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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

THE AMERICAN CIVIL LIBERTIES UNION OF NEVADA, a domestic nonprofit organization; CORIE HUMPHREY, an individual, Plaintiffs, vs. CLARK COUNTY SCHOOL DISTRICT, a political subdivision of the State of Nevada, Defendant.	Case No.: 2:25-cv-00892-RFB-MDC **RESPONSE TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER**

Defendant Clark County School District (hereinafter, "CCSD"), by and through their attorneys of record, the law firm of Weinberg Wheeler Hudgins Gunn & Dial, LLC, hereby submit this Response to Plaintiff's Motion for Temporary Restraining Order (ECF No. 6). This Response is made and based upon all papers and pleadings on file in this action, and any oral argument this Court may allow.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

It is well-settled that public school students are protected by the First Amendment and do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 506 (1969). Nonetheless, "the constitutional rights of students in public school are not automatically coextensive with the rights

of adults in other settings." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). A student's right to free speech must be balanced against the need for school officials "to maintain the discipline and learning environment necessary to accomplish the school's educational mission." *Barr v. Lafon*, 538 F.3d 554, 562 (6th Cir. 2008).

The Ninth Circuit has previously identified three distinct areas of student speech, each with varying degrees of constitutional protection: "(1) vulgar, lewd, obscene, and plainly offensive speech, (2) school-sponsored speech, and (3) speech that falls into neither of the[ ] categories." *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992). A public high school may control "the style and content of student speech in school-sponsored expressive activities so long as [its] actions are reasonably related to legitimate pedagogical concerns." *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988). A high school graduation ceremony is obviously a school sponsored event. *Lassonde*, 320 F.3d at 982. Plaintiff Corie Humphrey and her classmates' graduation attire is school-sponsored speech. *See Bear v. Fleming*, 714 F. Supp. 2d 972, 988-89 (D. S.D. 2010) (student's graduation attire is school-sponsored speech); *Griffith*, 157 F.Supp.3d 1159, 1164 (N.D. Ok. 2016) (graduation attire is school-sponsored speech because observers at the ceremony "reasonably could have perceived the expressions made through the students' graduation regalia as bearing the imprimatur of the school"). CCSD can, therefore, exercise control over the style and content of the speech as long as its "actions are reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. "It is only when the decision to censor a school-sponsored [activity] has no valid educational purpose that the First Amendment is so directly and sharply implicated as to require judicial intervention to protect students' constitutional rights." *Id*.

CCSD has a legitimate pedagogical purpose in "honoring its graduating seniors and preserving the unity of the class at this most auspicious event… [it] has a legitimate interest in ensuring that the graduation exercises convey, to the student body, teachers, staff, and family members, messages that advance the mission and goals of the school." *See Bear*, 714 F. Supp. 2d at 989-90. Moreover, the graduation dress code furthers CCSD's "interest in demonstrating the unity of the class and celebrating academic achievement." *Id*. (finding that the district's graduation

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dress code was reasonably related to "its legitimate interest in controlling the content of the graduation exercises"). Accordingly, CCSD's graduation policy pertaining to regalia attire is constitutional on its face and Plaintiffs do not sufficiently allege a free speech violation. Therefore, the Court should deny Plaintiffs' request for a temporary protective order and preliminary injunction.

II. STATEMENT OF FACTS

Clark County School District Regulation 5129 (R-5129) provides that the graduation ceremony is designed to honor and recognize graduates in a distinguished manner. *See* R-5129 attached hereto as **Exhibit A**. For graduation, students must wear the cap and gown selected by their school and must also adhere to the required proper attire worn under the cap and gown as defined by their school. *Id.* The Regulation further describes religious and cultural significance as adornments to the cap and gown consistent with NRS 388.915. *Id*. Decorations and adornments on caps must lay flat and not exceed the dimension of the cap. *Id*. Additionally, any decorations or adornments on the gowns must not cover more than 25% of the graduation gown. *Id*. This requirement applies to flags, stoles, cords, medals, pins, and similar items. *Id*. Consistent with First Amendment law, any decorations and adornments "must not be lewd, obscene, vulgar, profane, promote violence, promote the use of illicit drugs, constitute proselytizing speech, constitute discrimination, bullying, or harassment, or create a substantial disruption of, or material interference with, the graduation ceremony." *Id.* Any decorations or adornments on the caps and gowns must be approved by the school principal or designee prior to the graduation ceremony. *Id*. The approval and appeal procedures are set forth in separate administrative guidance. *Id*. CCSD reserves the right to restrict personal regalia, adornments, and decorations. *Id*. The Regulation further explains that the school principal or designee must approve any decorations or adornments prior to the ceremony and advises that there is a separate approval and appeal process. *Id*.

