No. _____

In The
Supreme Court of the United States

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

Petitioner,

v.

ARTHUR ACOSTA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Tenth Circuit Court misapply *Hope v. Pelzer* by requiring Petitioner demonstrate an arresting officer's conduct was egregious as opposed to obviously unconstitutional when it affirmed the dismissal of Petitioner's claims of unreasonable seizure on the basis of qualified immunity?

2. Did the Tenth Circuit Court err in discarding judicial precedent, which provided "fair warning" to an officer of the meaning of the language of a criminal statute after the state legislature employed the same language in a related statute prohibiting the same or similar conduct?

3. Did the Tenth Circuit Court err in finding that the purposeless arrest and transportation of a thirteen-year-old to juvenile detention was not obviously unconstitutional given the acknowledged harm that arrests cause to school children and the New Mexico statutory preference for keeping children out of juvenile detention?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The parties to the proceeding in the Tenth Circuit, whose judgment is sought to be reviewed are:

- A.M. on behalf of her minor child F.M., plaintiff, appellant below and petitioner here.
- City of Albuquerque police officer A. Acosta, defendant, appellee below and respondent here.

This writ seeks review of claims F.M. brought against Officer Acosta only. This matter was consolidated below with *A.M. v. Holmes*, 1:13-CV-356-MV-LAM (D.N.M. March 31, 2014). The Tenth Circuit considered the consolidated appeal. Petitioner makes no request for certiorari of the consolidated matter. None of the parties to the consolidated matter are parties to the proceedings herein.

No corporations are involved in this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, A.M., on behalf of her minor child, F.M., respectfully requests that the Court grant certiorari to review the judgment of the Tenth Circuit Court of Appeals in *A.M. v. Holmes*, 830 F.3d 1123 (10th Cir. 2016). A.M. seeks review only of her claims against Arthur Acosta that Acosta deprived her son of his Fourth Amendment right to be free of unreasonable seizure in his arrest and in the manner of his arrest.

OPINIONS BELOW

The opinion of the court of appeals for the Tenth Circuit is reported at 830 F.3d 1123, and is reprinted in the Appendix hereto, App. 1-100. On August 23, 2016, Petitioner requested en banc review. On September 8, 2016, the Tenth Circuit denied en banc review.

The memorandum opinion of the United States District Court for the District of New Mexico granting respondent's motion for summary judgment and qualified immunity has not been reported. It is reprinted in the Appendix hereto, App. 103.

JURISDICTION

This case arises from Albuquerque Police Officer Arthur Acosta's May 19, 2011 arrest of F.M., then thirteen years old, for interference with the educational

process, N.M. Stat. Ann. § 30-20-13(D), because he engaged in childhood mischief, namely, generating burps in Physical Education class. A.M. filed her Complaint for Recovery of Damages due to Deprivation of Civil Rights on behalf of F.M., her minor son, against Officer Acosta on November 30, 2011 in the Second Judicial District Court for the State of New Mexico. Officer Acosta properly removed this case to the United States District Court for the District of New Mexico on January 6, 2012. The basis for removal was 28 U.S.C. §§ 1331 and 1343(a)(3) and (4) (federal question).

On September 19, 2014, the district court, the Honorable Kenneth Gonzales presiding, entered summary judgment in Officer Acosta's favor. On October 10, 2014, A.M. filed her Notice of Appeal to the United States Court of Appeals for the Tenth Circuit. The Tenth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291. On July 25, 2016, the Tenth Circuit denied A.M.'s appeal and ruled in favor of Officer Acosta's claim of qualified immunity. On August 23, 2016, A.M. requested en banc review. On September 8, 2016, the Tenth Circuit denied en banc review. This court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioners brought the underlying action under 42 U.S.C. § 1983 which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Petitioner alleges that respondent violated the rights of the minor child under the United States Constitution's Fourth Amendment, which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

I. INTRODUCTION

Judge Gorsuch summed up his dissent and his summary serves as an apropos theme of this petition: "I don't believe the law happens to be quite as much of a ass." *A.M. v. Holmes*, 830 F.3d at 1170.

Thirteen-year-old F.M. burped in gym class, laughed, and, after the teacher removed him from the classroom, he leaned back into the classroom while sitting in the hall. Because these acts divided the teacher's attention, Officer Arthur Acosta ("Officer Acosta") handcuffed F.M., transported him to the local juvenile detention center, and charged him with Interference with the Educational Process, N.M.S.A. 1978, § 30-20-13(D) ("Section 30-20-13(D)"). Officer Acosta handcuffed and transported F.M. even though F.M. was compliant at the time he arrested him and there was no state interest in transporting him.

II. FACTUAL AND LEGAL BACKGROUND

In the Spring of 2011, F.M. was thirteen years old and in the seventh grade at Cleveland Middle School in Albuquerque, New Mexico. Officer Acosta, employed with the City of Albuquerque, was assigned to the school as its school resource officer. On May 19, 2011, at approximately 11:50 a.m. Margaret Mines-Hornbeck, a physical education teacher, called Officer Acosta on his hand-held radio to seek his assistance in removing a student from her classroom. On that day, near the end of the school term, the physical education

class was in a classroom because the students were giving presentations.

Officer Acosta responded to the call and observed the teacher standing in the doorway to her classroom. F.M. was seated adjacent to the classroom door with his right shoulder touching the doorframe. Officer Acosta noted that the other children in the class were intently looking out the door to see what F.M. was doing.

Officer Acosta asked the teacher why she had called him. The teacher replied that F.M. had been disrupting her class by "continually burping." The teacher further told the officer that F.M. had been sitting down and generating burps: "You know, when we were kids, I remember you'd have these burping contests, for lack of a better word . . . that's what he was doing." The teacher explained that F.M. had generated burps "a couple of more times" and she told him to stop. This, she said, caused the other students to laugh "[b]ecause each time he did it, he was getting more of response from the other students . . . it was egging him on, if you will, the response he was getting." The teacher told Officer Acosta that she then ordered F.M. to sit outside her classroom and that F.M. had complied. The teacher reported that F.M. continued to generate burps while seated outside her classroom, causing the other students to continue laughing.

While Officer Acosta interviewed the teacher, F.M. attempted to dispute her allegations. F.M. told Officer Acosta that the allegations were not true and that much of the teacher's account "did not happen." Officer

Acosta told F.M. to be quiet, and F.M. complied. Officer Acosta did not witness any of F.M.'s actions and solely relied on the teacher's version of the events.

Officer Acosta told F.M. that he was taking him to the administrative office. F.M. complied and peacefully accompanied the officer. Officer Acosta did not place F.M. in handcuffs, nor did he pat him down at that time. When they reached the office, Officer Acosta told F.M. to sit in a chair. Again, F.M. complied with Officer Acosta's request.

At that time, Officer Acosta decided to arrest F.M. for interfering with the educational process of Cleveland Middle School pursuant to Section 30-20-13(D), which states:

> No person shall 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.

He did so without interviewing F.M. He did so because when he arrived at the teacher's classroom she was outside the classroom "having to deal with" F.M. Officer Acosta had determined that F.M. should be arrested because "there was no more teaching going on" when he arrived at the classroom.

Although Officer Acosta "felt [he] already had the elements of what [he] needed" to arrest F.M., he finally

asked F.M. what had happened. F.M. responded that he was not disrupting class and that he had not intentionally burped. Officer Acosta did not press F.M. for details; he had already made the decision to arrest F.M.

Officer Acosta left F.M. sitting in the office and went to his patrol unit to retrieve his computer. F.M. did not accompany Officer Acosta to his car; "[h]e simply sat there in the front office." Officer Acosta walked out to his car, retrieved his computer, and returned to the office where F.M. remained seated. When Officer Acosta returned, he told F.M. he was under arrest for interference with the educational process of Cleveland Middle School and that he would be transported to the juvenile detention center. F.M. asked Officer Acosta why he was arresting him. Officer Acosta responded that he was arresting F.M. "because of the disruptions he saw."

Officer Acosta then went to his personal office to complete the arrest paperwork. Officer Acosta left F.M. seated in the main waiting area. Officer Acosta did not place F.M. in handcuffs while he was seated. He did not do so at that time because F.M. "was not combative" nor a flight risk. Indeed, Officer Acosta claims only to place children in handcuffs when they are a flight risk or combative.

As F.M. sat, Officer Acosta completed the arrest paperwork, including a criminal complaint, a police report, and a pre-booking report. Officer Acosta then told F.M. "[l]et's go to the car." F.M. replied "okay" and

walked with Officer Acosta to his squad car. When they reached the car, Officer Acosta opened the rear door to the back where prisoners are placed while being transported. Officer Acosta asked F.M. if he had any weapons. F.M. replied "no." Officer Acosta asked F.M. if he had any contraband on him. F.M. replied "no." Officer Acosta patted F.M. down to make sure he did not have any weapons.

Officer Acosta placed F.M. in handcuffs. Officer Acosta told F.M. to sit in handcuffs, in the rear of his squad car. F.M. was compliant "the whole time." Officer Acosta then transported F.M. to the juvenile detention center "without incident." Upon his return to the school, Officer Acosta completed a supplemental police report. Officer Acosta did not call A.M. prior to arresting and transporting F.M. to the juvenile detention center.

Officer Acosta arrested F.M. though the juvenile process in New Mexico counsels against the arrest of children for nonviolent offenses unless the child poses a substantial risk of harm to himself or others, or poses a flight risk. N.M. Stat. Ann. §§ 32A-2-10; 32A-2-11(A); 32A-2-5(B)(1-2); 32A-2-7(A).

Instead of handcuffing and arresting F.M., Officer Acosta could have issued F.M. a citation, summons, or simply faxed a copy of his police report to the juvenile probation department. Officer Acosta, a school resource officer, admitted he had no knowledge of the juvenile delinquency process. He had no knowledge of whether F.M. would be held in the juvenile detention

center once transported. Officer Acosta's practice was to drop children off at the detention center and to let the detention center staff determine whether the child should be held.

After taking F.M. from school in handcuffs, Officer Acosta booked F.M. into the detention center at approximately 1:31 p.m. and detention center staff then administered a risk assessment questionnaire on F.M. F.M. scored (-2) on a scale of (1-10), indicating he posed less than zero risk to the community and himself. At approximately 2:30 p.m., after the detention center completed F.M.'s risk assessment instrument, a detention center staff member called A.M. to request she come get her son.

Officer Acosta admitted that F.M.'s antics could have been handled administratively but that he made the decision to arrest F.M. because Mrs. Mines-Hornbeck "couldn't deal with him anymore." Officer Acosta criminalized F.M.'s conduct even though the Albuquerque Public Schools Handbook contemplates scholastic discipline for minor, disruptive behavior. In fact, the handbook's contemplated minimum mandatory consequence for a first offense of "general disruptive conduct and/or defiance" is "student/staff contact." The handbook's minimum mandatory consequences for a second offense of "general disruptive conduct and/or defiance" are "student/staff contact" and "administrative/parent contact."

Mrs. Mines-Hornbeck did not ask Officer Acosta to arrest F.M., nor did the school's principal; it was Officer

Acosta's decision, and his decision alone, to arrest F.M. for interfering with the educational process. Mrs. Mines-Hornbeck also did not ask Officer Acosta to handcuff F.M. or transport him to the juvenile detention center. Officer Acosta did so because he viewed himself as a "security element" in the school.

III. THE CIRCUIT COURT'S OPINION

The majority of the Tenth Circuit panel, Judges Tymcovich and Holmes, affirmed. Judge Gorsuch dissented. The majority, without explanation, elected to forgo the first prong of qualified immunity analysis – the constitutionality of F.M.'s arrest – and focused instead on whether the law had been clearly established at the time of arrest. A.M. had argued Officer Acosta was on notice that arresting F.M. for burping was unlawful in light of *State v. Silva*, 525 P.2d 903, 904 (1974), a New Mexico Court of Appeals case interpreting near-identical language in a predecessor statute prohibiting school disruption[1]. *Silva* held that the

[1] The predecessor statute prohibited

> willfully, refus[ing] or fail[ing] to leave the property of, or any building or other facility owned, operated or controlled by the governing board of any institution or higher education upon being requested to do so by the chief administrative officer or his designee . . . 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; (quoting N.M. Stat. Ann. § 40A-20-10(C)).

statute required a person to have caused substantial, physical invasion that interferes with a school's actual functioning in order to lawfully arrest someone for interfering with a school. App. 36-39. The majority disagreed that *Silva* provided fair notice that the statute's prohibitions were limited and held Officer Acosta was not on notice his conduct was unlawful.

In reaching its conclusion, the majority construed Section 30-20-13(D) first. Ignoring clear precedent that identical statutory terms should be afforded construction consistent with case law interpreting those same terms, the majority found the plain language of Section 30-20-13(D) supported arrest. App. 33. The panel reasoned Section 30-20-13(D)'s language was broad, so broad the New Mexico Legislature must have intended to criminalize any disruption to the educational process. App. 33.

As for *Silva* – the case A.M. argued should have been the primary notice to Officer Acosta that his conduct was unlawful – the majority rendered the *Silva* interpretation of identical language in a predecessor statute inapplicable. In the main, the majority distinguished *Silva* by characterizing the statute at issue therein as a distant statutory predecessor to Section 30-20-14, the statute upon which Officer Acosta relied. App. 36. The majority also found that even if *Silva* were relevant authority it would not have put Officer Acosta on notice because reasonable officers can be mistaken in assessing probable cause. App. 50.

Judge Gorsuch, on the other hand, found persuasive that the statutory terms at issue in *Silva* and the statute here are the same. As he explained:

> [T]he unobscurable fact remains that the relevant language of the two statutes is *identical* – requiring the government to prove that the defendant "commit[ed] any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions" of a school. *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 "interfere[d] with the actual functioning" of the school.

App. 98. And thus, "[t]he simple fact is the New Mexico Court long ago alerted law enforcement that the statutory language on which the officer relied for the arrest in this case does not criminalize 'noise[s] or diversion[s]' that merely 'disturb the peace or good order' of individual classes." *Id*. (quoting *Silva*, 525 P.2d at 907).

The majority acknowledged *Hope v. Pelzer*, 536 U.S. 730 (2002), but culled a test of "egregiousness," not obviousness. In other words, it explained, public officials do not need precedent of similarity if their conduct is egregious. App. 17-18. For the majority, F.M.'s arrest was not sufficiently egregious to overcome the need for similar precedent to have apprised the officer his conduct was lawful. Whereas, Judge Gorsuch saw

no need to apply *Hope* because *Silva* had clearly established the law. But his closing observation – that the law is not an ass – speaks well to this inquiry. App. 100.

Finally, the court held that neither the general *Graham v. Connor*, 490 U.S. 386 (1989) factors nor New Mexico law related to detention of juveniles provided sufficient notice to Officer Acosta that handcuffing a compliant thirteen-year-old and transporting him to a juvenile detention facility, which released him immediately, was unreasonable. App. 57-66. The opinion did note the overwhelming commentary against using shackles on children and that New Mexico is one state, among many, attempting to lessen the use of restraints on children. App. 65 n.18; (citing *A Solution to Michigan's Child Shackling Problem*, 112 Mich. L. Rev. First Impressions 161, 168-70 (2014) for the stated proposition).

REASONS FOR GRANTING THE PETITION

I. 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.

The recent introduction of law enforcement officers into our public schools has resulted in a profound shift: In days past, children may have received detention or extra assignments for minor acts of misconduct,

and, now, law enforcement and schools are increasingly arresting children for those same acts. Judge Gorsuch wrote:

> If a seventh grader starts trading fake burps for laughs in gym class, what's a teacher to do? Order extra laps? Detention? A trip to the principal's office? Maybe. But then again, maybe that's too old school. Maybe today you call a police officer. And maybe today the officer decides that, instead of just escorting the now compliant thirteen year old to the principal's office, an arrest would be a better idea. So out come the handcuffs and off goes the child to juvenile detention.

A.M., 830 F.3d at 1169 (Gorsuch, J., dissenting).

The recent criminalization of middle school antics and misbehavior is an issue of considerable public import to our nation. The harm this causes to school children across the country is the subject of significant commentary. The Court of Appeals acknowledged as much in its majority opinion:

> We are 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.

A.M., 830 F.3d at 1150 n.15 (Holmes, J.).

Most commentators note that the proliferation of police officers in schools originated with the implementation of zero tolerance policies in the 1990s and gained more traction after two students at Columbine High School killed twelve students and one teacher and injured twenty-three others in 1999.

> As a disciplinary approach, zero tolerance mandates that certain behaviors trigger severe responses, regardless of mitigating circumstances. This approach almost always begins with removal of the child from the classroom, and often removal from school, including removal through an arrest. Zero tolerance schools impose suspensions, expulsions, and even arrests for infractions across the spectrum – from disrespectful behavior and writing on a desk to drug use and weapon possession.

Udi Ofer, *Criminalizing the Classroom: The Rise of Aggressive Policing and Zero Tolerance Discipline in New York City Public Schools*, 56 N.Y.L. Sch. L. Rev. 1373, 1375-79 (2012). As a result, schools relinquished their duties to educate through discipline and treated all misconduct as criminal.

This shift is not trivial. An arrest carries far-reaching consequences for the child and for our country, a country in which we strive to deliver on our promise of equal opportunity to every child. *See Police in Schools: Arresting Developments*, The Economist, Jan. 9, 2016 (detailing the statistical evidence of a

"school-to-prison pipeline"); Ofer, *Criminalizing the Classroom*, *supra* at 1375.

There are no countervailing studies to the conclusion that the arrest of children from schools for minor infractions has a deleterious effect on both the individual student arrested and on other school children in the classroom who live under such a regime. Arrested children are more likely to drop out of school and the arrests are often implemented in a discriminatory manner. The policies are more often enforced against male students, students of color, students with disabilities, and students from low-income households.

> The American Psychological Association (APA) commissioned a Zero Tolerance Task Force in 2006 to study the evidence on the effects of zero tolerance on student behavior and achievement. The APA found that removing a misbehaving student from school does not result in a safer school environment for other students. In fact, data on school climate shows that schools that have a higher rate of suspension and expulsion also have less satisfactory school climate ratings and spend a disproportionate amount of school and staff time on disciplinary matters rather than academic performance. Studies have also found "a negative relationship between disciplinary exclusion and measures of achievement." Schools that rely more heavily on exclusionary discipline demonstrate less educational achievement, even when controlling for other factors such as student demographics.

Id. at 1401-03 (2012); *see also*, Jason B. Langberg & Barbara A. Fedders, *How Juvenile Defenders Can Help Dismantle the School-to-Prison Pipeline: A Primer on Educational Advocacy and Incorporating Clients' Education Histories and Records into Delinquency Representation*, 42 J.L. & Educ. 653, 657-62 (2013) ("Law enforcement has intervened in areas that are many times 'minor incidents' formerly viewed as typical childish behavior and 'teachable moments.' ").

To allow everyday acts of misbehavior to be criminalized creates serious consequences for our children: they are pushed out of school, into the criminal justice system, and introduced to institutionalization. They are taught that there is no discernable limit on the power of the state to arrest them. Then, in an unfair twist of culpability, we give the adults – those who should be protecting the well-being of the children and who should actually know better – a pass.

If causing disruptions by burping were sufficient to merit criminal punishment, then traditional scholastic punishments (like expulsion, suspension and detention) would have no place in school and children would be subject to arrest for any trivial or child-like act of indiscretion. However, it is clearly established that part of a child's education is school-based discipline. *Morse v. Frederick*, 551 U.S. 393, 413 (2007) (Thomas, J., concurring) (detailing the rich history of the common law doctrine of *loco parentis* in our country's history and the right of school teachers to discipline students).

II. 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.

This Court, in a recent per curiam opinion, reasserted that some constitutional violations are obvious and an officer need not have had specific precedential notice his conduct was unlawful. *White v. Pauly*, ___ U.S. ___, 137 S. Ct. 548, 552 (2017) ("*Garner* and *Graham* do not by themselves create clearly established law outside 'an obvious case.'") In *Hope*, this Court affirmed that some cases are so clear that general statements of law can give "fair and clear warning" to public officials that their conduct violates the Constitution – in other words, the obvious case. 536 U.S. at 745-46. However, there is a significant absence of judicial opinions applying *Hope* analysis. And, the principle annunciated in *Hope* seems to have fallen into desuetude in some circuit courts.

In applying *Hope*, the Tenth Circuit has substituted "egregious" for "obvious." *A.M. v. Holmes*, 830 F.3d at 1153 n.17 (stating any argument of "egregious conduct" would "border on fatuous"). The Tenth Circuit has not clarified whether it equates "egregiousness" with "obviousness" or whether "egregiousness" is characterized by the level of harm or the mental state of the public official.

The Fifth Circuit, on the other hand, has struggled with the tension between *Hope* and *Ashcroft v. al-Kidd*,

563 U.S. 731 (2011), which requires a case factually on point to establish law clearly. *Morgan v. Swanson*, 659 F.3d 359, 372-73 (5th Cir. 2011). In *Morgan*, the Fifth Circuit explained:

> [T]he Supreme Court's admonition in *al-Kidd* that we should not "define clearly established law at a high level of generality" sits in tension with its earlier statement in *Hope v. Pelzer* that "general statements of the law are not *inherently* incapable of giving fair and clear warning," at least in a certain category of "obvious" cases.

Id. To reconcile the two cases, the Fifth Circuit reduced the *Hope* Court's statement that the "Eighth Amendment prohibition against the unnecessary and wanton infliction of pain '*arguably*' gave the defendants 'fair warning' that it was unconstitutional to strip a prisoner shirtless and chain him to a hitching post (a painful stress position) for seven hours in the Alabama sun" to dicta. *Id*. The panel then noted that the *al-Kidd* Court did not cite the *Hope* opinion and described the *al-Kidd* Court's silence on *Hope* as "puzzling." The *Morgan* Court stated that it would "leave for another day the question of whether and when a constitutional violation may be so 'obvious' that its illegality is clear from only a generalized statement of law." *Id*. That day has apparently not yet come in the Fifth Circuit and appears to be a day rarely seen in any circuit court since the *Hope* decision.

The First Circuit stands alone employing *Hope* in what it calls a "three-part algorithm." *Savard v. Rhode*

Island, 338 F.3d 23, 27 (1st Cir. 2003). In evaluating a qualified immunity defense, the First Circuit asks 1) whether "the plaintiffs have established a constitutional violation"; 2) whether "fair warning" exists, i.e., whether the law was clearly established; and 3) "whether a reasonable official, situated similarly to the defendant(s), would have understood that the conduct at issue contravened the clearly established law." *Id*. (citation omitted). In support of the first part of the algorithm, the *Savard* Court cited to both *Hope* and *Saucier v. Katz*, 533 U.S. 194, 201 (2001). In support of the second part of the algorithm, the Court cited to *Hope* and *Anderson v. Creighton*, 483 U.S. 635, 638 (1987). In support of the third part of the algorithm, the Court did not cite to *Hope* and simply cites to *Saucier*. *Id*. The First Circuit appears to have folded the "obviousness standard" of *Hope* into a three-tiered qualified immunity analysis, which does not recognize the possibility of unique and obvious claims as this Court provided for in *Hope*.

In contrast, the Ninth Circuit recently applied the *Hope* decision, focusing on its "obvious cruelty" language and on *Hope*'s reliance on regulations and government reports as notice of the obvious unconstitutionality of the acts of using perjured testimony and fabricated evidence in a child custody proceeding. *Hardwick v. Cty. of Orange*, 844 F.3d 1112, 1120 (9th Cir. 2017). The Ninth Circuit pointed to a state statute warning public officials of the consequences of lies and perjury as sufficient notice to a public official that the use of perjured testimony and fabricated evidence

would be unconstitutional. *Id*. This, as described above, is markedly different than the Fifth Circuit in *Morgan* looking to the *Hope* Court's citation to "binding circuit precedent prohibiting extremely similar conduct, including 'handcuffing inmates to the fence and to cells for long periods of time'" as the determinate for the *Hope* decision. *Morgan*, 659 F.3d at 373. *See also Young v. Martin*, 801 F.3d 172, 182 (3d Cir. 2015) (recognizing *Hope*'s "fair warning standard").

Despite *Hope*'s acknowledgement of some civil rights violations as obvious, some circuits appear reluctant to find any such obvious cases and, indeed, are hesitant to even apply the holding of *Hope*. And this case is yet another example. Both the arrest of F.M. and his handcuffing and transportation to a juvenile detention center for disruptive burping should be obvious constitutional violations based on the data showing the significant risk of harm to arrested children; on the language of the criminal statute; and on New Mexico's laws of juvenile justice. Still, rather than asking whether the arrest was an obvious violation of the right to be free of unreasonable seizure, the Tenth Circuit rejected A.M.'s claim as insufficiently egregious. In requiring egregious conduct, the Tenth Circuit has impermissibly narrowed *Hope*.

The Tenth Circuit rejected the "egregiousness" of Officer Acosta's conduct while recognizing the overwhelming research and commentary on the harm caused when police arrest children in schools for misbehavior and when children are chained. App. 52-53, 65 n.15, 18. It also did so despite New Mexico's stated

interest in keeping children out of handcuffs and away from detention centers. It did so though New Mexico law counsels against the custodial arrest of juveniles, who are not to be detained unless exigent circumstances are present. N.M. Stat. Ann. § 32A-2-11 (stating in part that "a child taken into custody for an alleged delinquent act shall not be placed in detention" unless just cause exists to detain him).

Petitioner acknowledges "a violation of state law does not establish a Fourth Amendment violation. However, the question of compliance with state law may well be relevant in determining whether police conduct was reasonable under the Fourth Amendment." *United States v. Baker*, 16 F.3d 854, 856 n.1 (8th Cir. 1994). And given *Hope*'s reliance on regulation and government reports, statutes should certainly put an officer on notice his or her conduct is unconstitutional in an obvious scenario.

