No. 16-984

In The
Supreme Court of the United States

A.M., ON BEHALF OF HER MINOR CHILD, F.M.,

Petitioner,

v.

ANN HOLMES, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

I. INTRODUCTION

Petitioner's description of this case in her Introduction elucidates Petitioner's overall misplaced approach to how settled law applies to the facts underlying her original action. In her Introduction, Petitioner minimizes F.M.'s behavior at school, describing it as burping in class, laughing, being removed from class, and then leaning back into the classroom from the hallway.[1] (Petition at 4) While Petitioner does later expound on the facts of this case and includes a description of how F.M.'s behavior disrupted his physical education teacher, Ms. Mines-Hornbeck, along with her classroom teaching pursuant to NMSA 1978, § 30-20-13(D) (the "interference-with-educational-process" statute), Petitioner otherwise fails to acknowledge the true extent of the disruption and the application of the law to the disruption, choosing instead to misleadingly focus on the obvious behavior itself: burping.

In short, this case is about the application of section 30-20-13(D) to the very specific facts underlying F.M.'s arrest.[2] Both the district court and the

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[1] *Amici Curiae* take the same approach by describing F.M.'s behavior as acting "as a class clown by burping in class" (*Amici Curiae* Brief at 11) and thus downplaying the interruption caused by F.M. to the educational process.

[2] Although *Amici Curiae* assert that this case "extends much further [than to a 13-year-old jokester who acted as a class clown by burping in class], to countless future school children who may behave in similar ways[,]" (*Amici Curiae* Brief at 11), such a broad representation is not correct. The reality is that this case involves

Tenth Circuit correctly concluded and held, respectively, that the law in May of 2011 was not such that a reasonable officer in Officer Acosta's position would know that F.M.'s arrest fell outside the scope of NMSA 1978, § 30-20-13(D) or was otherwise unconstitutional. In no uncertain words, the Tenth Circuit held that Officer Acosta had arguable probable cause for F.M.'s arrest. *See A.M. v. Holmes*, 830 F.3d 1123, 1140 (10th Cir. 2016). Additionally, the district court correctly concluded that Officer Acosta had probable cause, or, at a minimum, arguable probable cause, for F.M.'s arrest.

II. FACTUAL AND LEGAL BACKGROUND

Petitioner filed her initial Complaint on November 30, 2011 against Albuquerque Public Schools Principal and Assistant Principal Susan Labarge and Ann Holmes, respectively; Albuquerque Public Schools teacher Margaret Mines-Hornbeck; and City of Albuquerque Police Officer Arthur Acosta. Petitioner's claims arose from two separate incidents that occurred (1) in May of 2011, wherein Petitioner's child, F.M., was arrested following an incident involving a disruption by F.M. of his physical education class taught by Ms. Mines-Hornbeck, and (2) in November of 2011, wherein F.M. was subjected to a search for contraband,

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a New Mexico state statute as applied to a New Mexican student. *Amici Curiae*'s posturing this case as having a national impact unreasonably inflates the impact of the decision past New Mexico's borders.

while he was at school, led by Principal Labarge.[3] Petitioner's claims against Officer Acosta consist of a Fourth Amendment violation brought under 42 U.S.C. § 1983 for unlawful arrest and excessive force. Officer Acosta arrested F.M. for a violation of section 30-20-13(D). In the district court, Officer Acosta asserted a defense of qualified immunity to Petitioner's claims, which was granted. Petitioner's case against Officer Acosta was dismissed on September 14, 2014, following the grant of qualified immunity. It is the district court's grant of qualified immunity, and subsequently, summary judgment issued to Officer Acosta, that is at issue here.

Officer Acosta not only had probable cause for the arrest in May of 2011 (or, at a minimum, arguable probable cause), but, at the time of Officer Acosta's arrest of F.M., it was not sufficiently clear to a reasonable officer that such an arrest would violate F.M.'s constitutional rights. Both the district court and the Tenth Circuit determined, *inter alia*, that Officer Acosta was entitled to qualified immunity because the clearly established law in May of 2011 would not have apprised a reasonable officer in Officer Acosta's position that F.M.'s conduct in disrupting Ms.

