IN THE UNITED STATES COURT OF APPEALS
FOR THE 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

On 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

BRIEF OF AMICI CURIAE CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE AT HARVARD LAW SCHOOL, CHILDREN'S LAW CENTER, INC., JUVENILE LAW CENTER, PUBLIC COUNSEL, TEXAS APPLESEED, AND YOUTH SENTENCING AND REENTRY PROJECT IN SUPPORT OF PLAINTIFF-APPELLANT'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 26.1 of the Federal Rules of Appellate Procedure, *Amici* make the following disclosures:

Charles Hamilton Houston Institute for Race and Justice at Harvard Law School, **Children's Law Center, Inc.**, **Juvenile Law Center**, **Public Counsel**, **Texas Appleseed**, and **Youth Sentencing and Reentry Project** are each nonprofit organizations organized under Section 501(c)(3) of the Internal Revenue Code. They have no parent corporations, and no publicly held corporations hold 10 percent or more of their stock.

DATED: August 30, 2016

/s/ Kathryn A. Eidmann
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INTRODUCTION AND INTEREST OF AMICUS CURIAE

The majority opinion permits law enforcement officers to arrest schoolchildren for doing nothing more than acting like children—"burping, laughing, and leaning into the classroom [from the hallway]." Slip Op. at 33. Criminalizing the behavior of the class clown is no laughing matter. While the law under which F.M. was charged purportedly aims to limit school disruption, extending the reach of this law to such commonplace behavior will instead have grave consequences for the children of New Mexico—and in particular, for children of color and children with disabilities—by diverting these young people away from the instruction and opportunities of the classroom and channeling them into the criminal justice system. This disruption of their educational experience will severely impair their education, health, and life chances. As the dissent points out, this absurd result is not compelled by clearly established law, and *Amici* respectfully request rehearing by this Court *en banc*.

In light of the potentially dire consequences for the children of New Mexico, and the precedent that would be set by permitting the criminalization of ordinary schoolroom conduct, the nonprofit organizations **Charles Hamilton Houston Institute for Race and Justice, Children's Law Center, Inc., Juvenile Law Center, Public Counsel, Texas Appleseed,** and **Youth Sentencing and Reentry**

Project have a vital interest in this case.[1] Each organization works to break the school-to-prison pipeline by advancing the rights of children, particularly children of color, to an equal education that can lead them to productive contributions to society rather than to prison.

ARGUMENT

I. The majority opinion permits the criminalization of ordinary schoolchildren's behavior in conflict with well-recognized legal principles

Children misbehaving in school is hardly unusual. They do so for various reasons, from boredom or insecurity due to a lack of understanding of the material being taught, to hunger, stress, or unaddressed trauma,[2] or to simple immaturity. The role that our schools play in socializing children and correcting their misbehavior is well recognized by courts. Education "is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Brown v. Board of Educ. of Topeka, Shawnee County, Kan.*, 347 U.S. 483, 493 (1954); *New*

[1] A further description of each *amicus* and its interest in this litigation is included in *Amici*'s Motion to File *Amicus* Brief.

[2] *See, e.g.*, Joe Morin & Rosemary Battalio, *Construing Misbehavior: The Efficacy Connection in Responding to Misbehavior*, 6 J. POSITIVE BEHAVIOR INTERVENTIONS 251, 252 (2004) ("A student who is troubled by family strife or learning difficulties may act out his or her frustration with overt defiance or aggression.").

Mexico Ass'n for Retarded Citizens v. State of N.M., 678 F.2d 847, 855 (10th Cir. 1082). Schools help children learn the tools and attributes of citizenship not only by transmitting content but by providing the socializing experience or "assimilative force" of the classroom. *Ambach v. Norwick*, 441 U.S. 68, 77 (1979). Public education must "prepare pupils for citizenship in the Republic" and "inculcate the habits and manners of civility." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986) (internal citation omitted). In other words, one of the responsibilities of schools is to help teach children the "habits and manners of civility" to prepare students for citizenship in our democracy. Inherent in this role of schools is the notion that children are not always civil and sage and are sometimes disruptive, and that schools have a responsibility to help immature children become mature adults.

The majority opinion interprets N.M. Stat. Ann. § 30-20-13(D) as criminalizing "a wide swath of conduct that interferes with the educational process," including "burping, laughing, and leaning into the classroom" which "stopped the flow of student educational activities." Slip Op. at 32-33. But, as is clear in Supreme Court and Tenth Circuit precedent, responding to such behavior is a central part of the educational process, and inculcating civil habits and manners is part of the function of a school. As explained in the dissent and by the petition for rehearing *en banc*, the majority's conclusion is not compelled by the law of this Circuit or of

New Mexico.[3] It also departs from common sense and from the reasoning of other courts which interpret similar statutes as distinguishing between "childish pranks and more seriously disruptive behaviors" and which hold that to criminalize the former would impede the due process rights of school children.[4] Slip op., dissent at 2-3.

