No. 21-15737

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LARISSA WALN and BRYAN WALN,

Plaintiffs-Appellants

v.

DYSART SCHOOL DISTRICT, *et al.*,

Defendants-Appellees

Appeal from the United States District Court for the District of Arizona
The Honorable Camille D. Bibles, United States District Judge
2:20-cv-00799-CDB

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331 and 1367.

Pursuant to the district court's order dismissing the Amended Complaint for failure to state a claim upon which relief can be granted, a final judgment was entered on March 25, 2021. (ER-4.) Appellants' notice of appeal was filed on April 23, 2021. (ER-172.) The notice was timely. FRAP 4(a)(1)(A).

This court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE CASE

The facts relevant to the issue of the sufficiency of plaintiffs' Amended Complaint to state a claim upon which relief can be granted are those that are well-plead in the complaint. The district court's perspective of those facts as viewed through the lens of the *Igbal/Twombly* plausibility standard is a part of its order granting defendants' motion to dismiss. (ER-6 at 4-9.) Appellants offer a somewhat different version in their Opening Brief. (OB at 6 at 6-15.) Ultimately, the well-plead facts are those determined by this court on de novo review. To assist the court, the following statement of relevant well-plead facts is offered.

Plaintiff "Larissa Waln was a senior at Valley Vista High School for the 2018- 2019 school year." (ER-102, ¶ 28.) "Valley Vista High School [is a] part of the Dysart School District" (the "District"). (ER-116, ¶ 87.)

Larissa "was scheduled to walk in her graduation ceremony on May 16, 2019 at State Farm Stadium in Glendale, Arizona." (ER-102, ¶ 28.) "Larissa is an enrolled member of the Sisseton Wahpeton Oyate, a federally recognized Indian tribe." (ER-102, ¶ 29.)

"Beading a graduation cap is a cultural and religious practice by Native American people that is usually done by a family member." (ER-103, ¶ 34.) "In anticipation of Larissa's high school graduation, [her father] began to traditionally bead a graduation cap for her in April of 2019." (ER-103, ¶ 33.) "Larissa was also

honored with an eagle plume to be worn on her graduation cap." (ER-104, ¶ 38.) "Larissa's eagle plume was blessed in a religious ceremony on the Rosebud Sioux Reservation in South Dakota and later presented to Larissa by her paternal grandmother." (ER-104, ¶ 40.) "Larissa's cap also included a medicine wheel," which is "a sacred symbol that represents various religious and spiritual aspects of the universe." (ER-106, ¶¶ 48-49.) "Larissa wanted to observe her religion and culture by wearing her beaded cap and sacred eagle plume during her high school graduation ceremony." (ER-105, ¶ 46.)

Valley Vista High School sent a letter to parents on April 25, 2019 prescribing "appropriate dress" for graduation, which it referred to as a "formal celebration":

- Male graduates: Shirt and tie, polo shirt, dress slacks, khakis, dress shoes (athletic shoes or sandals/flip flops and jeans are not allowed.)
- Female graduates: Dress, dress pants, blouse, dress shoes (athletic shoes or sandals/flip flops and jeans are not allowed. Spiked heels are not recommended.…)
- A school medallion and school approved honor cords and stoles may be worn over gown[s], no other adornment/additions are allowed.
- Students may NOT decorate their gown or cap.

(ER-152–153.)

"The District's commencement dress code require[d] all students to wear a cap and gown with tassel without adornment or alteration while participating in the commencement exercises. The reason for this requirement is to preserve the sanctity of the ceremony for graduating students and their families and honor the achievements of all students. In addition, the commencement dress code is intended to show respect for the formality of the ceremony, unity for the graduating Class of 2019, and to avoid disruption of the commencement ceremonies that is likely to occur if students are allowed to alter their graduation cap or gown." (ER-146–147; ER-160.)

"After learning that Larissa may not be able to wear her beaded cap and eagle plume … [her father] requested that the school allow Larissa to wear her beaded cap and blessed eagle plume for graduation." (ER-107, ¶ 53.) An "Assistant Principal refused [her father's] requests for a religious accommodation for Larissa." (ER-107, ¶ 54.)

"On May 14, 2019, [Larissa's father] met with [the District] Superintendent … to further discuss the matter." (ER-110, ¶ 64.) The Superintendent "was adamant that Larissa could not wear her eagle plume on her cap, but he offered to allow her to wear it in her hair, around her neck or under her robe." (ER-110, ¶ 67.) "For [Larissa], the eagle feather must be worn on the cap and to cover it up

under a gown or cap would desecrate or disrespect the feather (and therefore its sacredness)." (ER-105, ¶ 44.)

In response to a letter sent by the ACLU to the District on Larissa's behalf, the District's legal counsel advised that the District had "also denied a request that seminary students be allowed to wear a special adornment on their gowns during the graduation ceremony." (ER-112, ¶¶ 73-74; ER-161.)

