No. 15-2154

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

QUENTIN SCOTT,	)	**On Appeal from the United States**
	)	**District Court for the District of**
Plaintiff-Appellant,	)	**New Mexico**
	)	
v.	)	**United States District Judge**
	)	**Scott W. Skavdahl**
	)	
CITY OF ALBUQUERQUE,	)	**Appeal from District Court Case**
et al.	)	**No. 1:14-cv-0665-SWS-WPL**
	)	
Defendants-Appellees.	)	

APPELLEES CITY OF ALBUQUERQUE, RAY SCHULTZ AND DAMON HENSLEY'S SUPPLEMENTAL BRIEF

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ORAL ARGUMENT IS NOT REQUESTED

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INTRODUCTION

Defendants-Appellees City of Albuquerque ("City"), Ray Schultz ("Chief Schultz") and Damon Hensley ("Officer Hensley") hereby submit this Supplemental Brief in accordance with this Court's August 2, 2016 Order for supplemental briefing in light of this Court's recent decision in *A.M. v. Holmes, et al.*, No. 14-2066, 2016 WL 3999756 (10th Cir. July 25, 2016). This Court's decision in *A.M.* is in line with well-settled precedent that "[s]tudents whose presence pose . . . an ongoing threat of disrupting the academic process may be immediately removed from school[,]" *Goss v. Lopez*, 419 U.S. 565, 582 (1975), and may be applied in the present case to affirm summary judgment in favor of Appellees.

At issue in the *A.M.* case and in the present case is NMSA 1978, § 30-20-13 (referred to as the "interference-with-educational-process statute") and whether the respective school resource officers in these cases that effectuated the arrests of the students had probable cause or arguable probable cause to do so pursuant to Section 30-20-13. In both cases, it has been judicially determined that the respective school resource officers had probable cause or arguable probable cause in which to effectuate the arrests pursuant to Section 30-20-13, the interference-with-educational-process statute. *See A.M.*, 2016 WL 3999756, at * 27-28; Aplt. App. at 312-313.

This Court's decision in *A.M.* must guide its decision in the present, pending case. *See United States v. Foster*, 104 F.3d 1228, 1229 (10th Cir. 1997) (holding that a "three-judge panel cannot disregard or overrule circuit precedent."). First, it is important to note that Mr. Scott's arrest in the present case occurred on January 16, 2009 and that this Court, in the *A.M.* case, held that, as of May 2011 (the date of F.M.'s arrest), "the extant clearly established law . . . would not have apprised a reasonable law-enforcement officer in [the school resource officer's] position that F.M.'s conduct in [the teacher'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.M.*, 2016 WL 3999756, at *23. Query as to how, if in 2011, the law was not clearly established concerning probable cause under Section 30-20-13(D), Officer Hensley could have possibly held or had that knowledge in 2009 that he was violating the law. The answer is clear; he could not have. This Court's decision in the *A.M.* case clearly sets the stage for affirmance of summary judgment in Officer Hensley's favor on the basis of qualified immunity.

Second, in the instant case's underlying appeal, Mr. Scott argued extensively that the district court erred by not discussing *State v. Silva*, 1974-NMCA-072, 86 N.M. 543, 525 P.2d 903. *See* Opening Brief, pgs. 15-18. However, this Court weighed the decision in *Silva* in the qualified immunity context in the *A.M.* case

and rejected its application to either Section 30-20-13, the qualified immunity analysis, or the clearly-established prong of the qualified immunity analysis. *See A.M.*, 2016 WL 3999756, at *35-50. Now, in his Supplemental Brief, Mr. Scott argues that the facts of his case are distinct from those in *A.M.* and that these distinct facts should somehow warrant the rejection of this Court's decision in *A.M.* insofar as it declined to hold that the decision in *Silva* provided notice to school resource officers that they were violating the law in arresting students for violations of the interference-with-educational-process statute. Mr. Scott's position is untenable. Applying the *A.M.* Court's analysis of the common meaning of the words contained in the interference-with-educational-process statute, Section 30-20-13, as it must do, this Court may arrive at the same conclusions as the *A.M.* Court; that Appellees are entitled to summary judgment as a matter of law.

