explained that “the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of ‘conventions of decency.’” *Papish v. Board of Curators of the University of Missouri*, 410 U.S. 667, 670 (1973). The Court reiterated this fundamental principle in *Snyder v. Phelps*, 562 U.S. 443, 461 (2011), proclaiming that “[a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate.”

The United States Court of Appeals for the Sixth Circuit’s ruling in *Hardy* is instructive. There, an adjunct instructor teaching “Introduction to Interpersonal Communication” lectured students about “language and social constructivism,” discussing how “language is used to marginalize minorities and other oppressed groups in society.” *Hardy v. Jefferson Cmty. College*, 260 F.3d 671, 674 (6th Cir. 2001). Students, asked by the instructor to provide examples, suggested the words “lady,” “girl,” “faggot,” “nigger,” and “bitch.” *Id.* at 675. The Sixth Circuit found that the instructor’s use of those words was “clearly” relevant to his lecture exploring the “social and political impact of certain words,” and was not “gratuitously used . . . in an abusive manner.” *Id.* at 679. Accordingly, it remained protected expression. *Id.*

Maricopa County Community College District itself has affirmed its commitment to this important tenet of freedom of expression. As you may recall, in 2003, controversy broke out at

Glendale Community College when a professor shared his opinions concerning his views on immigration and other contentious issues. His fellow employees relayed concerns to the district, which responded by saying that the professor’s views were “not aligned with the vision of our district,” but that he would not be disciplined because doing so “could seriously undermine our ability to promote true academic freedom.”<sup>21</sup> When some of the professor’s colleagues filed a civil suit against the district for refusing to take action against him, the Ninth Circuit held in favor of the district, and reiterated the importance of free expression on college campuses.

The Ninth Circuit explained:

Intellectual advancement has traditionally progressed through discord and dissent, as a diversity of views ensures that ideas survive because they are correct, not because they are popular. Colleges and universities—sheltered from the currents of popular opinion by tradition, geography, tenure and monetary endowments—have historically fostered that exchange. But that role in our society will not survive if certain points of view may be declared beyond the pale.

*Rodriguez v. Maricopa County Community College District*, 605 F.3d 703, 708 (9th Cir. 2010).

Although the student who expressed his concern to Damask and the numerous other individuals who commented on Instagram were offended by the quiz questions, this reaction does not give SCC license to restrict Damask’s expressive and academic rights. Students, of course, should feel free to engage with their professors regarding course content and to register their concerns or complaints about their professors with the administration. The college, however, remains obligated to respond to such complaints in a way that does not infringe upon faculty rights, and “a teacher may require a student to write a paper from a particular viewpoint, even if it is a viewpoint with which the student disagrees, so long as the requirement serves a legitimate pedagogical purpose.” *Brown v. Li*, 308 F.3d 939, 953 (9th Cir. 2002); *see also Wood v. Arnold*, 915 F.3d 308, 312–319 (4th Cir. 2019) (where high school history class asked students to fill-in-the-blanks with statements describing Islamic beliefs, there was no infringement on the students’ rights against compelled speech, which “has limited application in a classroom setting in which a student is asked to study and discuss materials with which she disagrees,” and the assignment did not require the student to “profess or accept the tenets of Islam.”). Damask’s quiz questions were related to the assigned readings and the course’s subject, and served a legitimate pedagogical purpose.<sup>22</sup>

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<sup>21</sup> Will Creeley, *Ninth Circuit Delivers Resounding Victory for First Amendment on Campus*, FIRE (May 21, 2010), <https://www.thefire.org/ninth-circuit-delivers-resounding-victory-for-first-amendment-on-campus/>.

<sup>22</sup> Damask’s three quiz questions do not approach discriminatory harassment. *See, e.g., Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1032 (9th Cir. 1998) (observing that “the assignment of a literary work determined

Further, the study of political science—and particularly world politics and terrorism—will almost inevitably venture into sometimes-uncomfortable territory and include topics on which many students will have both varying and deeply-held beliefs. That students may experience discomfort, and even anger, in the course of their studies should have no bearing on a professor’s right to select relevant materials and test students on their knowledge of those materials as they see fit. The students in Damask’s class are adults in a college-level course and should be treated as such. To allow a student’s complaint to result in Damask being forced to change his course content and, shockingly, compelled to subject future course content to the review or approval of a religious leader will have a serious chilling effect on faculty expression and academic freedom.