In the instant case, Officer Acosta is not a patrol officer walking a beat; he is a school resource officer. As such, he should know the delinquency laws, and he should know the effect of arrest on children. As any reasonable officer would know, New Mexico statutory law makes clear that children alleged to have committed delinquent acts must not be detained or placed in detention unless exigent circumstances are present. N.M. Stat. Ann. § 32A-2-11(A). New Mexico law makes this clear because the arrest of a child is no small act. New Mexico law makes this clear because the state does not have an interest in jailing children except under extraordinary circumstances.

In light of the New Mexico legislature's abhorrence to the unwarranted arrest of children and the evidence of significant harm to children resulting from arrests, New Mexico law afforded Officer Acosta notice that his arrest of F.M. for burping was unreasonable. F.M. had complied with every one of the officer's requests; and, as evinced by F.M.'s less than zero score on the detention center's threat assessment, F.M. was not a danger to himself or anyone else. Officer Acosta could have initiated juvenile proceedings by simply faxing a report to the juvenile probation officer. In this context, the obviousness of the unconstitutionality of arresting a child for disruptive burping, especially when viewed in light of all the alternatives to custodial arrest provided for by the State of New Mexico, is obvious.

The petition does not present a claim that an officer should know obscure precedent. The petition argues simply that the state interest is obvious – childhood conduct that disturbs the peace of a school session is not criminal and children should be kept out of juvenile detention when possible. When the state interest against arresting children is balanced with the liberty interest of the child, the unconstitutionality of the arrest is obvious.

Perhaps the simplest formula for police officers to apply in the Fourth Amendment context is a balancing of the government interest in a certain search or seizure against the liberty interest of the person searched or seized, particularly when no government interest exists to arrest. Thus, the permissibility of a particular

practice "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 619 (1989) (citations omitted). Since Officer Acosta was unable to articulate any legitimate state interest in handcuffing F.M., his transportation to the detention center was obviously unnecessary.

III. REVIEW IS WARRANTED TO CORRECT AND CREATE UNIFORM STATUTORY INTERPRETATION IN THE QUALIFIED IMMUNITY CONTEXT.

Though his constitutional violation was obvious, the *Silva* decision also put Officer Acosta on notice that the arrest of F.M. was unlawful. Judge Gorsuch aptly explains in his dissent how *Silva*, which interpreted identical, operative terms in a predecessor statute to the criminal statute Officer Acosta charged F.M. with violating, should have put Officer Acosta on notice that his conduct was unlawful. And A.M., therefore, need not belabor that point.

But, briefly, the *Silva* opinion held that in a statute addressing interference with higher education the words "disrupt, impair, interfere with, or obstruct the lawful mission, processes, procedures or function" did not criminalize "conduct that disturbs 'merely the peace of the school session' but instead requires proof that the defendant more substantially or materially 'interfere[d] with the actual function' of the school." App. 98. That exact language appears in Section 30-20-13(D),

the statute Officer Acosta arrested F.M. for violating, and the language arises in an identical context – interference with education.

This Court's precedent requires courts to interpret amended statutes with the understanding that legislative bodies are deemed to know judicial pronouncements of the meaning of the statute being amended. *Bragdon v. Abbott*, 524 U.S. 624, 645 (1998) ("When administrative and judicial interpretations have settled the meaning of an existing statutory provision, repetition of the same language in a new statute indicates, as a general matter, the intent to incorporate . . . judicial interpretations as well.").

> It is always appropriate to assume that our elected representatives, like other citizens, know the law; in this case, because of their repeated references to Title VI and its modes of enforcement, we are especially justified in presuming both that those representatives were aware of the prior interpretation of Title VI and that that interpretation reflects their intent with respect to Title IX.

Cannon v. Univ. of Chicago, 441 U.S. 677, 696-98 (1979).

In the instant case, the majority concluded that the New Mexico Legislature must have intended to criminalize any conduct that results in interruption to the school day when it enacted Section 30-20-13(D). But *Silva* had limited the same language's reach to

only those instances where a person's conduct substantially disrupts school-wide function. In the wake of *Silva*, the New Mexico Legislature passed Section 30-20-13(D) utilizing the same terminology at issue in *Silva*. The Tenth Circuit should have concluded that the same terminology used in the amended statute understood and approved of *Silva*'s interpretations. Indeed, a broader reading of Section 30-20-13(D) would raise constitutional vagueness concerns. Officer Acosta should have been on plain notice that the arrest of F.M. was unlawful.

CONCLUSION

A.M. requests that this Court grant the petition for a writ of certiorari and reverse the decision of the Tenth Circuit Court of Appeals. In the alternative, this Court should enter a non-precedential order summarily reversing the Tenth Circuit's opinion and remanding this matter for further proceedings, including trial on the merits.

Respectfully submitted,

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PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

A.M., on behalf of her minor child, F.M.,* Plaintiff-Appellant, v. ANN HOLMES; PRINCIPAL SUSAN LABARGE; ARTHUR ACOSTA, City of Albuquerque Police Officer, in his individual capacity, Defendants-Appellees.	Nos. 14-2066; 14-2183

Appeal from the United States District Court for the District of New Mexico (D.C. Nos. 1:13-CV-00356-MV-LAM; 1:12-CV-00074-KG-CG)

(Filed Jul. 25, 2016)

Joseph P. Kennedy of Kennedy Kennedy & Ives, LLC, Albuquerque, New Mexico (Shannon L. Kennedy and

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* We use fictitious initials rather than a name to preserve the anonymity of F.M., who is a minor. *See Starkey ex rel. A.B. v. Boulder Cty. Soc. Servs.*, 569 F.3d 1244, 1244 n.* (10th Cir. 2009). Because F.M.'s identity would be discernible from his mother's name, we use fictitious initials when referring to Plaintiff-Appellant A.M. as well.

Michael L. Timm, Jr. of Kennedy Kennedy & Ives, LLC, Albuquerque, New Mexico, with him on the briefs), for Plaintiff-Appellant.

Emil J. Kiehne of Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, New Mexico, and Kathryn Levy, Deputy City Attorney for the City of Albuquerque, New Mexico (Jennifer G. Anderson and Megan T. Muirhead of Modrall, Sperling, Roehl, Harris & Sisk, P.A., Albuquerque, New Mexico, with them on the briefs), for Defendants-Appellees.

Before **TYMKOVICH**, Chief Judge, and **GORSUCH** and **HOLMES**, Circuit Judges.

HOLMES, Circuit Judge.

Plaintiff-Appellant A.M. filed this action under 42 U.S.C. § 1983 on behalf of her minor child, F.M., against two employees of the Albuquerque Public Schools – specifically, Cleveland Middle School ("CMS") Principal Susan LaBarge and Assistant Principal Ann Holmes – and against Officer Arthur Acosta of the Albuquerque Police Department ("APD"). A.M. brought several claims stemming from two school-related events: (1) the May 2011 arrest of F.M. for allegedly disrupting his physical-education class, and (2) the November 2011 search of F.M. for contraband. Ms. Holmes and Ms. LaBarge sought summary judgment on the basis of qualified immunity, and the district

court granted their respective motions. The court also denied A.M.'s motion for summary judgment on her claims pertaining to Officer Acosta after determining that Officer Acosta was entitled to prevail on qualified-immunity grounds.

On appeal, A.M. contends that the district court erred in awarding qualified immunity to all of the defendants. We have consolidated these matters for our review.[1] Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we **affirm** each grant of qualified immunity.

I. BACKGROUND

A. May 2011 Arrest of F.M.

On May 19, 2011, CMS physical-education teacher Margaret Mines-Hornbeck placed a call on her school-issued radio to request assistance with a student. Officer Acosta, the school resource officer, responded to the call. As he approached the designated classroom, he saw a student – later identified as F.M., who was then thirteen years old and in the seventh grade – sitting on the hallway floor adjacent to the classroom[2] while Ms. Mines-Hornbeck stood in the hallway near

[1] Ms. Holmes is the sole defendant-appellee in Case No. 14-2066; Ms. LaBarge and Officer Acosta are defendants-appellees in Case No. 14-2183. For clarity's sake, citations to the briefs and A.M.'s appendices include parentheticals identifying the case number with which the cited documents are associated.

[2] Ms. Mines-Hornbeck had convened her physical-education class in a classroom that day to facilitate the students' project presentations.

the classroom door. Other students were peering through the doorway.

Ms. Mines-Hornbeck explained that F.M. had generated several fake burps, which made the other students laugh and hampered class proceedings. After F.M. ignored her requests to stop making those noises, Ms. Mines-Hornbeck ordered him to sit in the hallway. F.M. nominally complied, but once he was situated in the hallway, he leaned into the classroom entranceway and continued to burp and laugh. This obliged Ms. Mines-Hornbeck to "hav[e] to deal with [F.M.] repeatedly" and rendered her unable to continue teaching the class. Aplt.'s App. (No. 14-2183) at 289 (Acosta's Dep., dated Dec. 3, 2012). Ms. Mines-Hornbeck told Officer Acosta that she "need[ed] [F.M.] removed from [t]here" because she could not control F.M. *Id.* at 288.

At some point during Ms. Mines-Hornbeck's conversation with Officer Acosta, F.M. interjected, saying, "That didn't happen. No, that's not true." *Id.* Nonetheless, based on what he had observed, Officer Acosta asked F.M. to come with him. F.M. cooperated; he accompanied Officer Acosta to CMS's administrative office and waited in a chair while Officer Acosta retrieved a computer from his patrol car.

Officer Acosta then informed F.M. that, "[b]ecause of the disruptions [he] saw," *id.* at 293, he would be arresting F.M. for interfering with the educational process in violation of N.M. Stat. Ann. § 30-20-13(D),[3]

[3] In full, subsection (D) reads: "No person shall willfully interfere with the educational process of any public or private school

which is a petty misdemeanor offense. Once again, F.M. stated that he had done nothing wrong. However, Officer Acosta did not "go into great detail with [F.M.]," Aplt.'s App. (14-2183) at 292, which is to say that he did not invite further discussion of F.M.'s version of events. Aware that he possessed complete discretion concerning whether to arrest F.M. or issue a citation, Officer Acosta believed that he had a legitimate basis to arrest (i.e., probable cause) based on (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," *id.* at 289, because Ms. Mines-Hornbeck was monitoring F.M. in the hallway. Officer Acosta thus drafted the necessary incident report, leaving F.M. outside the administrative office. He did not place F.M. in handcuffs at that point because F.M. posed no flight risk and "was not combative." *Id.* at 293.

When Officer Acosta advised Ms. LaBarge of his plan to arrest F.M., Ms. LaBarge prepared a disciplinary referral slip that denoted "Police or Outside Agency" action and imposed a one-day suspension to be served May 20, 2011. *Id.* at 118 (Discipline Referral, dated May 19, 2011). She gave Officer Acosta "the duplicate . . . Parent/Student copy" of the referral slip. *Id.*

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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." N.M. Stat. Ann. § 30-20-13(D).

at 114 (LaBarge's Aff., dated Sept. 20, 2012). Meanwhile, pursuant to school policy, Ms. LaBarge's administrative assistant attempted to notify A.M. She called the two telephone numbers listed in F.M.'s enrollment records, but to no avail: the first number had been disconnected, and the second number lacked a functioning voicemail account.

After completing his paperwork, Officer Acosta said to F.M., "Let's go to the car." *Id.* at 295. F.M. responded, "Okay," and walked to Officer Acosta's patrol car without incident. *Id.* Although he had not "laid a finger on [F.M.] . . . up to th[at] point," Officer Acosta told F.M. when they reached the vehicle that he would be performing a pat-down search "per APD policy." *Id.* F.M. indicated that he had no weapons or contraband on his person, and Officer Acosta found neither during the pat-down search. At that point, Officer Acosta handcuffed F.M., placed him in the patrol car, and drove him to the juvenile detention center.

F.M. was booked into the detention center at approximately 1:30 p.m. As Officer Acosta expected, a detention-center staff member completed F.M.'s risk assessment instrument before releasing F.M. to the custody of A.M. at around 2:30 p.m. Shortly thereafter, A.M. visited Ms. LaBarge at CMS to discuss F.M.'s suspension. By both accounts, the conversation was unproductive. *See id.* at 18 (Compl., filed Nov. 30, 2011) (embodying A.M.'s averment that Ms. LaBarge had unreasonably suspended F.M. without holding a hearing); *id.* at 115 (reflecting Ms. LaBarge's statement that

A.M.'s demeanor "prevented [them] from having a reasonable . . . discussion").

F.M. served his suspension and did not return to CMS for the remainder of the 2010-11 school year. Not surprisingly, the story of his arrest garnered some publicity. A.M. "spoke publicly" about the incident and "provided interviews to local news media." Aplt.'s App. (14-2066) at 14 (Compl., filed Feb. 28, 2013). According to Officer Acosta, news coverage of F.M.'s arrest "was on the airways quite a bit," much to the chagrin of school administrators. *Id.* at 115.

B. November 2011 In-School Search of F.M.

A.M. re-enrolled F.M. at CMS for the 2011-12 school year. F.M. was attending school on November 8, 2011, the date of the second event prompting this litigation. That morning, a CMS student approached a teacher to report having witnessed a potential drug transaction on campus. The student recounted having seen approximately five other students carrying small baggies containing what appeared to be marijuana; these individuals seemed to be exchanging money for drugs. Though unsure of the observed students' identities, the reporting student "gave . . . a location in the hallway where the incident took place." *Id.* at 122 (Uniform Incident Report, dated Nov. 9, 2011).

Ms. Holmes was notified of the student's report and "contacted [Officer Acosta] on the school radio . . . in regards to [the] suspicious situation." *Id.* Officer Acosta then retrieved the school's security-camera

footage to see if it might assist school administrators' efforts to identify the students of interest. During their review of the footage corresponding to the time and place described by the reporting student, Ms. Holmes and Ms. LaBarge recognized the five students involved in the suspicious transaction – including, as relevant here, F.M. These students were summoned to the administrative office while school representatives endeavored to contact the students' parents to inform them that their children would be searched in connection with a suspected drug transaction. The only student for whom a parent could not be reached was F.M.

All of the students were searched in a conference room next to Ms. LaBarge's office. Several adults were present: Ms. LaBarge, Ms. Holmes, Officer Acosta, a male teacher, and APD Officer Kiel Higgins. The first four searches and interviews were audio-recorded. According to Officer Acosta, these four students were asked to remove their shoes and empty their pockets. Two students stated that they had seen marijuana, "but [they] stopped short of saying who had it in their possession." *Id.* Another student reported seeing F.M. with money. No drugs were found on any of the first four students.

As for F.M., one of the adults videotaped his search and interview using Officer Higgins's lapel camera. F.M. emptied his pockets and produced $200 in cash, including a $100 bill.[4] Ms. Holmes asked F.M. if he had

[4] F.M. explained that the cash was a birthday gift from his father. When Ms. Holmes requested contact information for his

anything he was not supposed to have, and F.M. answered that he had a marijuana-leaf belt buckle. A search of F.M.'s backpack produced, among other items, a red bandana and a belt buckle displaying an image of a marijuana leaf. Both items violated CMS's prohibition of "bandanas," "gang-related" clothing, and apparel displaying "inappropriate messages or symbols." Aplt.'s App. (14-2183) at 122 (Uniform Dress Policy, filed Sept. 21, 2012).

F.M. was wearing "numerous layers of clothing," *id.* at 190 (LaBarge's Dep., dated Dec. 14, 2012), including a long-sleeved athletic shirt, a short-sleeved shirt layered over the first shirt, a pair of jeans, two pairs of athletic shorts, and boxer-shorts underwear. When prompted, he took off his shoes. F.M. also complied with a request to remove his jeans and place them on a table after demonstrating that he was wearing shorts underneath. At the school administrators' behest, the male teacher inspected F.M.'s waistband. He flipped down the waistband of the first pair of athletic shorts to reveal the second pair. The teacher left undisturbed the waistbands of F.M.'s other pair of athletic shorts and his boxer shorts. F.M. then removed one pair of athletic shorts and his short-sleeved shirt, which left him wearing a long-sleeved shirt, a pair of athletic shorts, and boxer-shorts underwear. Shortly thereafter, F.M. donned the rest of his clothing. The search of

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father, F.M. was unable to provide it. Ms. Holmes knew that F.M.'s fourteenth birthday was in August 2011 (i.e., several months prior to the search) and that CMS's enrollment files contained no data regarding F.M.'s father.

F.M.'s person, his removed clothing, and his backpack yielded no marijuana.

While F.M. was in the office, the school received a return phone call from A.M. Ms. LaBarge communicated with A.M., describing the events and the items recovered in the search of F.M. During the conversation, A.M. confirmed that F.M. had left home carrying $200 that morning. Ms. LaBarge elected "not [to] discipline F.M. for the suspected drug transaction due to his mother's corroboration of" why he possessed $200 in cash. *Id.* at 117. However, Ms. LaBarge imposed a three-day in-school suspension, marking "Dress Code Violation," "General Disruptive Conduct," and "Gang-Related Activity[–]red bandana" on the associated referral form. *Id.* at 123 (Discipline Referral, dated Nov. 8, 2011).

Later that day, Ms. LaBarge met with A.M. to explain the search and suspension. She subsequently stated that A.M. "stormed out" after "refus[ing] to listen" and saying "her attorney would contact [the school]." *Id.* After November 8, 2011, F.M. did not return to CMS.

C. Procedural History

On November 30, 2011, A.M. filed a lawsuit in New Mexico state court against Ms. LaBarge, Ms. Mines-Hornbeck, and Officer Acosta. A.M. alleged in the complaint that the defendants deprived F.M. of his civil rights by arresting him in May 2011 under N.M. Stat. Ann. § 30-20-13(D) and by handcuffing him while

effecting the arrest – asserting Fourth Amendment violations as to both claims. Notably, A.M. opined that a reasonable officer "should have known that burping was not a crime" and that "no force was necessary" to facilitate the arrest. Aplt.'s App. (14-2183) at 21. A.M. also alleged that in November 2011, Ms. LaBarge violated F.M.'s Fourth Amendment right to be free from unlawful searches, claiming that Ms. LaBarge's "strip-searching" of F.M. was unreasonable. *Id.* at 22.

After the defendants removed the action to federal court, Ms. LaBarge and Ms. Mines-Hornbeck filed a motion for summary judgment, asserting the defense of qualified immunity. In January 2013, after opposing the motion, A.M. agreed to the dismissal of all claims against Ms. Mines-Hornbeck and all claims against Ms. LaBarge pertaining to the arrest. And, in reply, Ms. LaBarge re-urged that she could avail herself of qualified-immunity protection on the claim stemming from the search.

On April 8, 2013, the district court granted Ms. LaBarge's motion for summary judgment based on its finding that she was entitled to qualified immunity. The court rested its qualified-immunity ruling on its conclusion that A.M. had failed to demonstrate that Ms. LaBarge committed a constitutional violation during the search of F.M. More specifically, applying the Supreme Court's reasoning in *Safford Unified School District No. 1 v. Redding*, 557 U.S. 364 (2009), and *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), the court found (1) that the search of F.M. was justified at its inception because school administrators perceived "a moderate

chance of finding evidence of wrongdoing," Aplt.'s App. (14-2183) at 256 (Mem. Op. & Order, filed Apr. 8, 2013); and (2) that the search was "conducted in a manner that was reasonably related . . . to the circumstances which justified the search in the first place," *id.* at 257.

In February 2013, while the claims detailed *supra* were still pending, A.M. filed another state-court lawsuit against Ms. Holmes, also bringing claims related to the November 2011 search. A.M. alleged that Ms. Holmes (1) unreasonably searched F.M., thereby violating the Fourth Amendment; (2) commenced F.M.'s search to retaliate against A.M. for speaking to the media about the May 2011 arrest, thereby allegedly violating F.M.'s First Amendment rights; and (3) "treated F.M. differently" than "other similarly situated students" during the search, thereby violating the Equal Protection Clause of the Fourteenth Amendment. Aplt.'s App. (14-2066) at 20 (Compl., filed Feb. 28, 2013). After removing the action to federal court, Ms. Holmes moved for summary judgment on the grounds of qualified immunity and collateral estoppel. As to the latter ground, Ms. Holmes argued: "Plaintiff lost her claim for unlawful search against Principal LaBarge and has simply reasserted the identical claim based on the identical facts against Assistant Principal Holmes." *Id.* at 42 (Holmes's Mot. for Summ. J., filed June 17, 2013).

The district court granted Ms. Holmes's motion for summary judgment. First, it concluded that "the elements necessary to invoke collateral estoppel [were] met" – namely: (1) A.M. was a party to the action

against Ms. LaBarge; (2) in the prior action, the district court adjudicated A.M.'s Fourth Amendment claim on the merits; (3) A.M. presented the same issue implicated in the prior action (the reasonableness *vel non* of the search); and (4) A.M. received a "full and fair opportunity to litigate the relevant issue." *Id.* at 164, 165 (Mem. Op. & Order, filed Mar. 31, 2014). The court also determined that dismissal of A.M.'s claims against Ms. Holmes was "required because [Ms. Holmes] did not violate a clearly established right in searching F.M.," *id.* at 166, and "because it was not clearly established that a search of a student based on reasonable suspicion could give rise to a First Amendment retaliation claim," *id.* at 171-72. Lastly, the court rejected A.M.'s equal-protection claim after finding that A.M. had not presented evidence to show that F.M. was treated differently from similarly situated students.

In August 2013 – i.e., after the district court granted Ms. LaBarge's summary-judgment motion, but before the court granted Ms. Holmes's motion – A.M. moved for summary judgment on her claims against Officer Acosta. She argued that Officer Acosta committed a constitutional violation when he arrested F.M. for interfering with the educational process under N.M. Stat. Ann. § 30-20-13(D). She further asserted that Officer Acosta committed a constitutional violation when he handcuffed F.M. and that "[c]learly established common and statutory New Mexico [l]aw put [Officer Acosta] on notice" that handcuffing F.M. could give rise to liability under § 1983. Aplt.'s App.

(14-2183) at 282 (A.M.'s Mot. for Summ. J., filed Aug. 15, 2013).

On September 19, 2014, after Officer Acosta responded to A.M.'s motion and argued for qualified immunity, the district court ruled on the motion. The court awarded qualified immunity to Officer Acosta regarding F.M.'s arrest based on its view that "F.M.'s right to be free from arrest was not clearly established at the time of the alleged misconduct." *Id.* at 395 (Mem. Op. & Order, filed Sept. 19, 2014). It also concluded that Officer Acosta was protected by qualified immunity on the excessive-force claim because A.M. had not shown that F.M. suffered any "actual physical or emotional injury," *id.* at 397, and thus had not demonstrated that Officer Acosta committed a Fourth Amendment violation in that regard. Not only did the court deny A.M.'s motion, it also dismissed A.M.'s claims against Officer Acosta with prejudice.

A.M. filed timely notices of appeal from all three of the district court's orders granting qualified immunity to Officer Acosta, Ms. Holmes, and Ms. LaBarge. We have consolidated these actions for our review.

II. STANDARD OF REVIEW

The defense of qualified immunity "protects governmental officials from liability for civil damages insofar as their conduct does not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Weise v. Casper*, 593 F.3d 1163, 1166 (10th Cir. 2010) (quoting

Pearson v. Callahan, 555 U.S. 223, 231 (2009)); *see also Mullenix v. Luna*, ___ U.S. ___, 136 S. Ct. 305, 308 (2015) (per curiam) ("Put simply, qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986))). This doctrine "not only protects public employees from liability, [but] also protects them from the burdens of litigation." *Allstate Sweeping, LLC v. Black*, 706 F.3d 1261, 1266 (10th Cir. 2013); *see Price-Cornelison v. Brooks*, 524 F.3d 1103, 1108 (10th Cir. 2008) (noting that qualified immunity provides "a right not to stand trial in the first place"). In light of these purposes, "we review summary judgment orders deciding qualified immunity questions differently from other summary judgment decisions." *Cortez v. McCauley*, 478 F.3d 1108, 1114 (10th Cir. 2007) (en banc) (quoting *Medina v. Cram*, 252 F.3d 1124, 1128 (10th Cir. 2001)).

When a defendant asserts the defense of qualified immunity, "the onus is on the plaintiff to demonstrate '(1) that the official violated a statutory or constitutional right, *and* (2) that the right was "clearly established" at the time of the challenged conduct.'" *Quinn v. Young*, 780 F.3d 998, 1004 (10th Cir. 2015) (quoting *Ashcroft v. al-Kidd*, 563 U.S. 731, 735 (2011)). In other words, if the plaintiff fails to establish either prong of the two-pronged qualified-immunity standard, the defendant prevails on the defense. *See, e.g.*, *Felders ex rel. Smedley v. Malcom*, 755 F.3d 870, 877-78 (10th Cir. 2014) ("[T]he 'record must clearly demonstrate the

plaintiff has satisfied his heavy two-part burden; otherwise, the defendants are entitled to qualified immunity.'" (quoting *Medina*, 252 F.3d at 1128)); *see also Cox v. Glanz*, 800 F.3d 1231, 1245 (10th Cir. 2015) ("[B]y asserting the qualified-immunity defense, Sheriff Glanz triggered a well-settled twofold burden that Ms. Cox was compelled to shoulder: not only did she need to rebut the Sheriff's no-constitutional-violation arguments, but she also had to demonstrate that any constitutional violation was grounded in then-extant clearly established law.").

We have discretion to address either prong first, *see Panagoulakos v. Yazzie*, 741 F.3d 1126, 1129 (10th Cir. 2013) – *viz.*, where appropriate, we may determine that "the right that [the plaintiff's] claim implicates . . . was not clearly established [at the relevant time]," *Cox*, 800 F.3d at 1247; *see, e.g.*, *Pearson*, 555 U.S. at 243 ("[W]e hold that petitioners are entitled to qualified immunity because the entry did not violate clearly established law."). "For a constitutional right to be clearly established, '[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.'" *Wilson v. Montano*, 715 F.3d 847, 852 (10th Cir. 2013) (alteration in original) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)); *accord Weigel v. Broad*, 544 F.3d 1143, 1154 (10th Cir. 2008).