Nevertheless, Larissa, "[w]earing her gown and holding her beaded cap and eagle plume, … attempted to enter [the graduation venue]. At the door, Valley Vista High School officials … refused to even allow Larissa to enter the building." (ER-114, ¶ 80.)

Larissa and her father filed suit against the District, its governing board members and superintendent, Larissa's high school and its principal and assistants. Their Amended Complaint alleged five causes of action: violation of right to free exercise of religion, violation of right to freedom of speech, violation of right to equal protection, and two state-law-based claims. (ER-95–135.) Defendants moved to dismiss for failure to state a claim on which relief can be granted. The district court granted the motion as to the first three claims and dismissed the state-law claims without prejudice. (ER-5; ER-60.) Leave to amend was not granted. (ER-59–60.) Larissa did not move to amend in the month between the order granting the motion and the entry of the final judgment of dismissal. (ER-4.)

Larissa and her father have appealed the entire judgment. (ER-172.) However, their Opening Brief does not argue the dismissal of the governing board and its members (OB 16, n.9), the dismissal of all individual defendants (OB 17, n. 10; ER-36), and the dismissal of the equal protection claim (OB 18, n.11). Neither does the Opening Brief argue any error in the district court's ruling that Larissa's father failed to state any claim that his own federal constitutional rights were violated. (ER-9, n.5.) Finally, the Opening Brief does not argue any error in the district court's rulings that Larissa's high school is not a legal entity subject to suit and the claim for declaratory relief was mooted by Larissa's graduation. (ER-9, 36.)

SUMMARY OF THE ARGUMENT

On defendants' motion to dismiss for failure to state a claim, the district court properly evaluated the allegations of the Amended Complaint and considered only those that were well-plead. The allegations regarding "other students" were not well-plead. But whether the district court properly evaluated the allegations regarding other students is now moot given the abandonment of the equal protection claim. In any event, the allegations regarding other students do not support the claims of violation of rights to free exercise of religion and free speech.

The District's graduation dress code did not infringe free exercise of religion. It is neutral and generally applicable, and only incidentally burdened any religious practice. It did not provide for exceptions, none were granted to anyone, Larissa was not entitled to an exception, and granting her an exception would violate other students' Establishment Clause rights.

Neither did the graduation dress code infringe freedom of speech. The code is subject to intermediate scrutiny, not strict scrutiny, and it withstands intermediate scrutiny. The code is viewpoint- and content-neutral, it furthers important government interests unrelated to the suppression of free speech, and any incidental restriction is no greater than essential to further those interests. Again, the code did not provide for exceptions and none were granted. The code is also constitutional under a forum analysis. The graduation was at most a limited

public forum, and the code satisfies the requirements for restriction of speech in such a forum.

The district court did not abuse its discretion by denying Larissa's request to further amend her Amended Complaint. Larissa failed to specify any proposed additional allegations and explain how they would cure her deficient statement of claims. Therefore, her request was inadequate to avoid futility. The additional allegations to which she now alludes confirm that further amendment would be futile.

The judgment of dismissal should therefore be affirmed.

ARGUMENT

I. The district court simply followed the law in evaluating the allegations of the Amended Complaint.

Larissa mischaracterizes the evaluation principles applied by the district court.[1] The court did not construe the factual allegations of the Amended Complaint against her. Indeed, the court's evaluation of the complaint began by recognizing that "[a]ll 'well-pleaded' factual allegations set forth in the complaint are taken as true and construed in the light most favorable to the plaintiff." (ER-14.) From there the court followed the law in evaluating the allegations.

A. *Twombly* and *Igbal* guided the district court.

Pursuant to *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Igbal*, 556 U.S. 662 (2009), the district court identified and ignored allegations that were not well-plead[2] and drew on judicial experience and common sense to determine whether the well-plead allegations plausibly showed that Larissa was

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[1] Although Larissa's father was a named plaintiff, the district court ruled that he failed to state any claim that his own federal constitutional rights were violated. (ER 9, n.5.) Because the Opening Brief does not argue any error in that ruling, this brief will refer to Larissa as the sole appellant.

[2] *E.g.*, threadbare recitals of the elements of a cause of action; allegations that are merely conclusory or contradict exhibits incorporated in the complaint; unwarranted deductions of fact; unreasonable inferences; bald or naked assertions; unsupportable conclusions; and legal conclusions.

entitled to relief. (ER-14–19.) The evaluation principles followed by the district court are stated in *Igbal* as follows:

> Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in *Twombly*, the pleading standard Rule 8 announces does not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement."
>
> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"
>
> Two working principles underlie our decision in *Twombly.* First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation"). Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will … be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But where the well-pleaded facts do not permit the

> court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not "show[n]"—"that the pleader is entitled to relief."
>
> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

556 U.S. at 677-679 (citations omitted).

B. Abandonment of the equal protection claim moots the district court's evaluation of allegations regarding "other students."

