No. 16-984

In The Supreme Court of the United States

A.M., on Behalf of Her Minor Child, F.M.,

Petitioner,

v.

ANN HOLMES, et al.,

Respondent.

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

BRIEF OF *AMICI CURIAE* ALLIANCE FOR EDUCATIONAL JUSTICE, CAMPAIGN FOR YOUTH JUSTICE, CENTER FOR LAW AND EDUCATION, CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE, CHILDREN'S LAW CENTER, INC., DISABILITY RIGHTS NEW MEXICO, FUTURES WITHOUT VIOLENCE, GWINNETT PARENT COALITION TO DISMANTLE THE SCHOOL TO PRISON PIPELINE, JUVENILE LAW CENTER, PROFESSOR WILLIAM S. KOSKI, NATIONAL LGBTQ TASKFORCE, NATIONAL WOMEN'S LAW CENTER, NATIVE AMERICAN DISABILITY LAW CENTER, PEGASUS LEGAL SERVICES FOR CHILDREN, PUBLIC COUNSEL, SOUTHERN POVERTY LAW CENTER, TEXAS APPLESEED, AND THE YOUTH LAW CENTER IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici **ALLIANCE FOR EDUCATIONAL JUSTICE, CAMPAIGN FOR YOUTH JUSTICE, CENTER FOR LAW AND EDUCATION, CHARLES HAMILTON HOUSTON INSTITUTE FOR RACE AND JUSTICE, CHILDREN'S LAW CENTER, INC., DISABILITY RIGHTS NEW MEXICO, FUTURES WITHOUT VIOLENCE, GWINNETT PARENT COALITION TO DISMANTLE THE SCHOOL TO PRISON PIPELINE, JUVENILE LAW CENTER, PROFESSOR WILLIAM S. KOSKI, NATIONAL LGBTQ TASKFORCE, NATIONAL WOMEN'S LAW CENTER, NATIVE AMERICAN DISABILITY LAW CENTER, PEGASUS LEGAL SERVICES FOR CHILDREN, PUBLIC COUNSEL, SOUTHERN POVERTY LAW CENTER, TEXAS APPLESEED, and THE YOUTH LAW CENTER** are a law professor and nonprofit organizations that are dedicated to advancing and protecting the civil rights of children across the United States, and have a direct interest in this matter. *Amici* have extensive litigation, advocacy, and policy experience and are recognized for their expertise in protecting the civil rights of students in public schools, limiting inappropriate criminalization of

[1] Pursuant to Supreme Court Rule 37.6, *Amici Curiae* and their counsel state that none of the parties to this case nor their counsel authored this brief in whole or in part, and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief. *Amici Curiae* file this brief with the written consent of all parties, copies of which are on file in the Clerk's office. All parties received timely notice of *Amici Curiae*'s intention to file this brief.

children, and advancing the interests of schoolchildren.

Amici, through advocacy, direct representation, and impact litigation, regularly represent public schoolchildren whose constitutional rights have been violated. *Amici* engage in policy advocacy to ensure that schools and other systems respect the constitutional rights of children, and in particular the rights of students of color, students with disabilities, LGBTQ students, and gender-non-conforming students—some of the most vulnerable students in the nation. Collectively and individually, *Amici* are interested in ensuring that the constitutional rights of schoolchildren are protected and that law enforcement agents do not violate students' fundamental rights.

Founded in 2008, the **Alliance for Educational Justice** (AEJ) is a national alliance of 29 youth organizing and inter-generational groups working for education justice by organizing for non-punitive school reforms to advance student achievement. AEJ member organizations have organized successfully to address an array of education justice issues impacting student achievement. AEJ member organizations have advocated for positive alternatives to punitive school discipline and for ending the criminalization of student behavior, including by helping defend students in South Carolina who were arrested for disturbing schools and by engaging in state and local campaigns to remove police from schools and end disturbing education laws.