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[3] During the pendency of the case in the District of New Mexico, Petitioner dismissed her claims against Defendant Mines-Hornbeck. In her petition for writ of certiorari, Petitioner abandoned her claims against Defendants Labarge and Holmes. (Petition at ii) The only remaining Respondent, therefore, is Officer Acosta. The remainder of this Brief will focus on Petitioner's claims against Officer Acosta and the facts underlying those claims.

Mines-Hornbeck's physical education class fell outside of section 30-20-13(D) such that there was not probable cause to arrest F.M. Petitioner requested an *en banc* review of the Tenth Circuit decision; no member of the Tenth Circuit panel and no judge on the Tenth Circuit court requested that the court be polled, therefore, Petitioner's request was denied. Petitioner has failed to contrapose the conclusion reached by both the district court and the Tenth Circuit that Officer Acosta is entitled to qualified immunity.

Petitioner overcomplicates this factually straightforward case and the application of section 30-20-13(D) to F.M.'s criminal behavior (albeit a petty misdemeanor). Petitioner argues that the act of mere burping should not be criminalized. However, as recognized by the district court and Tenth Circuit, the criminal act that was committed was F.M.'s interference with the educational process; not the act of burping. The act of burping, standing alone, was not what Officer Acosta's arrest was based on; rather, it was the vehicle by which the school disruption occurred. By enacting section 30-20-13 in 1970, the New Mexico Legislature declared it unlawful for any person to "willfully interfere with the educational process of any public or private school by committing, threatening to commit or inciting others to commit any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of a public or private school." *Id.* As recognized by the district court and Tenth Circuit, this is precisely what Officer Acosta had arguable

probable cause to believe that F.M. did; i.e., interfere with the educational process.

The Tenth Circuit recognized that Officer Acosta based his arrest of F.M. on two factors: "(1) Ms. Mines-Hornbeck's statement that F.M.'s (fake) burping and other specified misconduct prevented her from controlling her class, and (2) his observation that, when he responded to Ms. Mines-Hornbeck's call, there was no more teaching going on, . . . because Ms. Mines-Hornbeck was monitoring F.M. in the hallway." *A.M.*, 830 F.3d at 1139 (quotation marks omitted). (*Contra* petition at 6) The Tenth Circuit held that the law at the time of F.M.'s arrest was not clearly established such that a reasonable officer in Officer Acosta's position would know that the arrest was unlawful; or, alternately stated, Officer Acosta had arguable probable cause to arrest F.M. *A.M.*, 830 F.3d at 1139-40.

Petitioner posits a series of measures that Officer Acosta "could have" done rather than arrest F.M. (Petition at 8-9 (arguing that Officer Acosta *could* have issued a citation or faxed a copy of the report to the juvenile probation department[4])) However, the availability of lesser correctional measures is of no import and is nothing more than a red herring. In that same vein, Petitioner complains that *Officer Acosta* never attempted to contact her. (Petition at 8) However, it is

[4] Interestingly, Petitioner's suggested alternatives to arrest imply that Officer Acosta had probable cause to charge, and hence, arrest F.M.

clear that someone at the school did attempt to contact her. Indeed, as the Tenth Circuit recognized, Ms. LaBarge's administrative assistant attempted to contact F.M.'s mother, Petitioner, A.M., but could not reach her on either of the two phone numbers because "the first number had been disconnected, and the second number lacked a functioning voicemail account." *A.M.*, 830 F.3d at 1130.

Petitioner's complaints that "Officer Acosta, a school resource officer, admitted he had no knowledge of the juvenile delinquency process" and "no knowledge of whether F.M. would be held in the juvenile detention center once transported[;]" are also red herrings. (*See* petition at 8-9) Officer Acosta's knowledge of the juvenile detention or delinquency processes do not bear on the constitutionality of his arrest of F.M.