Whether the district court erred in evaluating Larissa's allegations is now moot in light of her abandonment of the equal protection claim. The primary focus of Larissa's argument is that the district court misjudged her allegations regarding "other students." She repeatedly compares the District's alleged treatment of them to its treatment of her. (OB 23-28.) But that no longer matters. Consequently, the allegations regarding "other students" are not relevant facts and whether the district court misconstrued the allegations as to them is not a relevant issue. Instead, the relevant issues are whether the graduation dress code violated Larissa's rights to free exercise of religion or freedom of speech.

C. Allegations regarding "other students" do not support the claims.

Even if the allegations regarding "other students" were still relevant, they do

not contribute to a plausible claim. The reasons are many.

Larissa did not allege that any other student was permitted to decorate a cap or gown with anything of a religious nature. A breast cancer awareness sticker, school medallions, honor cords and stoles are not religious in nature. Moreover, by the attachments to the Amended Complaint she acknowledges that the District denied the request of seminarians to wear a special adornment on their caps during the graduation ceremony. (ER-112, ¶¶ 73-74: ER-161.)

The student pictured in the Amended Complaint (ER-116) with a breast cancer awareness sticker on his cap was a student at a different high school, Shadow Ridge High School. (ER-115, ¶¶ 83, 86.) The photo was obviously taken after the Shadow Ridge graduation ceremony. The student is shown holding a cell phone in his right hand. The graduation dress code states that "[g]raduates are not to bring or carry anything during graduation (cell phones, [etc.])…." (ER-152.) He is also carrying his diploma in his left hand while also holding with the thumb and index finger of the same hand what appears to be another cap. The students and a teacher (in black robe) behind him over his left shoulder are posing for a post-ceremony picture. And the attendees in the background are standing and moving up the stairs to exit the ceremony. Therefore, the photo does not support the allegation that other students were permitted to adorn their caps during the graduation ceremonies.

The Shadow Ridge graduation was held after Larissa's graduation. (ER-115, ¶ 83.) Larissa did not allege that the Valley Vista principal or assistant principals were present at the Shadow Ridge graduation or had anything to do with it. Common sense teaches that they would not have. Therefore, it is not plausible that they permitted the Shadow Ridge student to display the breast cancer sticker on his cap.

Larissa's allegation "on information and belief" that "other students in the Dysart School District had adorned their caps or wore prohibited items on their person during their graduation ceremonies" (ER-117, ¶ 91; also ER-126, ¶ 134) is not worthy of consideration. The *Twombly* plausibility standard permits allegations of facts upon information and belief only "where the facts are peculiarly within the possession and control of the defendant or where the belief is based on factual information that makes the inference of culpability plausible." *Soo Park v. Thompson*, 851 F.3d 910, 928 (9th Cir. 2017) (citations omitted). Here, neither condition is satisfied. The graduation ceremonies were public. (ER-133, ¶ 158.) And they were of course attended by the graduating students. Therefore, whether other students adorned their gowns or decorated their caps during the ceremonies would be a fact known to all who attended, not just the defendants. Secondly, Larissa's allegation on information and belief lacks any supporting factual basis. Furthermore, the allegation is inconsistent with the documentation that other

students (seminarians) were not allowed to wear non-compliant items. (ER-112, ¶¶ 73-74: ER-161.)

D. The dress code did not permit exceptions.

Larissa's allegations and argument misperceive and misstate the dress code. She alleged that "[o]ther students … were permitted to express their educational achievement by wearing cords, sashes, medals, and other [unspecified] items for their graduation ceremony." (ER-116, ¶ 90.) And she alleged that "other students in the Dysart School District had adorned their caps or wore [unspecified] prohibited items on their person during their graduation ceremonies." (ER-117, ¶ 91; also ER-126, ¶ 134.) She argues that those allegations are supported by the dress code itself. (OB at 25.) That argument is contradicted by the express language of the dress code: "A school medallion and school approved honor cords and stoles may be worn over gown[s]." (ER-152.) Anything else is expressly prohibited: "no other adornment/additions are allowed. Students may NOT decorate their gown or cap." (ER-152.)

Larissa's argument also mischaracterizes medallions, cords and stoles as "exceptions" to the dress code. (OB at 23, 25, 27, 28.) That's upside down. The dress code states what is allowed and what is not allowed. There are no exceptions.

Furthermore, medallions, cords and stoles are worn over a gown. They are not decorations on a cap. (ER-116 photo shows school medallions hanging on a sash worn around the neck.)

Larrisa's allegation that the District Superintendent suggested she wear the eagle plume in her hair, around her neck or under her robe adds nothing to the statement of any claim. None of those options would be an adornment or addition to a gown or a decoration on a cap.