The **Campaign for Youth Justice** (CFYJ) is dedicated to ending the prosecution, sentencing, and incarceration of youth under 18 in the adult criminal justice system. There are currently nine states that automatically try and treat 16 and/or 17 year olds as adults. Permitting an arrest for relatively minor misbehavior has significant collateral consequences for all youth, but potentially life-long negative consequences for youth treated as adults and given adult criminal records. CFYJ believes that childish misbehavior must not be elevated to a crime such that thousands of youth are criminalized.

The **Center for Law and Education** (CLE) is a nonprofit resource, support, and advocacy organization founded in 1969, that strives to make the right of all students to quality education a reality, with an emphasis on assistance to low-income students. CLE is focused on bringing civil rights and school reform together to address systemic barriers that impede low-income students from accessing a rigorous curriculum. CLE believes that it is critical that students, especially from protected groups, are not denied access to learning by constructive exclusion from school through inappropriate instruction, or through abusive disciplinary or other unlawful practices, including criminalizing student behavior and inappropriate referrals to the juvenile or criminal court.

The **Charles Hamilton Houston Institute for Race and Justice** (CHHIRJ) at Harvard Law School marshals resources to advance Houston's dreams for a more equitable and just society. It brings together

students, faculty, practitioners, civil rights and business leaders, community advocates, litigators, and policymakers. CHHIRJ has focused on reforming unduly harsh criminal justice policies and redressing the influence of race on sentencing outcomes. As part of this initiative, CHHIRJ has addressed the criminalization of adolescent behavior and has studied and litigated disparate treatment of young people of color within the realm of school discipline.

The **Children's Law Center, Inc.** (CLC) is a nonprofit organization committed to the protection and enhancement of the legal rights of children. CLC strives to accomplish this mission by providing legal representation for youth and advocating for systemic and societal change. For over 25 years, CLC has worked in many settings, including the fields of special education, custody, and juvenile justice, to ensure that youth are treated humanely, can access services, and are represented by counsel. Recently, CLC has worked on issues facing Ohio youth prosecuted in juvenile and adult court, including ensuring that youth receive constitutionally required protections and due process in educational settings, as well as delinquency and criminal court proceedings.

Disability Rights New Mexico (DRNM) is a federally funded nonprofit corporation designated as New Mexico's protection and advocacy system organization that advocates for individuals with disabilities and is authorized to pursue various remedies to protect and advocate for the rights of such individuals. As DRNM knows from 38 years of experience, students with

disabilities are especially vulnerable to harsh disciplinary measures; it is estimated that as many as 65-70% of children in the juvenile justice system have a disability. To address this serious problem, DRNM works to protect and promote the educational rights of children with disabilities to disrupt the school-to-prison pipeline.

Futures Without Violence (FUTURES) is a national nonprofit organization that has worked for over 30 years to prevent and end violence against women and children around the world. FUTURES mobilizes concerned individuals and organizations to end violence through public education and prevention campaigns, public policy reform, training and technical assistance, and programming designed to support better outcomes for women and children experiencing or exposed to violence. Notably, FUTURES partners with local and state educational institutions to respond to the impacts of violence and trauma on learning and behavior. FUTURES' work in this area is anchored in the belief that students must feel safe and supported in order to learn.

The **Gwinnett Parent Coalition to Dismantle the School to Prison Pipeline** (Gwinnett SToPP) is a parent-driven grass roots community activist organization that concentrates its efforts toward derailing the discriminatory disciplinary practices in the Gwinnett County, Georgia school system. A segment of its work involves assisting scores of parents in critical need of support and advocacy when their student has been inequitably treated based on their race, gender

identity, or education program. Gwinette SToPP seeks to end the criminalization of youth, and the usage of unreasonable and discriminatory punishments in schools.

Juvenile Law Center, founded in 1975, is the oldest public interest law firm for children in the United States. Juvenile Law Center advocates on behalf of youth in the child welfare and criminal and juvenile justice systems to promote fairness, prevent harm, and ensure access to appropriate services. Among other things, Juvenile Law Center works to ensure that children's rights to due process are protected at all stages of juvenile court proceedings, from arrest through disposition, from post-disposition through appeal; and that the juvenile and adult criminal justice systems consider the unique developmental differences between youth and adults in enforcing these rights.