In that regard, we exercise "special care to 'define the clearly established right at issue on the basis of the specific context of the case' and, in so doing, avoid defining the 'case's context in a manner that imports

genuinely disputed factual propositions.'" *Felders*, 755 F.3d at 885 (quoting *Tolan v. Cotton*, ___ U.S. ___, 134 S. Ct. 1861, 1866 (2014) (per curiam)); *see Mullenix*, 136 S. Ct. at 308 ("'We have repeatedly told courts . . . not to define clearly established law at a high level of generality.' The dispositive question is 'whether the violative nature of *particular* conduct is clearly established.'" (omission in original) (quoting *al-Kidd*, 563 U.S. at 742)); *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004) (per curiam) (noting that the clearly-established-law "inquiry 'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223, 236 (2009))).

Ordinarily, a plaintiff may show that a particular right was clearly established at the time of the challenged conduct "by identifying an on-point Supreme Court or published Tenth Circuit decision; alternatively, 'the clearly established weight of authority from other courts must have found the law to be as [she] maintains.'" *Quinn*, 780 F.3d at 1005 (quoting *Weise*, 593 F.3d at 1167); *accord Cox*, 800 F.3d at 1247. However, "we do not always require case law *on point*," *Morris v. Noe*, 672 F.3d 1185, 1196-97 (10th Cir. 2012) (emphasis added), and "the Supreme Court has warned that 'officials can still be on notice that their conduct violates established law even in novel factual circumstances,'" *Casey v. City of Fed. Heights*, 509 F.3d 1278, 1284 (10th Cir. 2007) (quoting *Hope v. Pelzer*, 536 U.S. 730, 741 (2002)). "We have therefore adopted a

sliding scale to determine when law is clearly established. 'The more obviously egregious the conduct in light of prevailing constitutional principles, the less specificity is required from prior case law to clearly establish the violation.'" *Id.* (quoting *Pierce v. Gilchrist*, 359 F.3d 1279, 1298 (10th Cir. 2004)); *accord Fogarty v. Gallegos*, 523 F.3d 1147, 1161 (10th Cir. 2008). Although A.M. need not show that "the very action in question [has] . . . previously been held unlawful, 'in the light of pre-existing law the unlawfulness must be apparent.'" *Albright v. Rodriguez*, 51 F.3d 1531, 1535 (10th Cir. 1995) (quoting *Creighton*, 483 U.S. at 640).

Lastly, in determining whether the plaintiff has satisfied the necessary two-pronged qualified-immunity showing, courts ordinarily accept the plaintiff's version of the facts – that is, "the facts alleged," *Riggins v. Goodman*, 572 F.3d 1101, 1107 (10th Cir. 2009) – but "because at summary judgment we are beyond the pleading phase of the litigation, [the] plaintiff's version of the facts must find support in the record," *Thomson v. Salt Lake Cty.*, 584 F.3d 1304, 1312 (10th Cir. 2009); *see York v. City of Las Cruces*, 523 F.3d 1205, 1210 (10th Cir. 2008) ("As with any motion for summary judgment, '[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts[.]'" (alterations in original) (quoting *Scott v. Harris*, 550 U.S. 372, 380 (2007))).

III. DISCUSSION

Our review of the district court's rulings concerning "[l]iability under § 1983 . . . , and [the] defendants' entitlement to qualified immunity, turn[s] on an individual assessment of each defendant's conduct and culpability." *Pahls v. Thomas*, 718 F.3d 1210, 1233 (10th Cir. 2013). We will address A.M.'s claims against Officer Acosta, Ms. Holmes, and Ms. LaBarge in turn.

A. Claims Against Officer Acosta

When A.M. moved for summary judgment on her claims against Officer Acosta, she argued that he could not avail himself of qualified-immunity protection. Officer Acosta then lodged his response, invoking the defense of qualified immunity therein. Once the motion was fully briefed, the district court concluded that Officer Acosta *was* entitled to qualified immunity; not only did it deny the motion, the court also dismissed A.M.'s claims against Officer Acosta with prejudice.

On appeal, A.M. first contends that the court erred by entering judgment in Officer Acosta's favor *sua sponte* without affording her the requisite notice set forth in the Federal Rules of Civil Procedure. A.M. also seeks reversal of the court's grant of qualified immunity to Officer Acosta on her Fourth Amendment unlawful-arrest and excessive-force claims. We discern no reversible error and therefore uphold the relevant district court rulings.

1. Procedural Propriety of Summary Judgment Grant

Before granting summary judgment in favor of a non-movant – here, Officer Acosta – the district court must "giv[e] notice and a reasonable time to respond." Fed. R. Civ. P. 56(f). The court "may grant summary judgment sua sponte 'so long as the losing party was on notice that [it] had to come forward with all of [its] evidence.'" *Sports Racing Servs., Inc. v. Sports Car Club of Am., Inc.*, 131 F.3d 874, 892 (10th Cir. 1997) (alterations in original) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986)). "While the practice of granting summary judgment sua sponte is not favored," we will affirm the judgment when the losing party has received adequate notice of the need to marshal evidence. *Scull v. New Mexico*, 236 F.3d 588, 600 (10th Cir. 2000). Moreover, even if we deem the court's notice unsatisfactory, "we will still affirm a grant of summary judgment if the losing party suffered no prejudice from the lack of notice." *Johnson v. Weld Cty.*, 594 F.3d 1202, 1214 (10th Cir. 2010).

Based on our review of this case's procedural history, we find it pellucid that A.M. was aware that the district court planned to rule on the issue of qualified immunity with respect to Officer Acosta. Indeed, that was one matter on which A.M. *herself* requested a ruling. *See* Aplt.'s App. (14-2183) at 260 (reflecting A.M.'s "anticipat[ion]" in her summary-judgment motion that "Defendant Acosta w[ould] claim qualified immunity" and requesting that the court find that "Defendant Acosta is not entitled to qualified immunity"); *see also*

id. at 279-80 (arguing that "[o]nly if an officer's use of force in a case is objectively reasonable . . . is the defense of qualified immunity available" and citing qualified-immunity caselaw).

But even assuming *arguendo* that A.M. did not know if Officer Acosta would rely upon qualified immunity in addressing her motion – that is, whether Officer Acosta would put forward the qualified-immunity issue for resolution – any uncertainty would perforce have dissipated when Officer Acosta actually filed his response brief. Quite unremarkably, Officer Acosta *did* assert the qualified-immunity defense, and his arguments evidently prompted A.M. to devote the lion's share of her reply brief to the issue of qualified immunity. *See* Aplt.'s App. (14-2183) at 334, 340 (entitling the two sections of her reply brief (1) "Defendant Acosta is not entitled to qualified immunity for his arrest of F.M. for purportedly violating [N.M. Stat. Ann. § 30-20-13(D)]" and (2) "Defendant Acosta is not entitled to qualified immunity for the force exerted on F.M. as a matter of clearly established law" (capitalization altered)). As a result, A.M. is not situated to claim on appeal that she lacked notice that she should present evidence (as well as legal argument) designed to forestall a potential grant of qualified immunity to Officer Acosta.

To justify her view that she received inadequate notice of a forthcoming qualified-immunity ruling, A.M. relies on a non-precedential order and judgment issued by a panel of this court in 1993. *See Aitson v. Campbell*, 989 F.2d 507, 1993 WL 55951, at *3-4 (10th

Cir. Mar. 1, 1993) (unpublished table decision). An issue in *Aitson* was whether the district court erred in dismissing claims in a *sua sponte* grant of *absolute* immunity. Critically, the defendants in that case – members of the Oklahoma Board of Dentistry, who had revoked the plaintiff's professional license – had only sought *qualified* (not absolute) immunity in moving for summary judgment. *See id.* at *3. The panel reversed the district court's judgment; it reasoned that, because none of the briefing discussed absolute immunity, the plaintiff was prejudiced by a lack of notice that the issue was even presented for decision. *See id.* at *4. Those circumstances, however, make *Aitson* distinguishable. Notably, all three summary-judgment briefs concerning Officer Acosta addressed qualified immunity in some way, and that is precisely the kind of immunity that formed the basis for the district court's ruling. Accordingly, we conclude that *Aitson* does not avail A.M., and her reliance on it is misplaced.

Finally, A.M. contends that she was deprived of the opportunity to come forward with evidence of injuries she claims F.M. sustained during the handcuffing. However, our review of the parties' briefing belies this argument. Most saliently, in his response brief, Officer Acosta argued that any injury to F.M. would have been *de minimis*, *see* Aplt.'s App. (14-2183) at 322-23 (Acosta's Resp. Br., filed Jan. 29, 2014) (arguing that F.M.'s minor status did not render Officer Acosta's "minimal use of force unconstitutional" in light of "established precedent requir[ing a] . . . show[ing] [that] the force used resulted in some substantial injury");

this argument should have reasonably apprised A.M. it was necessary to present with her reply brief evidence concerning any physical or emotional injury of F.M. In this regard, our precedent treats "some actual injury" as an essential element of a claim for excessive force under § 1983. *Cortez*, 478 F.3d at 1129 & n.25. A.M. was therefore on notice that she needed to offer any evidence that she possessed regarding F.M.'s injuries from handcuff-related force applied during the arrest. Bearing the foregoing in mind, we conclude that A.M. is not entitled to reversal on this procedural basis.

In sum, we conclude that A.M. received sufficient warning that the question of qualified immunity would be resolved in the district court's ruling on her motion for summary judgment. And she certainly should have understood that, if the district court resolved the qualified-immunity issue in Officer Acosta's favor, that would effectively end the litigation as to him. We consequently discern no reversible error in the court's method of granting summary judgment to Officer Acosta, the non-moving party.

2. Unlawful-Arrest Claim

We now address whether the district court erred in granting qualified immunity to Officer Acosta on A.M.'s claim that he arrested F.M. without probable cause in violation of the Fourth Amendment. For the reasons discussed herein, we conclude (as the district court did) that Officer Acosta is entitled to qualified

immunity. Specifically, we affirm the court's judgment on the ground that the extant clearly established law in May 2011 would not have apprised a reasonable law-enforcement officer in Officer Acosta's position that F.M.'s conduct in Ms. Mines-Hornbeck's class fell outside of the scope of N.M. Stat. Ann. § 30-20-13(D), such that there would not have been probable cause to support an arrest of F.M. for interfering with the educational process.

a. Background Principles

i

"A warrantless arrest violates the Fourth Amendment unless it was supported by probable cause." *Keylon v. City of Albuquerque*, 535 F.3d 1210, 1216 (10th Cir. 2008); *see Romero v. Story*, 672 F.3d 880, 889 (10th Cir. 2012) ("In the context of an unlawful arrest . . . , the law was and is unambiguous: a government official must have probable cause to arrest an individual." (quoting *Fogarty*, 523 F.3d at 1158-59)). "Probable cause exists if facts and circumstances within the arresting officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to lead a prudent person to believe that the arrestee has committed or is committing an offense." *Keylon*, 535 F.3d at 1216 (quoting *Romero v. Fay*, 45 F.3d 1472, 1476 (10th Cir. 1995)).

When assessing whether an officer had probable cause to arrest an individual, courts "examine the events leading up to the arrest, and then decide

'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1996)); *accord Rojas v. Anderson*, 727 F.3d 1000, 1003 n.4 (10th Cir. 2013); *see also Illinois v. Gates*, 462 U.S. 213, 232 (1983) (noting that "probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules"). "Neither the officer's subjective beliefs nor information gleaned post-hoc bear on this inquiry." *Manzanares v. Higdon*, 575 F.3d 1135, 1144 (10th Cir. 2009). Ultimately, "[a]ll that matters is whether [the officer] possessed knowledge of evidence that would provide probable cause to arrest [the individual] on *some* ground." *Apodaca v. City of Albuquerque*, 443 F.3d 1286, 1289 (10th Cir. 2006).

In the present case, Officer Acosta contends that he had probable cause to arrest F.M. for violating N.M. Stat. Ann. § 30-20-13(D), which provides, in pertinent part: "No person shall willfully interfere with the educational process of any public . . . 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 . . . school."[5] Officer Acosta alleges

[5] As noted above, in full, subsection (D) reads: "No person shall 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

that he based his decision to arrest 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," Aplt.'s App. (14-2183) at 289, because Ms. Mines-Hornbeck was monitoring F.M. in the hallway. In sum, Officer Acosta asserts that F.M.'s behavior constituted an obvious and willful interference with the educational process – as described by the statute – and that his (Officer Acosta's) recognition of the interference supplied him with the requisite probable cause to arrest F.M.

However, in the qualified-immunity context, Officer Acosta's commission *vel non* of a constitutional violation need not be the focus of our inquiry. This is because A.M. "must demonstrate on the facts alleged *both* that [Officer Acosta] violated [F.M.'s] constitutional . . . rights, *and* that the right was clearly established at the time of the alleged unlawful activity." *Riggins*, 572 F.3d at 1107 (emphases added). We elect to center our analysis on the clearly-established-law question.

"As a practical matter, we implement this [clearly-established-law] standard by asking whether there was 'arguable probable cause' for an arrest – if there was, a defendant is entitled to qualified immunity." *Kaufman v. Higgs*, 697 F.3d 1297, 1300 (10th Cir. 2012)

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with or obstruct the lawful mission, processes, procedures or functions of a public or private school." N.M. Stat. Ann. § 30-20-13(D).

(quoting *Cortez*, 478 F.3d at 1121); *see id.* ("If we conclude that probable cause was lacking, we then must determine whether Mr. Kaufman's rights were clearly established, which we approach by asking whether the officers *arguably* had probable cause."). To be more specific,

> [w]hen a warrantless arrest is the subject of a § 1983 action, the defendant arresting officer is "entitled to immunity if a reasonable officer could have believed that probable cause existed to arrest" the plaintiff. "Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity."

Romero, 45 F.3d at 1476 (citations omitted) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227, 228 (1991) (per curiam)); *see Cortez*, 478 F.3d at 1120 ("Even law enforcement officials who reasonably but mistakenly conclude that probable cause is present are entitled to immunity."). In other words, in the § 1983 qualified-immunity context, an officer may be mistaken about whether he possesses *actual* probable cause to effect an arrest, so long as the officer's mistake is reasonable – *viz.*, so long as he possesses "arguable probable cause." *Cortez*, 478 F.3d at 1121; *see id.* at 1120 n.15 ("Some courts have referred to this standard as 'arguable probable cause.' "); *accord Koch v. City of Del City*, 660 F.3d 1228, 1241 (10th Cir. 2011); *see also Stonecipher v. Valles*, 759 F.3d 1134, 1141 (10th Cir. 2014) ("Arguable probable

cause is another way of saying that the officers' conclusions rest on an objectively reasonable, even if mistaken, belief that probable cause exists."); *Jones v. Cannon*, 174 F.3d 1271, 1283 n.3 (11th Cir. 1999) ("Arguable probable cause, not the higher standard of actual probable cause, governs the qualified immunity inquiry.").

We conclude that A.M. has not demonstrated that, under extant clearly established law, a reasonable officer in Officer Acosta's position would have had fair warning that he lacked probable cause to arrest F.M. for interfering with the educational process in violation of N.M. Stat. Ann. § 30-20-13(D). Put another way, in our view, such an officer could have reasonably believed – even if mistakenly – that the officer possessed probable cause under section 30-20-13(D) to arrest F.M.

ii.

At the outset, we note that there are *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. But, as we have explained in a case that turned on the interpretation of state law:

> [W]e think it prudent to clarify . . . the role played by *state* law in determining whether Plaintiff can show a violation of . . . *federal* rights. Here, where the context is an alleged

> [wrongful] arrest for a purported state offense, state law is of inevitable importance. The basic federal constitutional right of freedom from arrest without probable cause is undoubtedly clearly established by federal cases. But the precise scope of that right uniquely *depends on the contours of a state's substantive criminal law* in this case because the Defendants claim to have had probable cause based on a state criminal statute. And as to the interpretation of [that state's] criminal law, other than the statute itself . . . , [that state's] Supreme Court is the ultimate authority. So we look to the [state] Supreme Court's decisions when inquiring whether the Defendants' interpretation of the . . . statute was one that a reasonable officer would have held at the time of [Plaintiff's] arrest.

Kaufman, 697 F.3d at 1300-01 (emphases added) (citation omitted) (discussing Colorado's substantive criminal law); *see also Mayfield v. Bethards*, No. 15-3074, ___ F.3d 1___, 2016 WL 3397503, at *3-5 (10th Cir. June 20, 2016) (looking to Kansas law to define the contours of plaintiffs' Fourth Amendment right to be free from unreasonable seizure of their pet dog); *Wilson v. Montano*, 715 F.3d 847, 854 (10th Cir. 2013) (in determining whether the federal constitutional right to a prompt probable-cause determination was violated, noting that "[w]e consider New Mexico state law insofar as it bears on the scope of each appellant's responsibility to ensure a prompt probable cause determination"); *accord Cherrington v. Skeeter*, 344 F.3d 631, 643 (6th Cir. 2003).

When a state Supreme Court has not spoken on the question at issue, we assume (without deciding) that a reasonable officer would seek guidance regarding the scope of proper conduct at least in part from any on-point decisions of the state's intermediate court of appeals. *See* Richard B. Saphire, *Qualified Immunity in Section 1983 Cases and the Role of State Decisional Law*, 35 ARIZ. L. REV. 621, 647 n.123 (1993) ("Where the relevant state court decision is not that of the state supreme court,. . . . a decision by a state appellate court . . . for the judicial district within which a public official works will normally be considered a relevant, and at least a *provisionally binding*, source for determining the legal standards to which the public official should conform." (emphasis added)); *cf. Kokins v. Teleflex, Inc.*, 621 F.3d 1290, 1297 (10th Cir. 2010) ("[T]he decision of an intermediate appellate state court is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." (quoting *Stickley v. State Farm Mut. Auto. Ins. Co.*, 505 F.3d 1070, 1077 (10th Cir. 2007))).

For clarity's sake, however, we underscore that – even when it is essential to discern the content of state law – the rights being vindicated through § 1983 are federal. *See, e.g.*, *Baker v. McCollan*, 443 U.S. 137, 146 (1979) ("Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law."); *Clanton v.*

Cooper, 129 F.3d 1147, 1155 n.4 (10th Cir. 1997) ("Clanton also claims that such a statement [i.e., a confession of an admitted coconspirator] may not support an arrest warrant under Oklahoma law. . . . [A]n action may not be maintained under 42 U.S.C. § 1983 for a state official's failure to adhere to state law.").

b. Clearly-Established-Law Analysis

A.M. insists that Officer Acosta's arrest of F.M. for his burping and other horseplay in Ms. Mines-Hornbeck's classroom violated clearly established law because F.M.'s conduct patently did not rise to the level of seriousness envisioned by N.M. Stat. Ann. § 30-20-13(D) and "no case [was] necessary to alert him [i.e., Officer Acosta] to this fact." Aplt.'s Opening Br. (14-2183) at 40. In this regard, A.M. reasons, "At worst, F.M. was being a class-clown and engaged in behavior that would have subjected generations of school boys to an after-school detention, writing lines, or a call to his parents." *Id.* at 42. Moreover, A.M. contends that, when the provisions of section 30-20-13 are read as a whole, "it is clear that the New Mexico legislature contemplated" that the statute's provisions would only be violated "by actions which impede the overall public function of the school, and not a classroom in the school." Reply Br. (14-2183) at 15; *see* Aplt.'s Opening Br. (14-2183) at 40 ("Any reasonable officer would understand that Section 30-20-13(D) is targeted at criminalizing the intentional act of disrupting the overall operation of a school.").

As germane here, in assessing whether Officer Acosta had fair notice that his conduct would be unlawful in the circumstances he confronted (i.e., when he was deciding whether to arrest F.M.), we are guided, first, by the text of N.M. Stat. Ann. § 30-20-13(D) and, then, by any relevant state and federal decisions interpreting its import.

i.

The determination of whether a law-enforcement officer's reliance on a statute makes his conduct objectively reasonable turns, *inter alia*, on "the degree of specificity with which the statute authorized the conduct in question." *Mimics, Inc. v. Vill. of Angel Fire*, 394 F.3d 836, 846 (10th Cir. 2005) (quoting *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1253 (10th Cir. 2003)). And we "resist reading words or elements into a statute that do not appear on its face." *United States v. Handley*, 678 F.3d 1185, 1189 (10th Cir. 2012) (quoting *United States v. Sturm*, 673 F.3d 1274, 1279 (10th Cir. 2012)). So do the New Mexico courts. *See, e.g.*, *State v. Wood*, 875 P.2d 1113, 1116 (N.M. Ct. App. 1994) ("This Court will not read language into a statutory provision which is clear on its face."); *State v. Gutierrez*, 699 P.2d 1078, 1082 (N.M. Ct. App. 1985) ("This interpretation [i.e., the defendant's] requires us to read words into the statute or ignore words that are present. This we need not do, since the statute makes sense as written.").

We believe the text of N.M. Stat. Ann. § 30-20-13(D) manifests the New Mexico legislature's intent to prohibit a wide swath of conduct that interferes with the educational process. The statute renders unlawful, *inter alia*, the commission of "*any* act which would . . . interfere with" or "disrupt" school functioning and, thereby, "interfere with the educational process." N.M. Stat. Ann. § 30-20-13(D) (emphasis added). The common meaning of the word "any" is, *inter alia*, "one or some indiscriminately *of whatever kind*." *Any*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002) [hereinafter WEBSTER'S (2002)] (emphasis added); *see id.* (additionally defining the term to mean, *inter alia*, "one, no matter what one" and "some no matter how great or small").[6]

To "interfere" means "to be in opposition: to run at cross-purposes[;] . . . to act . . . so as to . . . diminish," *Interfere*, WEBSTER'S (2002), *supra*; or to "prevent (a process or activity) from continuing or being carried out properly," *Interfere*, NEW OXFORD AMERICAN DICTIONARY (2d ed. 2005). *See also Interference*, BLACK'S

[6] In a variety of contexts, the New Mexico Supreme Court has acknowledged the breadth of the term "any," as employed by the legislature. *See, e.g.*, *Elane Photography, LLC v. Willock*, 309 P.3d 53, 61 (N.M. 2013); *Key v. Chrysler Motors Corp.*, 918 P.2d 350, 355-56 (N.M. 1996); *see also In re Estate of DeLara*, 38 P.3d 198, 201 (N.M. Ct. App. 2001); *accord United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.' " (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 97 (1976))); *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (same); *Nat'l Credit Union Admin. Bd. v. Nomura Home Equity Loan, Inc.*, 764 F.3d 1199, 1237 (10th Cir. 2014) (same).

LAW DICTIONARY (10th ed. 2014) (defining the term as meaning, to pose "[a]n obstruction or hindrance"). Similarly, to "disrupt" means "to throw into disorder[;] . . . to interrupt to the extent of stopping, preventing normal continuance of, or destroying[ ] that experience," *Disrupt*, WEBSTER'S (2002), *supra*; or to "caus[e] a disturbance or problem," *Disrupt*, NEW OXFORD AMERICAN, *supra*.

The ordinary meaning of these statutory terms would seemingly encompass F.M.'s conduct because F.M.'s burping, laughing, and leaning into the classroom stopped the flow of student educational activities, thereby injecting disorder into the learning environment, which worked at cross-purposes with Ms. Mines-Hornbeck's planned teaching tasks. More to the point, we cannot conclude that the plain terms of subsection (D) would 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 in probable cause.

Though A.M. suggests that the New Mexico legislature only sought to criminalize more serious conduct, there is no such limiting language in subsection (D)'s plain terms, and we decline to read such a limitation into the statute. *See, e.g.*, *Handley*, 678 F.3d at 1189; *Wood*, 875 P.2d at 1116. Likewise, we discern no textual support for A.M.'s contention that the statute evinces the legislature's intention to punish the specified acts (e.g., "disrupt, impair, interfere") only when

they detrimentally impact "the overall public function of the school, and not a classroom in the school." Reply Br. (14-2183) at 15. And A.M. offers no statutory analysis to bolster her conclusory assertion to this effect.[7]

Accordingly, we do not believe that A.M. can carry her clearly-established-law burden by relying solely on the plain terms of N.M. Stat. Ann. § 30-20-13(D). We acknowledge, however, that when refracted through the lens of judicial decisions, statutory language may conceivably send a warning signal that is not readily apparent on the statute's face. And, in this regard, A.M. maintains that the caselaw extant at the time of F.M.'s arrest supports her view that Officer Acosta lacked probable cause for his arrest of F.M. under section 30-20-13(D).

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[7] Indeed, it is not clear that A.M.'s own argument would exclude from the ambit of section 30-20-13(D) all misconduct that occurs in the classroom setting. Whether student misconduct impacts the school as a whole seems at least sometimes, in A.M.'s view, to turn less on *where* the misconduct occurs than on whether the misconduct is very serious – e.g., violent or otherwise egregious. In this regard, A.M. contends that "behavior [involving] . . . physical obstruction of a person's lawful movement and the use of force or intimidation" would be covered by subsection (D), Reply Br. (14-2183) at 15 – even though such wrongful action could conceivably be directed at individuals in a classroom setting, rather than toward the school as a whole (through, for example, a threat to bomb the school).

ii

The body of relevant caselaw is very limited.[8] In making its clearly-established-law argument, A.M. principally relies on a decision of the New Mexico Court of Appeals, *State v. Silva*, 525 P.2d 903 (N.M. Ct. App. 1974). We conclude, however, that *Silva* does not get A.M. over her clearly-established-law hurdle.