ARGUMENT

I. *A.M. v. Holmes*, No. 14-2066, 2016 WL 3999756 (10th Cir. July 25, 2016)

In the relevant portions of this Court's decision in *A.M.*, this Court addressed whether a minor student's actions of disrupting class by burping and by continuing the behavior in the hallway after the teacher asked him to exit the classroom and sit by the classroom doorway was enough to satisfy the probable cause standard in order to justify an arrest pursuant to Section 30-20-13. *A.M.*, 2016 WL 3999756, at *3-6, 23-28. This Court determined that it was. Although this Court "centered" its

analysis on the clearly-established question, in doing so, it concluded that the officer's action in *A.M.* was supported by arguable probable cause. *Id.*, at *26-28.

The opinion in *A.M.* squarely addresses arguments made by Mr. Scott in his appeal; namely whether Officer Hensley had probable cause (or arguable probable cause) to arrest Mr. Scott and whether the law was clearly established at the time of Mr. Scott's arrest such that a reasonable officer would know that his conduct was unlawful. The import of the opinion in *A.M.* is discussed in more detail below in context of each of Mr. Scott's claims.

II. QUALIFIED IMMUNITY AND UNLAWFUL ARREST

In the present case, on appeal in this Court, Mr. Scott did not argue that there were factual issues that would preclude summary judgment for Officer Hensley on the issue of qualified immunity. Rather, Mr. Scott focused on the district court's application of Section 30-20-13(D) as it pertained to Mr. Scott's arrest; an application that was upheld in this Court's decision in *A.M.* Section 30-20-13(D) states as follows:

> 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 with or obstruct the lawful mission, processes, procedures or functions of a public or private school.

Id. As this Court discussed in the opinion in *A.M.*, Section 30-20-13(D) renders it unlawful to commit "*any* act which would . . . interfere with" or "disrupt" school

functioning and, thereby, "interfere with the educational process." *A.M.*, 2016 WL 3999756, at *32 (emphasis in original).

As explained by this Court in the *A.M.* opinion, the common meaning of the word "any" is "one or some indiscriminately *of whatever kind*." *Id.* (emphasis in original; citation omitted). The word "interfere" means "to be in opposition: to run at cross-purposes[;] . . . to act . . . so as to . . . diminish" or to "prevent (a process or activity) from continuing or being carried out properly." *Id.*, at *32-33 (alterations in original; citation omitted). The word "disrupt" means "to throw into disorder[;] . . . to interrupt to the extent of stopping, preventing normal continuance of, or destroying[] that experience" or to "caus[e] a disturbance or problem." *Id.*, at *33 (alterations in original; citation omitted).

In the *A.M.* decision, as recognized by Mr. Scott in his Supplemental Brief at pg. 2, this Court applied Section 30-20-13 and held that "[t]he 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 [the teacher's] planned teaching tasks." *A.M.*, 2016 WL 3999756, at *13. Important to the analysis in the present case is the application of the common meanings of the words contained in Section 30-20-13, as defined by this Court in the *A.M.* case.

Utilizing the common meanings of the words contained in Section 30-20-13, the interference-with-educational-process statute prohibits any act that diminishes or prevents a process or activity from continuing, prevents the normal continuance of the functions of a school or causes a disturbance or problem in the mission, process, procedures or functions of a school. *Supra*. Applying these common linguistic meanings to the facts of the present case, as described in more detail below, this Court may arrive at the same conclusion it did in the *A.M.* case, the same conclusion the district court arrived at, and grant summary judgment to Officer Hensley.