William S. Koski is the Eric & Nancy Wright Professor of Clinical Education and Professor of Law at the Stanford Law School and Professor of Education (by courtesy) at the Stanford Graduate School of Education. He also founded and directs the Law School's Youth & Education Law Project (YELP). With his students in YELP, Koski has represented hundreds of children and youth in special education and school discipline matters. He also has been lead counsel in a matter that sought to reform the school discipline system of a large school district (*Smith v. Berkeley Unified School District*) and another that seeks to reform the

special education service delivery system in an elementary school district and to reform the California Department of Education's special education monitoring system (*Emma C. v. Eastin*).

Since 1973, the **National LGBTQ Task Force** has worked to build power, take action, and create change to achieve freedom and justice for (LGBTQ) people and their families. As a progressive social justice organization, the Task Force works toward a society that values and respects the diversity of human expression and identity and achieves equity for all. Because LGBTQ and gender non-conforming (GNC) young folks, especially LGBTQ/GNC young people of color, are disproportionately likely to be disciplined in schools and to become involved in the juvenile justice system, legal efforts to address discriminatory use of school discipline are a critical piece of the organization's broader efforts to reform the criminal legal system.

The **National Women's Law Center** is a nonprofit legal organization that is dedicated to the advancement and protection of women's legal rights and the expansion of women's opportunities. Since 1972, the Center has worked to secure equal opportunity in education for girls and women through full enforcement of the Constitution and laws prohibiting discrimination. The Center has participated in numerous cases involving discrimination in education before the Supreme Court and the courts of appeals. The National Women's Law Center advocates for the end of overly

punitive disciplinary practices in schools, particularly as those affect Black girls.

The **Native American Disability Law Center** (NADLC) is a 501(c) nonprofit organization based in Farmington, New Mexico that advocates for the legal rights of Native Americans with disabilities. For over 20 years, the NADLC has worked extensively with families and students with disabilities to ensure that they have access to appropriate education services. Through community education, individual and systemic advocacy, and policy work, the NADLC works to ensure that the unique legal needs of Native American students with disabilities are addressed so that they are treated with respect and can reach their full potential.

Pegasus Legal Services for Children is a New Mexico nonprofit corporation established in 2002 to promote and defend the rights of children and youth to safe and stable homes, quality education and healthcare, and a voice in decisions that impact their lives. Pegasus joins this brief as an advocate for ensuring students have access to public education, and supports the student's position that it is obviously unconstitutional for a law enforcement officer to purposelessly arrest and transport a middle school student to juvenile detention for fake burping and laughing.

Public Counsel is the nation's largest *pro bono* law firm, serving over 30,000 low-income children, youth, families, and community organizations each year. Uniting litigation, legislative and policy change,

direct service, and community partnerships, Public Counsel works to ensure that public schools are engines of equality and opportunity and that all children have equal access to education, whatever their race or zip code may be. More specifically, Public Counsel partners with community groups across California, such as CADRE, Coleman Advocates for Children and Youth, and the Black Organizing Project, to advocate for reforms that keep children in class and out of the courtroom and for research-based alternatives that are proven to reduce out-of-school suspensions and increase learning and student graduation.

The **Southern Poverty Law Center** (SPLC) is a civil rights organization dedicated to fighting hate and bigotry, and seeking justice for the most vulnerable members of our society. Since SPLC's founding in 1971, it has won numerous landmark victories to attack institutional racism in the South, toppling some of the nation's most violent white supremacist groups, and overcoming barriers to equality for women, vulnerable children, the LGBTQ community, and people with disabilities. Through its Children's Rights practice area, SPLC works throughout the Deep South to ensure that all children—particularly poor children of color—have equal access to quality public education, and that children are not funneled from schools into the criminal justice systems.