Silva involved a distant statutory predecessor of N.M. Stat. Ann. § 30-20-13.[9] Though this earlier

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[8] All of the New Mexico state cases during the relevant timeframe involving N.M. Stat. Ann. § 30-20-13 focus on a different statutory subsection than the one at issue here (i.e., subsection (D)). *See Livingston v. Ewing*, 652 P.2d 235, 239 (N.M. 1982) (discussing a subsection that prohibits the willful failure to leave state-controlled property); *State v. Joyce*, 614 P.2d 30, 31 (N.M. Ct. App. 1980) (same).

[9] The statute at issue was N.M. Stat. Ann. § 40A-20-10 (1974). The *Silva* court noted at the outset that the defendants only had standing to challenge subsection (C) of that statute. *See* 525 P.2d at 905. That provision read in full:

> No person shall willfully refuse or fail to leave the property of, or any building or other facility owned, operated or controlled by the governing board of any institution of higher education upon being requested to do so by the chief administrative officer or his designee charged with maintaining order on the campus and in its facilities or a dean of a college or university, 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.

N.M. Stat. Ann. § 40A-20-10(C) (1974). The statute was substantially rewritten in 1975. *See* 1975 N.M. Laws, ch. 52, § 2, at 177; *see also* N.M. Stat Ann. § 40A-20-10, historical note ("The 1975

statute included some terms that are identical to the language of subsection (D), the *Silva* statute did not include any provision that specifically proscribed interference with educational process. Instead, the specific provision at issue in *Silva* prohibited any person from

> willfully refus[ing] or fail[ing] to leave the property of, or any building or other facility owned, operated or controlled by the governing board of any institution of higher education upon being requested to do so by the chief administrative officer or his designee . . . 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.

N.M. Stat. Ann. § 40A-20-10(C) (1974); *see Silva*, 525 P.2d at 905. The defendants were students who refused

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amendment rewrote this section"). Further, as a result of a comprehensive revision and compilation process commissioned in 1977 by the New Mexico legislature for completion in 1978, *see* 1977 N.M. Laws, ch. 74, § 1, at 227; *see also* N.M. Stat. Ann. pamphlet 1, prelim. matter, at iii (noting that "the statutes were completely reorganized" and that "[t]he complete arrangement of statutes required that new numbers be assigned to each section"), the text of the 1975 version of 40A-20-10 was redesignated – apparently without any material alteration of terms – as N.M. Stat. Ann. § 30-20-13, *see* N.M. Stat. Ann., parallel tables, at 49 (noting that section 40A-20-10 was redesignated in the 1978 compilation at section 30-20-13); *cf. Livingston*, 652 P.2d at 239 (citing the N.M. Session Law that enacted the 1975 version of section 40A-20-20, *see* 1975 N.M. Laws, ch. 52, § 2, at 177, as the originating source of N.M. Stat. Ann. § 30-20-13).

to leave a university president's office after being twice asked to do so. *See Silva*, 525 P.2d at 904. The president was conducting appointments in his office and voiced the concern that the students were "disrupting *his* normal business." *Id.* (emphasis added). This resulted in the police arresting the students. *See id.*

The students challenged the constitutionality of the statute, *inter alia*, on First Amendment overbreadth grounds. *See id.* at 907 ("When a statute draws within its prohibitory ambit conduct protected by the First and Fourteenth Amendments it is void for overbreadth."). But the court rejected this attack, reasoning, as an initial matter, that the statute was actually "more narrowly drawn" than analogous proscriptive statutes that had been upheld in the educational context and that subsection (C) of section 40A-20-10 was "valid on its face." *Id.* at 908. More specifically, as to the statute's narrowly drawn nature, the court reasoned that "[i]ts operative verbs (disrupt, impair (as construed), interfere with, obstruct), read as a whole, denote a more substantial, more physical invasion," than analogous statutes that, to the contrary, are broad enough to punish conduct that merely disturbs the peace. *Id.* at 907. In the same vein, the court held that, unlike such comparatively broader statutes, the statute at issue there (i.e., subsection (C)) "requires interference with the actual functioning of the University," *id.*; it reasoned that the statute's reference to the institution's mission, processes, procedures, and functions, "when read together, mean nothing less," *id.* at 908. In

addition, the court ruled that the statute was constitutional as applied, observing, among other things, that when the students' "demands were not met they added coercive conduct to their protected speech and their constitutional protection ended" and, more specifically, that "[b]y refusing to leave" the president's office after he asked them to leave, the students "substantially interfered in the functioning of *the president's business*." *Id.* at 908 (emphasis added).

According to A.M., *Silva* constitutes clearly established law for this case and, in particular, makes clear that N.M. Stat. Ann. § 30-20-13(D) should be interpreted as proscribing only conduct that (a) rises to a level of seriousness akin to that in *Silva*, and (b) detrimentally impacts the actual functioning of a school, as a whole, not just an individual classroom. Therefore, A.M. reasons that *Silva* would have given a reasonable officer in Officer Acosta's position fair warning that he lacked probable cause to arrest F.M. under section 30-20-13(D) for "[a]t worst, . . . being a class-clown" in Ms. Mines-Hornbeck's classroom. Aplt.'s Opening Br. (14-2183) at 42. We disagree.

First of all, it is not even clear that *Silva* is apposite in this factual and legal context – much less clearly established law for it. A.M. has not identified any New Mexico decisions in the relevant time period that have used *Silva* to define the scope of section 30-20-13(D), and we are not aware of any. To be sure, we freely acknowledge that there are similarities between the language of the statute at issue in *Silva* (i.e., section 40A-20-10(C)) and the language of section 30-20-13(D).

Notably, in an educational context, both statutes condition liability on an individual's direct or indirect commission of "any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions." N.M. Stat. Ann. § 30-20-13(D). *Compare* N.M. Stat. Ann. § 40A-20-10(C) (1974) (proscribing "any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions").

However, subsection (D) is a unique statute that the New Mexico legislature adopted in 1981 as an amendment to section 30-20-13, *see* 1981 N.M. Laws, ch. 32, § 1, at 107-08, 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 education. *See* N.M. Stat. Ann. § 40A-20-10(C) (punishing any "person [who] shall willfully refuse or fail to leave the property of, or any building or other facility owned, operated or controlled by the governing board of any institution of higher education upon being requested to do so"); *see Silva*, 525 P.2d at 907 (noting that "the statute vindicates the significant government interest in the control of campus disturbances"); *see also* Dan R. Price, Note, *State Legislative Response to*

Campus Disorder: An Analytical Compendium, 10 HOUS. L. REV. 930, 938 & n.74 (1972-73) (discussing "campus disorder laws" and noting, with citation to N.M. Stat. Ann. § 40A-20-10, that "[t]he single most popular enactment was a statute that forbade interference or trespass upon notice").

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. *See* N.M. Stat. Ann. § 30-20-13(D) (criminally punishing a "person [who] shall willfully interfere with the educational process of any public or private school"). 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 willful interference with the educational process.

The idea that the substantive concerns of the two statutes are different – which should be clear from their plain terms – becomes even more obvious when one recognizes that another subsection of section 30-20-13 – subsection (C) – is substantively analogous to the exact provision at issue in *Silva* – which is also designated subsection (C) (i.e., section 40A-20-10(C)). In other words, there is a provision in section 30-20-13 that addresses subject matter that is similar to the

provision at issue in *Silva*. Specifically, like subsection (C) in *Silva*, subsection (C) of section 30-20-13 criminalizes the willful failure to leave certain government property (albeit not just education-related property) "when requested to do so." N.M. Stat. Ann. § 30-20-13(C).[10] Given that subsection (C) of section 30-20-13 generally addresses similar subject matter as the statute at issue in *Silva*, we doubt that the New Mexico legislature also intended for subsection (D) – the one at issue here – to address this topic. The New Mexico courts presume that the legislature does not act in such a redundant fashion. *See, e.g.*, *Katz v. N.M. Dep't of Human Servs.*, 624 P.2d 39, 43 (N.M. 1981) ("A statute must be construed so that no part of the statute is rendered surplusage or superfluous."); *accord State v. Javier M.*, 33 P.3d 1, 15 (N.M. 2001).

Thus, given that the two [statutes] are focused on different things, we are hard-pressed to conclude that

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[10] In full, subsection (C) reads:

> No person shall willfully refuse or fail to leave the property of or any building or other facility owned, operated or controlled by the state or any of its political subdivisions when requested to do so by a lawful custodian of the building, facility or property 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 property, building or facility.

N.M. Stat. Ann. § 30-20-13(C). The language of this provision originated in the 1975 version of 40A-20-10, *see supra* note 9; the 1975 version removed the exclusive focus on institutions of higher learning that was found in the earlier iteration of section 40A-20-10 that *Silva* addressed.

it would have been pellucid to a reasonable officer in Officer Acosta's shoes that he should look to *Silva* for direction in seeking to enforce the separate provisions of section 30-20-13(D).[11] Put more broadly, given the absence of New Mexico authority from the relevant period applying *Silva* to section 30-20-13(D), and given the distinct legal contexts contemplated by, respectively, the statute in *Silva* and the one in this case, it is not clear to us that *Silva* is even apposite – let alone clearly established law. And, if it is not clear to us, it *a*

[11] Officer Acosta's briefing does not advance an argument based on the differences in sections 40A-20-10(C) and 30-20-13(D). However, it is beyond peradventure that "we may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district court or *even presented to us on appeal*." *Jordan v. U.S. Dep't of Justice*, 668 F.3d 1188, 1200 (10th Cir. 2011) (emphasis added) (quoting *Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011)). "[I]t is neither unusual nor unjust for this court" to do this. *United States v. Games-Perez*, 695 F.3d 1104, 1109 (10th Cir. 2012) (en banc) (Murphy, J., concurring in the den. of reh'g en banc). Moreover, such a decisional approach is particularly acceptable and proper when, as here, the matter at issue involves construing the plain terms of statutes – a quintessentially legal undertaking. *See Cox*, 800 F.3d at 1246 n.7 ("[W]e also recognize that we can entertain a defendant's argument on the clearly-established-law prong under certain circumstances, even if the argument had been forfeited in district court, because the issue involves a pure matter of law."); *cf. United States v. Lyons*, 510 F.3d 1225, 1238 (10th Cir. 2007) ("Our discretion allows us to determine an issue raised for the first time on appeal if it is a pure matter of law and its proper resolution is certain."). Put more concretely, the differences between the two statutes are patent; we need not (and do not) ignore them simply because Officer Acosta did not bring them to our attention.

fortiori would not have been clear to a reasonable officer in Officer Acosta's position.

Furthermore, even assuming *arguendo* that such a reasonable officer would have sought guidance from *Silva*, we are not persuaded that *Silva* would have clearly warned that officer that he lacked probable cause under section 30-20-13(D) to arrest F.M. In this regard, we underscore that A.M. must shoulder a "quite heavy" burden in showing that the law was clearly established by *Silva*. *Watson v. Univ. of Utah Med. Ctr.*, 75 F.3d 569, 577 (10th Cir. 1996) (quoting *Jantz v. Muci*, 976 F.2d 623, 627 (10th Cir. 1992)); *see also Dodds v. Richardson*, 614 F.3d 1185, 1191 (10th Cir. 2010) ("Once a defendant asserts qualified immunity, the plaintiff bears the burden of satisfying a 'strict two-part test.'" (citation omitted)). And, more specifically, it is not enough for A.M. to demonstrate that, under *Silva*'s guidance, Officer Acosta lacked probable cause to arrest F.M. Instead, A.M. must show that Officer Acosta lacked arguable probable cause: *viz.*, his belief that he possessed probable cause was not only mistaken, it was objectively unreasonable. *See, e.g.*, *Stonecipher*, 759 F.3d at 1141 ("Arguable probable cause is another way of saying that the officers' conclusions rest on an objectively reasonable, even if mistaken, belief that probable cause exists."). We conclude that A.M. has failed to carry this burden.

First of all, contrary to A.M.'s suggestion, there is nothing in *Silva*'s text that would have put a reasonable officer on notice that only conduct that substantially "mirrors" the degree of seriousness of the

students' conduct in *Silva*, Reply Br. (14-2183) at 18, is criminalized by subsection (D).[12] It is true that *Silva* describes the students' conduct as "*substantially* interfer[ing] in the functioning of the president's business." 525 P.2d at 908 (emphasis added). But the court does not purport to limit its holding to wrongful conduct of comparable seriousness.

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[12] To the contrary, it is worth noting that *Silva*'s reasoning could have led a reasonable officer to believe on these facts he was not obliged to refrain from arresting F.M. for his classroom horseplay just because school authorities had other means of disciplining him, such as "after-school detention, writing lines, or [placing] a call to his parents." Aplt.'s Opening Br. (14-2183) at 42. In rejecting the students' suggestion that their arrests were improper, the *Silva* court reasoned:

> They [i.e., the students] argue that the president was too hasty and could have moved his meeting elsewhere. There are . . . answers to that argument: First, [the president] had no way of knowing how long they would stay or how many appointments they would disrupt. . . . [Second], "[i]t may be, as has been suggested, that in these cases of nonviolent violation, there is 'sense in patient forbearance despite the wrong that the action involves.' Patient forbearance, however, is the result of a prudential judgment and is not constitutionally compelled."

525 P.2d at 908 (third alteration in original) (citation omitted). Like the university president in *Silva* who called for the students' arrest, a reasonable officer in Officer Acosta's shoes (1) could not have known how long F.M. might continue to provoke his classmates and teacher through his impromptu fake-burping conduct, and (2) was not required – by the statute's plain terms – to exercise extraordinary (or, for that matter, ordinary) "patient forbearance," *id.* (citation omitted), while F.M.'s horseplay caused Ms. Mines-Hornbeck's teaching to come to a grinding halt.

Relatedly, even if A.M. were correct that a central upshot of *Silva* is that mere disturbances of the peace – as such conduct is understood "in the school context," *id.* at 907 – are not punishable under section 30-20-13(D), that would not avail her on these facts. A reasonable officer in Officer Acosta's shoes, who was taking his cues from *Silva*, could have reasonably believed (even if mistakenly) that F.M.'s conduct – though he "was being a class-clown," Aplt.'s Opening Br. (14-2183) at 42 – amounted to more than a mere disturbance of the peace in a school setting. In that setting, *Silva* could be reasonably read as suggesting that the bar is quite low for conduct to qualify as a disturbance of the peace. Specifically, the court stated, "Normal conversational speech in an unobstructive or undisruptive situation may yet disturb." *Silva*, 525 P.2d at 907. It logically follows perforce that, comparatively speaking, it would not take much under *Silva* for a student's conduct to constitute more than a disturbance of the peace – that is, to be "a more substantial, more physical invasion," in *Silva*'s words. *Id.* In other words, one might reasonably infer from *Silva* that relatively minor student conduct could exceed the boundaries that define mere disturbances of the peace.

Here, F.M. was not merely speaking in a conversational tone (e.g., voicing a concern or criticism to the teacher or sharing a joke with a fellow student); instead, he was repeatedly fake-burping, laughing, and (later) leaning into the classroom. And the effect of his conduct was not merely to disturb the good order of Ms. Mines-Hornbeck's classroom; rather, it was to bring the

activities of that classroom to a grinding halt. In these circumstances, a reasonable officer in Officer Acosta's position, who was guided by *Silva*, could have believed that F.M. was doing more in the school context than disturbing the peace. More to the point, such an officer could have believed – even if mistakenly so – that he possessed probable cause under section 30-20-13(D) to arrest F.M. for interfering with or disrupting the educational process.

Moreover, we have serious doubts whether A.M. is correct in reading *Silva* as conditioning criminal liability under section 30-20-13(D) on a finding that the conduct at issue interfered with the functioning of the school as a whole, rather than a particular classroom of the school. To be sure, in construing the import of the same terms found in section 30-20-13(D) (i.e., "mission, processes, procedures or functions"), *Silva* stated that the statute "requires interference with the actual functioning of the University." 525 P.2d at 907. However, this statement came in the context of *Silva*'s attempt to distinguish the statute at issue (i.e., section 40A-20-10(C)) from analogous statutes that more broadly proscribed conduct that merely disturbed the peace but did not necessarily interfere with school operations. *See id.* In other words, the focus of *Silva* in this passage was arguably on demonstrating that section 40A-20-10(C) requires actual interference – *viz.*, on showing that mere disturbances of the peace are insufficient – not on establishing the proposition that any interference that the statute proscribes must affect the school as a whole.

Indeed, *Silva*'s facts and actual holding tend to belie A.M.'s reading of subsection (D)'s scope of liability. Specifically, in *Silva*, the students were not arrested for disrupting the University's operations as a whole; instead, they were arrested for interfering with the functions of one office – the president's. Before they were arrested the president specially reported that they were "disrupting *his* normal business." 525 P.2d at 904 (emphasis added); *see id.* at 908 (noting that "[b]y refusing to leave" the president's office after he asked them to leave, the students "substantially interfered in the functioning of *the president's business*" (emphasis added)). Therefore, insofar as a reasonable officer in Officer Acosta's position was looking to *Silva* for guidance, he could have reasoned that, to the extent that F.M.'s conduct in the classroom interfered with Ms. Mines-Hornbeck's teaching activities, F.M. could be held criminally liable under section 30-20-13(D), just as the students in the president's office in *Silva* were criminally liable for interfering with the president's business activities.[13]

Our conclusion that *Silva* might be reasonably read as not condemning the conduct of a reasonable officer in Officer Acosta's position, is fortified by a 2013

[13] In any event, it is not readily apparent to us why a student whose conduct disrupts and interferes with the educational processes of a classroom should not be deemed to have impaired, in A.M.'s words, "the overall public function of the school," Reply Br. (14-2183) at 15 – *viz.*, disrupted or interfered with the school's ability to carry out its overall functions and mission, in particular, with respect to the other students in the offending student's classroom.

federal district court decision construing the terms of N.M. Stat. Ann. § 30-20-13(D). *See G.M. ex rel. B.M. v. Casalduc*, 982 F. Supp. 2d 1235, 1240 (D.N.M. 2013). We permissibly seek guidance from *Casalduc* regarding the clearly-established-law question, even though it post-dates the arrest at issue here. *See, e.g.*, *Swanson v. Town of Mountain View*, 577 F.3d 1196, 1200 (10th Cir. 2009) ("[C]ases published *before* the incident govern our analysis. But we also examine cases published *after* the conduct in question to the extent they shed light on the fact that the law was *not* clearly established at the relevant time." (emphases added) (citation omitted)). Specifically, in *Casalduc*, the dispositive issue – akin to the one at issue here – was the propriety of awarding qualified immunity to a school resource officer who arrested a middle-school student under N.M. Stat. Ann. § 30-20-13(D) for sending text messages during class. Like F.M., the *Casalduc* student ignored numerous requests to discontinue her behavior. As a result, "her teacher stopped class to address [the situation]." *Casalduc*, 982 F. Supp. 2d at 1240.

The district court determined that the student's recalcitrant "conduct d[id] not clearly fall outside the conduct prohibited by the plain language of the statute" not only because the student had "ignored numerous requests to stop texting during class," but also because, "[u]nable to continue instruction, her teacher stopped class and eventually summoned [assistance]." *Id.* at 1243. Additionally, as relevant here, the court opined that a reasonable officer, guided by *Silva*, could justifiably have believed that willful text-messaging

could provide probable cause to arrest under section 30-20-13(D). More specifically, the court stated: "Assuming that a reasonable officer would be aware of *Silva*, a case from almost forty years ago interpreting a precursor statute, . . . a reasonable officer could conclude that [the student's] conduct substantially interfered with school functions." *Id.* at 1244. The court thus readily concluded that the student's right to be free from arrest was *not* clearly established, and it granted qualified immunity to the school resource officer. The reasoning of *Casalduc* is cogent, and we believe it underscores the correctness of our conclusion that *Silva* would not have given a reasonable officer in Officer Acosta's position fair warning that his conduct was unconstitutional.

In sum, if a reasonable officer in Officer Acosta's shoes had sought guidance from *Silva*, we do not believe that it would have given the officer fair warning that, if he elected to arrest F.M., he would be doing so without probable cause in violation of F.M.'s Fourth Amendment rights. Put another way, even if *Silva* was the controlling touchstone, Officer Acosta's belief that he had probable cause to arrest F.M. under section 30-20-13(D) was objectively reasonable – even if mistaken. Therefore, we conclude that A.M. cannot satisfy her clearly-established-law burden by relying on *Silva*.

We recognize, however, that A.M.'s brief does not limit its caselaw-based argument to *Silva*. Recognizing the paucity of New Mexico caselaw addressing N.M. Stat. Ann. § 30-20-13(D), A.M. contends that judicial decisions from three other states – Colorado, Florida,

and North Carolina – interpreting similar laws[14] should have apprised a reasonable officer in Officer Acosta's shoes that he lacked probable cause to arrest F.M. In particular, she reasons that these cases "have made common sense distinctions between school-wide threats and instances similar to burping in class," Aplt.'s Opening Br. (14-2183) at 43, and "[t]hese cases highlight the unreasonableness of Defendant Acosta's determination that F.M.'s actions merited arrest for disrupting the functioning of [CMS]," *id.* at 45.

However, even assuming *arguendo* that the decisions A.M. cites – which appear to be only from intermediate appellate courts – represent the controlling law of their respective states, A.M. has not persuaded us that we should view such a limited universe of caselaw as reflecting a "robust 'consensus of cases of persuasive authority' . . . that would alter our analysis of the qualified immunity question." *Plumhoff v. Rickard*, ___ U.S. ___, 134 S. Ct. 2012, 2023 (2014) (citation omitted) (quoting *al-Kidd*, 563 U.S. at 741); *see also Quinn*, 780 F.3d at 1005 (noting that, absent controlling law from the Supreme Court or the Tenth Circuit, a plaintiff may still satisfy the clearly-established-law burden by showing that "the clearly established weight of authority from other courts . . . ha[s] found the law to be as [she] maintains" (quoting *Weise*, 593 F.3d at 1167)). Accordingly, we conclude that A.M. cannot

[14] *See* Colo. Rev. Stat. Ann. § 18-9-109(2); Fla. Stat. Ann. § 877.13(1); N.C. Gen. Stat. Ann. § 14-288.4(a)(6).

carry her clearly-established-law burden by relying on these cases.

In sum, we hold that it would not have been clear to a reasonable officer in Officer Acosta's position that his arrest of F.M. under N.M. Stat. Ann. § 30-20-13(D) would have been lacking in probable cause and thus violative of F.M.'s Fourth Amendment rights. In other words, Officer Acosta's belief that he had probable cause to arrest F.M. under section 30-20-13(D) was objectively reasonable – even if mistaken – and, therefore, the district court correctly determined that Officer Acosta is entitled to qualified immunity on A.M.'s Fourth Amendment claim.[15]

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[15] We are 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. *Hawker v. Sandy City Corp.*, 774 F.3d 1243, 1244 (10th Cir. 2014) (Lucero, J., concurring); *see* Udi Ofer, *Criminalizing the Classroom: The Rise of Aggressive Policing and Zero Tolerance Discipline in New York City Public Schools*, 56 N.Y.L. SCH. L. REV. 1373, 1375 (2011/2012) ("The growing reliance by schools on policing tactics . . . to address misbehavior on its own raises significant concerns. But it is even more disconcerting given the availability of proven alternatives to securing the school environment that avoid the collateral consequences resulting from arrests and school removals."); *Police in Schools: Arresting Developments*, THE ECONOMIST, Jan. 9, 2016 ("[T]hose who become entangled in the justice system are likely to remain so. The opening of a juvenile criminal record – which may not be scrubbed clean until the age of 21 – is an augury of further arrests, further convictions and eventual imprisonment, a spiral known to researchers as the 'school-to-prison-pipeline.' "). Yet, it is beyond cavil that "[t]he *States* possess primary authority for defining and

3. Excessive-Force Claim

A.M. also contends that Officer Acosta, by handcuffing F.M. before driving him to the detention center, violated F.M.'s clearly established Fourth Amendment right to be free from an excessively forceful arrest. The district court resolved this claim on the first prong of our qualified-immunity test: it determined that A.M. had not shown that Officer Acosta committed a constitutional violation. Although we agree with the district court's ultimate disposition regarding the excessive-force claim – *viz.*, we conclude that the court properly awarded qualified immunity to Officer Acosta – we expressly ground our decision on the *second* prong of the qualified-immunity rubric. Specifically, we conclude that the clearly established law in existence in May 2011 would not have apprised a reasonable police officer similarly situated to Officer Acosta that he could be held liable under § 1983 for a Fourth Amendment violation based on handcuffing a minor pursuant to a lawful arrest.

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enforcing the criminal law." *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (emphasis added) (citation omitted); *see generally Bushco v. Shurtleff*, 729 F.3d 1294, 1304-05 (10th Cir. 2013) (discussing states' traditional police power when addressing Utah's sexual-solicitation statutory framework). 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. Background Principles

Under well-settled Supreme Court precedent, a law-enforcement officer's "right to make an arrest . . . necessarily carries with it the right to use some degree of physical coercion . . . to effect it." *Graham v. Connor*, 490 U.S. 386, 396 (1989); *accord Muehler v. Mena*, 544 U.S. 93, 99 (2005). Nonetheless, "[t]he degree of physical coercion that law enforcement officers may use is not unlimited," *Cortez*, 478 F.3d at 1125, and must comport with the Fourth Amendment. Indeed, "*all* claims that law enforcement officers have used excessive force . . . in the course of an arrest . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard." *Graham*, 490 U.S. at 395. A plaintiff who successfully demonstrates that an officer "used greater force than would have been reasonably necessary to effect a lawful arrest[] [may be] entitled to damages resulting from that excessive force." *Cortez*, 478 F.3d at 1127.