Petitioner also complains that Officer Acosta arrested F.M. "without interviewing [him]." (Petition at 6) While this allegation is not entirely true (as Officer Acosta explained that F.M. protested his innocence while Officer Acosta was talking to Ms. Mines-Hornbeck), even if it were, it does not invalidate Officer Acosta's arrest. An officer may establish probable cause for an arrest based on information provided by a witness to the crime at issue. *Romero v. Fay*, 45 F.3d 1372, 1146 (10th Cir. 1995). A "suspect's contradiction of a witness's accusation is not sufficient to vitiate probable cause." *Grubbs v. Bailes*, 445 F.3d 1275, 1278 (10th Cir. 2006). Once probable cause is established, an arresting officer is not obligated to continue searching for exculpatory evidence before

making an arrest. *See Baker v. McCollan*, 443 U.S. 137, 145-56 (1979).

The Tenth Circuit identified and focused on the correct standards of applicable law with regard to this case. Because there is no Supreme Court or published Tenth Circuit decision defining the contours of the New Mexico interference-with-educational-process statute, the Tenth Circuit correctly looked to state law. *A.M.*, 830 F.3d at 1140; *see Wilson v. Montano*, 715 F.3d 847, 854 (10th Cir. 2013) (considering New Mexico state law when determining whether a federal constitutional right was violated). First, the Tenth Circuit looked at the language of the statute itself and concluded that the legislature's intent in passing section 30-20-13(D) was to "prohibit a wide swath of conduct that interferes with the educational process." *A.M.*, 830 F.3d at 1142. The statute uses the very broad words "any" and "interfere;" it defines the misdemeanor crime as "*any* act which would . . . interfere with" or "disrupt" school functioning. *See* section 30-20-13(D) (emphasis added). The Tenth Circuit applied these terms to F.M.'s conduct and held that not only would the statutory terms encompass F.M.'s behavior, but "the plain terms of subsection (D) would [not] have given a reasonable law enforcement officer in Officer Acosta's shoes fair warning that if he arrested F.M. for engaging in his classroom misconduct he (i.e., the officer) would be violating F.M.'s Fourth Amendment right to be free from an arrest lacking probable cause." *A.M.*, 830 F.3d at 1142.

Next, the Tenth Circuit examined the application of *State v. Silva*, 86 N.M. 543, 525 P.2d 903 (N.M. Ct. App. 1974) to section 30-20-13(D). *A.M.*, 830 F.3d at 1143-44. The Tenth Circuit initially noted that "*Silva* involved a distant statutory predecessor" of section 30-20-13(D). *A.M.*, 830 F.3d at 1143. Because it involved a predecessor statute, the *Silva* statute "did not include any provision that specifically proscribed interference with educational process[,]" rather, it criminalized a willful refusal to leave the property owned, operated or controlled by an institution of higher learning upon a request to do so "if the person is committing, threatens to commit or incites others to commit any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions of the institution." *A.M.*, 830 F.3d at 1144; *see* NMSA 1978, § 40A-20-10(C); *see Silva*, 525 P.2d at 905. While recognizing that the proscriptive language in the statutes was similar, the Tenth Circuit distinguished the *Silva* statute from section 30-20-13(D). *A.M.*, 830 F.3d at 1145.

In distinguishing the two statutes from which Petitioner was trying to draw a comparison, the Tenth Circuit stated that:

> [S]ubsection (D) is a unique statute that the New Mexico legislature adopted in 1981 as an amendment to section 30-20-13, to deal with different concerns than those addressed by the statute at issue in *Silva* – i.e., subsection (C) of section 40A-20-10. The plain language of the two statutes patently reveals this fact.

> Significantly, the express terms of section 40A-20-10(C) convey that the New Mexico legislature's objective in enacting the statute was to punish those who would willfully engage in a comparatively narrow set of conduct – unauthorized sit-ins and other occupations of property of colleges and other institutions of higher learning.
>
> In sharp contrast, the plain terms of section 30-20-13(D) reveal that the proscriptive focus of the New Mexico legislature was broader: it aimed to punish any person who willfully, *inter alia*, disrupts or interferes with a school's "educational process" – without restricting by its terms the form in which that process might manifest itself. Notably, though subsection (C) of section 40A-20-10 and subsection (D) of section 30-20-13 use some of the same language, there is no substantive analogue of subsection (D) in any provision of section 40A-20-10. In other words, none of the latter's provisions specifically relates to the willful interference with the educational process.