In addition to the content-neutral Regulation, Clark County School District also relies on a guidance that follows, verbatim, the Regulation. *See* CCSD's Graduation Participation Guideline attached hereto as **Exhibit B**. Notably, East Career Technical Academy's (ECTA) powerpoint on graduation reiterated CCSD's Regulation and Guidance. *See* ECTA's Checkout and Graduation

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Plan attached hereto as **Exhibit C**. Specific to Humphrey's claims, the powerpoint presentation was given on approximately April 8-9, 2025. See Declaration of Jennifer Geissinger attached as **Exhibit E**. Subsequently, graduation regalia information was also shared through email communications with students and parents. *Id*. During these communications, students and parents were advised that the ECTA administration must review all graduation regalia requests. *Id.* While other students have made such formal requests, consistent with the Regulation and information provided to students and parents, Corie Humphrey's failed to ever make such a request. *Id.*

III. LEGAL ARGUMENT

A. TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION STANDARD.

On May 15, 2025, Plaintiffs filed their complaint in the Eighth Judicial District Court of Nevada. On May 16, 2025, Plaintiffs filed a motion for a temporary restraining order or preliminary injunction on order shortening time. Then, after CCSD filed for removal to federal court, Plaintiffs filed the instant Motion for Temporary Retaining Order on May 21, 2025.

In deciding whether to grant a motion for a temporary restraining order, courts look to substantially the same factors that apply to a court's decision on whether to issue a preliminary injunction. *See Sttihlbarg Intl Snles Co. v. John D. Brush & Co*., 240 F.3d 832, 839 n.7 (9th Cir. 2001). A plaintiff seeking a preliminary injunction generally must show that: (1) he or she is likely to succeed on the merits; (2) he or she is likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in his or her favor; and (4) that an injunction is in the public interest. *Winter v. Nut. Res. Def. Coaincil, Inc*., 555 U.S. 7, 20 (2008). Like a preliminary injunction, a temporary restraining order is an "extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Id*. at 22.

The Ninth Circuit applies a "sliding scale" approach in considering the factors outlined in *Winter*. A stronger showing of one element of the preliminary injunction test may offset a weaker showing of another. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131-32 (9th Cir. 2011). Thus, "when the balance of hardships tips sharply in the plaintiff's favor, the plaintiff need

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demonstrate only 'serious questions going to the merits.'" *hiQ Labs, Inc. v. Linkedln Corp.*, 938 F.3d 985, 992 (9th Cir. 2019) (quoting *All. for the Wild Rockies*, 632 F.3d at 1135).

It is also well settled that injunctions should not issue when the relief would be impractical to enforce or too difficult for the issuing court to meaningfully supervise. *See, e.g., United States v. Paramocsnt Pictures, Inc.,* 334 U.S. 131, 161-66 (1948) (vacating an injunction ordering the motion picture industry to distribute films by competitive bids); *see also* Restatement (Second) of Torts, § 943 (stating that "[t]he practicability of drafting and enforcing" an injunction is a factor to be considered in deciding whether to issue it).

Finally, the already high standard for granting a TRO or preliminary injunction is further heightened when the type of injunction sought is a "mandatory injunction." *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (noting that the burden is "doubly demanding" for a mandatory injunction). To obtain a mandatory injunction, a plaintiff must "establish that the law and facts clearly favor her position, not simply that she is likely to succeed." *Id*. (emphasis in original). As explained by the Ninth Circuit:

> A preliminary injunction can take two forms. A prohibitory injunction prohibits a party from taking action and preserves the status quo pending a determination of the action on the merits." A mandatory injunction orders a responsible party to take action. A mandatory injunction goes welt beyond simply maintaining the status quo pendente lite and is particularly disfavored. In general, mandatory injunctions are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages. The *status quo ante litem* referenced in *Chalk* means the last, uncontested status which preceded the pending controversy.

Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co., 571 F.3d 873, 878-79 (9th Cir. 2009) (quotation marks and citation omitted) (alterations in original).

In this case, Plaintiffs ask the Court to (1) enjoin CCSD from "enforcing provisions of the District's Regulation R-5129" [ECF No. 6, pg 1:22-23]; and (2) order CCSD to allow Plaintiff Corie Humphrey "wear the specific regalia as requested in [Plaintiffs] motion." [ECF No. 6, pg. 2:2-4]. This type of request is similar to that in *Bear* and *Griffith* (cited above) where the court denied the requested emergency relief sought by the plaintiff because the regalia policy was

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reasonably related to the school's legitimate interest in controlling the content of the graduation exercises. Moreover, because Plaintiffs are not asking the Court to preserve the status quo but asking CCSD to take a particular action. Therefore, the Court must analyze Plaintiffs' motion under the heightened mandatory injunction standard.