We assay a plaintiff's excessive-force claim for objective reasonableness, asking "whether the officer['s] actions [were] objectively reasonable in light of the facts and circumstances confronting [him], without regard to underlying intent or motivation." *Weigel*, 544 F.3d at 1151 (quoting *Graham*, 490 U.S. at 388); *see also Holland ex rel. Overdorff v. Harrington*, 268 F.3d 1179, 1194 (10th Cir. 2001) ("The whole course of conduct of an officer in making an arrest or other seizure . . . must be evaluated for Fourth Amendment reasonableness in light of the totality of the circumstances."). Guided by *Graham*, we consider factors such as "the

severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Casey*, 509 F.3d at 1281 (quoting *Graham*, 490 U.S. at 396). Further, the Supreme Court has said that "for the most part *per se* rules are inappropriate in the Fourth Amendment context." *United States v. Drayton*, 536 U.S. 194, 201 (2002).

Thus, when a defendant asserts the defense of qualified immunity in response to a plaintiff's excessive-force claim, the "plaintiff is required to show that the force used was impermissible (a constitutional violation) *and* that objectively reasonable officers could not have not thought the force constitutionally permissible (violates clearly established law)." *Cortez*, 478 F.3d at 1128 (emphasis added). As regards the first requirement – concerning the commission *vel non* of a Fourth Amendment violation – we have said that "our precedent requires a showing in a handcuffing case of an actual, non-de minimis physical, emotional, or dignitary injury to succeed on a claim." *Fisher v. City of Las Cruces*, 584 F.3d 888, 899 (10th Cir. 2009); *accord Koch*, 660 F.3d at 1247. This is because "[h]andcuffing claims, in essence, concern the manner or course in which a petitioner is handcuffed," and "[b]ecause handcuffing itself is not necessarily an excessive use of force in connection with an arrest." *Fisher*, 584 F.3d at 897.

b. Clearly Established Law

At summary judgment, the district court rejected A.M.'s excessive-force claim on the first prong of the qualified-immunity standard after finding that she "ha[d] not produced evidence that F.M. suffered an actual physical or emotional injury" stemming from Officer Acosta's use of handcuffs. Aplt.'s App. (14-2183) at 397. The court opined that "*nowhere* in the summary judgment evidence [wa]s there actual evidence that F.M. suffered *any* . . . trauma, much less any . . . above the *de minimis* level." *Id.* (first and second emphases added). In other words, the district court based its ruling on the first prong of the qualified-immunity standard – determining that A.M. failed to demonstrate that Officer Acosta's conduct effected a constitutional violation. A.M. now contends that the court erred not only by failing to find a constitutional violation, but also by failing to realize that then-extant clearly established law should have notified Officer Acosta that he could not handcuff F.M. before transporting him to the detention center. We elect to reach only the clearly-established-law question – that is, the second prong of the qualified-immunity standard. On this alternative ground,[16] we conclude that A.M.'s claim fails because

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[16] *See Panagoulakos*, 741 F.3d at 1129; *see also SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (observing "the settled rule that, in reviewing the decision of a lower court, it must be affirmed if the result is correct '[even if] the lower court relied upon a wrong ground or gave a wrong reason'" (quoting *Helvering v. Gowran*, 302 U.S. 238, 245 (1937))); *Richison*, 634 F.3d at 1130 (noting our prerogative to "affirm on any basis supported by the

there was *no* clearly established law indicating that F.M.'s minor status could negate Officer Acosta's customary right to place an arrestee in handcuffs during the arrest.

i. A.M.'s Proffered Clearly Established Law

A.M. shoulders the responsibility in the first instance "of citing to us what [she] thinks constitutes clearly established law" for purposes of this claim. *Thomas v. Durastanti*, 607 F.3d 655, 669 (10th Cir. 2010). A.M. first relies upon the Supreme Court's holding in *Graham* as the applicable clearly established law, arguing: "Applying the *Graham* factors to this case, there was no need to handcuff and transport F.M. to the Detention Center." Aplt.'s Opening Br. (14-2183) at 52. We are constrained to reject her proffer of *Graham* for this purpose.

Graham, though certainly an excessive-force lodestar, provides no guidance concerning whether an officer, when effecting an arrest supported by probable cause, must refrain from using handcuffs because the arrestee is a minor (lest he open himself up to potential § 1983 liability). *See, e.g.*, *Cavanaugh v. Woods Cross City*, 625 F.3d 661, 664-65 (10th Cir. 2010) (explaining that *Graham* speaks to the *court's* duty to balance individuals' Fourth Amendment rights against countervailing state interests); *Casey*, 509 F.3d at 1281-82

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record, even if it requires ruling on arguments not reached by the district court").

(invoking *Graham* in terms of overall objective reasonableness in light of a particular case's circumstances). Consequently, *Graham* does not satisfy A.M.'s clearly-established-law burden because it defines the right at issue at an impermissibly "high level of generality." *al-Kidd*, 563 U.S. at 742. Insofar as *Graham* applies here, it merely instructs us regarding "general principles of the Fourth Amendment" – that is, overarching concepts that the Supreme Court has said do "not [render] obvious . . . that the conduct of the officer[ ] in this case violated the Amendment." *Wilson v. Layne*, 526 U.S. 603, 615-16 (1999).[17]

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[17] As we noted *supra* in Part II, in conducting a clearly-established-law analysis, this circuit uses a sliding-scale approach that demands less specificity in the clearly established law the more egregious the conduct that effects the constitutional violation. In other words, the latter (i.e., the egregiousness of the conduct) is in inverse relationship with the former (i.e., the specificity of the clearly established law). Under such an approach, we do not gainsay 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. *See Pauly v. White*, 814 F.3d 1060, 1075 (10th Cir. 2016) ("Thus, when an officer's violation of the Fourth Amendment is particularly clear from *Graham* itself, we do not require a second decision with greater specificity to clearly establish the law." (quoting *Casey*, 509 F.3d at 1284)), *pet. for cert. filed* (U.S. July 11, 2016) (No. 16-67); *see also Browder v. City of Albuquerque*, 787 F.3d 1076, 1083 (10th Cir. 2015) (noting that hardly any caselaw specificity was necessary in our clearly-established-law inquiry because the appeal involved a deadly motor-vehicle accident where the officer was "speeding on [his] own business"). It would border on the fatuous, however, for A.M. to suggest that Officer Acosta's treatment of F.M. – notably, his handcuffing of him – constitutes one of those rare instances of

The only other source of law that A.M. insists would have given Officer Acosta fair warning that F.M.'s minor-child status negated his customary right to place an arrestee in handcuffs is a New Mexico statute governing "[c]riteria for detention of children." N.M. Stat. Ann. § 32A-2-11. The specific statutory provision on which she relies states that:

> 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. § 32A-2-11(A). In our view, the statute does not support A.M.'s argument by its plain terms. It patently contemplates the situation that was confronted by the detention-center employees after F.M.'s arrival – i.e., whether to admit F.M. or release him to the custody of his mother – but *not* the situation confronted by Officer Acosta – i.e., whether to transport F.M. to the center with or without restraints. *See, e.g.*, *State v. Steven B.*,

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egregious conduct where *Graham*, alone, would be a sufficient source of clearly established law.

94 P.3d 854, 862 (N.M. Ct. App. 2004) ("[The minor] objected . . . that failure to turn in paperwork did not meet the criteria for detention. The criteria for detention under Section 32A-2-11, however, is applicable *before disposition*; [the minor] was already on probation." (emphasis added)); *cf. State v. Anthony M.*, 958 P.2d 107, 109-10 (N.M. Ct. App. 1998) ("The State cites this statute [section 32A-2-11(A)] for the proposition that Child could not be detained at the Boys' School pending court hearing on the second delinquency petition. . . . We agree with Child that this statute does not preclude detention at the Boys' School. The purpose of the confinement determines whether a child is in detention or commitment at the Boys' School."). In other words, the statute clearly cannot be read as announcing any limitations on an arresting officer's traditional right to place an arrestee in handcuffs. Indeed, as of May 2011, none of the extant New Mexico cases interpreting this statute implicated the issue of handcuffing a minor pursuant to a lawful arrest.

At bottom, A.M. asks us to impute to Officer Acosta awareness that N.M. Stat. Ann. § 32A-2-11(A) would have required him to consider factors related to a hypothetical detention-center placement before handcuffing F.M. in an arrest supported by probable cause. This we cannot do: no court has found that N.M. Stat. Ann. § 32A-2-11(A) imposes a requirement of that nature on officers effecting lawful arrests and the plain terms of the statute do not evince such a command. Furthermore, we likewise cannot conclude that any such requirement would be grounded in the Fourth

Amendment. *See, e.g.*, *United States v. Gonzales*, 535 F.3d 1174, 1182 (10th Cir. 2008) ("[W]e have indicated that compliance with state [statutes] may be relevant to our Fourth Amendment reasonableness analysis, [but] we have never held it to be determinative of the constitutionality of police conduct."). Therefore, the statute is *far* from being clearly established law for our purposes.

ii. Our Survey of the Law

Because neither of A.M.'s cited sources can serve as the extant clearly established law governing her excessive-force claim, "we could hold that [A.M.] has not properly laid the groundwork to defeat [Officer Acosta's] assertion of qualified immunity." *Cox*, 800 F.3d at 1247. Nonetheless, we have taken the additional step of surveying the caselaw extant at the time of the arrest that *would* have guided Officer Acosta's "endeavors to conform his . . . conduct to constitutional norms." *Id.* We have determined that the applicable clearly established law in May 2011 would not have apprised a reasonable officer similarly situated to Officer Acosta that handcuffing F.M. would run afoul of the Fourth Amendment's prohibition on excessive force. We thus conclude that A.M. has failed to satisfy her burden on the clearly-established-law prong of the qualified-immunity standard. Officer Acosta is entitled to qualified immunity on A.M.'s excessive-force claim.

Because A.M. has intimated that F.M.'s handcuffing was a humiliating experience, we first address the

Supreme Court's decision in *Atwater v. City of Lago Vista*, 532 U.S. 318 (2001). There, the Court addressed whether an "inconvenient and embarrassing" arrest for various motor-vehicle violations, and the officer's concomitant handcuffing of the arrestee (an adult), flouted constitutional norms. *Id.* at 355. The officer yelled at the arrestee, "said that he had 'heard [the arrestee's] story two-hundred times,' " *id.* at 324 (citation omitted), and handcuffed the arrestee before placing her in a patrol car. On that set of facts, the Court concluded that the arrest was not "made in an 'extraordinary manner, unusually harmful to [the arrestee's] privacy or . . . physical interests.' " *Id.* at 354 (omission in original) (quoting *Whren v. United States*, 517 U.S. 806, 818 (1996)). The Court explained:

> [The] arrest was surely humiliating, . . . but it was no more harmful to . . . privacy or . . . physical interests than the normal custodial arrest. She was handcuffed, placed in a squad car, and taken to the local police station . . . [, which was] inconvenient and embarrassing to [her], but not so extraordinary as to violate the Fourth Amendment.

Id. at 354-55 (second and third omissions in original) (quotations omitted).

We have interpreted the substance of *Atwater* as an endorsement of an officer's right to use handcuffs when conducting an otherwise legally proper arrest. In *Cortez*, for instance, we "ha[d] little difficulty concluding that a small amount of force, like grabbing [the

plaintiff] and placing him in the patrol car, [wa]s permissible in effecting an arrest under the Fourth Amendment." 478 F.3d at 1128 (citing *Atwater*, 532 U.S. at 354-55). We then characterized *Atwater* as instructing that, standing alone, embarrassment associated with handcuffing during a lawful arrest cannot support an actionable excessive-force claim. *See id.* Similarly, in *Petersen v. Farnsworth*, after noting that the arrestees "did not have [significant] security concerns," we unequivocally read *Atwater* as "establish[ing] that defendants charged with non-violent and non-jailable crimes do not enjoy a constitutional right to be free from all restraints." 371 F.3d 1219, 1223 (10th Cir. 2004). In light of these post-*Atwater* decisions, we confidently conclude here that a reasonable officer in Officer Acosta's position would have understood *Atwater*'s general acceptance of handcuffing incident to a lawful arrest to indicate that, in the ordinary course, handcuffing any arrestee – absent some injury specifically caused by the application of the cuffs – is lawful.

Our holding in *Fisher* is congruent with this conclusion. There, in assessing the "manner or course in which [the plaintiff] [wa]s handcuffed," *Fisher*, 584 F.3d at 897, we stated that "in nearly every situation where an arrest is authorized, or police reasonably believe public safety requires physical restraint, handcuffing is appropriate," *id.* at 896. And we underscored that "in handcuffing cases, a plaintiff must establish some non-de minimis actual injury." *Id.* at 898. Put succinctly, *Fisher* lends support to our view that the

right A.M. asserts on F.M.'s behalf – a minor's freedom from restraint during a constitutionally sound arrest – was not clearly established in May 2011.

Of course, we recognize that neither *Atwater* nor *Fisher* involved the distinguishable, critical factor of minor-child status. However, it appears that no subsequent published Tenth Circuit decision has taken that variable into consideration in the excessive-force calculus. But we note a recent observation of a panel of this court, in an unpublished order and judgment, that it "ha[d] uncovered *no case law* (and the parties cite[d] to none) applying a different standard when the victim of the alleged excessive force is a minor." *Hawker v. Sandy City Corp.*, 591 F. App'x 669, 674 n.8 (10th Cir. 2014) (emphasis added).

Along these same lines, we have not uncovered any cases extant at the time of F.M.'s arrest that describe the state of the law and the right at issue as A.M. does. In fact, our study of the relevant caselaw cuts against any reasonable conclusion that a minor's purported right to avoid handcuffing during a lawful arrest was clearly established in May 2011. *See Hedgepeth ex rel. Hedgepeth v. Wash. Metro. Area Transit Auth.*, 386 F.3d 1148, 1155-56 (D.C. Cir. 2004) (noting, in a case involving the handcuffing of a twelve-year-old girl, where the officer had probable cause to arrest: "the right at issue in this case is the right of freedom of movement when there is probable cause for arrest. . . . [T]his definition does not depend on the challenged classification – minority status – itself. . . . The law of this land does not recognize a fundamental right to

freedom of movement when there is probable cause for arrest." (citations omitted)); *cf. Gray ex rel. Alexander v. Bostic*, 458 F.3d 1295, 1305-07 (11th Cir. 2006) (deeming it unreasonable to handcuff a nine-year-old student who had cooperated with officers and was not engaging in further disruptive behavior, but noting: "Deputy Bostic's purpose in handcuffing [the child] was simply to punish her and teach her a lesson. Every reasonable officer would have known that handcuffing a compliant nine-year-old child *for purely punitive purposes* is unreasonable." (emphasis added)). And a number of legal commentators have likewise concluded – though many have lodged vociferous objections in doing so – that restraining minors during arrest procedures is commonplace in many jurisdictions.[18] In light

[18] *See, e.g.*, Kim M. McLaurin, *Children in Chains: Indiscriminate Shackling of Juveniles*, 38 WASH. U. J.L. & POL'Y 213, 232 (2012) ("Despite the many constitutional and ethical arguments against the blanket use of shackles [i.e., handcuffs or leg irons] on juveniles without any showing of need, most states continue to do so [on] a daily basis."); Ofer, *supra*, at 1376-77 (observing that "stories of children getting . . . handcuffed" "now appear regularly in the media"); Bernard P. Perlmutter, *"Unchain the Children": Gault, Therapeutic Jurisprudence, and Shackling*, 9 BARRY L. REV. 1, 6 (2007) ("Throughout Florida, juveniles in secure detention routinely appear before judges wearing metal handcuffs . . . regardless of age . . . or alleged offense."); Ira P. Robbins, *Kidnapping Incorporated: The Unregulated Youth-Transportation Industry and the Potential for Abuse*, 51 AM. CRIM. L. REV. 563, 585 (2014) ("At the state level, the standards for the transportation of juvenile offenders vary. . . . The regulations in Cincinnati, Ohio contain the uncommon requirement that all juveniles 'remain handcuffed during all phases of transportation and processing.' " (citation and footnote omitted)); *cf.* Gabe Newland, Comment, *A Solution to Michigan's Child Shackling Problem*, 112 MICH. L. REV. FIRST IMPRESSIONS 161, 168-70 (2014) (noting that

of the foregoing analysis, we are unwilling to conclude that Officer Acosta could have had fair warning that his conduct during F.M.'s arrest would have constituted a Fourth Amendment excessive-force violation.

In short, we hold that the then-extant clearly established law would not have apprised a reasonable officer in Officer Acosta's position that F.M.'s minor-child status should have negated his time-honored right to use handcuffs in effecting F.M.'s arrest. For these reasons, we conclude that the district court correctly awarded qualified immunity to Officer Acosta on this Fourth Amendment claim.

B. Claims Against Ms. Holmes[19]

Next, we address A.M.'s claims against Ms. Holmes alleging violations of the Fourth, First, and Fourteenth Amendments. The district court awarded

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many states, including New Mexico, are developing a presumption against shackling (which includes handcuffing) children appearing *in court*).

[19] We note that A.M. provides her Fourth Amendment unreasonable-search arguments in her opening brief in the Holmes appeal, even though the district court only reached the merits of this claim in ruling on *Ms. LaBarge's* summary-judgment motion. A.M.'s briefing approach is presumably explained by the fact that, in the Holmes appeal, she challenges the court's collateral-estoppel ruling (wherein the court viewed the LaBarge matter as the "prior action") before arguing alternatively that the court improperly awarded qualified immunity to Ms. Holmes on her Fourth Amendment unreasonable-search claim. In her opening brief in the LaBarge appeal, A.M. incorporates and adopts her (Holmes) unreasonable-search arguments by reference.

summary judgment on qualified-immunity grounds to Ms. Holmes on all of these claims. We conclude that it was correct in doing so. We acknowledge that the district court also ruled against A.M. on her Fourth Amendment claim on collateral-estoppel grounds, in light of the court's prior resolution of A.M.'s Fourth Amendment claim against Ms. LaBarge. However, because we uphold on the merits the district court's qualified-immunity determinations involving Ms. Holmes – including its ruling on the Fourth Amendment claim – we need not (and therefore do not) opine on the correctness of the district court's collateral-estoppel resolution of A.M.'s Fourth Amendment claim against Ms. Holmes.

1. Unreasonable-Search Claim

A.M. first contends with respect to Ms. Holmes that "the district court erred in finding that F.M.'s Fourth Amendment rights were not clearly established" under extant caselaw as of November 8, 2011 (the date of the in-school search). Aplt.'s Opening Br. (14-2066) at 32 (capitalization altered). Although the district court did base this aspect of its ruling on its determination that any constitutional right would not have been clearly established, in the exercise of our discretion, *see Panagoulakos*, 741 F.3d at 1129, we elect to resolve the issue on the first prong of the qualified-immunity standard. *See Richison v. Ernest Grp., Inc.*, 634 F.3d 1123, 1130 (10th Cir. 2011) ("[W]e may affirm on any basis supported by the record, even if it requires ruling on arguments not reached by the district

court. . . ."). We conclude that the court correctly granted qualified immunity to Ms. Holmes on the unreasonable-search claim because, on A.M.'s version of the facts (insofar as they are borne out by the record), the search of F.M. was supported by reasonable suspicion. Thus, we rest our affirmance regarding this claim on our specific conclusion that A.M. has failed to carry her burden of demonstrating that Ms. Holmes committed a Fourth Amendment violation.

Among other rights, the Fourth Amendment safeguards individuals' "right . . . to be secure in their persons . . . and effects [] against unreasonable searches." U.S. Const. amend. IV. "The Fourth Amendment 'requires a balancing of the need for the particular search against the invasion of personal rights that the search entails.'"[20] *Archuleta v. Wagner*, 523 F.3d 1278, 1283 (10th Cir. 2008) (quoting *Bell v. Wolfish*, 441 U.S. 520, 559 (1979)). It is presently "understood to apply within the school setting, and it is not limited to actions taken for law enforcement purposes." *Couture v. Bd. of Educ. of Albuquerque Pub. Schs.*, 535 F.3d 1243, 1250 (10th Cir. 2008).

"With limited exceptions, a search . . . requires either a warrant or probable cause." *Narotzky v. Natrona Cty. Mem'l Hosp. Bd. of Trs.*, 610 F.3d 558, 567 (10th

[20] Usually, the analytical touchstone in our Fourth Amendment unlawful-search cases is twofold: "we first consider whether there was an expectation of privacy in the area searched. If so, we . . . determine whether the search was [objectively] reasonable under the circumstances." *Narotzky v. Natrona Cty. Mem'l Hosp. Bd. of Trs.*, 610 F.3d 558, 567 (10th Cir. 2010).

Cir. 2010) (citing *Camara v. Mun. Ct.*, 387 U.S. 523, 528-29 (1967)); *see Safford*, 557 U.S. at 369 ("The Fourth Amendment [protection] . . . against unreasonable searches . . . generally requires . . . probable cause for conducting a search." (citation and quotations omitted)). One such exception applies in this case – for, as the Supreme Court has specifically noted, "[t]he warrant requirement . . . is unsuited to the school environment." *T.L.O.*, 469 U.S. at 340; *accord Fuerschbach v. Sw. Airlines Co.*, 439 F.3d 1197, 1203-04 (10th Cir. 2006). The Court has determined that this is so because "[a]lthough the underlying command of the Fourth Amendment is always that searches . . . be reasonable, what is reasonable depends on the context within which a search takes place." *T.L.O.*, 469 U.S. at 337. Likewise, the Court has expressly recognized "that the school setting 'requires some modification of the level of suspicion of illicit activity needed to justify a search,'" *Safford*, 557 U.S. at 370 (quoting *T.L.O.*, 469 U.S. at 340) – *viz.*, in-school searches do not require a predicate finding of probable cause.

The *New Jersey v. T.L.O.* Court thus held that "the accommodation of the privacy interests of schoolchildren with [administrators'] substantial need . . . to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause" and that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." 469 U.S. at 341. As the Court has explained more recently, "[t]he lesser standard for school searches could as readily be

described as a moderate chance of finding evidence of wrongdoing." *Safford*, 557 U.S. at 371. We have understood these holdings to mean that a school search "need only be [1] 'justified at its inception' and [2] 'reasonably related in scope to the circumstances which justified the interference in the first place.'" *Couture*, 535 F.3d at 1250 (quoting *Edwards v. Rees*, 883 F.2d 882, 884 (10th Cir. 1989)); *see also Jones v. Hunt*, 410 F.3d 1221, 1229 (10th Cir. 2005) (observing that a state defendant in a school search or seizure is "scrutinized under the minimal requirements of *Terry* [*v. Ohio*, 392 U.S. 1 (1968)]").

a. Justified at Inception

T.L.O. makes clear that ordinarily "a search of a student by a . . . school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." 469 U.S. at 341-42 (footnote omitted). The official need not possess absolute certainty that a search will produce such evidence; rather, "sufficient probability . . . is the touchstone of reasonableness" in the school-search context. *Id.* at 346 (quoting *Hill v. California*, 401 U.S. 797, 804 (1971)).

A.M. asserts that the search of F.M. was not justified at its inception due to "the absence of any particularized evidence pointing to possession of drugs on the person of F.M." Aplt.'s Opening Br. (14-2066) at 34. We disagree. In fact, the record clearly bespeaks Ms.

Holmes's awareness of a considerable quantum of particularized evidence when she initiated the challenged search. A student anonymously reported seeing F.M. participating in a suspected drug transaction on school grounds. It would have been reasonable for Ms. Holmes to take this report seriously, given CMS's apparently ongoing problem of student drug-trafficking. In this regard, Officer Acosta confirmed not only that CMS had "a lot of issues with drugs," but also that he had made several in-school arrests related to marijuana. Aplt.'s App. (14-2066) at 117.

Acting on the student report, Ms. Holmes perused security-camera footage depicting the time and location provided by the reporting student. Ms. Holmes's review bolstered the student's "tip": she saw F.M. standing in a closed circle of students – apparently holding a roll of money and passing something to other students in the cohort. In light of her observations, she summoned the students depicted in the video to the administrative office. Interviewing and searching F.M.'s four identified peers revealed the following: two students said they had seen *someone* with marijuana at school that day; another student said F.M. was carrying cash; and at least three students said that the "circle" incident involved marijuana. Guided by the relaxed standard of *T.L.O.*, we are satisfied that this information suggested a reasonable probability that marijuana (or evidence of other illegal-drug possession or distribution) might be found by searching the fifth

student involved, F.M.[21] *T.L.O.* only requires "*reasonable* grounds" for believing that a search will unearth evidence of wrongdoing, 469 U.S. at 342 (emphasis added), and in this case the foregoing evidence, taken together, rendered sufficiently reasonable the expectation that evidence of rule violations might be found in a search of F.M.

A.M. also urges us to accord the initial tip of a suspected drug transaction less credence because of the reporting student's anonymity. However, the student was *not* entirely anonymous; he or she was merely unknown to F.M. and A.M. Because the teacher who relayed the tip to Ms. Holmes *was* aware of the student's identity, it ineluctably follows that Ms. Holmes could have identified and confronted the student if the report had proven false. And the tip, though not conclusively so, was at least strongly substantiated by surveillance footage. In these respects, the student's report resembles one made in an anonymous 911 call in *Navarette v. California*, ___ U.S. ___, 134 S. Ct. 1683 (2014) – a call the Supreme Court deemed sufficiently reliable for purposes of reasonable suspicion because (1) the 911 system could have unmasked the anonymous caller in

[21] We are not persuaded by A.M.'s suggestion that Ms. Holmes's failure to find marijuana on the other four students eviscerated the reasonableness of her expectation that marijuana would be found on F.M. Indeed, given Ms. Holmes's growing, evidence-based suspicion that *someone* in the group possessed marijuana, she might logically have interpreted the first four fruitless searches as mildly *increasing* the probability of discovering marijuana on F.M.'s person or effects.

the event of a false alert, and (2) subsequent investigation corroborated the caller's report. *See* 134 S. Ct. at 1689-90. Ultimately, given our well-settled rule that "there is no need to establish the veracity of [an] informant" when "there is sufficient independent corroboration of [the] informant's information," *United States v. Artez*, 389 F.3d 1106, 1111 (10th Cir. 2004) (quoting *United States v. Danhauer*, 229 F.3d 1002, 1006 (10th Cir. 2000)), we conclude that the report that provided the impetus for the search bolstered Ms. Holmes's reasonable suspicion of wrongdoing by F.M.