Mr. Scott also argues in his Supplemental Brief that his arrest was sufficiently egregious so as to violate the law with regard to lawful arrests. *See* Supplemental Brief, pgs. 3-9. However, Mr. Scott's argument is derived from something the Court in *A.M.* specifically did not discuss (as conceded by Mr. Scott on page 3 of his Supplemental Brief) and therefore, is outside of the scope of the supplemental briefing ordered by this Court.[1] Mr. Scott also takes the opportunity to cite to multiple "commentators" (notably from 2016 (on pages 4-5), 2012 (on pages 5-6), 2012-13 (on page 6))[2] not otherwise apparently cited in the *A.M.*

[1] In its Order, this Court specifically requested supplemental briefing to address "the impact of this court's recent decision in *A.M.*" *See* Order, filed August 2, 2016.

[2] Interestingly, the bulk of the commentary cited to by Mr. Scott references the disparate effect policing in schools has on students of color; an allegation never

opinion, inferring that this commentary from 2012, 2013 and 2016 was somehow adequate to inform Officer Hensley of the "egregiousness" of his actions in 2009. In doing so, Mr. Scott misses the mark; both with respect to the purpose of the supplemental briefing and with regard to the determination of whether the law was clearly established in 2009 such that a reasonable officer in Officer Hensley's position would have known that his conduct was unlawful.

In his Supplemental Brief, Mr. Scott argues, contrary to the opinion in *A.M.*, that Officer Hensley's arrest of him reached such a level of egregiousness that this Court should relax the "specificity of judicial precedent." *See* Supplemental Brief, pg. 8. However, this Court's opinion in *A.M.* guides the analysis in the present case using the common meanings of the words contained in Section 30-20-13. The common meanings of the words contained in Section 30-20-13 prohibit any act that diminishes or prevents a process or activity from continuing, prevents the normal continuance of the functions of a school or causes a disturbance or problem in the mission, process, procedures or functions of a school. *Supra*.

In the present case, the undisputed facts show that Officer Hensley knew Mr. Scott was not in class and that the school secretary, Ms. Griego, had stopped what she was doing to inquire of Mr. Scott as to what he was doing. *See* Appellees' Answer Brief, pg. 3. Mr. Scott, having told Ms. Griego that he was helping out the

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made by Mr. Scott as related to his arrest, making it inapplicable to the present case in any event. *See* Supplemental Brief, pgs. 4-5, 8.

custodians, was found by Officer Hensley to be in the custodian's office. *Id.* At that point, Mr. Scott's teacher, Ms. Wiggins, was interrupted from her teaching so that she could assist in addressing the situation. *Id.* Ms. Wiggins reported to Officer Hensley that Mr. Scott was supposed to be in health class and was probably ditching class, to which Mr. Scott later admitted. *Id.* At the time, however, Mr. Scott told Officer Hensley that he was allowed to leave class at any time to help the custodians; a fact that was refuted by Ms. Wiggins. *Id.* at pg. 4.

It is clear that in applying the common meanings of the words of the interference-with-educational-process statute, Mr. Scott's acts were (1) diminishing or preventing the activities of Ms. Griego, Ms. Wiggins and Officer Hensley to continue; (2) preventing the normal continuance of the school function; and (3) causing a disturbance or problem in the mission, process, procedure or function of the school. Mr. Scott's act of ditching class and attempting to hang out in the custodian's office instead of reporting to his assigned classroom clearly disrupted the regular functions of Ms. Griego, Ms. Wiggins and Officer Hensley and created a disturbance in the process of the school. Each Ms. Griego, Ms. Wiggins, and Officer Hensley stepped away from the tasks they were performing in order to address Mr. Scott's conduct. Moreover, and in specifically addressing Ms. Wiggins' time spent away from her classroom to deal with Mr. Scott ditching his class, much like in *A.M.*, there was disorder was injected into the "learning

environment" thereby interfering with the teacher's "planned teaching tasks." *See A.M.*, 2016 WL 3999756, at *13. This similarity alone warrants the affirmance of summary judgment in this case much as it did in the *A.M.* case.