II. Larissa did not allege a viable claim that the dress code violated her right to free exercise of religion.

The essence of Larissa's argument is that the graduation dress code is not neutral and generally applicable because it "contained a mechanism for exceptions and treated comparable secular activity more favorably than religious exercise." (OB at 3.) For support, Larissa relies on (1) the dress code's allowance of school medallions and honor cords and stoles worn over gowns and (2) her allegation that the District permitted other students to adorn their caps or wear prohibited items on their person during their graduation ceremonies. As discussed above, that allegation was not well-plead. Therefore, the analysis of Larissa's argument must be limited to the dress code itself.

A. The dress code has no "exceptions."

The dress code does not contain "a mechanism for exceptions." The dress code is fixed. It states what is allowed and what is not allowed. There are no exceptions or any provision for exceptions. Contrary to Larissa's mischaracterization, school medallions, honor cords and stoles are not "exceptions" to the dress code. They are simply items that are allowed or not disallowed by the code.

Larissa's characterization of school medallions, honor cords and stoles as "exceptions" is disingenuous. It appears that every student wore his or her

school's medallion. (*See* photo at ER-116.) And it is common knowledge that honor cords and stoles are worn by students who have earned certain distinctions. Honor cords and stoles are not something a student requests an exception to wear; they are bestowed as an honor.[3]

That the District has previously worked with families to find solutions to dress code issues does not indicate that exceptions have been made to the dress code, as Larissa suggests. (OB at 32.) The complete passage of the letter from the District's counsel, from which Larissa quotes incompletely, reveals that the solutions respected the dress code rather than creating an exception:

> The District has worked with any family when issues have arisen related to the commencement dress code to find a workable solution *consistent with the commencement dress code*. For example, the District has worked with families to allow students to wear attire *underneath their gown* that honors or expresses something important to the student, such as military membership or a student's heritage.

(ER-147, emphasis added.)

B. The dress code is neutral and generally applicable.

The district court correctly ruled that the dress code is both neutral and

[3] Larissa's brief makes reference for the first time to "stoles bearing the names and logos of branches of the military, national groups and organizations" and to caps "with different color tassels." (OB at 33.) No such items were alleged in the Amended Complaint. Moreover, they are just examples of the permitted honor cords and stoles. Military stoles might honor those students who participated in a Junior ROTC program, are enlisting in the military after graduation, or have been selected to attend a military academy. Colored tassels, like cords, denote academic honors, *e.g.*, Dean's List, National Honor Society.

generally applicable. (ER-47, 48, 52.)

> "A law is neutral so long as its object is something other than the infringement or restriction of religious practices." *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 649-50 (10th Cir. 2006). *See also Parents for Privacy*, 949 F.3d at 1235. A policy is "generally applicable" provided "it does not make distinctions based on religion." *Michigan Catholic Conference & Catholic Family Servs. v. Burwell*, 755 F.3d 372, 394 (6th Cir. 2014), *vacated on other grounds*, 575 U.S. 981 (2015). * * *
>
> Because the policy at issue, i.e., the commencement dress code regarding the adornment of graduation caps, "make[s] no reference to any religious practice, conduct, belief, or motivation," it is facially neutral. *See Stormans Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015) ("*Weisman*"). Neither Plaintiffs' Amended Complaint nor the record in this matter plausibly suggest that the graduation dress code was promulgated with the object of suppressing the exercise of religion. Accordingly, the Court concludes the dress code is neutral for the purpose of analyzing Plaintiffs' free exercise claim.

(ER-47.)

> The question of general applicability addresses whether a law treats religious observers unequally. *See Lukumi*, 508 U.S. at 542. * * *
>
> The graduation dress code itself was content-neutral and, as written, generally applicable. There is no indication in the facts pled by Plaintiffs that the dress code sought to further the District's interests only against religious expression or Native American culture, and the dress code also prohibited secular speech as it was a blanket prohibition on the decoration of graduation caps.

(ER 47-48.)[4]

[4] Contrary to Larissa's contention (OB at 30, 34), the district court's focus on "caps" was appropriate because Larissa sought to decorate her cap, not to adorn her gown.

Like the school uniform policy in *Jacobs v. Clark Cnty. Sch. Dist.*, the graduation dress code herein is "the quintessence of a "neutral [rule] of general applicability." 526 F.3d 419, 439 (9th Cir. 2008) (quoting *Employment Div., Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 879 (1990)). "The [code] applies to all students equally (regardless of the students' religious beliefs), and it prohibits conduct (*i.e.*, [adornment of or additions to gowns and decoration of caps) that presents no obvious impediments to the free exercise of any particular religion or religions." *Jacobs*, 526 F.3d at 439. Therefore, the code does not "implicate the Free Exercise Clause." *Id.*

C. Larissa's religious beliefs did not entitle her to an exception.

"The free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires." *Smith*, 494 U.S. at 877. However, "the freedom to act pursuant to one's religious beliefs cannot be absolute." *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020) (internal quotations and citations omitted). "[T]he Free Exercise clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the government." *Lyng v. NW Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) (citation omitted). In other words, the Constitution does not compel "'school officials to surrender control of the American public school system to public school students.'" *Bethel Sch. Dist. No.*

403 v. Fraser, 478 U.S. 675, 686 (1986) (quoting Justice Black's dissent in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 526 (1969)).