B. PLAINTIFFS ARE NOT LIKELY TO SUCCEED ON THE MERITS OF THEIR FREE SPEECH CLAIMS

While students do not shed their constitutional rights of freedom of speech or expression at the schoolhouse gate, the Constitution also "does not compel 'teachers, parents, and elected school officials to surrender control of the American public school system to public school students.'" *Henery v. City of St. Charles*, 200 F3d 1128, 1131-1132 (8th Cir. 1999) The constitutional rights of public school students "are not automatically coextensive with the rights of adults in other settings, … and a school need not tolerate speech that is inconsistent with its pedagogical mission, even though the government could not suppress that speech outside the schoolhouse." *Id.* As such, "courts must analyze First Amendment violations alleged by students 'in light of the special characteristics of the school environment." *Id*.

The First Amendment protects not only verbal and written expression, but also symbols and conduct that constitute symbolic speech. *Littlefield v. Forney Independent School Dist.*, 268 F.3d 275, 282 (5th Cir. 2001) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. at 505–06 (1969)). The First Amendment inquiry is two-fold. *Zalewska v. County of Sullivan, New York*, 316 F.3d 314, 319 (2d Cir. 2003). First, the Court must determine whether Plaintiff's actions would constitute expressive conduct to warrant First Amendment protection. *Id*. Second, the Court must determine whether CCSD's graduation regalia policy impermissibly denies such protection to Plaintiffs. *Id*. (citing *Texas v. Johnson*, 491 U.S. 397, 403. (1989)).

Here, the essence of Plaintiffs' claim is that the First Amendment right to free speech protects their choice to wear whatever she chooses at her high school graduation, and among the cases, she cites *Tinker v. Des Moines Independent Community School District*, 393 US 503 (1969) for this proposition. But Plaintiffs ignore the fact that, in characterizing a stole adorned with the words "Black Girl Magic" as "akin to 'pure speech,'" the Supreme Court in *Tinker* explicitly

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contrasted that with permissible school "regulation of the length of skirts or ***the type of clothing***." 393 US at 507-08 (emphasis supplied). "It is apparent that … clothing requirements originate from the governing authority's ability to regulate a student's appearance while at school, provided that the policy is facially neutral and generally applicable." *Littlefield v. Forney Ind. Sch. Dist*., 108 F.Sup.2d 681, 693 (ND Tex. 2000).

Plainly, "[n]ot every defiant act by a high school student is constitutionally protected speech," *Bivens v. Albuquerque Public Schools*, 899 F.Supp 556, 560 (D. NM 1995), and "it is the obligation of the person desiring to engage in assertively expressive conduct to demonstrate that the First Amendment even applies. To hold otherwise would be to create a rule that all conduct is presumptively expressive." *Clark v. Community for Creative Non-Violence*, 468 US 288, 293 n.5 (1985). And, the Supreme Court has made clear, "[i]t is possible to find some kernel of expression in almost every activity a person undertakes – for example, walking down the street or meeting one's friends at a shopping mall – but such a kernel is not sufficient to bring the activity within the protection of the First Amendment." *City of Dallas v. Stanglin*, 490 US 19, 25 (1989). Thus, "[i]n deciding whether particular conduct possesses sufficient communicative elements to bring the First Amendment into play, [the Court must ask] whether '[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it.'" *Texas v. Johnson*, 491 US 397, 404 (1989) (emphasis supplied).

1. <u>Only a Portion of Plaintiff Humphrey's Relief Constitutes Expressive Conduct.</u>

Plaintiff seeks to wear several different non-school related stoles and a decorated cap. As a threshold matter, the court must determine whether the protections of the First Amendment, as incorporated and applicable to states through the Fourteenth Amendment, apply to this case. The protections of the First Amendment generally do not apply to conduct in and of itself. *Blau v. Fort Thomas Public School Dist.*, 401 F.3d 381, 388 (6th Cir. 2005). The Supreme Court has rejected the notion that " 'an apparently limitless variety of conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea[.]' " *States v. O'Brien*, 391 U.S. 367, 376 (1968)). Rather, conduct must be "sufficiently imbued with elements of communication"

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to be entitled to First Amendment protection. *Spence v. Washington*, 418 U.S. 405, 409 (1974)). Courts must also consider the context in which symbolic conduct is used, for the context may give it its meaning. *Spence*, 418 U.S. at 410, 94 S.Ct. 2727.