***D. SCC and the MCCC Governing Board must not investigate Damask as a result of his course content.***

With respect Iudicello’s statement that the MCCC Governing Board is reviewing these events, we remind you that an investigation of protected speech can itself violate the First Amendment. When “an official’s act would chill or silence a person of ordinary firmness from future First Amendment activities,” that act violates the First Amendment. *Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999). In *Sweezy v. New Hampshire*, 354 U.S. 234, 245–48 (1957), the Supreme Court noted that government investigations “are capable of encroaching upon the constitutional liberties of individuals” and have an “inhibiting effect in the flow of democratic expression.” Similarly, the Court later observed that when issued by a public institution like SCC, “the threat of invoking legal sanctions and other means of coercion, persuasion, and intimidation” might violate the First Amendment. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 67 (1963).

Accordingly, several appellate courts, including the Ninth Circuit, have held that government investigations into protected expression violate the First Amendment. *See White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (holding that a government investigation into clearly protected expression chilled speech and therefore violated the First Amendment).

Iudicello’s insinuation that Damask should expect “paperwork” from SCC’s governing body did have a chilling effect. Damask’s conversations with Iudicello left him with the feeling that his job was in jeopardy, and that he would be unable to exercise autonomy in the determination of his course content moving forward. A reasonable faculty member, faced with public condemnation of their course content and a potential threat to their position, would be likely to discontinue the activity that gave rise to that threat, even when, as here, it was expression protected by the First Amendment and academic freedom. This is an unacceptable result.

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to have intrinsic educational value by the duly authorized school authorities cannot constitute the type of discriminatory conduct prohibited by the Fourteenth Amendment and Title VI”).



***E. The First Amendment and Arizona state law bar SCC from forcing Damask to issue an apology and from punishing him for refusing to do so.***

Along with the right to speak freely, the First Amendment protects speakers from being compelled to make public statements of opinion against their will. As the Supreme Court wrote nearly seventy years ago, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion that force citizens to confess by word or act their faith therein.” *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

Arizona law likewise bars SCC’s chosen course of action, as faculty members at community colleges are expressly afforded the right to “take a position on the public policy controversies of the day,” and the institution “may not take action . . . in a way that requires students or faculty members to publicly express or endorse a particular view” of such a controversy. A.R.S. § 15-864(G)-(H). Requiring a faculty member to publicly disavow questions concerning terrorism—one of the most controversial public policy matters of the past twenty years—is precisely the coercive activity barred by Arizona law.

Moreover, SCC’s representation to the public that Damask would apologize is inconsistent with the college’s First Amendment obligations. To present him with a pre-written apology—prepared for him by an administrator whose primary responsibilities involve the college’s public image—and demand that he send it to the student is a stark admission that the college’s foremost interest is its public perception, which it has shamefully elevated above the well-established expressive and academic freedom rights of its students and faculty. Although it is clear from Sells’ May 5 email that SCC is anxious for Damask to send this apology in short order in fulfillment of your own public promise, concern about SCC’s image is a flatly insufficient justification for depriving Damask of his right *not* to speak. *See Wooley v. Maynard*, 430 U.S. 705 (“The right to speak and the right to refrain from speaking are complementary components of the broader concept of ‘individual freedom of mind.’”).

This directive is also self-defeating. Assuming Damask wanted to apologize, SCC’s public statement makes it abundantly clear that any apology comes at the behest of its administration, not at Damask’s own initiative. While SCC is free to *ask* Damask to apologize, it cannot compel him to do so in order to fulfill its own promise.

**III. SCC Must Preserve Damask’s Right to Determine the Content of His Course Without Apology, and Must Not Move Forward with An Investigation**

SCC’s actions in response to Damask are irreconcilable with its constitutional and statutory obligations as a public institution of higher education. Your own public promise that Damask would issue an apology when he had indicated no such intention, as well as the decision to have a marketing professional draft an apology for him, make clear that SCC’s response to the social media backlash against Damask’s quiz questions has been motivated by concerns for its image, abandoning its duty to protect Damask’s freedom of expression and academic freedom.

SCC cannot abandon its obligations under the First Amendment and Arizona law. We call on SCC to cease any investigation into Damask, rescind its demand that he issue a compulsory apology, and disavow any limit on his ability to present and test on pedagogically-relevant materials to his class.

Given the urgent nature of this matter, we request receipt of a response to this letter no later than the close of business on May 8, 2020.

Sincerely,



Katlyn A. Patton

Program Officer, Individual Rights Defense Program and Public Records

Cc: Kathleen Iudicello, Dean of Instruction  
Leslie Cooper, General Counsel, Maricopa County Community Colleges District  
Maricopa County Community Colleges District Committee on Free Expression, c/o  
Interim Chancellor Dr. Steven Gonzales

Encl.