"The right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Smith*, 494 U.S. at 879 (internal quotation and citations omitted). Because the dress code is neutral and generally applicable Larissa "had no right under the Free Exercise Clause to a religious exemption." *Jacobs*, 526 F.3d at 440.

D. The dress code only incidentally burdened any religion practice.

First, Larissa did not allege an actual religious practice or any burden on any practice, as the district court observed:

> Plaintiffs' Amended Complaint reflects the importance of Larissa's culture and heritage and her sincere desire to express and affirm her culture and heritage at her graduation. However, the Amended Complaint does not demonstrate that wearing a beaded cap adorned with an eagle feather to a public high school graduation ceremony was an actual "practice" of Larissa Waln's religion. Larissa was not prohibited from participating in her graduation ceremony, she was advised she could not participate in the ceremony wearing an augmented graduation cap. And although wearing a beaded cap adorned with an eagle feather, which feathers hold special significance for Native Americans, would have been an acknowledgement of Larissa's faith and cultural heritage, she does not allege "any specific religious conduct that was affected by the Defendants' actions." *Torlakson*, 267 F. Supp. 3d at 1226 (emphasis added). Accordingly, Plaintiffs have not alleged interference with Larissa's actual exercise of her religion under the Constitution.

(ER-51–52.)

But even assuming a religious practice was involved, the dress code did not infringe free exercise because it only incidentally burdens the practice. "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993).

In this case, the dress code caused at most only an incidental burden, as the district court explained:

> Plaintiffs have not established that the commencement dress code placed more than an incidental burden on a "central religious belief or practice." Plaintiffs do not plausibly allege that Larissa's participation in the graduation ceremony in an unadorned graduation cap would violate a central religious belief, *i.e.*, that doing so would have compelled "a violation of conscience" or required her to engage in a behavior proscribed by her religious faith. *Thomas v. Review Bd. of Indiana Emp't Div.*, 450 U.S. 707, 717 (1981). In order to demonstrate a violation of the Free Exercise Clause, "a litigant must show that challenged state action has a coercive effect that operates against the litigant's practice of his or her religion." *Grove*, 753 F.2d at 1533.
>
> Notably, a public high school graduation ceremony is a secular, government controlled activity. Larissa's participation in the event did not transform it into a religious event; Plaintiffs' allegation that the event was similar to a bar mitzvah or a Christian confirmation ([ER-105, ¶ 46]) does not establish her free exercise claim, as a bar mitzvah and a Christian confirmation are religious-themed events while the graduation ceremony was a secular, government-sponsored activity solely for the purpose of acknowledging a non-religious accomplishment, *i.e.*, each student's completion of a government-mandated curriculum for graduation from high school. Although Larissa had a sincere desire to wear her adorned cap to honor her

> culture and religion and thus increase the spirituality, fervor, and spiritual satisfaction derived from the public high school graduation ceremony, the diminishment of Plaintiffs' "subjective, emotional religious experience," *i.e.*, the diminishment of their spiritual fulfillment in the course of a public-school secular activity, was at best only an incidental burden on the free exercise of her religion. *See Navajo Nation v. United States Forest Serv.*, 535 F.3d 1058, 1070 (9th Cir. 2008) (applying the Religious Freedom Restoration Act's "substantial burden" analysis).
>
> * * * Larissa was not prohibited from participating in her graduation ceremony, she was advised she could not participate in the ceremony wearing an augmented graduation cap. And although wearing a beaded cap adorned with an eagle feather, which feathers hold special significance for Native Americans, would have been an acknowledgement of Larissa's faith and cultural heritage, she does not allege "any specific religious conduct that was affected by the Defendants' actions." *Torlakson*, 267 F. Supp. 3d at 1226 (emphasis added). Accordingly, Plaintiffs have not alleged interference with Larissa's actual exercise of her religion under the Constitution.

Larissa's assertion that wearing an undecorated cap was "inconsistent with her tradition and religious beliefs" (OB at 39) is not supported by the allegations of her Amended Complaint.

E. Adherence to the dress code was necessary to avoid violating other students' Establishment Clause rights.

The Establishment Clause prohibits the government from affirming religious beliefs or compelling others to do so. The District has a compelling government interest in complying with the Establishment Clause. *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761–62 (1995). As the district court correctly observed, "federal courts have repeatedly prohibited public schools from

entangling their high school graduation ceremonies with religious observances." (ER-33, citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), and *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 983 (9th Cir. 2003)). Therefore, public high schools are required to regulate religious messages "to avoid the appearance of government sponsorship of religion" and not "impermissibly coerc[e] … dissenters, requiring them to participate in a religious practice even by their silence." *Lassonde,* 320 F.3d at 983 (citations omitted).