In addition to departing from well-established law in this Circuit and beyond, the majority opinion sanctions the transfer of authority for responding to misbehavior from the school to law enforcement and the criminal justice system. This result, which is not compelled by the language of the statute or New Mexico law, not only harms the students of New Mexico but runs counter to current policy and guidance of the federal government which cautions against school-based arrests and other forms of exclusionary discipline. *See, e.g.*, U.S. Department of Education and U.S. Department of Justice, *Joint "Dear Colleague" Letter on the Nondiscriminatory Administration of School Discipline*, Appendix 1 (Jan. 8, 2014)

[3] Even assuming the broad reading of the statute put forth by the majority, "an officer's reliance on an authorizing statute does not render the conduct per se reasonable." *Roska ex rel. Roska v. Peterson*, 328 F.3d 1230, 1252 (10th Cir. 2003).

[4] Amici do not concede that limiting the statute to apply only to substantial disruptions would cure all of its constitutional deficiencies. However, because F.M.'s acts so clearly did not rise to the level of a substantial disruption, Amici do not believe that in this case the Court needs to go beyond the rule set forth in *State v. Silva*, 525 P.2d 903, 907-908 (N.M. Ct. App. 1974), to deny Officer Acosta qualified immunity.

(recommending that school personnel, rather than law enforcement personnel, recognize "responsibil[ity] for administering routine student discipline"); and U.S. Dep't of Educ., *Guiding Principles: A Resource Guide for Improving School Climate and Discipline* at 11(Jan. 2014) ("non-violent conduct, such as tardiness, loitering, use of profanity, dress code violations, and disruptive or disrespectful behaviors . . should [not] lead to law enforcement responses such as arrest or ticketing").

II. Permitting school-based arrests for ordinary classroom misconduct criminalizes typical childish behavior with potentially dire consequences for children's education, health, and life chances

By interpreting the New Mexico statute to permit the criminalization of the most minimal schoolroom misbehavior—and finding this to be objectively reasonable—the majority opinion increases, rather than stanches, the flow of the school-to-prison pipeline. The school-to-prison-pipeline "refers to the practice of funneling students currently enrolled in school to the juvenile justice system or removing students from school temporarily or permanently, thereby creating conditions under which the students are more likely to end up in prison." *Hawker v. Sandy City Corp*., 774 F.3d 1243, 1245 (10th Cir. 2014) (Lucero, J., concurring) (citation omitted). Exclusionary discipline can range from suspensions and expulsions by traditional school authorities to, in its most extreme form, "[r]eferral

of students to law enforcement—so that even minor offenses are often dealt with and punished by the police rather than school officials." *Id.* This case falls at the most extreme end of exclusionary discipline: a law enforcement officer arrested a child for repeatedly burping in class, behavior that lies squarely within the province of school discipline but in this case was referred to law enforcement and treated as criminal.

As this Court has noted, involving law enforcement in "traditional in-school discipline" comes at a high cost to students by "taking them out of the normal education process," among other negative consequences. *Id.* (quoting *N.C. v. Commonwealth*, 396 S.W.3d 852, 863 (Ky. 2013)). School-based arrests dramatically increase chances that students engage in physical fights, carry weapons, smoke, use alcohol and other drugs, and drop out. Rhonda Brownstein, *Pushed Out*, 75 Educ. Digest 23, 25 (2010); *see* Brea L. Perry & Edward W. Morris, *Suspending Progress: Collateral Consequences of Exclusionary Punishment in Public Schools*, 79 American Sociological R. 1067, 1081, 1083 (2014); Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 Just. Q. 462, 473, 478–79 (2006).

The referral of students to law enforcement also corrodes trust students have in their educators and generates apathy and detachment. Students arrested pursuant to exclusionary discipline are likely to see school as "the institution that resulted in

their involvement with the criminal justice system." Brownstein, *supra* at 25; *see also, e.g.*, James E. Davis, & Will J. Jordan, *The Effects of School Context, Structure and Experiences on African American Males in Middle and High Schools*, 63 J. Negro Educ. 570 (1994). Evidence shows that students have better academic outcomes and that schools are safest when students have positive relationships with adults. *See, e.g.*, Okonofua, et al., *Brief Intervention to Encourage Empathic Discipline Cuts Suspension Rates in Half Among Adolescents*, PNAS 113, 5221-5226 (2016); *see also* Clifton B. Parker, *Teacher Empathy Reduces Student Suspensions, Stanford Research Shows*, Stanford News (Apr. 26, 2016), http://news.stanford.edu/2016/04/26/teacher-empathy-reduces-student-suspensions-stanford-research-shows/.