To sustain a free-speech claim involving conduct, a court must determine whether the claimant has shown an intent to convey a particularized message and whether the likelihood is great the message will be understood by those who view it. *Blau*, 401 F.3d at 388 (citing *Spence*, 418 U.S. at 411). "The threshold is not a difficult one, as 'a narrow, succinctly articulable message is not a condition of constitutional protection.'" *Id*. (quoting *Hurley v. Irish–American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995)). Yet, the First Amendment requires more than vague and attenuated notions of expression. *Id*. at 390. The requirements are modest for bringing an expressive-conduct claim within the umbrella of the First Amendment. *Id*. However, at a minimum, the plaintiff must show their conduct can fairly be described as " 'imbued with elements of communication' " which convey a particularized message understood by the viewers. *Id*. (quoting *Spence*, 418 U.S. at 411). The burden is on Plaintiff as the movant to demonstrate her intended conduct falls under the umbrella of protection of the First Amendment. *Clark v. Cmty. for Creative Non–Violence*, 468 U.S. 288, 294 n. 5 (1984) ("[I]t is the obligation of the person desiring to engage in assertedly expressive conduct to demonstrate that the First Amendment even applies.").

In *Zalewska*, the Court of Appeals for the Second Circuit considered a First Amendment challenge to a municipal transit authority's dress code which mandated all employees wear pants as part of a driver's uniform. 316 F.3d at 317. Claimant, a female van driver, desired to wear a skirt, having never worn pants as a matter of familial and cultural custom. *Id*. She claimed wearing a skirt was an expression of a deeply held cultural value. *Id*. at 318. The court discussed the importance of clothing as a means of communication:

> We realize that for Zalewska—as for most people—clothing and personal appearance are important forms of self-expression. For many, clothing communicates an array of ideas and information about the wearer. It can indicate cultural background and values, religious or moral disposition, creativity or its lack, awareness of current style or adherence to earlier styles, flamboyancy, gender identity, and social status. From the nun's habit to the judge's robes, clothing may often tell something about the person so garbed.

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Id. at 319. Yet, the court recognized the First Amendment did not protect all forms of communication:

> [T]he fact that something is in some way communicative does not automatically afford it constitutional protection....
> To determine whether conduct is expressive and entitled to constitutional protection requires an inquiry into whether the activity is sufficiently imbued with the elements of communication to fall within the scope of the First and Fourteenth Amendments, for not all conduct may be viewed as speech simply because by her conduct the actor intends to express an idea. To be sufficiently imbued with communicative elements, an activity need not necessarily embody a narrow, succinctly articulable message, but the reviewing court must find, at the very least, an intent to convey a particularized message along with a great likelihood that the message will be understood by those viewing it.

Id. (internal citations and quotation marks omitted).

The court in *Zalewska* found the message claimant intended to convey was not specific or particularized, but rather was a broad statement of cultural values. *Id*. The court characterized claimant's actions as an attempt to communicate a vague and unfocused message, that is, a "vague, overarching view of cultural tradition," which was afforded "minimal if any First Amendment protection." *Id*. at 319–20. The court also found claimant''s message could not be understood readily by viewers since "no particularized communication can be divined simply from a woman wearing a skirt." *Id*. at 320. "Essential to deciding whether an activity carries a perceptible message entitled to protection is an examination of the context in which the activity was conducted." *Id*. On this issue, the court offered the following useful analysis:

> The Supreme Court has been careful to distinguish between communicative activity with a clear contextual message, such as the wearing of a black armband in protest during the Vietnam War, compared with other types of activity, like choosing what to wear in the ordinary course of employment. The statement in *Tinker*—that regulation of length of skirts or type of clothing, ... hair style, or deportment is different from that sort of regulation that involves direct, primary First Amendment rights akin to pure speech—suggests that a person's choice of dress or appearance in an ordinary context does not possess the communicative elements necessary to be considered speech-like conduct entitled to First Amendment protection.

Id. (internal citations and quotation marks omitted). The court concluded claimant's conduct, though expressive, did not implicate the First Amendment because the ordinary viewer would not glean a particularized message from claimant's wearing of a skirt as part of her uniform instead pants. *Id*. The court noted a woman in contemporary society would not automatically signal any

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particularized message about her culture or beliefs by wearing a skirt or dress. *Id*.; *see also East Hartford Ed. Ass'n v. Board of Ed. of Town of East Hartford*, 562 F.2d 838, 856–60 (2d Cir. 1977) (in considering a First Amendment challenge to a public school board's dress code requiring male teachers to wear neckties, the court found claimant's message of nonconformity and rejection of older traditions, as expressed through his refusal to wear a necktie, was sufficiently vague to allow the school board to regulate it without running afoul of the First Amendment).