Texas Appleseed is a nonprofit public interest law center that seeks economic, social, and political justice for all Texans through systemic reform. Utilizing research, education, community-based campaigns,

and innovative advocacy, Texas Appleseed has worked to address many of the harmful policies and practices that impact children's access to quality public education. Texas Appleseed believes that excluding children from the classroom and subjecting them to criminal penalties for behavior that is best handled within a school setting is detrimental to their success and funnels them into the school-to-prison pipeline.

The **Youth Law Center** is a national public interest law firm that works to protect the rights of children at risk of or involved in the juvenile justice and child welfare systems. Since 1978, Youth Law Center attorneys have represented children in civil rights and juvenile court cases across the country. The Center's attorneys are often consulted on juvenile policy matters, and have participated as *Amicus Curiae* in numerous cases involving important juvenile system issues. They have written extensively on juvenile justice policy issues, and have provided research, training, and technical assistance on these issues to public officials in almost every State. The Center has long been involved in public discussions, legislation, and court challenges involving the treatment of juveniles in the justice system. This case, involving the excessive and unnecessary criminalization of children and attendant deprivation of rights, fits squarely within the Center's interests and expertise.

SUMMARY OF THE ARGUMENT

The Tenth Circuit 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]." *A.M. v. Holmes*, 830 F.3d 1123, 1142 (10th Cir. 2016). Criminalizing the behavior of the class clown is a serious 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 exactly the opposite effect and cause grave consequences for children across the country—and in particular, for students of color; students with disabilities; lesbian, gay, bisexual, transgender, queer and questioning (LGBTQ) students; and gender non-conforming students—by diverting young people away from the instruction and opportunities of the classroom and channeling them into the criminal justice system.

This case is not simply about a 13-year-old jokester who acted as a class clown by burping in class. The reach of this case extends much further, to countless future school children who may behave in similar ways. Criminalizing such commonplace behavior will severely impair students' education, health, and life chances. It is also ineffective, unnecessary, and contrary to fundamental constitutional precepts. As Judge Gorsuch points out in his dissent to the majority opinion, the law recognizes the commonsense notion that an arrest of a young person for ordinary classroom behavior violates the student's constitutional rights, and

Amici respectfully request that the Court grant certiorari.

ARGUMENT

I. The majority opinion permits the criminalization of commonplace behavior of schoolchildren in conflict with obvious, well-recognized legal principles.

Schoolchildren do not always behave in ways adults would like them to. Such behavior stems from various causes, from boredom or insecurity due to a lack of understanding of the material being taught, to hunger, stress, disability, health issues, or unaddressed trauma, *see, e.g.*, Joe Morin & Rosemary Battalio, *Construing Misbehavior: The Efficacy Connection in Responding to Misbehavior*, 6 J. POSITIVE BEHAV. INTERVENTIONS 251, 252 (2004), or to their developmental age, *see J.D.B. v. North Carolina*, 564 U.S. 261, 272, (2011) (recognizing that developmental differences between children and adults affect behaviors and decision-making).

Courts have long recognized that schools not only transmit knowledge to children but also play an important role in teaching children about social and cultural expectations. 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. Bd. of Educ.,* 347 U.S. 483, 493 (1954); *New*

Mexico Ass'n for Retarded Citizens v. New Mexico, 678 F.2d 847, 855 (10th Cir. 1982). Schools help children learn the tools and attributes of citizenship not only by transmitting content but by working as a force "by which diverse and conflicting elements in our society are brought together on a broad but common ground." *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) (quoting C. Beard & M. Beard, New Basic History of the United States 228 (1968)). In other words, a core responsibility of schools is to help teach children the habits of good citizenship to prepare them to participate 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 teach children what is socially expected of them. "[D]isciplining children who temporarily distract classmates and interrupt lessons 'is simply part of [traditional] school activity' and part of its 'lawful mission . . . or function [ ].'" *A.M.*, 830 F.3d at 1170 (Gorsuch, J., dissenting) (second and third alterations in original) (quoting *In re Jason W.*, 837 A.2d 168, 174 (Md. 2003)). Through public education, we teach children how to be part of our society. In any classroom, teachers teach academic subjects but they also instruct on how to sit, pay attention, and meet sensible expectations about how to succeed in class. Teaching appropriate student behavior is an integral part of teaching—and it can be

even more valuable than administering a spelling test or conducting a math lesson. A one-to-one interaction between student and teacher is not a disruption of the educational process, but is education itself.