If the District had accommodated Larissa it would have thereby violated the Establishment Clause by subjecting other students to her religious practice. Larissa acknowledges in pleading her Free Speech claim that she "intended to convey a particularized religious and cultural message that was likely to be understood by others." (ER-122, ¶ 116.) Forcing any other student to choose between foregoing attendance at graduation or attending and effectively participating in a religious practice with which the student disagrees is not constitutionally permissible. *Lassonde*, 320 F.3d at 983-84.

Furthermore, had the District granted Larissa an exception to wear a beaded cap and eagle plume it would have lent District approval to her religious message. All other students and their parents, who were familiar with the District's dress code, would have perceived that Larissa's religious message carried the District's seal of approval. *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1103 (9th

Cir. 2000) (regarding effect of approval of sectarian, proselytizing commencement speech).

Therefore, even if Larissa's religious practice was substantially burdened, the District's adherence to the dress code furthered a "compelling governmental interest" through the "least restrictive" means. The District simply did not have another way of preventing coerced participation.

Larissa's argument that her allegation that "other schools in Arizona permitted students to wear … religious items" "show[s] that the District's graduation dress code was not the least restrictive means to further its interests" (OB at 45) is not just a bootstrap, it is nonsensical. Larissa does not explain how those other schools complied with the Establishment Clause.

III. Larissa did not allege a viable claim that the dress code violated her right to Free Speech.

A. Dress codes are not necessarily controlled by *Tinker*.

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969), was not a dress code case. *Tinker* involved a school district's prohibition on the wearing of black armbands in protest of the involvement of the United States in the Vietnam War, which was a viewpoint-based restriction on a form of pure speech.

Jacobs v. Clark Cnty. Sch. Dist., 526 F.3d 419 (9th Cir. 2008), is a dress code case. After schools in the district adopted mandatory school uniform policies, several students and their parents alleged that the policies infringed the students' free speech rights by preventing them from engaging in both constitutionally protected "pure speech" and "expressive conduct."

The *Jacobs* plaintiffs argued that their speech must be analyzed under the substantial interference standard utilized in *Tinker* – whether allowing students to wear black armbands would "substantially interfere with the work of the school or impinge on the rights of other students." 393 U.S. at 509. The district court disagreed and found no infringement because the policies withstood intermediate scrutiny. After analyzing *Tinker*, this court held that the stricter standard utilized in *Tinker* did not apply to the dress codes in *Jacobs*.

B. The holding of *Tinker* is limited.

As this court observed in *Jacobs*, the holding of *Tinker* is limited:

> First, as the [Supreme] Court itself made clear, its "substantial interference" test applies only to restrictions on "pure speech," and does not necessarily apply to school policies placing incidental restrictions on expressive conduct. ... Thus, *Tinker* leaves unresolved the question of how restrictions upon expressive conduct in schools should be evaluated. * * *
>
> Second, the holding itself extends only to viewpoint-*based* speech restrictions, and not necessarily to viewpoint-*neutral* speech restrictions.

526 F.3d at 430.

"[N]o reading of *Tinker* suggests that viewpoint-and-content-*neutral* restrictions on student speech should also be subjected to '*Tinker* scrutiny.'" 526 F.3d at 431. "*Tinker* says nothing about how viewpoint- and content-neutral restrictions on student speech should be analyzed, thereby leaving room for a different level of scrutiny than that employed in either *Bethel*, *Hazelwood*, or *Tinker* when student speech is restricted on a viewpoint- and content-neutral basis." *Id*. at 431-432.

C. The District's neutral graduation dress code need only withstand intermediate scrutiny.

The appropriate different level of scrutiny is intermediate scrutiny, as this court explained in *Jacobs*:

> Outside the school speech context, the Supreme Court has repeatedly held that a law restricting speech on a viewpoint- and content-neutral basis is constitutional as long as it withstands intermediate scrutiny—*i.e.*, if: (1) "it furthers an important or substantial government interest"; (2) "the governmental interest is unrelated to the suppression of free expression"; and (3) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *Turner,* 512 U.S. at 661–62, 114 S.Ct. 2445. The same is true of a regulation that has an incidental effect on expressive conduct. *United States v. O'Brien,* 391 U.S. 367, 376–77, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968).
>
> We agree with the district court that this same level of scrutiny should extend to the school speech context. (Citations omitted.) Applying intermediate scrutiny to school policies that effect content-neutral restrictions upon pure speech or place limitations upon expressive conduct (or, as is the case here, do both) not only strikes the correct balance between students' expressive rights and schools' interests in furthering their educational missions, but, as the Fifth Circuit explained, is entirely consistent with the Supreme Court's other school speech precedents, not to mention the remainder of the Court's First Amendment jurisprudence.