A.M., 830 F.3d at 1145 (internal citations omitted). Thus, given the different focus of the two statutes, *inter alia*, the Tenth Circuit concluded that a reasonable officer would not have looked to *Silva* for guidance; thus concluding that *Silva* was not clearly established law as it applied to section 30-20-13(D). *A.M.*, 830 F.3d at 1146.

Even after arriving at this conclusion, the Tenth Circuit considered whether, *if* a reasonable officer would have sought guidance from *Silva*, *Silva* would have clearly warned that officer that "he lacked probable cause under section 30-20-13(D) to arrest F.M." *A.M.*, 830 F.3d at 1146. The Tenth Circuit concluded that Petitioner had not shouldered her "heavy burden" of showing that the law was clearly established by *Silva* or that Officer Acosta's belief that he possessed probable cause was "not only mistaken, [but] objectively unreasonable." *A.M.*, 830 F.3d at 1147, 1149.

The Tenth Circuit also held that the law was not clearly established such that a reasonable officer in Officer Acosta's position would have known that handcuffing F.M. would violate F.M.'s constitutional rights (i.e., amount to "excessive force"). *A.M.*, 830 F.3d at 1152. In so holding, the Tenth Circuit determined that there was "*no* clearly established law indicating F.M.'s minor status could negate Officer Acosta's customary right to place an arrestee in handcuffs during the arrest." *Id*. (emphasis in original); *see also Hawker v. Sandy City Corp.*, 591 Fed. Appx. 669, 674 n.8 (10th Cir. 2014). Contrastingly, the law is clearly established that an officer has the right to use handcuffs "when conducting an otherwise legally proper arrest." *A.M.*, 830 F.3d at 1155 (referencing *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001)). Moreover, "standing alone, embarrassment associated with handcuffing during a lawful arrest cannot support an actionable excessive-force claim." *A.M.*, 830 F.3d at

1155 (citing *Atwater*, 532 U.S. at 354-55). In the absence of some injury specifically caused by the application of handcuffs, of which there was none alleged here, a reasonable officer in Officer Acosta's position would have understood the handcuffing in this case to be lawful. *A.M.*, 830 F.3d at 1155.

While the Tenth Circuit ultimately reached the conclusion that Officer Acosta's arrest of F.M. did not violate clearly established law, *supra*, the Tenth Circuit did express sensitivity to A.M.'s policy arguments concerning potential future effects that such an arrest may have. In footnote 15 of the opinion, the Tenth Circuit stated that it was

> neither oblivious nor unsympathetic to "the potential future consequences to [a] child," such as F.M., of an arrest or other law-enforcement sanction for seemingly non-egregious classroom misconduct; such a law-enforcement response could potentially have a "far-reaching impact" on a child's ability to lead a productive life. Yet, it is beyond cavil that "[t]he States possess primary authority for defining and enforcing the criminal law." It ultimately is not our place to question or undermine the New Mexico legislature's policy choice to criminalize interference with the educational process and, more specifically, to (at least arguably) proscribe the kind of classroom misconduct that led to F.M.'s arrest.

A.M., 830 F.3d at 1150 n.15 (internal citations omitted). Notably, and a point worth repeating herein,

the Tenth Circuit recognized that ultimately it was deciding the issue at hand based upon a New Mexico statute and that the policy arguments posited by Petitioner concerning the wisdom of the interference with the educational process statute are best entertained by the body governing the statute: the New Mexico Legislature.