Finally, Mr. Scott's reliance on the opinion in *Castenada v. The City of Albuquerque, et al*., No. CIV 14-0103 RB/LAM, Doc. 89 (D.N.M. February 4, 2016) is misplaced, as not only are the facts distinguishable (and there were disputed issues of fact present in that case which are not present in the instant case), but it was decided before this Court's decision in *A.M.* discussed the application of the common meaning of the statutory words to factual circumstances. *See*, *e.g.*, *Castenada*, at *17, 19 (holding that "the Court finds that there is a genuine issue of material fact" and "[q]uestions of fact remain that preclude the Court from deciding whether a reasonable officer would have concluded that Plaintiff's behavior violated the statute.").

III. EXCESSIVE FORCE

The issue of excessive force discussed in *A.M.* reaffirms the principle that "the clearly established law in May 2011 [and therefore, January of 2009] would not have apprised a reasonable police officer similarly situated . . . that he could be held liable under § 1983 for a Fourth Amendment violation based on handcuffing a minor pursuant to a lawful arrest." *A.M.*, 2016 WL 3999756, at *52. Additionally, this Court in *A.M.* reiterated the standard under the law that, in order to state a

claim for relief for a handcuffing injury, a showing of "actual, non-de minimis physical, emotional, or dignitary injury" must be shown. *Id.*, at *54. In the present case, similar to the district court's decision in the *A.M.* case, the district court found that "the undisputed evidence in the record shows nothing beyond a de minimis injury. *See* Aplt. App. at 320-323; *see A.M.*, 2016 WL 3999756, at *54-55.

Mr. Scott does make assertions in his Supplemental Brief that he was humiliated during the arrest and infers in his Brief that this alleged humiliation should be analyzed under an excessive force inquiry. However, this issue was addressed by this Court in *A.M.*, 2016 WL 3999756, at *60-61. In the decision in *A.M.*, this Court cited to *Atwater v. City of Lago Vista*, 532 U.S. 318, 354-55 (2001), wherein the Court held that while the "arrest was surely humiliating, . . . it was no more harmful to . . . privacy or . . . physical interests that the normal custodial arrest." This Court in *A.M.* went on to state that "[w]e . . . characterized *Atwater* as instructing that, standing alone, embarrassment associated with handcuffing during a lawful arrest cannot support an actionable excessive-force claim." *A.M.*, 2016 WL 3999756, at *61. Mr. Scott's "humiliation" claims may be similarly disposed of.

IV. ADA AND MUNICIPAL LIABLITY

Appellees agree with Appellant's position in his Supplemental Brief that the decision in *A.M.* does not touch on Mr. Scott's argument with regard to the

Americans with Disabilities Act ("ADA") or his municipal liability claim. *See* Supplemental Brief, pg. 10. As stated in their previously-filed Answer Brief, Mr. Scott did not and can not show that Officer Hensley arrested him for a manifestation of his alleged disability or for failing to accommodate him in the arrest. *See J.H. ex rel. J.P. v. Bernalillo County*, 806 F.3d 1255, 1260-61 (10th Cir. 2015). Moreover, in the absence of an underlying constitutional violation, Mr. Scott's municipal liability claim fails as a matter of law. *See*, *e.g.*, *Bd. of County Comm'rs of Bryan County, Okla. v. Brown*, 520 U.S. 397, 404 (1997).

CONCLUSION

This Court's decision in *A.M. v. Holmes*, No. 14-2066, 2016 WL 3999756 (10th Cir. July 25, 2016) may guide the decision in the instant case and supports affirmance of the summary judgment that was granted in favor of Appellants.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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 and in 14 point Times New Roman.

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

/s/ *Kristin J. Dalton*
Assistant City Attorney

CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing **APPELLEE'S SUPPLMENTAL 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 the VirusTotal Version 3.0 and, according to the program, is free of viruses. In addition, I certify that all required privacy redactions have been made.

/s/ *Kristin J. Dalton*
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **APPELLEE'S SUPPLEMENTAL BRIEF** was furnished through ECF electronic service to the following on this 30th day of August, 2016:

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