In addition, A.M. contends that the passage of a few hours' time between the alleged drug transaction and the search of F.M. extinguished any reasonable suspicion Ms. Holmes might have possessed. We disagree. Although the *Safford* Court did opine that "if [a report] had been [made] *a few days* before, that would weigh heavily against any reasonable conclusion that [the student] presently had [contraband] on her person," 557 U.S. at 376 (emphasis added), that hypothetical situation is obviously distinguishable. A.M. has never alleged a hiatus of that duration, and, on this record, she could not reasonably do so. The fact that a few *hours* elapsed between the student's report and the search of F.M. does not shake our confidence in the reasonableness of Ms. Holmes's belief – grounded in statements of other students and video evidence – that there was at least a fair probability that F.M. was carrying contraband.

Again, given all of these factors, we conclude that the record demonstrates articulable and particularized

indicia of a sufficient probability of wrongdoing by F.M. This plainly satisfies the *T.L.O.* Court's controlling formulation of the school-search rubric; consequently, we conclude that the search of F.M. was justified at its inception.

b. Reasonable in Scope

Once the search of F.M. began, it could remain constitutionally sound only insofar as it was "permissible in its scope" by using measures "reasonably related to the objectives of the search and not excessively intrusive" under the totality of the circumstances. *T.L.O.*, 469 U.S. at 342; *see Brannum v. Overton Cty. Sch. Bd.*, 516 F.3d 489, 496 (6th Cir. 2008) ("[I]t is necessary . . . that the [search] method chosen was, in the circumstances, *justifiably* intrusive in light of the purpose of the policy being carried out."). We conclude that it was.

To begin, it is settled under *Safford* that a search of a student which is justified at its inception is also justified as to outer clothing and a backpack. Pursuant to *Safford*, "[i]f a student is reasonably suspected of giving out contraband [items], [he] is reasonably suspected of carrying them on [his] person and in the carryall that has become an item of student uniform in most places today" – that is, the backpack. 557 U.S. at 373-74. *Safford* suggests that this is true as a matter of logic: "if '[a school administrator's] reasonable suspicion of [contraband] distribution were not understood to support searches of outer clothes and backpack, it would not justify any search worth making.'" *Id.* at 374

(citation omitted). Here, A.M. argues that the search of F.M. transcended outer clothing and effects; she claims it ventured into the realm of an unjustified strip search.

Before asking F.M. to remove any clothing, Ms. Holmes obtained certain clues from his pockets and backpack suggesting the possibility of a drug transaction. Namely, she found $200 in cash – an arguably unusual amount of money for a middle-school student to carry, and certainly a relevant factor in a drug-related investigation. *See, e.g.*, *United States v. Wagoner Cty. Real Estate*, 278 F.3d 1091, 1094 (10th Cir. 2002) (assigning significance to "several hundred dollars in cash" uncovered in a search for contraband); *United States v. Mendoza-Salgado*, 964 F.2d 993, 1008 (10th Cir. 1992) (noting that "courts generally view items such as . . . large quantities of cash . . . as 'tools of the trade' for distributing illegal drugs"). Ms. Holmes also found a belt bearing the image of a marijuana leaf, which at least reasonably indicated F.M.'s interest in, or affiliation with the use of, marijuana. *See, e.g.*, *United States v. Salgado*, 761 F.3d 861, 865-66 (8th Cir. 2014) ("[The officer] also observed . . . [a] jacket embroidered with a large marijuana leaf in the back seat, and reasonably associated it with potential drug activity."); *Lorenzo v. City of Tampa*, 259 F. App'x 239, 240 (11th Cir. 2007) (per curiam) (deeming relevant to the issue of probable cause handbills depicting "a picture of a marijuana leaf"). Finally, Ms. Holmes found a bandana, which we have considered "gang-related clothing" in describing evidence obtained in searches. *See*

United States v. Roach, 582 F.3d 1192, 1198 (10th Cir. 2009). These foregoing items provided support to continue the search of F.M.

Though for purposes of qualified immunity we ordinarily do accept the facts that a plaintiff like A.M. alleges, we do so only insofar as those facts have a basis in the record – as relevant here, only insofar as A.M.'s account of the search does not patently conflict with the record's video footage. *See, e.g.*, *Thomson*, 584 F.3d at 1312. The video demonstrates that F.M. was first asked to remove his shoes and his jeans, leaving him in a short-sleeved shirt, a long-sleeved shirt, two pairs of athletic shorts, and boxer-shorts underwear. He then flipped down the waistband of his *outer pair* of athletic shorts, but he left undisturbed the waistbands of his other pair of athletic shorts and his boxer shorts. Finally, he removed his outer pair of athletic shorts and his outer (short-sleeved) shirt so that when the search concluded, he was still wearing a long-sleeved shirt, a pair of athletic shorts, and underwear. Soon afterward, he got dressed as he had been prior to the search.

Based on this sequence of events, we believe A.M. stretches the term "strip search" beyond recognition in her attempt to apply it here.[22] The video unequivocally

[22] Although we conclude that the facts of *this* particular search do not implicate a genuine strip search, we note the potential for ambiguity in future cases because the Supreme Court did not explicitly define the term in *Safford*. *See, e.g.*, Diana R. Donahoe, *Strip Searches of Students: Addressing the Undressing of Children in Schools and Redressing the Fourth Amendment Violations*, 75 MO. L. REV. 1123, 1153 (2010) (opining that "it will be difficult for school officials and courts to determine whether a

shows that F.M. was only prompted to remove outer clothing and that he was wearing additional layers of non-intimate street clothing underneath the removed items. Thus, because the scope of the search at all times remained reasonable, the search satisfied the strictures of the Fourth Amendment.

Comparing the search of F.M. to the search at issue in *Safford* underscores why Ms. Holmes did not allow the search to become unreasonable in scope. In *Safford*, a thirteen-year-old female student was suspected of possessing prescription pain-relief pills. Acting on a report that the student was distributing the pills, the school nurse asked her "to remove her jacket, socks, and shoes, leaving her in stretch pants and a T-shirt (both without pockets)." *Safford*, 557 U.S. at 369. The nurse then asked her to remove her shirt and pants, "to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree." *Id.* The Court found no constitutional violation in searching the student's outer clothing because that conduct (1) was justified by a fair probability of discovering evidence of wrongdoing, and (2) was related to the scope of a search for prohibited pills. But the Court reached a different conclusion as to the school nurse's second step of requiring the student to manipulate her undergarments.

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strip search has actually occurred using a sliding scale test because the [*Safford*] Court refused to label or define the term 'strip search' ").

Specifically, the Court held that the second aspect of the challenged search violated the Fourth Amendment's prohibition on unreasonable searches because:

> [t]he very fact of [the student's] pulling her underwear away from her body in the presence of the [school] officials who were able to see her necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.
>
> [The student's] subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating.

Id. at 374-75. The distinction appears clear: whereas reasonable suspicion (as enunciated in *T.L.O.*) supporting a fair probability of finding contraband permits a search of *outer* clothing, a higher level of justification is necessary to proceed with a search that will expose a student's intimate areas.

Unlike the student in *Safford*, in this case F.M. was at all times covered by at least one pair of pants (athletic shorts), one shirt, and underwear. The search of F.M. can therefore only be fairly characterized as implicating outerwear, even though it involved more than one layer of clothing. Mindful that the reporting student claimed to have seen baggies of marijuana, we

conclude that asking F.M. to remove more than one external article of clothing was consistent with the objective of detecting small items. In light of the foregoing, we are satisfied that the search of F.M. was not excessively intrusive in its scope; rather, we hold that it was thoroughly reasonable in that regard.

In sum, we conclude that Ms. Holmes's search of F.M. was supported by reasonable suspicion as required by the Supreme Court's holding in *T.L.O.* The search was both justified at its inception and reasonable in scope. Accordingly, A.M. has failed to demonstrate any Fourth Amendment violation premised on an unreasonable search by Ms. Holmes. We therefore affirm the district court's grant of qualified immunity to Ms. Holmes on this claim.

2. Retaliation Claim

Next, A.M. alleges that Ms. Holmes searched F.M. in retaliation for A.M.'s exercise of her First Amendment rights – *viz.*, that the search was a reprisal for A.M.'s remarks to the media about the May 2011 arrest. The district court granted qualified immunity to Ms. Holmes on this claim, reasoning: "Because the search was objectively supported by reasonable suspicion, even assuming *arguendo* that Defendant was motivated by retaliatory animus, . . . that would not be enough to violate clearly established law." Aplt.'s App. (14-2066) at 169. We, too, conclude that Ms. Holmes is entitled to qualified immunity on A.M.'s First Amendment retaliation claim. Recognizing that we

may affirm on any ground supported by the record,[23] we deem it appropriate to affirm on the ground that there was no evidence that Ms. Holmes's search of F.M. was substantially motivated by A.M.'s exercise of her First Amendment rights.

"[T]he law is settled that as a general matter the First Amendment prohibits government officials from subjecting an individual to retaliatory actions . . . for speaking out." *Hartman v. Moore*, 547 U.S. 250, 256 (2006). To prevail on a First Amendment retaliation claim, a plaintiff must show:

> (1) that she was engaged in a constitutionally protected activity; (2) that a defendant's action caused her to suffer an injury that would chill a person of ordinary firmness from continuing to engage in that activity; and (3) that a defendant's action was substantially motivated as a response to her exercise of her First Amendment speech rights.

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[23] *See, e.g.*, *Ellis v. J.R.'s Country Stores, Inc.*, 779 F.3d 1184, 1192 (10th Cir. 2015) ("[W]e can affirm on any ground supported by the record, so long as the appellant has had a fair opportunity to address that ground." (quoting *Alpine Bank v. Hubbell*, 555 F.3d 1097, 1108 (10th Cir. 2009))); *Schanzenbach v. Town of Opal*, 706 F.3d 1269, 1272 (10th Cir. 2013) ("We can affirm on any ground supported by the record, so long as the appellant has had a fair opportunity to address that ground." (quoting *Merrifield v. Bd. of Cty. Comm'rs*, 654 F.3d 1073, 1077 (10th Cir. 2011))); *Vaughn v. Epworth Villa*, 537 F.3d 1147, 1150 (10th Cir. 2008) ("[W]e may affirm on any basis supported by the record, even though not relied on by the district court." (quoting *Seegmiller v. LaVerkin City*, 528 F.3d 762, 766 (10th Cir. 2008))).

Becker v. Kroll, 494 F.3d 904, 925 (10th Cir. 2007); *accord Buck v. City of Albuquerque*, 549 F.3d 1269, 1292 (10th Cir. 2008).

Ms. Holmes has raised the defense of qualified immunity. First, she argues that it was not clearly established in November 2011 that she could be subject to a viable First Amendment retaliation claim predicated on her decision to conduct an in-school search of a student that was supported by reasonable suspicion. Second, in the alternative, Ms. Holmes argues that she may avoid § 1983 liability because A.M. has failed to offer any evidence that Ms. Holmes's search was substantially motivated by a desire for retaliation. Because we agree with Ms. Holmes's second alternative argument, we need not reach the merits of her first.

In order to establish liability for any claim brought under § 1983, and to defeat a claim of qualified immunity, a plaintiff must present evidence of "a violation traceable to a defendant-official's 'own individual actions.'" *Pahls*, 718 F.3d at 1225 (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009)). "Because § 1983 . . . [is a] vehicle[] for imposing personal liability on government officials, we have stressed the need for careful attention to particulars,. . . . '[I]t is particularly important' that plaintiffs 'make clear exactly *who* is alleged to have done *what* to *whom*, . . . as distinguished from collective allegations'" – more specifically, "it is incumbent upon a plaintiff to 'identify *specific* actions taken by *particular* defendants' in order to make out a viable § 1983 . . . claim." *Id.* at 1226 (third alteration and third omission in original) (citations omitted).

Thus, we have made clear that "[t]o make out [a] viable § 1983 . . . claim[] *and* to overcome defendants' assertions of qualified immunity," a plaintiff "must do more than show that their rights 'were violated' or that 'defendants,' as a collective and undifferentiated whole, were responsible for those violations," and a "[f]ailure to make this [more particularized, defendant-specific] showing both dooms plaintiffs' § 1983 . . . claim[] and entitles defendants to qualified immunity." *Id.* at 1228.

More specifically, in cases where plaintiffs have presented enough individualized evidence of a substantial motive to retaliate to establish § 1983 liability for a First Amendment retaliation claim, we have emphasized that the evidence indicated that *each individual defendant* had such a substantial motive. For example, in *Howards v. McLaughlin*, 634 F.3d 1131 (10th Cir. 2011), *rev'd on other grounds sub nom. Reichle v. Howards*, 132 S. Ct. 2088 (2012), we concluded that the plaintiff Mr. Howards had provided sufficient evidence to deprive each of the defendants, Agents Doyle and Reichle, of qualified immunity on his First Amendment retaliation claim because the evidence indicated that each defendant agent may have been substantially motivated by Mr. Howards's speech when they arrested him. Specifically, we reasoned that Mr. Howards had provided evidence that: (1) Agent Doyle overheard Mr. Howards's speech and admitted that the comment "disturbed" him, (2) Agent Reichle was told about Mr. Howards's speech by both Agent Doyle and Mr. Howards himself, and upon being told,

he "became visibly angry," and (3) Agent Reichle admitted that he considered Mr. Howards's speech when deciding to arrest him. *Howards*, 634 F.3d at 1145 (quoting the record). *Howards* illustrates our focus on whether the plaintiff has presented individualized evidence that each defendant possessed a substantial motive to retaliate in order to support liability under § 1983 and overcome a claim of qualified immunity. Applying this general principle here, it is clear that A.M. must show by reference to individualized evidence that Ms. Holmes's search of F.M. was substantially motivated by a personal desire to retaliate against A.M. for her exercise of free speech. A.M. has failed to carry this proof burden.

A.M. relied solely on Officer Acosta's testimony to show that Ms. Holmes had a substantial motive to retaliate against her. Specifically, in response to the motion for summary judgment, A.M. argued that "the testimony of Officer Acosta proves shows [sic] that Plaintiff's actions in contacting the media after the arrest of F.M. caused angst among the administration of [CMS] for which F.M. was thereafter retaliated against." Aplt.'s App. (14-2066) at 100. More specifically, A.M. argued that Officer Acosta's testimony showed that

> Defendant [i.e., Ms. Holmes] and other school administrators were bothered by Plaintiff's exercise of her First Amendment rights when she contacted the media after the arrest of F.M. for burping, to the extent that "for the reasons of everything that happened in May,

> the idea was we're going to make sure we cross ou[r] Ts and dot our Is on this go-round" when F.M. was targeted for a strip search.

Id. at 89 (quoting Acosta testimony).

However, in truth, Officer Acosta's testimony (overall) is generalized and, notably, not specifically focused on Ms. Holmes's conduct. Officer Acosta testified that media reporting of F.M.'s arrest in May 2011 "really bothered the administration," "bothered Ms. Labarge," and "bothered a lot of the teachers," including Ms. Mines-Hornbeck. *Id.* at 115 (Acosta's Dep., dated Dec. 3, 2012). Officer Acosta elaborated that he "just kn[e]w that the general atmosphere in the school was kind of – you know, people were just upset at seeing it." *Id.* at 116. He noted that "[t]he one thing that [he] c[ould] recall that Ms. Labarge told [him] [was] . . . [the school] had just got an award," and Ms. LaBarge "was upset at the fact that . . . there could have been something positive to cover [instead of the negative news of the arrest]." *Id.* Officer Acosta added that "when we dealt with [F.M.] in November, for the reasons of everything that happened in May, the idea was we're going to make sure we cross our Ts and dot our Is on this go-round." *Id.* at 115. These statements provide the only evidentiary support for A.M.'s claim that Ms. Holmes's search was substantially motivated by a desire to retaliate against A.M. because she spoke to the media about F.M.'s May 2011 arrest.

Even viewed in the light most favorable to A.M., this evidence falls far short of showing that Ms.

Holmes's search was substantially motivated by a desire to retaliate against A.M. for her remarks to the media. Critically, Officer Acosta never suggested that *Ms. Holmes* was upset by the media reporting. In fact, he never testified that Ms. Holmes was even aware that A.M. had spoken to the media. Moreover, Officer Acosta never suggested that *anyone* – not even Ms. Labarge or Ms. Mines-Hornbeck (the only two individuals whose reactions he could specifically remember) – was upset *at A.M.* for speaking to the media. This lack of particularized evidence is simply not sufficient to support liability under § 1983, or to defeat Ms. Holmes's claim of qualified immunity. *See Pahls*, 718 F.3d at 1226 ("[I]t is incumbent upon a plaintiff to 'identify *specific* actions taken by *particular* defendants' in order to make out a viable § 1983 . . . claim." (citation omitted)); *id.* at 1228 ("To make out [a] viable § 1983 . . . claim[] *and* to overcome defendants' assertions of qualified immunity, plaintiffs. . . . must do more than show that their rights 'were violated' or that 'defendants,' as a collective and undifferentiated whole, were responsible for those violations. . . . Failure to make this showing both dooms plaintiffs' § 1983 . . . claim[] and entitles defendants to qualified immunity.").

Furthermore, to the extent that a reasonable jury *could* derive any inference from Officer Acosta's testimony that Ms. Holmes possessed a retaliatory motive against A.M. – and to be clear, it could not – any such inference would be significantly weakened by the delay

between when A.M. spoke to the media about F.M.'s arrest and when Ms. Holmes searched F.M. The search occurred nearly six months after A.M. spoke with the media about F.M.'s arrest. We have said that "a long delay" between the exercise of free speech and the allegedly retaliatory conduct "tend[s] to undermine any inference of retaliatory motive and weaken the causal link." *Maestas v. Segura*, 416 F.3d 1182, 1189 (10th Cir. 2005). We conclude that A.M. has failed to present sufficient evidence that, when Ms. Holmes searched F.M., she possessed a substantial retaliatory motive with respect to A.M. based on comments that A.M. made to the media nearly six months prior to the search.

In sum, based on the foregoing, we conclude that Ms. Holmes is entitled to qualified immunity on this claim, and the district court correctly granted summary judgment for her. *See, e.g.*, *Trant v. Oklahoma*, 754 F.3d 1158, 1170-71 (10th Cir. 2014) (concluding that the district court "correctly granted summary judgment for Jordan" because "Trant has pointed to no evidence, besides temporal proximity, that Jordan's comments were substantially motivated by Trant's protected speech or that Jordan made his comments with a retaliatory intent").

Before turning to A.M.'s next contention of error regarding the district court's equal-protection ruling, we pause to underscore the fairness of our decision to resolve A.M.'s First Amendment retaliation challenge on this alternative evidentiary-sufficiency ground. It is true that Ms. Holmes did not move for summary judgment on the First Amendment retaliation claim based

on the evidentiary-sufficiency ground; instead, she contended that there was not clearly established law to support the claim. However, it is patent to us that A.M. had a fair opportunity to address the evidentiary-sufficiency issue before the district court and to make a record regarding it.

Indeed, although Ms. Holmes did not raise the issue of evidentiary sufficiency in the district court, A.M. did. Specifically, in response to Ms. Holmes's motion for summary judgment, A.M. argued that Ms. Holmes's search was substantially motivated by a desire to retaliate, and she cited Officer Acosta's testimony to support this argument. Ms. Holmes then replied to A.M.'s evidentiary-sufficiency argument by contending that A.M. "provide[d] no factual support for her claim that *Defendant Holmes* was upset by Plaintiff's decision to speak to the media about the arrest." Aplt.'s App. (14-2066) at 143. In the district court, therefore, the parties took positions on whether A.M. had provided sufficient evidence of a substantial motive to retaliate; they briefed the issue and submitted evidence regarding it.

Furthermore, on appeal, A.M. has tackled Ms. Holmes's alternative evidentiary-sufficiency argument head-on and never suggested that it would be unfair for us to consider the merits of it. Indeed, A.M. has clarified in her reply brief that "[t]he parties agree that '[t]o make a First Amendment retaliation claim, "a plaintiff must show that . . . the government's actions were substantially motivated as a response to his constitutionally protected conduct."'" Reply Br. (14-2066)

at 22 (second alteration in original) (quoting *Stonecipher*, 759 F.3d at 1147). A.M. then has proceeded to argue that she provided sufficient evidence of a substantial motive to retaliate in this case. Moreover, A.M. has argued in conclusion that "it was error for the District Court to grant Holmes summary judgment on A.M.'s First Amendment retaliation claim both on the ground that the claim was not clearly established and on Holmes' asserted alternative ground that A.M. failed to provide evidence of retaliatory animus." *Id.* at 24-25. In sum, A.M. has had a fair opportunity to respond to the evidentiary-sufficiency issue: specifically, we note that (1) she was the one who first raised the issue in the district court, (2) the parties briefed and provided evidence on the issue in the district court, (3) A.M. has never asserted that it would be unfair for us to resolve the First Amendment retaliation claim on this ground, and (4) to the contrary, A.M. has continued to engage the issue on the merits.

As we turn to A.M.'s challenge to the district court's equal-protection ruling, we briefly reprise our merits conclusion here: Ms. Holmes is entitled to qualified immunity on A.M.'s First Amendment retaliation claim because A.M. has failed to provide sufficient evidence to raise a triable issue that Ms. Holmes's search of F.M. was substantially motivated by a desire to retaliate against A.M for her exercise of free speech.

3. Equal-Protection Claim

A.M. alleges that Ms. Holmes searched F.M. in a more intrusive fashion than she did the other four students. Accordingly, she submits that Ms. Holmes singled F.M. out for a markedly different search in violation of F.M.'s right to equal protection, as safeguarded by the Fourteenth Amendment. We conclude that, on this record, A.M. has failed to set forth a legally cognizable Fourteenth Amendment equal-protection claim (and, more specifically, the "class-of-one" variant of such a claim). Consequently, we affirm the district court's grant of summary judgment to Ms. Holmes on this claim.

"The Equal Protection Clause 'is essentially a direction that all persons similarly situated should be treated alike.'" *Kitchen v. Herbert*, 755 F.3d 1193, 1222 (10th Cir.) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)), *cert. denied*, ___ U.S. ___, 135 S. Ct. 265, (2014). Generally speaking, equal-protection jurisprudence is "concerned with governmental action that disproportionately burdens certain classes of citizens." *Kan. Penn Gaming, LLC v. Collins*, 656 F.3d 1210, 1215-16 (10th Cir. 2011); *see Price-Cornelison*, 524 F.3d at 1109 (discussing equal-protection claims based on governmental conduct involving, *inter alia*, "suspect" or "quasi-suspect" classifications of groups); *accord Hassan v. City of New York*, 804 F.3d 277, 298 (3d Cir. 2015) ("At a minimum, intentional discrimination against any 'identifiable group' is subject

to rational-basis review, which requires the classification to be rationally related to a legitimate governmental purpose. Where a 'quasi-suspect' or 'suspect' classification is at issue, however, the challenged action must survive 'intermediate scrutiny' or 'strict scrutiny.'" (citation omitted)); *see also Vasquez v. Cooper*, 862 F.2d 250, 251-52 (10th Cir. 1988) ("Unless it provokes strict judicial scrutiny, a state practice that distinguishes among classes of people will typically survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose.").

But this is not always so; the equal-protection inquiry does not always relate to groups. Indeed, in *Village of Willowbrook v. Olech*, the Supreme Court carved out a "class of one" equal-protection claim; it held that a plaintiff may state such a claim by alleging that he or she "has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." 528 U.S. 562, 564 (2000) (per curiam); *see also* 3 Ronald D. Rotunda & John E. Nowak, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.2(a) (5th ed. 2012) ("If the government applies the law in a certain manner to all persons except a single individual, that single individual may bring an equal protection claim against the government even though the individual is 'a class of one.'"). Where, as here, a plaintiff brings a class-of-one claim, she must demonstrate (1) that "other 'similarly situated' individuals were treated differently" from

her, and (2) that "there is no 'rational basis' for [the different treatment]." *SECSYS, LLC v. Vigil*, 666 F.3d 678, 688-89 (10th Cir. 2012) (citations omitted).

"We have approached class-of-one claims with caution, wary of 'turning even quotidian exercises of government discretion into constitutional causes.'" *Kan. Penn Gaming*, 656 F.3d at 1216 (quoting *Jicarilla Apache Nation v. Rio Arriba Cty.*, 440 F.3d 1202, 1209 (10th Cir. 2006)). Our circumspection in this regard stems from the fact that when "[l]ooking only at one individual, . . . there is no way to know whether the [alleged] difference in treatment was occasioned by legitimate or illegitimate considerations without a comprehensive and largely subjective canvassing of all possible relevant factors." *Jennings v. City of Stillwater*, 383 F.3d 1199, 1213-14 (10th Cir. 2004). In other words, the sample size in a class-of-one claim is obviously too small to permit a plaintiff to paint the contours of the claim in broad brushstrokes. "It is therefore imperative for the class-of-one plaintiff to provide a specific and detailed account of the nature of the preferred treatment of the [allegedly] favored class." *Id.* at 1214. This is because, at its core, "[t]he Equal Protection Clause. . . . keeps governmental decisionmakers from treating differently persons *who are in all relevant respects alike.*" *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 54 (10th Cir. 2013) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)).