Petitioner cites to Judge Gorsuch's dissent for her arguments that F.M.'s arrest was unconstitutional. (Petition at 4, 12, 14) However, Judge Gorsuch relied largely on disjointed language from *Silva* and other state court interpretations of "similar statutes" to arrive at his conclusion that a "'more substantial, more physical invasion' of the school's operations" is required before section 30-20-13(D) applies. *A.M.*, 830 F.3d at 1169 (quoting *Silva*, 86 N.M. 543, 525 P.2d at 908-07). However, as explained in more detail below, *Silva* did not hold that a "more substantial, more physical invasion" of the school's operations was required before section 40A-20-10 applied. *See Silva*, 525 P.2d at 547 (comparing section 40A-20-10 to the statute examined in *Grayned v. City of Rockford*, 408 U.S. 107 (1972) that criminalized "any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof" and indicating that section 40A-20-10 "denote[d] a more substantial, more physical invasion" than the statute examined in *Grayned*).

Judge Gorsuch also compared section 30-20-13(D) to its predecessor statute, section 40A-20-10(C) and concluded that "the relevant language of the two

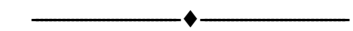
statutes is *identical* – requiring the government to prove[5] that the defendant 'committ[ed] any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions' of a school." *A.M.*, 830 F.3d at 1170 (quoting NMSA 1978, § 30-20-13(D)) (emphasis and alteration in original). Judge Gorsuch then declared that "*Silva* expressly held that *this* language does *not* criminalize conduct that disturbs 'merely the peace of the school session' but instead requires proof that the defendant more substantially or materially '[i]nterefered with the actual functioning' of the school." *A.M.*, 830 F.3d at 1170 (quoting *Silva*, 525 P.2d at 907) (emphasis and alteration in original). Contrarily, the majority highlighted exactly the opposite conclusion: the fact that, in *Silva*, the New Mexico Court of Appeals did not expressly hold that "substantial interference" was required for probable cause to be present.[6] *A.M.*, 830

[5] Notably, the burden of proof alluded to by Judge Gorsuch (i.e., beyond a reasonable doubt) is not applicable to the analysis of whether or not Officer Acosta had probable cause to believe that F.M. violated section 30-20-13(D).

[6] Judge Gorsuch's dissent does not address the discrepancy between his conclusion and the majority's conclusion concerning the holding in *Silva*. However, in *Silva*, when the court concluded that section 40A-20-10(C) denoted "a more substantial, more physical invasion[,]" it was comparing section 40A-20-10(C) to a statute that proscribed "any noise or diversion which disturbs or tends to disturb the peace or good other of such a school session or class thereof[.]" *Silva*, 525 P.2d at 907 (comparing section 40A-20-10(C) to the statute litigated and upheld in *Grayned*, *supra*). In this context, it is clear that the *Silva* court was not holding that section 40A-20-10(C) required a "more substantial, more physical" invasion of the school's functioning, but that section

F.3d at 1147 ("It is true that *Silva* describes the students' conduct as '*substantially* interfer[ing] in the functioning of the president's business.' But the court does not purport to limit its holding to wrongful conduct of comparable seriousness." (quoting *Silva*, 525 P.2d at 908 (emphasis and alterations in original))). An analysis of the *Silva* holding leads to the same conclusion as reached by the Tenth Circuit: the analysis of section 40A-20-10 in *Silva* is not enough to alert a reasonable officer in Officer Acosta's position that an arrest in this case would be unconstitutional.

Petitioner's red herring arguments should not detract from the Tenth Circuit's careful analysis of clearly established law as it applies to the facts of this case. The Tenth Circuit correctly applied the law as it existed in New Mexico in 2011 and there is no basis for Petitioner's arguments to the contrary.



REASONS FOR DENYING THE PETITION

In essence, the petition for writ of certiorari argues that the Tenth Circuit erred. *Contra* Supreme Court Rule 10. In doing so, *inter alia*, Petitioner has failed to meet any of the criteria this Court has set forth as reasons for granting certiorari, such as (1) a conflicting decision between two United States Courts of Appeals; (2) a conflicting decision between a United States Court of Appeals with a state court of last resort;

40A-20-10(C) was even more substantial than the statute upheld in *Grayned*, which criminalized any noise or diversion.

and/or (3) a state court or United States Court of Appeals "has decided an important issue of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court." *See id.* In her petition for a writ of certiorari, Petitioner states that the Tenth Circuit decided an important issue of federal law that has not been, but should be, settled by this Court, but fails to identify what that issue may be. (*See* petition at 13) Petitioner also claims that a circuit split exists, but does not identify a "true" circuit split. (*See* petition at 18) The petition essentially seeks a different interpretation of section 30-20-13(D) in the qualified immunity context based on "error" and nothing more. Because Petitioner has failed to meet any of the conditions specified in Supreme Court Rule 10, *inter alia*, the petition should be denied.