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." *A.M.*, 830 F.3d at 1142. But, as is well-established in precedent from the Supreme Court and other courts, responding to such behavior is a common, central part of the educational process. As Judge Gorsuch points out in his dissent, courts have "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.'" *A.M.*, 830 F.3d at 1170 (Gorsuch, J., dissenting) (alterations in original) (quoting *In re Jason W.*, 837 A.2d at 174). The majority's conclusion departs from common sense and from the reasoning of other courts that have interpreted similar statutes as distinguishing between "childish pranks and more seriously disruptive behaviors" and have held that to criminalize the former would impede the due process rights of schoolchildren.[2] *A.M.*, 830 F.3d at 1170 (Gorsuch, J., dissenting).

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[2] *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

Further, the panel fails to grapple with the *criminal* nature of the statute at issue. As interpreted by the majority's opinion, which disregards the evidence that the state legislature did not intend such a reading, N.M. Stat. Ann. § 30-20-13(D) could be limitless in its criminalization of typical child behavior, would provide no discernible line between legally permissible and impermissible classroom misconduct, and would hinge much of whether a child is subjected to a life-altering arrest on the competencies and decisions of others. Does fake burping warrant arrest only if one's classmates opt to laugh? Does laughing to cover a real but embarrassing burp (or for that matter, laughing at the burper) constitute a crime? Or does it depend on whether the teacher has the patience and skills to address the behavior quickly and effectively? Or simply on whether the teacher sends the student down the hall to the principal's office instead of calling in a law enforcement officer and halting his or her teaching? Under no set of circumstances, can it be thought that the Fourth Amendment permits the arrest, detention, and shackling of a child for conduct like burping or laughing in class.[3]

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this case the Court needs to go beyond the rule set forth in *State v. Silva*, 525 P.2d 903, 907-08 (N.M. Ct. App. 1974), to deny Officer Acosta qualified immunity.

[3] Of course, conduct on school grounds that constitutes a threat to the security of students or faculty is punishable under other laws. Thus nothing is gained by this statute, but much is lost.

In addition to departing from well-established law, the majority opinion sanctions the transfer of authority for responding to student behavior from the school to law enforcement and the criminal justice system. This not only harms students but runs counter to policy and guidance of state[4] and

[4] For instance, in New Mexico, where F.M. was arrested for fake burping, the legislature and courts have uniformly emphasized that a child's age and maturity must be taken into account in all decisions involving the justice system. *See, e.g.*, *State v. Jonathan M.*, 791 P.2d 64, 65-66 (N.M. 1990). Importantly, New Mexico has chosen not to criminalize status offenses, activities that are unlawful due to a child's age and would not be criminal if engaged in by an adult. *See ACLU v. City of Albuquerque*, 992 P.2d 866, 870 (N.M. 1999).