In this case, A.M.'s endeavor to state a class-of-one claim necessarily fails because she cannot "first establish that others, 'similarly situated in every material

respect[,]' were treated differently" from F.M. during the in-school search. *Kan. Penn Gaming*, 656 F.3d at 1216 (quoting *Jicarilla*, 440 F.3d at 1210). Reduced to its essence, her argument is that other students searched that day – "none [of whom] were asked to remove articles of clothing," Aplt.'s Opening Br. (14-2066) at 52 – were treated differently from F.M., who was asked to remove some outerwear. This skeletal argument does not advance A.M.'s cause for at least two reasons.

First, it is not clear from the record whether, as A.M. maintains, F.M. was the *only* student required to remove clothing during the search for contraband. Only the search of F.M. was video-recorded, which significantly impedes our ability to review the searches of the remaining students. A.M. consequently relies exclusively on Officer Acosta's description of the searches in setting out her class-of-one claim – an account which, in our view, reveals little of material significance. Officer Acosta testified that the searches were conducted "consistently with each student, from what [he] remember[ed] seeing," and that they involved "going through the backpack[s], empty[ing] . . . pockets, things of that nature." Aplt.'s App. (14-2066) at 119. But, critically, he stated more than once that he did not recall whether *any* student – including F.M. – had been asked to remove specific articles of clothing. *See id.* (noting that F.M. "may have" taken off a shirt, that he "couldn't tell you one way or other" if any other male students were required to remove clothing, and that the female student, at best, "may have taken off her

shoes"). It is thus evident, from that limited testimony, that Officer Acosta's recollection of events cannot offer the "specific and detailed account of the nature of the preferred treatment of the favored class" necessary to form the basis of a class-of-one equal-protection claim. *Jennings*, 383 F.3d at 1214.

Second, even assuming *arguendo* that only F.M. was directed to remove clothing when searched, A.M. has not demonstrated that Ms. Holmes's treatment of F.M. differed from her treatment of *similarly situated* students. We conclude that A.M.'s contrary assertion that "the conduct that was attributed to F.M.'s . . . search was no different than that of the other students involved in the alleged transaction," Aplt.'s Opening Br. (14-2066) at 54, is not supported by the record and utterly unpersuasive. In point of fact, A.M. identifies in her opening brief several obvious reasons why Ms. Holmes could have viewed F.M.'s circumstances as distinct from those of his peers: "because F.M. voluntarily handed over the novelty marijuana leaf belt buckle, because Holmes found a bandana in his back-pack, and because F.M. had more cash on him that day than Holmes thought the average student should." *Id.* at 52. It is undisputed that F.M., and F.M. alone, presented these issues. In other words, there is no evidence that any of the other searched students possessed a bandana that possibly suggested gang affiliation, a belt buckle that suggested interest in marijuana, or an unusually large amount of cash. F.M. possessed all three suspicious items, which patently demonstrates that he was *not* similarly situated "in every material respect,"

Jicarilla, 440 F.3d at 1210, to the other students that Ms. Holmes searched. These differences suffice to defeat a claim of irrational differences in treatment[24] from other students similarly situated.

In sum, we conclude that, on the record before us, F.M. was not similarly situated to the other students searched in November 2011. Therefore, the district court properly determined that A.M.'s class-of-one equal-protection claim was deficient as a matter of law. We accordingly affirm the district court's grant of summary judgment to Ms. Holmes on A.M.'s Fourteenth Amendment claim.

C. Claims Against Ms. LaBarge

Lastly, A.M. contends that the district court committed reversible error when it granted summary judgment to Ms. LaBarge on the Fourth Amendment unreasonable-search claim. The district court awarded qualified immunity to Ms. LaBarge after finding that A.M. had not carried her burden of demonstrating that Ms. LaBarge committed a constitutional violation with respect to F.M. It specifically concluded, with reference to the Supreme Court's holdings in *Safford* and *T.L.O.*, that the November 2011 in-school search was justified at its inception and reasonable in scope.

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[24] We note as well that in any event, based upon our Fourth Amendment unreasonable-search analysis *supra*, the search of F.M. could hardly be deemed irrational conduct devoid of any legitimate state objective. *See Olech*, 528 U.S. at 564.

In challenging the merits of the district court's Fourth Amendment qualified-immunity decision with respect to Ms. LaBarge, A.M. limits her briefing to incorporating the arguments she made in her brief in *A.M. v. Holmes*, No. 14-2066 (i.e., the related appeal with which *A.M. v. LaBarge*, No. 14-2183, has been consolidated). Ms. LaBarge likewise incorporates by reference the arguments advanced in Ms. Holmes's appellate response brief regarding the validity of the search. *See* Fed. R. App. P. 28(i) ("In a case involving more than one appellant or appellee, including consolidated cases, any number of appellants or appellees may join in a brief, and any party may adopt by reference a part of another's brief."). We have fully addressed all of the parties' relevant contentions in Part III.B.1, *supra*, in concluding that the district court properly awarded qualified immunity to Ms. Holmes on A.M.'s Fourth Amendment unreasonable-search claim. We discern no basis for following a different course insofar as this claim implicates Ms. LaBarge's conduct.

Accordingly, for the same reasons set forth in Part III.B.1, *supra* – i.e., based on the same rationale we used to resolve the Fourth Amendment claim in the Holmes appeal – we conclude that the district court did not err in finding that A.M. did not show that Ms. LaBarge committed a Fourth Amendment violation in searching F.M. We therefore affirm the court's grant of qualified immunity to Ms. LaBarge on this claim.

IV. CONCLUSION

For the reasons discussed above, we **AFFIRM** the judgment of the district court in its three orders resolving A.M.'s claims against Officer Acosta, Ms. Holmes, and Ms. LaBarge. Regarding Officer Acosta, we: (1) conclude that the district court did not issue an improper *sua sponte* grant of summary judgment in his favor; (2) **AFFIRM** the court's grant of qualified immunity to him on A.M.'s Fourth Amendment unlawful-arrest claim; and (3) **AFFIRM** the court's grant of qualified immunity to him on A.M.'s Fourth Amendment excessive-force claim. With respect to Ms. Holmes, we: (1) **AFFIRM** the court's grant of qualified immunity to her on A.M.'s Fourth Amendment unreasonable-search claim; (2) **AFFIRM** the court's grant of qualified immunity to her on A.M.'s First Amendment retaliation claim; and (3) **AFFIRM** the court's grant of summary judgment to her on A.M.'s Fourteenth Amendment equal-protection claim. Finally, as regards Ms. LaBarge, we **AFFIRM** the court's grant of qualified immunity to her on A.M.'s Fourth amendment unreasonable-search claim.

GORSUCH, Circuit Judge, dissenting.

If a seventh grader starts trading fake burps for laughs in gym class, what's a teacher to do? Order extra laps? Detention? A trip to the principal's office? Maybe. But then again, maybe that's too old school. Maybe today you call a police officer. And maybe today

the officer decides that, instead of just escorting the now compliant thirteen year old to the principal's office, an arrest would be a better idea. So out come the handcuffs and off goes the child to juvenile detention. My colleagues suggest the law permits exactly this option and they offer ninety-four pages explaining why they think that's so. Respectfully, I remain unpersuaded.

The simple fact is the New Mexico Court of Appeals long ago alerted law enforcement that the statutory language on which the officer relied for the arrest in this case does not criminalize "noise[s] or diversion[s]" that merely "disturb the peace or good order" of individual classes. *State v. Silva*, 525 P.2d 903, |907 (N.M. Ct. App. 1974). Instead, the court explained, the law requires "a more substantial, more physical invasion" of the school's operations – proof that the student more "substantially interfered" with the "actual functioning" of the school. *Id.* at 907-08. What's more, other state courts have interpreted similar statutes similarly. They've sustained criminal convictions for students who created substantial disorders across an entire school. *See, e.g.*, *State v. Wiggins*, 158 S.E.2d 37, 42-44 (N.C. 1967); *State v. Midgett*, 174 S.E.2d 124, 127-28 (N.C. Ct. App. 1970). But they've also refused to hold students criminally liable for classroom antics that "momentarily divert[ed] attention from the planned classroom activity" and "require[d] some intervention by a school official." *In re Jason W.*, 837 A.2d 168, 174 (Md. 2003). Even when the antics required a teacher to leave her class for several

minutes, *In re Brown*, 562 S.E.2d 583, 586 (N.C. Ct. App. 2002), or otherwise "divert[ed] the teacher or the principal from other duties for a time," *P.J.B. v. State*, 999 So. 2d 581, 587 (Ala. Crim. App. 2008) (per curiam). *See also*, *e.g.*, *S.L. v. State*, 96 So. 3d 1080, 1083-84 (Fla. Dist. Ct. App. 2012). Respectfully, I would have thought this authority sufficient to alert any reasonable officer in this case that arresting a now compliant class clown for burping was going a step too far.

In response, my colleagues suggest that *Silva* is distinguishable because it interpreted not the state statute addressing misconduct in public schools on which the officer here relied, *see* N.M. Stat. Ann § 30-20-13(D), but another statute dealing with protests at colleges, *see* N.M. Stat. Ann. § 40A-20-10(C) (1972). And that much is true enough. But the unobscurable fact remains that the relevant language of the two statutes is *identical* – requiring the government to prove that the defendant "commit[ed] any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions" of a school. *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 "interfere[d] with the actual functioning" of the school. 525 P.2d at 907. Neither do my colleagues offer any reason why a reasonable officer could have thought this same language carried an entirely different meaning when applied to public school burps rather than college sit-ins – and the parties supply none. *Cf. Smith v. City of*

Jackson, 544 U.S. 228, 233 (2005) ("[W]hen Congress uses the same language in two statutes having similar purposes, . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes.").

My colleagues likewise dismiss the authority from other states interpreting similar statutes similarly. Maj. Op. at 49-50. But again it's hard to see why. After all, these cases draw the same distinction suggested by *Silva* – between childish pranks and more seriously disruptive behaviors – and hold that only the latter are prohibited by statutes like the one before us today. And they draw that distinction, too, because disciplining children who temporarily distract classmates and interrupt lessons "is simply part of [traditional] school activity" and part of its "lawful mission . . . or function []." *In re Jason W.*, 837 A.2d at 174; *see also In re Brown*, 562 S.E.2d at 585-86. Given that, I would have thought these cases would have only reinforced the lesson *Silva* already taught reasonable officers in New Mexico. *See Wilson v. Layne*, 526 U.S. 603, 617 (1999) (noting law may be clearly established if there is "a consensus of cases of persuasive authority such that a reasonable officer could not have believed that his actions were lawful").

Often enough the law can be "a ass – a idiot," Charles Dickens, *Oliver Twist* 520 (Dodd, Mead & Co. 1941) (1838) – and there is little we judges can do about it, for it is (or should be) emphatically our job to apply, not rewrite, the law enacted by the people's representatives. Indeed, a judge who likes every result he

reaches is very likely a bad judge, reaching for results he prefers rather than those the law compels. So it is I admire my colleagues today, for no doubt they reach a result they dislike but believe the law demands – and in that I see the best of our profession and much to admire. It's only that, in this particular case, I don't believe the law happens to be quite as much of a ass as they do. I respectfully dissent.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

A.M., on behalf of her minor child F.M., Plaintiff-Appellant, v. ANN HOLMES, Defendant-Appellee.	No. 14-2066 (D.C. No. 1:13-CV-00356-MV-LAM) (D. N.M.)
A.M., on behalf of her minor child F.M., Plaintiff-Appellant, v. PRINCIPAL SUSAN LABARGE; ARTHUR ACOSTA, City of Albuquerque Police Officer, in his individual capacity, Defendants-Appellees.	No. 14-2183 (D.C. No. 1:12-CV-00074-KG-CG) (D. N.M.)

JUDGMENT

(Filed Jul. 25, 2016)

Before **TYMKOVICH**, Chief Judge, **GORSUCH**, and **HOLMES**, Circuit Judges.

This case originated in the District of New Mexico and was argued by counsel.

The judgment of that court is affirmed.

Entered for the Court

/s/ Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

A.M., on behalf of her minor child, F.M.,

Plaintiff,

vs.

No. CIV-12-00074 KG/CEG

ARTHUR ACOSTA, City of Albuquerque Police Officer, in his individual capacity,

Defendant.

MEMORANDUM OPINION AND ORDER

(Filed Sep. 19, 2014)

This matter comes before the Court upon Plaintiff's Motion for Summary Judgment Against Defendant Officer Acosta (Motion for Summary Judgment), filed on August 13, 2014. (Doc. 61). On January 29, 2014, Defendant filed a response to the Motion for Summary Judgment asserting a defense of qualified immunity, and on February 24, 2014, Plaintiff filed a reply. (Docs. 73 and 75). Having reviewed the Motion for Summary Judgment, the accompanying briefs, and the evidence of record, the Court denies Plaintiff's Motion for Summary Judgment, and dismisses this lawsuit on the grounds of qualified immunity.

I. Plaintiff's Complaint (Doc. 1-1)

In her Complaint, Plaintiff, on behalf of her minor child, F.M., asserts an alleged Fourth Amendment violation brought under 42 U.S.C. § 1983 for unlawful arrest and excessive force by Defendant Arthur Acosta (Defendant), on May 19, 2011.

Plaintiff now moves for summary judgment on both Section 1983 claims, arguing that Defendant is not entitled to qualified immunity. In response, Defendant raises a qualified immunity defense and opposes the Motion for Summary Judgment in its entirety.

II. Standard of Review

Summary judgment is appropriate if there is no genuine dispute as to a material fact and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a). When applying this standard, the Court examines the factual record and reasonable inferences therefrom in the light most favorable to the non-movant. *Deepwater Invs. Ltd. v. Jackson Hole Ski Corp.*, 938 F.2d 1105, 1110 (10th Cir. 1991). The movant bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Only then does the burden shift to the non-movant to come forward with evidence showing that there is a genuine issue of material fact. *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). An issue of material fact is genuine if a reasonable jury could return a verdict for the non-movant.

Kaul v. Stephan, 83 F.3d 1208, 1212 (10th Cir. 1996) (citation omitted). The nonmovant may not avoid summary judgment by resting upon the mere allegations or denials of his or her pleadings. *Bacchus Indus., Inc.*, 939 F.2d at 891.

Special rules apply when a defendant raises the affirmative "defense of qualified immunity on summary judgment." *Hinton v. City of Elwood, Kan.*, 997 F.2d 774, 779 (10th Cir. 1993). Specifically, qualified immunity requires a two-part inquiry. *Morris v. Noe*, 672 F.3d 1185, 1191 (10th Cir. 2012). "When a defendant asserts qualified immunity at summary judgment, the burden shifts to the plaintiff to show that: (1) the defendant violated a constitutional right and (2) the constitutional right was clearly established." *Id.* (citation omitted). Only if the plaintiff satisfies both prongs is qualified immunity defeated. *Id.* Although the Court views the evidence in the light most favorable to the non-movant, "the record must clearly demonstrate the plaintiff has satisfied his heavy two-part burden; otherwise, the defendants are entitled to qualified immunity." *Gross v. Pirtle*, 245 F.3d 1151, 1156 (10th Cir. 2001). The Court has "the freedom to decide 'which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.'" *Lundstrom v. Romero*, 616 F.3d 1108, 1118 (10th Cir. 2010) (quoting *Pearson v. Callahan*, 555 U.S. 223, 236 (2009)). The Court must conduct the two-part qualified immunity inquiry for unlawful arrest and excessive force claims separately. *Morris*, 672 F.3d at 1191.

III. Undisputed Material Facts[1]

On May 19, 2011, Margaret Mines-Hornbeck (Ms. Mines-Hornbeck), a teacher at Cleveland Middle School, placed a call on the school's radio requesting security in her classroom to assist with a student. (Doc. 61) at 3; (Doc. 61-1) at 3 (depo. at 10). Defendant, an Albuquerque Police School Resource Officer, responded to the call. (Doc. 61) at 3; (Doc. 61-1) at 3 (depo. at 10). When Defendant arrived at Ms. Mines-Hornbeck's classroom, Defendant noticed that Ms. Mines-Hornbeck was standing in the hallway at the entrance of the door to her classroom, while a student, identified as F.M., sat on the hallway floor adjacent to the classroom door. (Doc. 61) at 3; (Doc. 61-1) at 3 (depo. at 12-13).[2] Defendant proceeded to ask Ms. Mines-Hornbeck what had occurred. (Doc. 61) at 3; (Doc. 61-1) at 4 (depo. at 13-14).

Ms. Mines-Hornbeck informed Defendant that F.M. was disrupting her class by continually burping. (Doc. 61) at 3; (Doc. 61-1) at 4 (depo. at 16). Ms. Mines-Hornbeck clarified that during class F.M. generated several fake burps and she repeatedly asked him to stop. (Doc. 61) at 3; (Doc. 61-1) at 4 (depo. at 16). In response, F.M. and other students started laughing at F.M.'s actions. (Doc. 61) at 3; (Doc. 61-1) at 4 (depo. at 16). F.M. then continued to generate fake burps, which

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[1] Unless otherwise noted, the summary of material facts is undisputed.

[2] The parties agree that at the time of the incident, F.M. was a 13 year-old seventh grade student at Cleveland Middle School. (Doc. 61) at 3.

created more of a response from his fellow students. (Doc. 61-1) at 4 (depo. at 16). Ms. Mines-Hornbeck told F.M. to "stop doing that;" F.M., however, burped two or three more times. (Doc. 61) at 3; (Doc. 61-1) at 4 (depo. at 16). At that time, Ms. Mines-Hornbeck told F.M. to sit in the hallway. (Doc. 61) at 3; (Doc. 61-1) at 4 (depo. at 16).

Once he was in the hallway, F.M. sat in a position that placed his right shoulder along the classroom doorframe. (Doc. 61) at 3; (Doc. 61-1) at 4 (depo. at 17). Ms. Mines-Hornbeck reported to Defendant that while F.M. was sitting in the hallway, F.M. would lean into the entranceway of the classroom and continue to burp. (Doc. 61-1) at 4 (depo. at 17). Ms. Mines-Hornbeck also stated that F.M.'s actions resulted in F.M. and his fellow students "laughing and carrying on," which created a disruption. (Doc. 61-1) at 4 (depo. at 17). Ms. Mines-Hornbeck then told Defendant that she called him on the school radio because she could not control F.M. and needed him removed from her classroom. (Doc. 61) at 3; (Doc. 61-1) at 4 (depo. at 17).

Throughout his discussion with Ms. Mines-Hornbeck, Defendant glanced into the classroom and observed that "instruction in the classroom had ceased" and, instead of studying, students were intently "looking out the door" at the situation in the hallway. (Doc. 61-1) at 4-5 (depo. at 14, 20). In addition, at some point, F.M. denied the allegations, stating, "[o]h, that didn't happen," and "[n]o, that's not true." (Doc. 61) at 3; (Doc. 61-1) at 4 (depo. at 17). Defendant told F.M. to remain quiet. (Doc. 61) at 3; (Doc. 61-1) at 4 (depo. at 17).

After Defendant finished speaking with Ms. Mines-Hornbeck, Defendant told F.M. to walk with him to his office. (Doc. 61-1) at 4-5 (depo. at 17-18). Defendant testified that F.M. was not placed in handcuffs or under arrest at that time. *Id.* at 5 (depo. at 18). F.M. complied. *Id.* Once in the office, Defendant instructed F.M. to sit in a chair. *Id.* Again, F.M. complied. *Id.* Defendant left F.M. in the office and went to his vehicle to retrieve his computer. (Doc. 61-2) at 2 (depo. at 35-36). When Defendant returned to the office, he informed F.M. that he would be arrested for "interference with the educational process," a violation of NMSA 1978, § 30-2013(D) (Repl. Pamp. 2004), a petty misdemeanor. (Doc. 61-2) at 2 (depo. at 36); (Doc. 61-2) at 6. F.M. asked why he was being arrested. (Doc. 61-2) at 2 (depo. at 36-37). Defendant stated that he was under arrest because Defendant observed F.M. disrupt classroom instruction. *Id.* (depo. at 37). It is unclear from the record, but at some point Defendant asked F.M. what occurred in the classroom. *Id.* at 1 (depo. at 30). Defendant testified that F.M. stated something to the effect of, "I wasn't burping," "I just burped," or "I didn't do anything." *Id.* at 1-2 (depo. at 31, 37). Defendant further testified that he did not ask F.M. for details because, based on his observations, he believed that the elements of the statute in question were satisfied. *Id.* at 1 (depo. at 31).

After Defendant completed the necessary incident report for the Juvenile Detention Center, he escorted F.M. to his vehicle. *Id.* at 3-4 (depo. at 40-41, 49). Defendant did not place F.M. in handcuffs during the

escort because F.M. was not a flight risk or combative. *Id.* at 4 (depo. at 48-49). When Defendant and F.M. arrived at the vehicle, Defendant told F.M. that he would conduct a frisk to ensure that F.M. did not have weapons or contraband on his person. *Id.* (depo. at 49). Prior to the frisk, Defendant asked F.M. if he had any weapons or contraband. *Id.* F.M. responded that he did not have weapons or contraband on his person. *Id.* After Defendant conducted the frisk, he placed F.M. in handcuffs, and drove him to the Juvenile Detention Center.[3] *Id.*

IV. Discussion

A. Unlawful Arrest

1. First Prong of Qualified Immunity: Whether Defendant Violated F.M.'s Fourth Amendment Rights.

Plaintiff argues that Defendant is not entitled to qualified immunity because he cannot articulate reasonable and arguable probable cause to support F.M.'s arrest. In response, Defendant contends that he is entitled to qualified immunity because Defendant's seizure of F.M. was reasonable under the circumstances,

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[3] In the Motion for Summary Judgment, Plaintiff alleges additional facts that occurred prior to and after F.M.'s arrest. *See* (Doc. 61) at 5-6. These facts, however, are only supported by Plaintiff's unverified complaint, and thus, cannot be considered evidence for Plaintiff's Motion for Summary Judgment. *Williams v. McCallin*, 439 Fed. Appx. 707, 710 (10th Cir. 2011) (unverified complaint is not evidence).

as required under Tenth Circuit precedent for the seizure of a student on school property. Defendant further argues that, if the Court finds that probable cause is the proper standard, Defendant is still entitled to qualified immunity because probable cause existed for F.M.'s arrest.

In the context of an unlawful arrest, an officer must have probable cause to arrest an individual. *Fogarty v. Gallegos*, 523 F.3d 1147, at 1158-59 (10th Cir. 2008) (citing *Cortez v. McCauley*, 478 F.3d 1108, 1117 (10th Cir. 2007). "Probable cause exists if facts and circumstances within the arresting officer's knowledge and of which he or she has reasonably trustworthy information are sufficient to lead a prudent person to believe that the arrestee has committed or is committing an offense." *Jones v. City & Cnty. of Denver*, 854 F.2d 1206, 1210 (10th Cir. 1988) (citations omitted). "Officers can have reasonable, but mistaken, beliefs as to the facts establishing the existence of probable cause . . . and in those situations courts will not hold that they have violated the Constitution." *Saucier v. Katz*, 533 U.S. 194, 206 (2001), *overruled on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009). An officer's reasonable but mistaken belief that probable cause exists is sometimes called "arguable probable cause." *Koch v. City of Del City*, 660 F.3d 1228, 1241 (10th Cir. 2011) (citation omitted).

In the present case, Defendant arrested F.M. for violating NMSA 1978, § 30-20-13(D), which provides, in pertinent part, "[n]o person shall willfully interfere

with the educational process . . . 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." F.M.'s conduct does not clearly fall outside the conduct prohibited by the plain language of the statute. While in class, F.M. started burping, which Ms. Mines-Hornbeck stated caused a disruption to classroom instruction. F.M. then ignored Ms. Mines-Hornbeck's several requests that he stop burping during class. When F.M. continued the behavior, Ms. Mines-Hornbeck told F.M. to sit in the hallway. F.M., however, continued to burp, which in turn caused Ms. Mines-Hornbeck to stop class and request Defendant to assist with F.M. Based on these facts, a reasonable officer in Defendant's position would, at the very least, have arguable probable cause that F.M. willfully interfered with the educational process by disrupting school functions, specifically, classroom instructions, in violation of NMSA 1978, § 30-20-13(D). Plaintiff, therefore, has failed to meet her burden under the first prong of the qualified immunity analysis.

2. Second Prong of Qualified Immunity: Whether F.M.'s Fourth Amendment Right to be Free from Arrest was Clearly Established.

Plaintiff claims that, at the time of the incident, it was clearly established that offenses warranting criminal sanction under NMSA 1978, § 30-20-13(D) required an intentional material disruption to the

"functioning of the entire school," and, therefore, arresting F.M. for a disruption in the classroom setting was an unconstitutional act. (Doc. 61) at 9, 15. Defendant argues that New Mexico state law contradicts Plaintiff's contention.

"A constitutional right is clearly established when, at the time of the alleged violation, the contours of the right were sufficiently clear that a reasonable official would understand that his actions violate that right." *Lundstrom*, 616 F.3d at 1118-19 (citation omitted). "This inquiry must be undertaken in light of the specific context of the case, not as a broad general proposition." *Fisher v. City of Las Cruces*, 584 F.3d 888, 900 (10th Cir. 2009) (citation omitted). Accordingly, a "plaintiff must do more than identify in the abstract a clearly established right and allege that the defendant has violated it." *Lundstrom*, 616 F.3d at 1119. Specifically, a "plaintiff must show legal authority making it apparent that in the light of preexisting law a reasonable official would have known that the conduct in question violated the constitutional right at issue." *Id.* (internal quotation and citation omitted).