Applying this standard, the *Bear* Court ruled that a plaintiff's wearing of traditional Lakota clothing as he received his diploma constituted expressive conduct because of his intent to convey a particular message—a Lakota man honoring his people and his heritage during a special event in his life. *Id*. at 984. In reaching this decision, the court relied on plaintiff's declaration that provided:

> I have a lot of respect for the American culture and the American military, BUT that is not where I come from[.] I come from the Oglala Sioux Tribe, and my ancestors have fought many battles and wars with the wasicu people just so that I can stand here in confidence and respect for my people and honor what my people gave their lives for and that is our heritage, our culture, our beliefs, our language, and most of all our pride, and *I can only see me honoring them by wearing what I wish to wear in making it through a white man's education, by graduating high school.*

Id. The court found that this message is akin to the wearing of braids as an expression of a student's cultural identity or the wearing of female clothing as an expression of a student's gender identity. *Id*. The court further recognized that this message would be understood by those viewing it in light of the fact that nine of the ten graduating seniors are Lakota and the fact that the school itself understood the significance as evidenced by inclusion of the feather and plume and star quilt ceremonies at the graduation ceremonies.

Here, Plaintiffs, and in particular Humphrey, seeks to adorn stoles. CCSD does not dispute that the stole "Black Girl Magic" would constitute expressive conduct based on the analysis above. However, the other colored stoles, black and red, are not considered expressive conduct as a reasonable person would not understand what message is being conveyed by such stoles. Even Humphrey's own declaration admits she is unsure exactly what the stole would look like, but at a minimum she intends to wear black and red stoles to demonstrate her membership with ACLU.

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Furthermore, nothing in Humphrey's or in the briefing demonstrates that the colored stoles would convey to parents, teachers, and students the Plaintiffs' involvement with ACLU. Likewise, nothing signifies that the decorations on the cap are also protected by the First Amendment. Accordingly, the Court should find that the only expressive conduct at issue is the single stole stating "Black Girl Magic."

2. Graduation Regalia is Clearly School Sponsored Speech

Where "students, parents, and members of the public might reasonably perceive [the speech] to bear the imprimatur of the school," it is considered school-sponsored speech. *Morse v. Frederick*, 551 U.S. 393, 405 (2007)). Schools may restrict school-sponsored speech, "provided the restrictions 'are reasonably related to legitimate pedagogical concerns.'" *Id.* (quoting Hazelwood, 484 U.S. at 273. Moreover, restrictions on school-sponsored speech need not be viewpoint neutral. *See Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 926–29 (10th Cir. 2002). To determine whether the instant speech, graduation regalia, constitutes school-sponsored speech, the Court should look to "the level of involvement the school had in organizing or supervising the contested speech." *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1228 (10th Cir. 2009).

Here, CCSD maintains the decision to permit particular graduation regalia which, for school-sponsored speech analysis, is a recognition of the reality that, in practice, that CCSD controls the attire which graduates wear during the graduation ceremony. CCSD has explicit guidelines as to the expressive decorations, and reserves the right to disallow anything that is not considered appropriate for commencement ceremony. These practices are, in turn, reasonably apparent to any graduation attendee facing a group of similarly attired graduates at a ceremony that has been planned in detail by individual school. *See Corder*, 566 F.3d at 1229 ("A high school graduation ceremony under these circumstances is 'so closely connected to the school that it appears the school is somehow sponsoring the speech.' " (quoting *Fleming*, 298 F.3d at 925)). *See also Pena Villasano v. Garfield Cnty. Sch. Dist. 16*, No. 23-CV-01317-RMR, 2023 WL 3687441, at *6 (D. Colo. May 26, 2023) (concluding that a school district's policy on graduation regalia

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qualifies as school sponsored speech). This court should follow the other courts and find that the graduation regalia issue raised by Plaintiffs amounts to school sponsored speech.

3. CCSD's Policy Does Not Impermissibly Infringe on Plaintiffs' First Amendment Right.

The court must be cognizant of the need to tread carefully in the realm of school policy. Federal courts should refrain from interfering with the decisions of school authorities. *East Hartford Ed. Ass'n*, 562 F.2d at 857. Judicial interference in the operation of public schools requires "care and restraint." Epperson v. State of Ark., 393 U.S. 97, 104, (1968). "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Id*.