While the facts underlying Petitioner's claims may be of interest because they are somewhat unique, the legal issue involved is nothing more than the application of New Mexico law to the qualified immunity analysis. The Tenth Circuit's application of qualified immunity was not irregular; rather, it utilized long-settled law. Although Petitioner attempts to raise an issue concerning the applicable legal standard, i.e., by claiming that the Tenth Circuit's interpretation of *Hope v. Pelzer*, 536 U.S. 730 (2002) created a circuit split, that representation is not correct. Nonetheless, at worst the Tenth Circuit's recitation of the applicable legal standard in *Hope v. Pelzer* is misapplied to

Petitioner's facts, but properly stated. *See* Supreme Court Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

In this case, the Tenth Circuit correctly cited the applicable law for cases involving qualified immunity. In short, the Tenth Circuit did not substitute the "obvious" standard that Petitioner claims is applicable to this case pursuant to *Hope v. Pelzer* in favor of its own "egregious" standard. (*Contra* petition at 12) The Tenth Circuit only cited to *Hope v. Pelzer* twice in its standard of review; it did not refer to an "egregious" standard in any holdings of its opinion; rather, it stated, in dicta, in a footnote while reviewing Petitioner's excessive force claim (and not Petitioner's unlawful arrest claim as she erroneously asserts), that "under certain circumstances where the excessive force is of a particularly egregious nature (e.g., an incredibly reckless taking of a human life by a law-enforcement officer), *Graham* or little more may qualify as the clearly established law that defeats a qualified-immunity defense[.]" *A.M.*, 830 F.3d at 1153 n.17. Petitioner has simply not identified an issue ripe for this Court's review. *See* Supreme Court Rule 10.

I. Review is not warranted because the Tenth Circuit did not decide an important, unsettled issue of federal law; rather, the Tenth Circuit applied settled law to a unique factual scenario arising from a valid arrest pursuant to section 30-20-13(D).

In section I of Petitioner's reasons argued for granting the petition, Petitioner states that "review is warranted because the Tenth Circuit has decided an important issue of federal law that has not been, but should be, settled by this court." (Petition at 13) What Petitioner fails to do in this section, however, is identify what federal law she claims that Tenth Circuit decided that has not otherwise been settled by this Court. (*See* petition at 13-17) Rather, Petitioner focuses on published articles concerning the "criminalization" of "misbehavior." (*See* petition at 14-17) In support of her argument that "misbehavior" was "criminalized," Petitioner makes several bold statements without supporting authorities. (*See* petition at 15 (stating that "schools relinquished their duties to educate through discipline and treated all misconduct as criminal" with no supporting authority)); *id.* at 16 (stating that "[a]rrested children are more likely to drop out of school and the arrests are often implemented in a discriminatory manner" with no supporting authority); *id.* at 17 (claiming that "[i]f causing disruptions by burping were sufficient to merit criminal punishment, then traditional scholastic punishments . . . would have no place in school and children would be subject to arrest for any trivial or child-like act of indiscretion"

with no supporting authority). Interestingly, Petitioner also alleges that "policies[7] are more often enforced against male students, students of color, students with disabilities, and students from low-income households." (Petition at 16) Petitioner does not, however, support this allegation with case law, a scholarly article, or even a published article; again, this is a red herring. Moreover, nothing in the record establishes that F.M. was a student of color, student with disabilities, or student from a low-income household. Petitioner's allegation is nothing more than an attempt to inflame the passions of this Court.[8]

Petitioner's focus on the "criminalization of misbehavior" should not detract from the fact that she fails to identify what, if anything, this Court should be reviewing concerning the Tenth Circuit's opinion or what federal law she claims should be settled by this court. Indeed, in this section, Petitioner only generally cites to one case; namely, *Morse v. Frederick*, 551 U.S. 393, 413 (2007), as standing for the concept that school teachers have a right to discipline students. (Petition

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[7] Petitioner does not specify *what* "policies" she is referring to.