The adverse social-emotional effects of arrest and exclusionary discipline take a severe toll on students' academic performance, preventing educational institutions and teachers from preparing students for later professional training and increasing the chances of future unemployment and involvement with the criminal justice system. "In addition to missing school when they are suspended or expelled, students who experience the harsh effects of these policies are more likely to struggle in classes, drop out, and suffer other negative effects on their educations." *Hawker*, 774 F.3d at 1245. Studies show the direct effect of the full range of exclusionary discipline on student outcomes: excessive use of exclusionary

discipline is linked with rapid decline in reading and math achievement on a schoolwide basis, even after adjusting for a school's overall level of violence and disorganization. *E.g.*, Perry & Morris, *supra*, at 1079; Prudence Carter *et al.*, Discipline Disparities Series: Overview 1 (2014) (finding that frequent use of disciplinary removal from school is associated with a host of negative student outcomes, including lower academic achievement); Davis & Jordan, 63 J. Negro Educ. 570 (finding that school suspension results in poorer grades and performance on cognitive tests in science, math, and history).

More specifically, arrest, which is at the most severe end of the spectrum of exclusionary discipline, has been demonstrated dramatically to increase a student's likelihood of dropping out. First-time arrest, particularly when accompanied by a court appearance, "increases the odds of high school dropout by at least a factor of three." Sweeten, 23 Just. Q. at 463. Most disturbingly, this effect is magnified among youths who were less involved in delinquency to begin with. *Id.* at 463, 478. Even when arrested students subsequently manage to conform their behavior to appropriate standards, they are five times more likely to be arrested for the same behaviors as their peers after first arrest. Akiva M. Liberman, *et al.*, *Labeling Effects of First Juvenile Arrests: Secondary Deviance and Secondary Sanctioning*, 52 Criminology 345, 359, 363 (2014).

Once a student is excluded from school, as happens with arrests, he or she is far less likely to enroll in college. Veronica Terriquez *et al.*, *The Impact of Punitive High School Discipline Policies on the Postsecondary Trajectories of Young Men*, University of Southern California 3 (2013). Because the average high school dropout can expect to earn an annual income of only $20,241— $10,386 less than a typical high school graduate and $36,424 less than someone with a bachelor's degree—exclusionary discipline, including arrests, funnels students into lives of poverty and potential increased involvement with the criminal justice system. Jason M. Breslow, *By the Numbers: Dropping Out of High School*, Frontline, Sept. 21, 2012, http://www.pbs.org/wgbh/frontline/article/by-the-numbers-dropping-out-of-high-school/.; *see also*, *e.g.*, Alliance for Excellent Education, Saving Futures, Saving Dollars: The Impact of Education on Crime Reduction and Earning 3 (2013) (finding a direct correlation between lower-educational achievement and increased arrest/incarceration rates). It even puts students' health at risk, making them more likely to experience stress-related illnesses such as poor birth outcomes, adult chronic disease and obesity, mental health disorders, heart disease, and substance abuse, in addition to psychiatric problems, suicide attempts, and increased HIV, Hepatitis C, and tuberculosis. Human Impact Partners, Health Impact Assessment of School Discipline Policies 2 (2013).

Arresting students for misbehavior not only hurts their educational and vocational prospects but is not necessary to ensuring school order. Evidence-based studies show that many effective approaches to managing student behavior result in an orderly school while providing better outcomes for students. *See* Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J. L. & Educ. 281, 323-27 (2012). The U.S. Department of Education Institute for Education Sciences maintains a database of research of evidence-based programs that have been subject to rigorous scientific review. IES, What Works Clearinghouse. http://ies.ed.gov/ncee/wwc/.

Conversely, reliance on punitive approaches to behavior management can lead to increased school disruption. *See* Joseph B. Ryan, et al., *Reducing Seclusion Timeout and Restraint Procedures with At Risk Youth*, 13 J. AT RISK YOUTH 1 (2007); R. Lewis, *Classroom Discipline and Student Responsibility, the Student's View*, 17 TEACHING & TEACHER EDUC. 307 (2001). "By focusing officers' roles on the critical issue of safety and avoiding inappropriate officer involvement in routine discipline matters, schools have found that they can reduce students' involvement in the juvenile justice system and improve academic outcomes while improving school safety." U.S. Dep't of Educ., *Guiding Principles* at 10.