526 F.3d at 434 (referring to *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437 (5th Cir. 2001).

D. The District's graduation dress code is viewpoint- and content-neutral.

As discussed above in the Free Exercise argument, the District's graduation dress code is neutral. It does not restrict any particular viewpoint or specific content. It simply prohibits all cap decorations and all gown adornments or

additions. It is not directed at speech or expression of any particular persuasion or nature, such as Larissa's beaded cap and eagle plume.

Larissa's argument that the dress code is not neutral because exceptions were granted is premised on allegations that are not well-plead, as discussed above in the Free Exercise argument.

E. The District's graduation dress code withstands intermediate scrutiny.

1. It furthers an important or substantial government interest.

The dress code states that "Graduation is a formal celebration.…" (ER-153.) Accordingly,

> The District's commencement dress code requires all students to wear a cap and gown with tassel without adornment or alteration while participating in the commencement exercises. The reason for this requirement is to preserve the sanctity of the ceremony for graduating students and their families and honor the achievements of all students. In addition, the commencement dress code is intended to show respect for the formality of the ceremony, unity for the graduating Class of 2019, and to avoid disruption of the commencement ceremonies that is likely to occur if students are allowed to alter their graduation cap or gown.

(ER-146–147; ER-160.)

Those reasons are important and substantial. Preserving the sanctity of the ceremony, showing respect for its formality, uniting the graduating students, and avoiding disruptions are all important and substantial government interests. Larissa did not allege and does not argue otherwise.

2. The governmental interest is unrelated to the suppression of free expression.

The interests sought to be furthered by the dress code have nothing to do with quelling speech or limiting expression. Larissa did not allege and does not argue otherwise.

3. The incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

A less restrictive dress code that would not compromise the interests it served is inconceivable.

Moreover, the least restrictive means of serving those interests is not required:

> While "the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of [the government's] interest, ... a regulation need not be the *least* speech-restrictive means of advancing the [g]overnment's interests," *Turner*, 512 U.S. at 662, 114 S.Ct. 2445 (emphasis added); it need only promote "a substantial government interest that would be achieved less effectively absent the regulation," *id*. (internal quotation marks and citations omitted).

Jacobs, 526 F.3d at 435, n.36 (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622 (1994)).

The District's graduation dress code applied only in the narrow window of the graduation ceremony. It did not restrict Larissa's freedom to wear a beaded

cap and eagle plume in celebration with her family before and after the ceremony. And it did not restrict Larissa's freedom to express herself in other ways, such as wearing the eagle plume in her hair or as a necklace during the ceremony.

F. The dress code's restriction on speech is also constitutional under a forum analysis.

This court has apparently "never determined what forum is created when a school district holds a graduation." *Nurre v. Whitehead*, 580 F.3d 1087, 1094 (9th Cir. 2009). The options are four: public, designated public, nonpublic, and limited public. They are defined and distinguished as follows:

> The traditional public forum is a place which by long tradition ... ha[s] been devoted to assembly and debate.
>
> The designated public forum exists when the government intentionally dedicates its property to expressive conduct.
>
> The non-public forum is any public property that is not by tradition or designation a forum for public communication.
>
> The limited public forum is a sub-category of a designated public forum that refers to a type of nonpublic forum that the government has intentionally opened to certain groups or to certain topics.

OSU Student Alliance v. Ray, 699 F.3d 1053, 1062 (9th Cir. 2012).

A graduation ceremony is most certainly not a public or a designated public forum. The district court herein observed that "[t]he federal courts that have considered the issue have generally determined that school-sponsored settings, such as a high school graduation ceremony, are non-public or 'limited' public

forums.…" (ER-41, citations omitted.) The District submits that its graduation ceremonies are non-public because they are not by tradition or designation a forum for public communication and the limited public forum definition does not fit.

1. Non-public forum.

"Public property which is not by tradition or designation a forum for public communication is governed by different standards." *Perry Educ. Ass'n v. Perry Local Educators Ass'n*, 460 U.S. 37, 46 (1983). A public high school graduation site is such property. The Supreme Court "has recognized that the First Amendment does not guarantee access to property simply because it is owned or controlled by the government. In addition to time, place, and manner regulations, the state may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view." *Id*., internal quotation and citation omitted.

The District's graduation dress code is reasonable and viewpoint-neutral. It was reasonable under the circumstances and was not designed to suppress the expression of any viewpoint with which District officials might disagree.

2. Limited public forum.

Even assuming the ceremony was a limited public forum, the District's graduation dress code passes Constitutional muster:

> [I]n a limited public forum, speech restrictions are constitutional so long as they: (1) comport with the definition of the forum (for example, the government cannot exclude election speech from a forum that it has opened specifically for election speech); (2) are reasonable in light of the purpose of the forum; and (3) do not discriminate by viewpoint.

OSU, 699 F.3d at 1062 (citing *Flint v. Dennison*, 488 F.3d 816, 831 (9th Cir. 2007)).