[8] Similarly, the Brief of *Amici Curiae* does nothing more than to inject irrelevant passion into the case, as it also focuses on "students of color; students with disabilities; lesbian, gay, bisexual, transgender; queer and questioning (LGBTQ) students; and gender non-conforming students[.]" (*See Amici Curie* Brief at 11, 23-26.) As previously stated, there is nothing in the record to indicate that F.M. falls into even a single one of the categories as described by *Amici Curiae* and, therefore, argument concerning the Tenth Circuit's impact on any one of these groups is not ripe.

at 17) Petitioner otherwise points to no federal law in front of this Court that has not been settled or that this Court should settle.

II. Review is not warranted because the Tenth Circuit did not interpret *Hope v. Pelzer* such that a circuit split was created.

Petitioner argues that "review is warranted for the Court to revivify *Hope v. Pelzer* and to correct a circuit split on reviewing 'obvious' cases of deprivation of civil rights." (Petition at 18) Petitioner then applies the holding in *Hope v. Pelzer* to her claims, while conflating her claims for unlawful arrest and excessive force although *Hope v. Pelzer* only applied to claims of cruel and unusual punishment (and arguably, albeit reachingly, excessive force). *See Hope*, 536 U.S. 730, 733, 735, 737 (2002) (determining whether the petitioner was subject to cruel and unusual punishment in violation of the Eighth Amendment). Nonetheless, and ignoring the synonymous nature of the words "obvious" and "egregious," Petitioner also attempts to argue that a circuit split exists in the application of *Hope v. Pelzer* between the Tenth Circuit, the Fifth Circuit, the First Circuit, and the Ninth Circuit. (Petition at 18-21) Petitioner argues that "some circuits'" "reluctance" to find "obvious" civil rights violations amounts to the aforementioned circuit split. This is opprobrious. Petitioner's attempt to liken the differing application of *Hope v. Pelzer* to different cases simply because they are in different circuits does not create a circuit split.

Petitioner is incorrect in her assertion that the Tenth Circuit "rejected A.M.'s claim [of unreasonable seizure] as insufficiently egregious." (Petition at 21) The Tenth Circuit did not apply an "egregious conduct" standard to Petitioner's unreasonable seizure claim, however, it merely stated, in dicta, in a footnote while reviewing Petitioner's excessive force claim, that "under certain circumstances where the excessive force is of a particularly egregious nature (e.g., an incredibly reckless taking of a human life by a law-enforcement officer), *Graham* or little more may qualify as the clearly established law that defeats a qualified-immunity defense[.]" *A.M.*, 830 F.3d at 1153 n.17. The Tenth Circuit's analysis in this regard is a far cry from incorrectly identifying the law or incorrectly applying it as Petitioner suggests. Rather, the Tenth Circuit recognized that if force is used in an egregious manner, it could be acknowledged as a clearly established constitutional violation in the absence of a fact-specific case on point. The Tenth Circuit's refusal to recognize the otherwise lawful handcuffing in this case as obviously unlawful is not a rejection of the claim as "insufficiently egregious." *Contra supra*. Petitioner's argument in this regard can be properly rejected.

Next, Petitioner suggests that, as it did in *Hope* by relying on regulations to determine whether there was a violation of the Eighth Amendment, this Court should look to NMSA 1978, § 32A-2-11(A) to determine whether there was a violation of state law by Officer Acosta. Petitioner cites to section 32A-2-11(A) for her

conclusion that "New Mexico statutory law makes it clear that children alleged to have committed delinquent acts must not be detained or placed in detention unless exigent circumstances are present." (Petition at 22) That is not what section 32A-2-11(A) says, however. First, section 32A-2-11 applies to children in detention; not to whether they can be detained if they are under arrest. *Id.* Second, section 32A-2-11(A) reads, in relevant part, as follows: "Unless ordered by the court pursuant to the provisions of the Delinquency Act, a child taken into custody for an alleged delinquent act shall not be placed in detention unless a detention risk assessment instrument is completed and a determination is made that the child: (1) poses a substantial risk of harm to himself; (2) poses a substantial risk of harm to others; or (3) has demonstrated that he may leave the jurisdiction of the court." *Id.* This statute says nothing about exigent circumstances and Petitioner's argument to the contrary should be rejected.