New Mexico has made a concerted effort to reduce school arrests, the disproportionate involvement of students of color in the juvenile justice system, and the unnecessary detention of children. *See e.g.*, N.M. Stat. Ann. § 32A-1-3(E) (providing that one purpose of Children's Code is "to reduce overrepresentation of minority children and families in the juvenile justice . . . system [ ]"). As early as 1994, representatives from the Children, Youth, and Families Department (CYFD), New Mexico's child welfare agency, recognized that African American and Native American students were significantly more likely than White students to be involved in the juvenile justice system. N.M. SENTENCING COMM'N, STATE OF NEW MEXICO DISPROPORTIONATE MINORITY CONTACT STATEWIDE ASSESSMENT: PRELIMINARY REPORT 27-28 (2012), https://cyfd.org/docs/final-state-of-nm-disproportionate-minority-contact-statewide-assessment.pdf [hereinafter DISPROPORTIONATE MINORITY CONTACT STATEWIDE ASSESSMENT]. From 2004 to 2010, a CYFD-appointed panel of representatives from law enforcement, judicial, education, behavioral health, and advocacy agencies, worked to identify reasons for the disproportionate involvement of students of color in the juvenile justice system. *Id.* at 10. Between 2010 and 2011, Bernalillo County, where F.M.'s school in Albuquerque is located, worked to reduce detention of children of color in certain Albuquerque zip codes with large numbers of students of color. *Id.*

federal[5] government that warns against school-based arrests and exclusionary discipline.

II. Permitting school-based arrests for commonplace classroom behavior has dire consequences for children's education, health, and life chances.

By interpreting the New Mexico statute to permit the criminalization of the commonplace classroom behavior—and failing to acknowledge that a purposeless arrest for such behavior violates a student's constitutional rights—the Tenth Circuit opinion increases, rather than stanches, the flow of the school-to-prison

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at 11; *see* THOMAS E. SWISSTACK ET AL., SMALLER, SMARTER, AND MORE STRATEGIC: JUVENILE JUSTICE REFORM IN BERNALILLO COUNTY 1 (2010), http://www.bernco.gov/uploads/FileLinks/e5a5d854808348828d873dd7a15212bd/Smaller_Smarter_and_More_Strategic__County_Commission__2_.pdf; Disproportionate Minority Contact Statewide Assessment, *supra*, at 12-13.

[5] *See, e.g.*, Statement of Interest of the United States at 5 & n.9, Kenny v. Wilson, No. 2:16-cv-02794-CWH (D.S.C. Nov. 28, 2016) (collecting consent orders entered into by the United States "that prevent schools and law enforcement agencies from using the juvenile and criminal justice systems to address routine student misbehavior"); OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC. & CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, DEAR COLLEAGUE LETTER ON THE NONDISCRIMINATORY ADMINISTRATION OF SCHOOL DISCIPLINE app. 3 (Jan. 8, 2014) [hereinafter DEAR COLLEAGUE LETTER] (recommending that school personnel, rather than law enforcement personnel, recognize "responsib[ility] for administering routine student discipline"); U.S. DEP'T OF EDUC., GUIDING PRINCIPLES: A RESOURCE GUIDE FOR IMPROVING SCHOOL CLIMATE AND DISCIPLINE at 11 (2014) ("[N]on-violent conduct . . . should [not] lead to law enforcement responses such as arrest or ticketing.").

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) (quoting Jason P. Nance, *School Surveillance and the Fourth Amendment*, 2014 WIS. L. REV. 79, 83 (2014)). 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 courts have noted, involving law enforcement in "traditional in-school discipline" comes at a high cost to students by "tak[ing] student[s] out of the normal education process," among other negative consequences.[6] *Id.* (quoting *N.C. v. Commonwealth*, 396 S.W.3d 852, 863 (Ky. 2013)). Students not only miss school due to suspension or expulsion, but "are more likely to struggle in classes, drop out, and suffer other

[6] For noncitizen students, such consequences can include deportation, loss of legal status, or bars to applying for certain types of lawful status.

negative effects on their educations." *Id*. Indeed, studies indicate that exclusionary discipline results in poorer grades and performance on cognitive tests in science, math, and history. James Earl Davis & Will J. Jordan, *The Effects of School Context, Structure and Experiences on African American Males in Middle and High School*, 63 J. NEGRO EDUC. 570, 575-86 (1994).

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." Rhonda Brownstein, *Pushed Out*, 75 EDUC. DIGEST 23, 25 (2010).