This requirement does not mean that a plaintiff must "present a case with an identical factual situation." *Id.* To the contrary, the United States Supreme Court has made clear that "officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). The "salient question," thus, is whether the state of the law at the time of the alleged misconduct gave the defendant "fair warning" that his

alleged misconduct was unconstitutional. *Id.* In order to answer this question, the Court looks to United States Supreme Court or Tenth Circuit precedent on point, or to the clearly established weight of authority from other courts. *Mick v. Brewer*, 76 F.3d 1127, 1134 (10th Cir. 1996).

The second prong of the qualified immunity analysis, in an unlawful arrest case, hinges on the state of applicable New Mexico criminal law at the time of F.M.'s arrest. *Herrera v. City of Albuquerque*, 589 F.3d 1064, 1071 (10th Cir. 2009). In other words, an officer is entitled to qualified immunity, unless the state criminal statute relied upon the officer to effectuate the arrest "is inapplicable – by virtue of its language or by virtue of case law interpreting the statute – to the facts confronting the officer." *G.M. ex rel. B.M. v. Casalduc*, 982 F. Supp. 2d 1235, 1243 (D.N.M. 2013).

Plaintiff claims that "F.M.'s actions showed no intent to materially disrupt the school's functioning." (Doc. 61) at 15. As discussed in *G.M. ex rel. B.M.*, the requisite general intent in NMSA 1978, § 30-20-13(D) is that F.M. acted "willfully." 982 F. Supp. 2d at 1243-44. "New Mexico case law defines criminal willfulness as connoting knowledge or as acting 'without just cause or lawful excuse.'" *Id.* at 1244 (quoting *State v. Elliott*, 2001-NMCA-108 ¶ 13, 131 N.M. 390, 37 P.3d 107, 112; citing *State v. Elmquist*, 1992-NMCA-119 ¶ 3, 114 N.M. 551, 552, 844 P.2d 131, 132). Given the repeated warnings to F.M., a reasonable officer could conclude that F.M. knowingly and without just cause

committed an act, which disrupted classroom instruction, and, thus, interfered with school functions.

Furthermore, at the time of F.M.'s arrest, a reasonable officer could conclude that F.M.'s conduct interfered with school functions pursuant to New Mexico case law. In *State v. Silva*, 86 N.M. 543, 525 P.2d 903 (N.M. Ct. App. 1974), nonviolent student protestors at Eastern New Mexico University were arrested for violating NMSA 1953, § 40A-20-10, a precursor to NMSA 1978, § 30-20-13, after refusing multiple requests to leave the office of the university president. *Id.* at 544, 548, 525 P.2d at 904, 908. The students challenged the statute on the ground that the words "disrupt, impair, interfere with or obstruct" in subsection C were unconstitutionally vague.[4] *Id.* at 546, 525 P.2d at 906. The Court held that the statute was valid on its face and "punishe[d] only conduct which disrupts . . . normal school activities." *Id.* at 548, 525 P.2d at 908. The Court reasoned that the term "impair," in the context of the other operative verbs, including "disrupt" and "interfere with," meant "a substantial physical diminution or damage and not just any diminution in quality." *Id.* at 547, 525 P.2d at 907. Accordingly, the Court determined that the students' conduct was prohibited under

[4] NMSA 1953, § 40A-20-10(C), stated, in relevant part, that,

> [n]o person shall willfully refuse or fail to leave the property of . . . any [educational institution] upon being requested 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.

the statute because their presence in the president's office "substantially interfered" with school functions by disrupting the president's daily meetings. *Id.* at 548, 525 P.2d at 908.

Here, assuming that a reasonable officer would be aware of *Silva*, the Court finds that a reasonable officer could have believed that F.M.'s conduct substantially interfered with school functions. Similar to the students in *Silva*, F.M. refused to comply with Ms. Mines-Hornbeck's requests to stop the disruptive behavior. Moreover, while the students in *Silva* only disrupted a single office, F.M. substantially interfered with the actual functioning of the educational process by disrupting an entire classroom and requiring Ms. Mines-Hornbeck to cease instruction until Defendant removed him from the area.

Plaintiff offers two additional arguments in support of her contention that F.M.'s right to be free from arrest was clearly established at the time of the alleged misconduct. First, Plaintiff claims that Defendant should have responded to F.M.'s behavior by taking "traditional scholastic punishments (like expulsion, suspension and detention)," instead of pursuing criminal sanctions. (Doc. 61) at 9, 14-16. The Court, in *G.M. ex rel. B.M.*, rejected this argument, noting that "while 'patient forbearance' of student misconduct may be wise, it is not legally required." 982 F. Supp. 2d at 1244 (citing *Silva*, 86 N.M. at 548, 525 P.2d at 908).

Second, Plaintiff argues that Colorado, Florida, and North Carolina case law interpreting similar

statutes to NMSA 1978, § 30-20-13(D), clearly establish that F.M.'s conduct did not violate NMSA 1978, § 30-20-13(D). *See* (Doc. 61) at 13-15 (citing, for example, *People ex rel. J.P.L.*, 49 P.3d 1209, 1211 (Colo. App. 2002) (holding that student's creation of "hit list" violated state statute because statute explicitly prohibited conduct that willfully impeded student's educational activities by "use of restraint, abduction, coercion, or intimidation or when force and violence are present or threatened"); *L.T. v. State*, 941 So.2d 551, 552 (Fla. Dist. Ct. App. 2006) (fording that student lacked required specific intent element of state statute); *In re S.M.*, 660 S.E.2d 653, 657 (N.C. Ct. App. 2008) (concluding that student's conduct did not constitute substantial interference because classroom instruction was not substantially disrupted, student was not aggressive or violent, and student did not use vulgar or disturbing language)).

After review of the Colorado, Florida, and North Carolina case law, the Court is not persuaded that there has emerged a "robust consensus of cases of persuasive authority," such that a reasonable New Mexico officer would have "fair and clear warning" that F.M.'s disruption of classroom proceedings did not fall within the purview of NMSA 1978, § 30-20-13(D). *Plumhoff v. Rickard*, 134 S. Ct. 2012, 2023 (2014) (internal quotation and citation omitted); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2087 (2011) (quoting *United States v. Lanier*, 520 U.S. 259, 217 (1997)). For instance, unlike the Colorado and Florida statutes, NMSA 1978, § 30-20-13(D) requires general intent, not specific intent, and

prohibits "any act," not explicit acts. Moreover, a relatively small set of persuasive authority does not vitiate an officer's qualified immunity. *See Ashcroft*, 131 S. Ct. at 2086-87 (2011). Although the Court acknowledges that Plaintiff's proffered case law provides persuasive authority for how a New Mexico court, today, may interpret NMSA 1978, § 30-20-13(D); current New Mexico precedent and the limited persuasive authority would not provide "fair warning" to a reasonable officer that, at the time of the incident, F.M.'s actions did not fall within the scope of NMSA 1978, § 30-20-13(D). For the aforementioned reasons, the Court finds that F.M.'s right to be free from arrest was not clearly established at the time of the alleged misconduct, and, accordingly, Plaintiff has failed to satisfy the second prong of the qualified immunity analysis.

The Court, therefore, finds that having failed to meet the two-prong test to defeat qualified immunity, Defendant is entitled to qualified immunity on the unlawful arrest claim. Thus, Plaintiff's Fourth Amendment unlawful arrest claim is dismissed with prejudice.

B. Excessive Force

Plaintiff contends that Defendant's act of handcuffing and transporting F.M. to the Juvenile Detention Center was objectively unreasonable and resulted in psychological harm to F.M., thereby violating F.M.'s Fourth Amendment rights. *See* (Doc. 61) at 22-23. In

response, Defendant argues that (1) the use of force was reasonable under the circumstances; (2) the use of handcuffs in a juvenile arrest is not *per se* unreasonable; and (3) Plaintiff has failed to demonstrate an actual injury.

"[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat." *Graham v. Connor*, 490 U.S. 386, 396 (1989). The Fourth Amendment, however, prohibits an arresting officer from using force greater than necessary under the circumstances. *Cortez*, 478 F.3d at 1127. The force employed during an arrest is excessive if, under the totality of the circumstances, the use of force was objectively unreasonable. *Graham*, 490 U.S. at 397. This inquiry requires consideration of "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* at 396. The Court must view the reasonableness of an officer's use of force from an "on-scene" perspective. *Saucier*, 533 U.S. at 205. Only that information which was known to the officer at the time of the incident is examined in making this determination. *See Weigel v. Broad*, 544 F.3d 1143, 1152 (10th Cir. 2008). To recover, however, the plaintiff must show "some actual injury caused by the unreasonable seizure that is not *de minimis*, be it physical or emotional." *Fisher*, 584 F.3d at 897.

At the outset, Plaintiff's excessive force claim fails because she has not produced evidence that F.M. suffered an actual physical or emotional injury. In her Complaint and Motion for Summary Judgment, Plaintiff asserts that F.M. suffered "damaging effects of handcuffing and transportation to the Juvenile Detention Center," and that F.M. has incurred psychological medical expenses. (Doc. 61) at 3; (Doc. 1-1) at 9. However, nowhere in the summary judgment evidence is there actual evidence that F.M. suffered any psychological trauma, much less any that rises above the *de minimis* level. Plaintiff's bare allegations do not provide the requisite evidence of an "actual injury" necessary to succeed on an excessive force claim in the Tenth Circuit. *See Silvan W. v. Briggs*, 309 Fed. Appx. 216, 225 (10th Cir. 2009) (finding no excessive force when plaintiff submitted only his testimony that he suffered "extreme emotional trauma"). Plaintiff has thus failed to meet her burden of establishing a violation of F.M.'s constitutional right to be free from use of excessive force. Therefore, the Court finds that Defendant is entitled to qualified immunity on Plaintiff's excessive force claim. Accordingly, Plaintiff's Fourth Amendment excessive force claim is dismissed with prejudice.

IT IS ORDERED that:

1. Plaintiff's Motion for Summary Judgment (Doc. 61) is denied;

2. Defendant is entitled to qualified immunity on all of Plaintiff's claims raised in the Complaint (Doc. 1-1), filed January 24, 2012; and

3. all of Plaintiff's claims against Defendant will be dismissed with prejudice.

/s/ Kenneth J. Gonzales
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

A.M., on behalf of her minor child, F.M.,

Plaintiff,

vs.

No. CIV-12-00074 KG/CEG

ARTHUR ACOSTA, City of Albuquerque Police Officer, in his individual capacity,

Defendant.

FINAL ORDER DISMISSING ALL CLAIMS ON THE GROUNDS OF QUALIFIED IMMUNITY

(Filed Sep. 19, 2014)

Having denied Plaintiff's Motion for Summary Judgment (Doc. 61), filed August 13, 2014, and found that Defendant is entitled to qualified immunity on all of Plaintiff's claims raised in the Complaint (Doc. 1-1), filed January 24, 2012, by Memorandum Opinion and Order entered contemporaneously with this Final Order Dismissing All Claims on the Grounds of Qualified Immunity,

IT IS ORDERED that all of Plaintiff's claims in the Complaint against Defendant are dismissed with prejudice.

/s/ Kenneth J. Gonzales
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

A.M., on behalf of her minor child F.M.,

Plaintiff,

vs.

No. CIV 12-0074 RB/ACT

PRINCIPAL SUSAN LABARGE, TEACHER MARGARET MINES-HORNBECK, and CITY OF ALBUQUERQUE OFFICER A. ACOSTA, each in their individual capacities,

Defendants.

MEMORANDUM OPINION AND ORDER

(Filed Apr. 8, 2013)

THIS MATTER is before the Court on Defendant Labarge's Motion for Summary Judgment on the Grounds of Qualified Immunity (Doc. 29). Jurisdiction arises under 28 U.S.C. § 1331. Having considered the submissions of counsel, the record, and relevant law, the Court grants the Motion.

I. Background

The Complaint is based on events that occurred when F.M. was a student at Cleveland Middle School in Albuquerque, New Mexico. A.M. is the mother of F.M.

On May 19, 2011, F.M. burped during Physical Education class and the teacher, Margaret Mines-Hornbeck, summoned Albuquerque Police School Resource Officer Art Acosta. Officer Acosta handcuffed F.M. and transported him to the Juvenile Detention Center. The school principal, Susan Labarge imposed a one-day suspension. On November 8, 2011, a student reported that she had witnessed a drug transaction on school premises. Officer Acosta and an Assistant Principal reviewed a video of the incident and identified F.M. as one of the students involved. Defendant Labarge called the students shown on the video to her office one by one. F.M. was searched and given a three day in-school suspension.

Plaintiff filed suit in this Court asserting claims under 42 U.S.C. § 1983 for unlawful arrest, excessive force, unlawful search, and violation of procedural due process. Defendants Labarge and Mines-Hornbeck moved for summary judgment and asserted qualified immunity. After the motion was filed, Plaintiff voluntarily dismissed all claims against Mines-Hornbeck and the claims against Defendant Labarge related to the May 2011 arrest. Thus, the matters remaining for decision with regard to the motion are the November 2011 search and the suspensions of F.M. Plaintiff opposes the motion. The motion does not address the claims against Defendant Acosta[.]

II. Standard

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). In cases where the moving party will not bear the burden of persuasion at trial, it bears the initial responsibility of identifying an absence of evidence to support the non-moving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). "If the movant meets this initial burden, the burden then shifts to the nonmovant to 'set forth specific facts' from which a rational trier of fact could find for the nonmovant." *Libertarian Party of N.M. v. Herrera*, 506 F.3d 1303, 1309 (10th Cir. 2007) (quoting FED. R. CIV. P. 56(e) (2007 version)). The non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). When applying this standard, the court examines the record and makes all reasonable inferences in the light most favorable to the non-moving party. *Turner v. Pub. Serv. Co. of Colo.*, 563 F.3d 1136, 1142 (10th Cir. 2009).

III. Statement of Facts

The Court must view the facts in the light most favorable to Plaintiff, the non-moving party. *See id.* Thus, all reasonable inferences are drawn and factual ambiguities are resolved in her favor. During the 2010-2011 school year, F.M. was a thirteen-year-old seventh

grade student at Cleveland Middle School. (Doc. 29-1, Def. Ex. 1, Affidavit of Susan Labarge). On May 19, 2011, F.M.'s Physical Education class was held in a classroom for students to present fitness projects. (*Id.*; Doc. 29-1, Def. Ex. 1-A, Discipline Referral Form). The Physical Education teacher, Ms. Mines-Hornbeck, used a hand-held radio to request assistance with F.M., who was disrupting the class. (Labarge Aff.) Defendant Acosta, an Albuquerque Police Officer assigned to Cleveland Middle School, responded to the call. (*Id.*) Ms. Mines-Hornbeck informed Officer Acosta that F.M. disrupted her class by burping and, after Ms. Mines-Hornbeck sent F.M. outside, he continued to disrupt the class by knocking on the door, burping, and making noises. (Discipline Referral Form).

Officer Acosta arrested F.M. for interfering with the educational process in violation of N.M. STAT. ANN.§ 30-20-13. (Doc. 29-1, Def. Ex. 2, Uniform Incident Report). Officer Acosta advised Defendant Labarge that he was transporting F.M. to the Juvenile Detention Center. (Labarge Aff.) School Administrative Assistant Yvette Campos tried to contact A.M. at two telephone numbers on F.M.'s enrollment documentation, but the first number had been disconnected and the second number lacked a working voicemail account. (*Id.*) Defendant Labarge issued a Discipline Referral slip imposing an off-campus suspension of one day. (*Id.*) She gave the pink copy to F.M. and Defendant Acosta before they left the school for the Juvenile Detention Center. (Def. Ex. 1-A, Discipline Referral Form). F.M. did not return to school for the remainder

of the school year after the one-day suspension expired, and he did not complete the 2010-2011 school year. (*Id.*)

F.M. returned to Cleveland Middle School for the 2011-2012 school year and he had his fourteenth birthday in late August 2011. (Labarge Aff.; Def. Ex. 1-B). On November 8, 2011, a female student reported to a teacher that she witnessed a drug transaction on school premises involving four to five students. (Labarge Aff.) Defendant Labarge asked Defendant Acosta to obtain the security video recording of the incident. (*Id.*) Assistant Principal Ann Holmes and Defendant Acosta reviewed the video recording and identified the students involved in the transaction, including F.M. (*Id.*; Doc. 43-2, Pl. Ex. A, Labarge Dep. at 53-54). Defendant Labarge called each of the students to her office one by one. (*Id.*) The school office attempted to contact the parents of each student to notify them that their children would be searched in an effort to determine whether the student was involved in a drug transaction on campus, but they were unable to contact F.M.'s parents. (*Id.*)

The search took place in a conference room adjacent to Defendant Labarge's office. (Doc. 51, Pl. Ex. B, DVD; Labarge Dep. at 58). Defendant Labarge, Defendant Acosta, Assistant Principal Holmes, Mr. Jenkuski (a male teacher), and another man were present during the search. (*Id.*) Assistant Principal Holmes asked F.M. to empty his pockets and he produced $200 in cash. (*Id.*) Assistant Principal Holmes asked F.M. if he had anything he was not supposed to have and F.M.

stated he had a marijuana leaf belt buckle. (*Id.*; Doc. 29-1, Def. Ex. 1-C). Assistant Principal Holmes emptied F.M.'s backpack and commented that the contents included a prohibited red bandana. (Def. Ex. B). The marijuana leaf belt buckle and the red banana violated the school's dress code. (Labarge Aff.) F.M. stated that his father had given him the cash the previous Friday for his birthday. (*Id.*) F.M. was unable to provide contact information for his father, there was no mention of F.M.'s father on his enrollment documentation, and Defendant Lafarge noted that F.M.'s birthday was in late August. (*Id.*)

Defendant Acosta videotaped the search with his lapel camera. (Def. Ex. B.) F.M. wore a pair of jeans, two pairs of basketball shorts, a pair of boxer underwear and several shirts. (*Id.*) Due to the numerous layers of clothing, Defendant Labarge asked F.M. to remove his pants so he could turn out the pockets on his shorts. (Labarge Depo. at 61). F.M. wore at least one shirt, basketball shorts and boxer underwear during the search. (Def. Ex. B.) Defendant Labarge asked Mr. Jenkuski to check the waistband of the shorts. (*Id.*) Mr. Jenkuski checked the waistband of the shorts that F.M. had taken off as well as the shorts he was still wearing. (*Id.*) No part of F.M.'s pelvic area was exposed at any time during the search. (*Id.*)

While F.M. was in Defendant Labarge's office, her staff received a return call from A.M. (Labarge Aff.) Defendant Labarge informed A.M. about the search of F.M. and the items yielded by the search. (*Id.*) A.M. advised Defendant Labarge that F.M. had left home on

the morning of November 8, 2011 with the $200 and planned to ride the bus to the mall after school. (*Id.*) Defendant Labarge made a disciplinary notation in F.M.'s file because of his possession of the red bandana. (*Id.*) She did not discipline F.M. for the suspected drug transaction due to A.M.'s corroboration of F.M.'s explanation for the $200 cash. (*Id.*) Defendant Labarge imposed a three day in-school suspension as a result of the November 8, 2011 incident. (*Id.*) After November 8, 2011, F.M. did not return to Cleveland Middle School. (*Id.*)

IV. Discussion

Defendant Labarge contends that she is entitled to qualified immunity and summary judgment on Plaintiff's claims. Section 1983 provides that "[e]very person" who acts under color of state law to deprive another of constitutional rights "shall be liable to the party injured in an action at law." 42 U.S.C. § 1983. "The doctrine of qualified immunity protects government officials 'from liability for civil damages insofar as their conduct does not violate clearly established . . . constitutional rights of which a reasonable officer would have known.'" *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (*quoting Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)). In contrast to a standard motion for summary judgment, which places the burden on the moving party to point out the lack of any genuine issue of material fact for trial, a motion based on a claim of qualified immunity imposes the burden on the plaintiff to show "both that a constitutional violation occurred

and that the constitutional right was clearly established at the time of the alleged violation." *Green v. Post*, 574 F.3d 1294, 1300 (10th Cir. 2009) (internal quotations omitted). If either of these requirements is not met, the defendant is entitled to qualified immunity and summary judgment is appropriate.

The Supreme Court has "applied a standard of reasonable suspicion to determine the legality of a school administrator's search of a student." *Safford Unified Sch. Dist. No. 1 v. Redding, 557* U.S. 364, 370 (2009) (*citing New Jersey v. T.L.O.*, 469 U.S. 325, 342 (1985)). The reasonableness determination requires a two-part inquiry: first, the Court must ask whether the search or seizure was justified at its inception; and second, the Court must consider whether the scope of the search or seizure was justified in light of the seriousness of the offense and the surrounding circumstances. *T.L.O.*, 469 U.S. at 341.

In *Safford*, the Supreme Court determined that school officials violated the plaintiff's Fourth Amendment rights when the school officials searched the plaintiff's bra and underwear based on information from another student that the plaintiff had distributed over-the-counter and prescription strength pills to other students. At the time of the search, the school officials knew that the plaintiff and the other student were friends and that the plaintiff was part of a "rowdy" group. But the school officials did not have any information that the plaintiff presently had pills or that the plaintiff was concealing pills in her underwear.

In reaching this holding, the Supreme Court reiterated the reasonableness standard that applies to student searches:

> In *T.L.O.* we recognized that the school setting "requires some modification of the level of suspicion of illicit activity needed to justify a search," and held that for searches by school officials "a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause." We have thus applied a standard of reasonable suspicion to determine the legality of a school administrator's search of a student, and have held that a school search "will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction."

Id. at 370 (quoting *T.L.O.*, 469 U.S. at 340-42) (internal citations omitted). Based on this standard, the Court determined that the other student's statement was "sufficiently plausible to warrant suspicion that [the plaintiff] was involved in pill distribution" and that "[t]his suspicion of [the school official's] was enough to justify a search of [the plaintiff's] backpack and outer clothing." *Id.* at 373. The Court, however, determined that the school officials violated the Fourth Amendment when they searched the plaintiff's bra and underwear. The Court made clear that "[t]he indignity of

the search does not, of course, outlaw it," but "what was missing from the suspected facts that pointed to [the plaintiff] was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that [the plaintiff] was carrying pills in her underwear." *Id.* at 376-77. Therefore, the Court concluded that "the combination of these deficiencies was fatal to finding the search reasonable." *Id.* at 377.

The *Safford* opinion clearly establishes that school officials must have reasonable suspicion before searching a student and this includes "the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from the outer clothes and backpacks to exposure of intimate parts." *Id.* The Court described the "reasonable suspicion" standard for school searches "as a moderate chance of finding evidence of wrongdoing." *Safford*, 557 U.S. at 377.

In this case, the search was justified at its inception. On November 8, 2011, a female student reported to a teacher that she witnessed a drug transaction on school premises involving four to five students. Assistant Principal Holmes and Defendant Acosta reviewed the video recording and identified the students involved in the transaction, including F.M. Defendant Labarge called each of the students to her office one by one. F.M. produced $200 in cash from his pocket and a marijuana leaf belt buckle. Based on these factors, there was reasonable suspicion to search F.M. for drugs as there was a moderate chance of finding evidence of wrongdoing.

Additionally, the search was reasonable in scope. F.M. wore multiple layers of clothing. In that the objective of the search was drugs, it was reasonable to ask F.M. to remove the outer layers of his clothing, empty his pockets, and ask Mr. Jenkuski to check the elastic waistbands of F.M.'s two pairs of basketball shorts. F.M.'s pelvic area was not exposed during the search and he was not required to remove or shake out his underwear. The video shows that F.M. did not remove his inner shirt, his inner pair of basketball shorts, or his underwear. In light of these circumstances, the search was reasonable in scope. As the search was justified at its inception and conducted in a manner that was reasonably related in scope to the circumstances which justified the search in the first place, Defendant Labarge is entitled to summary judgment on the Fourth Amendment claim. *See T.L.O.*, 469 U.S. at 341-42.

Defendant Labarge is also entitled to summary judgment on the due process claims. The United States Supreme Court has stated that the requirements of due process do not apply when the property interest involved is "de minimis." *Goss v. Lopez*, 419 U.S. 565, 576 (1975). Courts have held that temporary in-school suspensions of less than ten days constitute de minimis deprivations of property or liberty. *See Laney v. Farley*, 501 F.3d 577, 584 (6th Cir. 2007) (finding "a one day in-school suspension to be a de minimis deprivation"); *Wise v. Pea Ridge Sch. Dist.*, 855 F.2d 560, 563 n.3 (8th Cir. 1988) (noting that the interference with the student's liberty or property interests resulting

from a three-day in-school suspension was de minimis); *Fenton v. Stear*, 423 F.Supp. 767, 772 (W.D. Pa. 1976). The Court concurs with this reasoning and finds the one-day off-campus and three-day in-school suspensions were de minimis deprivations that did not implicate the requirements of due process. Plaintiff does not assert that Defendant Labarge failed to follow established procedures. Thus, Defendant Labarge is entitled to summary judgment on the due process claims.

THEREFORE,

IT IS ORDERED that Defendant Labarge's Motion for Summary Judgment on the Grounds of Qualified Immunity (Doc. 29) is GRANTED.

IT IS FURTHER ORDERED that the claims against Defendant Acosta are not addressed by this Memorandum Opinion and Order and this matter remains pending.

/s/ Robert C. Brack
ROBERT C. BRACK
UNITED STATES
DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

A.M., on behalf of her minor child F.M.,

Plaintiff-Appellant,

v.

ANN HOLMES, et al.,

Defendants-Appellees.

Nos. 14-2066 & 14-2183

CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE AT HARVARD LAW SCHOOL, et al.,

Amici Curiae.

ORDER

(Filed Sep. 8, 2016)

Before **TYMKOVICH**, Chief Judge, **GORSUCH**, and **HOLMES**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge

in regular active service on the court requested that the court be polled, that petition is also denied.*

Entered for the Court

/s/ Elisabeth A. Shumaker

ELISABETH A. SHUMAKER, Clerk

* The Honorable Harris L. Hartz is recused in this matter and did not participate in consideration of the en banc petition.