**Case No. 15-2154**

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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|---|---|
| Quentin Scott, | ) |
| | ) |
| Plaintiff - Appellant, | ) |
| | ) |
| v. | ) |
| | ) |
| City of Albuquerque, et al., | ) |
| | ) |
| Defendants - Appellees. | ) |

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On Appeal from the United States District Court
For the District of New Mexico
Honorable Scott W. Skavdahl, presiding

**No. 1:14-CV-0665-SWS-WPL**

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# APPELLANT'S REPLY BRIEF

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Respectfully Submitted,

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**ORAL ARGUMENT REQUESTED**

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## INTRODUCTION

Hensley's counsel could make a cogent argument that any interruption in class, that any failure to complete assigned school work, that any wandering through the school in search of a place to belong is arguable probable cause for the crime of interference with the educational process. However, if a child finds himself arbitrarily arrested for seeking comfort with the school custodians rather than sitting through the sometimes tediousness of school, he will soon learn that school is hostile to him. In our nation, these students will leave behind our schools in droves and leave our citizenry the poorer, robbing it of an educated workforce and electorate. For children who gain a direct understanding that American governmental authority is arbitrary through an unlawful arrest in school, there is little to be gained in participating in our future work or our future leadership.

## ARGUMENT

### I. Qualified Immunity Does not Protect Hensley from Liability

Although Hensley's brief discusses State v. Silva, 1974-NMCA-072, 86 N.M. 543, 547, 525 P.2d 903, 907, Hensley never directly addresses the application of the language of "disruption" as interpreted in Silva to the facts confronting Hensley when he decided to place Scott in handcuffs and transport him to a juvenile detention center. One supposes, Hensley's position is that whenever a school administrator's task at hand is interrupted or a school administrator is re-

directed from a lesson plan or other administrative work by the act of a child, the criminal statute allows law enforcement to make an arrest of a child. Such an application of the statute is an absurd reading of the law, ignores the Silva Court's application of the predecessor statute, and would criminalize the very basic aspect of being a child – lack of maturity.

> "[A]s any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions."

Roper v. Simmons, 543 U.S. 551, 569 (2005) (citation omitted).

Hensley argues that Silva left to the jury the question of whether a child has committed the act of interfering with the processes, procedures or functions of the school. However, this argument ignores the clear statement in Silva that an arresting officer, as with all criminal statutes, must make a preliminary determination as to whether the child has interrupted the school process. State v. Silva, 1974-NMCA-072, 86 N.M. 543, 545, 525 P.2d 903, 905 ("As it is with all criminal statutes, the determination is preliminarily made by the arresting officer under statutory standards.").

Hensley boldly states that Scott "disrupted the function of the school itself." [Appellee's Brief at 15]. However, if the function of the school is to educate,

Hensley has zero evidence from which to draw any preliminary determination that any child failed to be educated because of Scott's actions. There was simply no evidence that Hensley had any belief that Scott disrupted any class by wandering away from class. The fact that Teacher Wiggins had to leave her class preparation cannot reasonably be deemed a "disruption" under common usage or under the Silva interpretation of that very language. Neither Hensley nor Wiggins testified that Hensley was aware of Wiggins' leaving her class or failing to prepare for class.

In Silva, the University President held a regular meeting of the Administrative Council of the University. The meeting started at 9:00 a.m. At 10:30 a.m., the council started the discussion about the ethnic studies program. At 11:15 a.m., the president determined that the meeting was becoming "disorderly". He asked the students to leave. When they did not leave, he and other council members met in another room to discuss business. The president informed the students he would need his office at 1:30 p.m. At 2:00 p.m., when the students still refused to leave, he and the school's attorney actually read the statute to the students. The president then informed the attorney that the students were "disrupting his normal business." State v. Silva, 1974-NMCA-072, ¶ 2.

The failure of the District Court to discuss the Silva precedent is difficult to defend. In Silva, the New Mexico Court of Appeals contrasted the unlawful

behavior of repeatedly ignoring requests to leave a university president's office with less physical intrusions. The Silva Court stated explicitly that "[the] operative verbs [of the statute] (disrupt, impair (as construed), interfere with, obstruct), read as a whole, denote a more substantial, more physical invasion" than an unobstructive or undisruptive situation that may disturb, such as normal conversational speech. State v. Silva, 1974-NMCA-072, ¶ 18. So while, counsel can make an argument that Scott's actions disturbed the activity of Teacher Wiggins, the disturbance was not through a "physical invasion" and, thus, neither counsel nor Hensley can seriously contend that Scott's actions arguably violated a criminal statute that requires a "physical invasion." The Silva Court contrasted the statute that the United States Supreme Court reviewed in Grayned v. City of Rockford, 408 U.S. 104 (1972) with the New Mexico statute. The statute the Grayned Court reviewed prohibited conduct "that [was] neither violent nor physically obstructive." The Silva Court explicitly stated that the New Mexico statute was "not so broad." State v. Silva, 1974-NMCA-072, ¶ 18.