Courts interfering in the operation of a public school must balance the interest in protecting students' First Amendment rights with the equally important interest in allowing school administrators to regulate student affairs. The "'vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). Courts "have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief." *Id*.

The Supreme Court has made it clear students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. "They cannot be punished merely for expressing their personal views on the school premises—whether 'in the cafeteria, or on the playing field, or on the campus during the authorized hours'—unless school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students.' " Hazelwood, 484 U.S. at 266 (quoting *Tinker*, 393 U.S. at 509, 512–13).

However, constitutional rights of students in public schools are not "automatically coextensive" with the rights of adults in non-school settings. *Bethel School Dist. No. 403 v. Fraser*,

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478 U.S. 675, 683 (1986). The rights of students must be "applied in light of the special characteristics of the school environment [.]" *Tinker*, 393 U.S. at 506. "While certain forms of expressive conduct and speech are sheltered under the First Amendment, constitutional protection is not absolute, especially in the public school setting. Educators have an essential role in regulating school affairs and establishing appropriate standards of conduct." *Canady v. Bossier Parish School Bd.*, 240 F.3d 437, 441 (5th Cir.2001) (citing *Fraser*, 478 U.S. at 681). "A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school." *Hazelwood*, 484 U.S. at 266 (quoting *Fraser*, 478 U.S. at 685). It is the school board, not the federal court, that should make the determination as to what constitutes appropriate behavior and dress in public schools. *Id*. at 267.

The Supreme Court has determined three levels of scrutiny courts should apply to regulation of student speech. *Canady*, 240 F.3d at 441–42. When determining the appropriate level of scrutiny, courts should examine the substance of the message, the purpose of the regulation, and the manner in which the message is conveyed. *Id*. at 441 & 441 n. 4 (collecting Supreme Court cases). Regardless of which level of scrutiny applies, the Constitution does not compel "'teachers, parents, and elected school officials to surrender control of the American public school system to public school students.'" *Fraser*, 478 U.S. at 686 (quoting *Tinker*, 393 U.S. at 526).

The first category is represented by *Tinker*, which involved school regulations directed at specific student viewpoints—which clearly does not apply here. 393 U.S. 503. In that case, school officials suspended students for wearing black armbands in protest of the Vietnam War. *Id*. at 508. The Supreme Court held this type of speech, akin to "pure speech," may only be prohibited if it causes a substantial and material disruption in the school's operation. *Id*. at 509. The second category is represented by *Fraser*, which involved the regulation of lewd, vulgar, obscene, or plainly offensive speech. 478 U.S. 675. There, school officials suspended a student for delivering a nomination speech at a school assembly because the speech contained sexually explicit metaphors that the school deemed inappropriate for the members of the audience. *Id*. at 677–79. The court held this type of speech may be prohibited because it was "wholly inconsistent with the

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'fundamental values' of public school education." *Id*. at 685–86. The third category is represented by *Hazelwood*, which involved regulation of student expression within the context of school-sponsored activities. 484 U.S. 260. It is within this third category Plaintiffs' case lies.

In *Hazelwood*, the court considered a First Amendment challenge to the decision of school officials to delete two pages from the school newspaper. 484 U.S. at 260. The pages included articles on teen pregnancy and the impact of divorce on students. *Id*. Former high school students who were staff members of the newspaper filed suit against the school district and school officials alleging a violation of their First Amendment rights. *Id*. The newspaper was written and edited by a journalism class as part of the school's curriculum. *Id*.

The Court first determined the newspaper was not a public forum for public expression. *Id*. at 267. The newspaper was not open for indiscriminate use by the general public or by some segment of the public, including student organizations. *Id*. School officials did not evince, by policy or practice, any intent to open the pages of the newspaper to indiscriminate use by student writers, editors, or even the student body. *Id*. at 269. Rather, officials reserved the newspaper for its intended purpose, "as a supervised learning experience for journalism students." *Id*. As a learning experience and as a means to teach leadership skills, students were allowed some authority over the contents of the newspaper. *Id*. at 269–70. Yet, the school did not relinquish ultimate control over the newspaper. *Id*. at 270. Because the newspaper was not a public forum, school officials "were entitled to regulate the ... contents [of the newspaper] in any reasonable manner." *Id*.

The Court provided a detailed analysis distinguishing the *Hazelwood* case from its holding in *Tinker*. Id. at 271–72, 108 S.Ct. 562. The Court's reasoning is significant and detrimental to Plaintiffs' claims here.