At the most severe end of the spectrum of exclusionary discipline, students who have been arrested are less likely to graduate from high school and more likely to be involved in the criminal justice system in the future. Being arrested for the first time, particularly when accompanied by a court appearance, "increases the odds of high school dropout by at least a factor of three." Gary Sweeten, *Who Will Graduate? Disruption of High School Education by Arrest and Court Involvement*, 23 JUST. Q. 462, 463 (2006). Students who have been arrested are often labeled by law enforcement as delinquent and are three times more likely to be arrested again than peers without a history of arrest who engage in the same conduct. Akiva M. Liberman, *et al.*, *Labeling Effects of First Juvenile Arrests: Secondary Deviance and Secondary Sanctioning*, 52 CRIMINOLOGY 345, 359, 363 (2014).

The adverse social-emotional effects of arrests prevent educational institutions from properly serving students, making it much less likely that students will enroll in college. *See, e.g.*, VERONICA TERRIQUEZ ET AL., UNIVERSITY OF SOUTHERN CALIFORNIA, THE IMPACT OF PUNITIVE HIGH SCHOOL DISCIPLINE POLICIES ON THE POSTSECONDARY TRAJECTORIES OF YOUNG MEN 3 (2013). Because the average annual income for a student who did not graduate high school is $20,241—$10,386 less than a high school graduate and $36,424 less than someone with a bachelor's degree—exclusionary discipline practices, including arrests, funnel 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 EDUC., 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 and incarceration rates).

Exclusionary discipline 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 rates. Human Impact Partners, Health Impact Assessment of School Discipline Policies 2 (2013).

Furthermore, not only do exclusionary discipline and arrests negatively affect individual students, but they also negatively impact the entire school community. Studies show the direct effect 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. *See, e.g.*, PRUDENCE CARTER ET AL., DISCIPLINE DISPARITIES SERIES: OVERVIEW 1 (2014) (finding that frequent use of disciplinary removal from school is associated with negative student outcomes, including lower academic achievement). Reliance on punitive, criminally based approaches to behavior management can also lead to less overall school safety. *See* Joseph B. Ryan et al., *Reducing Seclusion Timeout and Restraint Procedures with At-Risk Youth*, 13 J. AT-RISK ISSUES 1, 12 (2007); Ramon Lewis, *Classroom Discipline and Student Responsibility: The Students' View*, 17 TEACHING & TCHR. EDUC. 307, 315 (2001). Thus, arresting students not only hurts their educational and vocational prospects, but also makes schools less safe.

Evidence-based studies show that many effective approaches to managing student behavior result in an orderly school while providing better outcomes for students. *See, e.g.*, Thalia González, *Keeping Kids in Schools: Restorative Justice, Punitive Discipline, and the School to Prison Pipeline*, 41 J. L. & EDUC. 281, 321-34 (2012). These alternatives prioritize positive relationships between students and adults, which result in

better academic outcomes and safer schools. *See, e.g.*, JASON A. OKONOFUA ET AL., BRIEF INTERVENTION TO ENCOURAGE EMPATHIC DISCIPLINE CUTS SUSPENSION RATES IN HALF AMONG ADOLESCENTS, 113 PROC. NAT'L ACAD. SCI. 5221, 5221 (2016); *see also* Clifton B. Parker, *Teacher Empathy Reduces Student Suspensions, Stanford Research Shows*, STANFORD NEWS SERVICE (Apr. 26, 2016), http://news.stanford.edu/2016/04/26/teacher-empathy-reduces-student-suspensions-stanford-research-shows/. The U.S. Department of Education Institute for Education Sciences maintains a database of such evidence-based programs that have been subject to rigorous scientific review. INST. EDUC. SCI., WHAT WORKS CLEARINGHOUSE, http://ies.ed.gov/ncee/wwc/ (last visited Mar. 7, 2017).

In short, the majority opinion would allow school districts in New Mexico, and potentially across the country, to refer students to law enforcement for arrest and detention for a broad swath of commonplace child behavior despite clear evidence that there is a less discriminatory and far more effective alternative.