Qualified immunity does not ask whether the "very action in question has previously been held unlawful", only that "in the light of preexisting law, the unlawfulness must be apparent." Anderson v. Creighton, 483 U.S. 635, 640 (1987). "If the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing his

conduct." Harlow v. Fitzgerald, 457 U.S. 800, 818-19, 102 S. Ct. 2727, 2738, 73 L. Ed. 2d 396 (1982). The Tenth Circuit uses a sliding scale approach to examine immunity issues. "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.' 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." Casey v. City of Fed. Heights, 509 F.3d 1278, 1284 (10th Cir. 2007) (citation omitted).

The arrest of a thirteen-year-old school child with known mental and emotional deficits for "hanging out" with the school custodians, rather than being in class is oppressive. "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society." Wolf v. People of the State of Colo., 338 U.S. 25, 27 (1949). The Supreme Court has recognized that even a Terry stop, "constitutes a severe, though brief, intrusion upon cherished personal security, and it must surely be an annoying, frightening, and perhaps humiliating experience." Terry v. Ohio, 392 U.S. 1, 24-25 (1968). In reviewing the arrest of juveniles for trespassing, the Fifth Circuit noted the disturbing practice of arresting juveniles en masse,

> "[r]egardless of the visibility of the signs, regardless of whether a class B misdemeanor (criminal trespass) was committed, regardless of whether the officers had a probable cause to arrest, and regardless of how bad a litter problem the shopping centers were having, we can find no explanation for taking every high school student found on the parking lot under any circumstances and arresting them, handcuffing them, and keeping them in jail for the night as if they were threats to society. Whatever the legal points and the liability, how can any party deny that the criminal justice system operated here as an instrument of oppression?"

Morgan v. City of DeSoto, Tex., 900 F.2d 811, 814 (5th Cir. 1990).

II. Scott Presented Sufficient Evidence of Municipal Liability

"Municipal liability may be based . . . on an informal 'custom' so long as this custom amounts to 'a widespread practice that, although not authorized by written law or express municipal policy, is 'so permanent and well settled as to constitute a 'custom or usage' with the force of law.'" Brammer-Hoelter v. Twin Peaks Charter Acad., 602 F.3d 1175, 1189 (10th Cir. 2010), citing City of St. Louis v. Praprotnik, 485 U.S. 112, 127 (1988) (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 167–68 (1970). Municipal liability may also be based on "injuries caused by a failure to adequately train or supervise employees, so long as that failure results from 'deliberate indifference' to the injuries that may be caused." Id., citing City of Canton v. Harris, 489 U.S. 378, 388–91 (1989).

Defendants again do not address the evidence Scott presented to the District Court that the City of Albuquerque had a custom and practice of arresting children

for disruptions that were not the result of "physical intrusions." Scott related the evidence presented on pages seven and eight of his opening brief and will not re-state them here. Scott presented a pattern of Albuquerque police officers enforcing the interference with educational process statute in an over broad manner. Scott must show that officers were confronting a recurring situation in an unconstitutional manner. Brown v. Gray, 227 F.3d 1278, 1286 (10th Cir. 2000). The juvenile probation officer's testimony (Martha Todd) combined with police reports showing repeated use of criminal sanctions for childhood behavior are sufficient for a jury to conclude that the City had a de facto policy of indifference to how officers were applying the Interference with Educational Process statute.

In Brown, the Tenth Circuit affirmed a jury verdict when the plaintiff presented evidence that the training of officers in off-duty shooting scenarios was inadequate. In Brown, the plaintiff presented evidence to show that the scenario confronting the officer was a predictable scenario. Id. So too, the arrest of children for non-physical disturbances in schools was a predictable and, in fact, was a repeated scenario.

## CONCLUSION

For all the reasons stated in Scott's opening brief and for the reasons stated herein, Scott requests that this Court reverse the District Court and order that

judgment be entered against Hensley on his Fourth Amendment claim of arrest without probable cause.

## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

As required by Fed. R. App. P. 32(a)(7)(c), I certify that 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) insofar as this brief is proportionally spaced using Microsoft Word 2013 in 14 point Times New Roman and contains 1710 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). In coming to this word count, I relied on my word processor to obtain the count and it is Microsoft Word Version 2013.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonably inquiry.

Respectfully,

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## CERTIFICATE OF DIGITAL SUBMISSION

I hereby certify that a copy of the foregoing **APPELLANT'S REPLY BRIEF**, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with ESET Endpoint Security™ version 5.0.2228.1, with the most recent update occurring on January 26, 2016; and, according to the program, is free of viruses. 10th Cir. R. 25.3. In addition, I certify all required privacy redactions have been made.

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **APPELLANT'S REPLY BRIEF** was furnished through (ECF) electronic service to the following on this 27th day of January 2016:

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