III. The Tenth Circuit's statutory interpretation of section 30-20-13(D) does not create irregularity in its application.

Petitioner argues that because the language in section 30-20-13(D) and section 40A-20-10(C) are identical, the interpretation in *Silva* that a more substantial disruption of school-wide function must apply to section 30-20-13(D) as it did to section 40A-20-10(C). (Petition at 24-26) However, as intimated above and as explained in more detail below, *Silva* did not hold that a "more substantial, more physical invasion" of the

school's operations was required before section 40A-20-10 applied. For this reason, including other reasons detailed below, Petitioner's argument that the Tenth Circuit's interpretation of section 30-20-13(D) creates non-uniformity should be rejected.

First, Petitioner's arguments do not fall within the criteria of Supreme Court Rule 10. *Supra*. The result Petitioner argues in support of concerning the "uniform statutory interpretation in the qualified immunity context," if convincing, would only apply within the confines of New Mexico's borders. Second, as pointed out above, there are no conflicting or non-uniform interpretations of section 30-20-13(D). The *A.M.* opinion unequivocally stated that "there is *no* Supreme Court or published Tenth Circuit decisions addressing the contours of probable cause to arrest under New Mexico's interference-with-educational-process statute[,]" *A.M.*, 830 F.3d at 1140 (emphasis in original), and noted the "absence of New Mexico authority from the relevant period applying *Silva* to section 30-20-13(D)." *Id.* at 1146. Indeed, Judge Gorsuch, in his dissent, implicitly recognized the absence of controlling authority applicable to section 30-20-13(D). *Id.* (examining other states' courts interpretations of similar statutes).

Petitioner's argument that there exists a non-uniform statutory interpretation is improperly premised on acceptance of her argument that *Silva*'s interpretation of section 40A-20-10(C) applies to section 30-20-13(D) and further premised on Petitioner's mistaken assertion that the *Silva* court held that

section 40A-20-10(C) required a "more substantial, more physical" invasion of the school's function in order for there to be an arrestable offense. As described *supra*, however, the Tenth Circuit was correct in its interpretation of *Silva* that *Silva* did not hold that "substantial interference" was required for probable cause to be present. *A.M.*, 830 F.3d at 1147 ("It is true that *Silva* describes the students' conduct as '*substantially* interfer[ing] in the functioning of the president's business.' But the court does not purport to limit its holding to wrongful conduct of comparable seriousness." (quoting *Silva*, 525 P.2d at 908 (emphasis and alterations in original))). In examining the context of the *Silva* opinion wherein the New Mexico Court of Appeals discusses "a more substantial, more physical invasion[,]" it is clear that the court was comparing section 40A-20-10(C) to a statute that proscribed "any noise or diversion which disturbs or tends to disturb the peace or good order of such a school session or class thereof[.]" *Silva*, 525 P.2d at 907 (comparing section 40A-20-10(C) to the statute litigated and upheld in *Grayned*, *supra*).

Pursuant to this comparison, it is clear that the *Silva* court was not in-and-of-itself holding that section 40A-20-10(C) required a "more substantial, more physical" invasion of the school's functioning, but rather, it was noting that 40A-20-10(C) was constitutional because it required a more substantial invasion than that of the statute that criminalized noise or diversion in *Grayned*. There is no non-uniform application statutory interpretation; therefore, no basis for

a grant of the Petition on those grounds, even if a grant of a petition for writ of certiorari would have otherwise been available.

CONCLUSION

For all of the foregoing reasons, this Court should deny certiorari herein.

Respectfully submitted,

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