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," *A.M. v. Holmes*, 830 F.3d 1123, 1142 (10th Cir. 2016), the panel opinion renders N.M. Stat. Ann. § 30-20-13(D) susceptible to "discriminatory" or "arbitrary" enforcement by law enforcement officers. *United States v. Corrow*, 119 F.3d 796, 802 (10th Cir. 1997); *see Bushco v. Shurtleff*, 729 F.3d 1294, 1307 (10th Cir. 2013). Indeed, the majority agrees that "any" is effectively limitless in defining what behavior would fall under the statute. *A.M.*, 830 F.3d at 1142 ("The common meaning of the word 'any' is, *inter alia*, 'one or some indiscriminately *of whatever kind*"). If the Tenth Circuit Opinion is allowed to stand, what will stop subsequent courts from criminalizing similar and even lesser behavior? Will simply passing notes equate to a disruption of the educational process? Telling jokes while the teacher is speaking? All of these innocuous behaviors by school-aged children would seemingly be subject to criminalization pursuant to the Tenth Circuit Opinion.

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." DEAR COLLEAGUE LETTER, *supra* note 5, at 3; *see* U.S. DEP'T OF EDUC., 2013-14 CIVIL RIGHTS DATA COLLECTION: A FIRST LOOK 3-4 (2016) (publishing national data demonstrating that students of color and students with disabilities are disproportionately

disciplined in grades K-12); Kathryn E.W. Himmelstein & Hannah Brückner, *Criminal-Justice and School Sanctions Against Nonheterosexual Youth: A National Longitudinal Study*, 127 PEDIATRICS 49, 49 (2011) ("Nonheterosexual youth suffer disproportionate educational and criminal-justice punishments that are not explained by greater engagement in illegal or transgressive behaviors."); Kerry Welch & Allison Ann Payne, *Racial Threat and Punitive School Discipline*, 57 SOC. PROBS. 25, 40-41 (2010) (finding that schools with higher percentages of Black students are more likely to rely on punitive discipline and implement zero tolerance policies).

In New Mexico, where F.M. was arrested, students of color and students with disabilities are most profoundly affected by school arrests and referrals to juvenile probation. DISPROPORTIONATE MINORITY CONTACT STATEWIDE ASSESSMENT, *supra* note 4, at 28. For example, Native American students account for 22.8% of school arrests, although they comprise about 11% of the child population in New Mexico. OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., 2011-12 DISCIPLINE ESTIMATIONS FOR NEW MEXICO, http://ocrdata.ed.gov/StateNationalEstimations/Estimations_2011_12 (last visited Mar. 7, 2017); CHILD POPULATION, AGES 0-19, BY RACE AND ETHNICITY, KIDS COUNT DATA CENTER, https://tinyurl.com/hs947th (last visited Mar. 7, 2017).

These disparities are "not explained by more frequent or more serious misbehavior by students of color." DEAR COLLEAGUE LETTER, *supra* note 5, at 4; *see* Himmelstein & Brückner, *supra*, at 49 (reaching the

same conclusion with respect to nonheterosexual students).

Numerous studies support the United States' conclusion that discretionary discipline referrals unfairly target Black and Latino students. *See, e.g.*, Russell J. Skiba et al., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 34 URBAN REV. 317, 332, 334 (2002) (finding that racial disparities in discipline are more prominent in categories of offenses that are defined subjectively, such as "disrespect," than in objective categories, such as "smoking"); Russell 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, 101 (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 Latino 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 4 (2007) (finding that African American students were significantly overrepresented in discretionary discipline decisions); Jason A. Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, PSYCHOL. SCI., May 2015, at 1, 4 (finding that Black students are disciplined more severely than White students). 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).

Given the documented prevalence of such disparities in school discipline for students of color, students with disabilities, LGBTQ and gender non-conforming students, 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 vulnerable children across the country.

CONCLUSION

Criminalizing commonplace schoolroom behavior is an issue of critical importance. *Amici* urge the Court to grant certiorari to decide this issue decisively and protect vulnerable children from arbitrary and discriminatory treatment.

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