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in Tinker—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the

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> imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.
>
> Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.... A school must be able to set high standards for the student speech that is disseminated under its auspices ... and may refuse to disseminate student speech that does not meet those standards.... Otherwise, the schools would be unduly constrained from fulfilling their role as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."

Id. at 270–72 (internal citations omitted).

The Court concluded the standard articulated in *Tinker*, used when determining when a school may punish student expression, was not the same standard to be used when determining when a school may refuse to lend its name and resources to the dissemination of student expression. *Id*. at 272. Importantly, the Court held "educators do not offend the First Amendment by exercising editorial control **over the style and content of student speech in school-sponsored expressive activities** so long as their actions are reasonably related to legitimate pedagogical concerns." *Id*. at 273 (emphasis added). "It is only when the decision to censor a school-sponsored publication, theatrical production, or other vehicle of student expression has no valid educational purpose that the First Amendment is so directly and sharply implicated as to require judicial intervention to protect students' constitutional rights." *Id*. (internal citation, quotation marks, and footnote omitted).

The Court found school officials acted reasonably in deleting two pages of the newspaper. *Id*. at 274. The school was not unreasonable in concluding the articles were unsuitable for publication. *Id*. The need to protect the privacy of individuals featured in the articles was not unreasonable. *Id*. Thus, the Court concluded the students' First Amendment rights were not violated. *Id*. at 276.

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In *Henerey ex rel. Henerey v. City of St. Charles, School Dist.*, 200 F.3d 1128 (8th Cir. 1999), the Court of Appeals for the Eighth Circuit considered whether school officials could regulate student speech during an election campaign for student council. *Id*. at 1131. The principal of the school disqualified a student candidate for distributing, without obtaining prior approval, inappropriate materials as part of his campaign strategy. *Id.* The court distinguished its case from those cases involving "[p]urely individual speech by students constituting 'personal expression that happens to occur on the school premises[.]' " *Id*. at 1132 (quoting *Hazelwood*, 484 U.S. at 271). This latter type of speech was subject to a high degree of First Amendment protection. *Id*. (citing *Hazelwood*, 484 U.S. at 276).

Like the Court in *Hazelwood*, the Eighth Circuit found the election campaign was not open to the public and, thus, was not a public forum. *Id*. at 1133. The court further found the student's expression was school-sponsored speech, not independent speech, because it was uttered during participation in a school-sponsored activity where "'students, parents, and members of the public might reasonably perceive [the school-sponsored speech] to bear the imprimatur of the school.' " *Id*. (quoting *Hazelwood*, 484 U.S. at 270–71). In such cases, the court reasoned a school might exercise greater control to assure "'that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.'" *Id*. (quoting *Hazelwood*, 484 U.S. at 271). "Although to be considered 'school-sponsored,' expressive activities must be 'curricular' in a broad sense, they need not 'occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.'" *Id*. (quoting *Hazelwood*, 484 U.S. at 271). The court's discussion on this point is instructive:

> The election was supervised by a school administrator serving as the student council advisor, and it ran for a limited time period set by the school. It was operated under the auspices of the school administration, and any member of the public could reasonably have concluded that campaign materials were distributed with the implied approval of the school. Moreover, the election was conducted for the pedagogical purposes of allowing candidates to learn leadership skills and exposing the general student body to the democratic process. Accordingly, we agree with the

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> district court that the election was a school-sponsored activity that was a part of the school's curriculum.

Id. The court concluded the school district's decision to disqualify the student was reasonably related to legitimate pedagogical concerns and its educational mission. *Id*. at 1136.

In *Bear*, the Court ruled that the graduating proceeding is a school-sponsored event, and thus the student's speech is school sponsored speech. *Id*. at 988-89. The court recognized that a graduation proceeding is a theatrical production in a sense—the actors, director, and stage crew, or rather the students, administrators, teachers, and staff members, hope to convey a message the audience will understand and appreciate. *Id*. In addressing the educational concerns, the *Bear* court acknowledged:

> The school board has a legitimate interest in ensuring that the graduation exercises convey, to the student body, teachers, staff, and family members, messages that advance the mission and goals of the school. The graduation proceedings celebrate not only the students' achievements, but also the school's achievement as an institution of learning and the teachers' and administrators' achievements as educators. If the school board were to allow students to do what they wish at graduation, even if the students' activities were exemplary, the messages advanced by the proceedings may become diluted. Obviously, the proceedings in and of themselves have meaning, otherwise the school would mail the students their diplomas without any fanfare. However, the school board has invested much time and resources in creating an atmosphere of celebration. The message is clear that a student's hard work and dedication will be rewarded. The school board's interest in the graduation exercises and in the messages the festivities convey cannot be fairly disputed.