III. The majority opinion gives law enforcement almost unlimited discretion to arrest children, resulting in disproportionate consequences for children who are most at risk

By interpreting the New Mexico statutory language as rendering unlawful "any act which would disrupt, impair, interfere with or obstruct the lawful mission, processes, procedures or functions" of a school to include such conduct as "burping, laughing, and leaning into the classroom," Slip Op. at 33, the majority opinion renders N.M. Stat. Ann. § 30-20-13(D) vague and susceptible to being interpreted in a discriminatory or arbitrary fashion by law enforcement officers. *U.S. v. Corrow*, 119 F.3d 796, 802 (10th Cir. 1997); *Bushco v. Shurtleff*, 729 F.3d 1294, 1306 (10th Cir. 2013). Indeed, the majority agrees that "any" is effectively limitless in defining what behavior would fall under the statute. Slip Op. at 32 ("The common meaning of the word 'any' is, *inter alia*, 'one or some indiscriminately *of whatever kind*"). Discriminatory enforcement of the statute is a very real concern given the well-established racial disparities in the administration of school discipline. As the United States has documented, "students of certain racial or ethnic groups tend to be disciplined more than their peers." U.S. Dep't of Educ. and U.S. Dep't of Justice, *Dear Colleague Letter on the Nondiscriminatory Administration of School Discipline* (Jan. 8, 2014). African American students without disabilities are more than three times as likely as their white peers without

disabilities to be expelled or suspended, a racial disparity that is "not explained by more frequent or more serious misbehavior of students of color." *Id.*

Numerous studies support the United States' conclusion that discretionary discipline referrals unfairly target African American and Hispanic students. *See, e.g.*, R. J. Skiba *et al., Race is Not Neutral: A National Investigation of African American and Latino Disproportionality in School Discipline*, 40 Sch. Psychol. Rev. 85, 100 (2011) (finding that African American students are twice as likely as White students to receive a discipline referral at the elementary level and four times as likely at the middle school level, while Hispanic students are more than one-and-a-half times more likely to receive a referral at the middle-school level); Texas Appleseed, Texas' School to Prison Pipeline: Dropout to Incarceration: The Impact of School Discipline and Zero Tolerance (2007) (finding that African American students were significantly overrepresented in discretionary discipline referrals in comparison to their percentage in the total population). Thus, African American students in particular are referred to law enforcement for "infractions that are both less serious and more subjective in their interpretation than white students." Lisa H. Thurau & Johanna Wald, *Controlling Partners: When Law Enforcement Meets Discipline in Public Schools*, 54 N.Y. L. Sch. L. Rev. 977, 981 (2009). Racial disparities in discipline are more prominent in categories of offenses that are defined subjectively, such as "disrespect" or "excessive noise" than in

objective categories such as "smoking." Russel J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URBAN REVIEW 317 (2010).

Given the documented prevalence of such disparities in school discipline for students of color, the majority's interpretation of the statute, which allows for such wide discretion in its application, cannot stand. Such a broad interpretation is contrary to prevailing law and would have grave consequences for New Mexico's children of color.

CONCLUSION

For the foregoing reasons, *en banc* review should be granted.

Dated: August 30, 2016

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations set forth in Fed. R. App. P. 29(d) and 32(a)(7)(B)(i), and 10th Cir. Rule 29.1, because this brief contains 2,803 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 (Version 14) in Times New Roman 14-point font.

Executed this 30th day of August, 2016.

/s/ Kathryn Eidmann
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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **Brief of *Amici Curiae* Charles Hamilton Houston Institute for Race And Justice at Harvard Law School, Children's Law Center, Inc., Juvenile Law Center, Public Counsel, Texas Appleseed, and Youth Sentencing and Reentry Project in Support of Plaintiff-Appellant's Petition For Rehearing En Banc,** as submitted in Digital Form via the court's CF system, is an exact copy of the hard copy document to be filed with the Clerk if accepted for filing, and that it has been scanned for viruses with Symantec Endpoint Protection (v.12.1.6), and, according to the program, is free of viruses. In addition, I certify that all privacy redactions required have been made.

Executed this 30th day of August, 2016.

/s/ Kathryn Eidmann
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CERTIFICATE OF SERVICE

I hereby certify that, on August 30, 2016, I electronically filed the foregoing **Brief of *Amici Curiae* Charles Hamilton Houston Institute for Race And Justice at Harvard Law School, Children's Law Center, Inc., Juvenile Law Center, Public Counsel, Texas Appleseed, and Youth Sentencing and Reentry Project in Support of Plaintiff-Appellant's Petition For Rehearing En Banc** with the Clerk of the Court for the U.S. Court of Appeals for the Tenth Circuit, by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Executed this 30th day of August, 2016.

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