Here, the District's dress code satisfies all three requirements. It comported with the definition of the forum, which as the district court observed is the graduation ceremony itself. (ER-43.) *Flint*, 488 F.3d at 831 (relevant forum was student election itself). The restrictions on caps and gowns were reasonable in light of the stated purposes of the graduation (ER-146–147, 153, 160), as the district court correctly ruled. (ER-43–44.) And the restrictions did not discriminate by viewpoint – they were neutral, as the district court also correctly ruled. (ER-44.)

IV. The District Court did not abuse its discretion by denying Larissa's inadequate and futile request to further amend her complaint.

Larissa's response to the District's motion to dismiss made only this naked request: "If the Court finds any of Plaintiffs' claims to be inadequately plead, Plaintiffs request the opportunity to amend their First Amended Complaint to cure any deficiencies." (ER-93.) Although the motion to dismiss made Larissa aware of the reasons why the Amended Complaint failed to state a claim, her response did nothing to specify, or even indicate, what additional allegations she could make in an amended complaint and how they would cure her failure state a claim. For example, she did not advise the district court of other photographs or request that judicial notice of them be taken, as she belatedly does now. (OB at 14-15.) Therefore, the district court observed:

> Plaintiffs have not shown in their briefing how they could amend their claims to remedy the Amended Complaint's legal deficiencies with regard to stating an adequate free speech, free expression, or equal protection claim under the appropriate standard of review, or to correct the primary deficiency with all of their claims, *i.e.*, that an identifiable Dysart graduating senior was given leave by one of the named individual Defendants, acting in their official capacity, to augment their graduation cap.

(ER-59–60.)

Accordingly, the district court also addressed the futility of an amendment:

> The failure of Plaintiffs' Amended Compliant includes both the insufficiency of a plausible critical factual allegation and the failure of their factual allegations to state a claim for relief under the appropriate

> standard of scrutiny, which is not strict scrutiny as Plaintiffs contend. Amending their claims will not change, for example, the extent of the rights that are protected by the free speech, free expression, or equal protection provisions of the United States Constitution.

(ER-60.)

Therefore, the district court did not abuse its discretion by denying Larissa's inadequate and futile request to further amend her complaint.

Even now Larissa does not specify any allegations that could be well-plead. She makes only conclusory statements (OB at 37) incorporating an earlier section of her brief (OB at 12-15) that relied on the photograph of a single unidentified student from a different high school wearing a breast cancer awareness sticker and a "medal on a golden colored sash around his neck," on her mischaracterization of the terms of the dress code as "exceptions," and on her baseless conclusory statements that honor cords and stoles bore expressive messages unconnected to the school or academic achievement.

Indeed, her would-be allegations are belied by the photographs she asks the court to judicially notice. Four of the twelve photos are from graduations at other schools, namely Dysart High School, Shadow Ridge High School, and Willow Canyon High School. The photos show that every student is wearing a school medallion (not a "medal") on a colored sash around their neck. The medallions and sash colors are distinctive to each school. The medallions of Dysart High School and Willow Canyon High School bear the names of those schools. (OB at

14, n.5; OB at 15, n.8) The Shadow Ridge High School medallion may also, but it is harder to read. (OB at 15, n.5.)

The photos also depict numerous stoles related to academic or other honors. Several National Honor Society stoles are visible. (OB 15, n.6.) The "AVID" stoles (OB at 15, n.6, n.7) denote academic achievement. "AVID" stands for "Advancement Via Individual Determination."[5] The "DECA" stole refers to a common high school program that honors emerging leaders.[6] (OB 15, n.6.) The stole depicting the faces of drama and comedy may say "Theatre" and most plausibly relates to a related school honor. (OB at 15, n.6) The black stole reading, in part, "Senior Class," is most plausibly worn by a class officer, and her Kiwanis Club stole recognizes an honor from that organization. (OB 15, n.6.)

Incidentally, the flower to which Larissa refers is in the student's hair, not on a cap or gown. (OB at 15, n.8.)

It is important to note Larissa had a month between the district court's Order granting the motion to dismiss (ER-6) and the entry of the dismissal order and judgment (ER-4, 5) in which to move to amend her complaint. She did not do so.

For all of these reasons there is no point in giving Larissa leave to further amend her complaint only to face another motion to dismiss that would be granted.

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[5] https://www.avid.org/what-avid-is

[6] https://www.deca.org/high-school-programs/high-school-recognition-awards/

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed and appellees' costs taxed against the appellants.

Respectfully submitted on January 3, 2022.

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CERTIFICATE OF COMPLIANCE

This brief contains 7,818 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief complies with the word limit of Cir. R. 32-1.

Dated: January 3, 2021.

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CERTIFICATE OF FILING AND SERVICE

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: January 3, 2022.

GUST ROSENFELD P.L.C.

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STATEMENT OF RELATED CASES

No other cases in this court are related.