Id. at 989-90. Summarily, the court held that the cap and gown requirement furthers the school board's interest in demonstrating the unity of the class and celebrating academic achievement. Id. Affirming the school's pedagogical interests, the court reasoned that '[i]t is important to note not all of the audience members will be Lakota or will understand the significance of Mr. Dreaming Bear's traditional Lakota clothing. The cap and gown, however, is a universally recognized symbol." *Id*. On this reasoning, the court upheld the policy and denied plaintiff's requested emergency relief.

Similarly in *Griffith*, the court recognized that a cap and gown policy furthered a school's pedagogical concerns. *Griffith v. Caney Valley Pub. Sch.*, 157 F. Supp. 3d 1159, 1164 (N.D. Okla. 2016) (plaintiff failed to state a claim for relief under the First Amendment). Finally, the *Villasano*

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court reached the same result in a very similar case. *Pena Villasano v. Garfield Cnty. Sch. Dist. 16*, No. 23-CV-01317-RMR, 2023 WL 3687441, at *6 (D. Colo. May 26, 2023). There, Plaintiff asserted her First Amendment right was violated because the school only permitted sashes in relation to honors or school-affiliated organizations. *Id.* Following the framework outlined in Hazelwood, Bear, and Griffith, the Colorado court found that the school district's restriction on the sashes is reasonably related to legitimate pedagogical concerns and passes *Hazelwood* scrutiny.

Following the logic established in *Hazelwood, Bear, Griffith, and Villasano*, the Court must recognized the inherent and legitimate pedagogical concerns in CCSD's educational mission in controlling graduation regalia.

C. PLAINTIFFS DO NOT FACE IRREPARABLE HARM.

Plaintiffs must also "demonstrate that irreparable injury is likely in the absence of an injunction." *Winter*, 555 U.S. at 22, 129 S.Ct. 365. To satisfy this factor, Plaintiffs must show a "real or immediate threat that [plaintiffs•] will be wronged again." *City of Los Angeles v. Lyons*, 461 U.S. 95, 111 (1983). In general, mandatory injunctions "are not granted unless extreme or very serious damage will result and are not issued in doubtful cases or where the injury complained of is capable of compensation in damages." *Marlyn Nutraceuticals, Inc*., 571 F.3d at 879 (quoting *Anderson v. United States*, 612 F.2d 1112, 1114 (9th Cir. 1980) (internal quotation marks omitted)).

Here, Ms. Humphrey will suffer no "irreparable injury" by not being allowed to display a stole that says "Black Girl Magic". *See Karaha Bodas Co*., 335 F.3d at 363. It is undisputed that Humphrey will graduate regardless of whether she dons this stole or not. Likewise, it is undisputed that Humphrey will retain the honor of graduating from East Career and Technical Academy irrespective of this stole. Ms. Humphrey is not at risk of losing scholarships or other opportunities if she does not adorn this stole. *See Swany,* 720 F.Supp. at 775. Humphrey's reputation, community standing, and credibility will not suffer irreparable harm if she does not wear a stole that says "Black Girl Magic" or red and black stoles. *See id*. (explaining that a student's "good name, reputation or honor or any future opportunities" were not infringed upon when he was precluded

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from attending graduation because there was nothing on his permanent record indicating he was prevented from attending commencement exercises).

D. THE PUBLIC INTEREST AND BALANCE OF EQUITIES FAVOR CCSD

A plaintiff seeking a preliminary injunction or temporary restraining order must also establish not only that he is likely to succeed on the merits and is likely to suffer irreparable harm in the absence of preliminary relief, but also that the balance of equities tips in his favor, and that an injunction is in the public interest. *Winter*, 555 U.S. at 20. "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Id*. at 24.

The public interest weighs in favor of abstaining from interfering with CCSD's graduation Regalia Policy. *See Karaha Bodas Co*., 335 F.3d at 363; *Williams*, 796 F.Supp. at 256 ("The citizens of [the state] are disserved when federal judges substitute their notions of fairness in place of officials elected to make these kinds of policy decisions and judgment calls.").

IV. CONCLUSION.

Based on the foregoing, CCSD asks that the Court deny Plaintiffs' Motion for a Temporary Restraining Order and a Preliminary Injunction.

Dated this 24th day of May, 2025.

/s/ Jacqueline Nichols

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CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of May, 2025, I served a true and correct copy of the foregoing **RESPONSE TO PLAINTIFF'S MOTION FOR TEMPORARY RESTRAINING ORDER** by e-service, in accordance with the Electronic Filing Procedures of the United States District Court, to the following:

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