IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

NO. 19-14725-E

E.F., a minor, by and through, Laquarbashaun Ford, his mother, Plaintiff-Appellant

v.

Troup County School System, et al., Defendants-Appellees

On Appeal from

the United States District Court

for the Northern District of Georgia – Newman Division

Case No. 3:19-cv-00141-TCB

MOTION OF THE EDUCATION CIVIL RIGHTS ALLIANCE, ET AL., FOR LEAVE TO FILE INITIAL BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT FOR REVERSAL

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E.F. v. Troup County School District, et al., No. 19-14725-E

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel for the Education Civil Rights Alliance, Lawyers' Committee for Civil Rights Under Law, Southern Poverty Law Center, National Center for Youth Law, Equal Justice Society, Intercultural Development Research Association, Education Deans for Justice and Equity, Legal Aid Justice Center, Children's Law Center, Washington Lawyers' Committee for Civil Rights and Urban Affairs, Juvenile Law Center, Public Counsel, and Gwinnett Parent Coalition to Dismantle the School to Prison Pipeline, as amici curiae, pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Eleventh Circuit Rule 26.1-1, hereby certify that:

1. The foregoing organizations have no parent corporations;

2. No publicly held corporation owns more than 10% of any of the foregoing organizations' stock; and

3. Neither any of the foregoing organizations nor the undersigned counsel is aware of any persons, firms, partnerships, or corporations that may have an interest in the outcome of this appeal:

By: /s/ Delia G. Frazier
Delia G. Frazier
Attorney of Record for Amici Curiae
Education Civil Rights Alliance, et al.

The Education Civil Rights Alliance, Lawyers' Committee for Civil Rights Under Law, Southern Poverty Law Center, National Center for Youth Law, Equal Justice Society, Intercultural Development Research Association, Education Deans for Justice and Equity, Legal Aid Justice Center, Children's Law Center, Washington Lawyers' Committee for Civil Rights and Urban Affairs, Juvenile Law Center, Public Counsel, and Gwinnett Parent Coalition to Dismantle the School to Prison Pipeline (collectively "Amici") respectfully move for leave pursuant to Rule 29 of the Federal Rules of Appellate Procedure to file, as *amici curiae*, a brief in support of E.F.'s appeal seeking reversal of the district court's dismissal of his case under the *Younger* abstention doctrine. Movants' proposed brief is attached hereto as Exhibit A.

Interest of Amici

The Education Civil Rights Alliance ("ECRA") is a diverse and experienced group, convened by the National Center for Youth Law, of organizers, educator organizations, community groups, professional associations, civil rights organizations, and government agencies that are committed to protecting the civil rights of marginalized students. The ECRA was formed because of the urgency to protect student's civil rights in the face of growing attacks around the country. It believes that schools should serve, educate, empower and be safe for all students. The ECRA has an interest in protecting marginalized students' and their parents'

civil rights in the education context. The following organizations are members of the ECRA that likewise have an interest in this matter.

The Lawyers' Committee for Civil Rights Under Law ("Lawyers' Committee") is a tax-exempt, non-profit civil rights organization founded in 1963 at the request of President John F. Kennedy in order to mobilize the private bar in vindicating the civil rights of African-Americans and other racial and ethnic minorities. The principal mission of the Educational Opportunities Project at the Lawyers' Committee is to ensure that all children have access to quality educational opportunities and to enforce civil rights protections for all students. As a leading racial justice organization, the Educational Opportunities Project achieves its mission by advocating on behalf of students of color though litigation, public policy advocacy, and know-your-rights trainings.

The Southern Poverty Law Center ("SPLC") is a nonprofit civil rights organization founded in 1971, dedicated to fighting hate and bigotry, and to seeking justice for the most marginalized members of society through public advocacy and education, policy reform, and direct and impact litigation. Among other things, the SPLC's Children's Rights practice seeks to ensure that all children have equal opportunities to live, grow, and thrive by working to end the school-to-prison pipeline, advance education equity, and improve access to health services for children in the Deep South.

The National Center for Youth Law ("NCYL") is a private, non-profit law firm that uses the law to help children achieve their potential by transforming the public agencies that serve them. For more than 40 years, NCYL has worked to protect the rights of low-income children and to ensure that they have the resources, support, and opportunities they need to become self-sufficient adults. One of NCYL's priorities is to ensure that youth have access to appropriate education services to improve their educational outcomes and reduce the number of youth subjected to harmful and unnecessary incarceration. NCYL provides representation to children and youth in cases that have broad impact, and has represented many students in litigation and class administrative complaints to ensure their access to adequate, appropriate and non-discriminatory services. NCYL currently represents, and has represented, students in challenging the violation of their federal rights in school discipline by school districts in federal courts throughout the nation.

The Equal Justice Society ("EJS") is transforming the nation's consciousness on race through law, social science, and the arts. Through litigation and legislative advocacy, EJS challenges racially discriminatory and unlawful school discipline practices that disproportionately target Black students and deprive Black students of their education. EJS has a strong interest in ending the Troup County School District's racially discriminatory discipline practices and

ensuring that student E.F. can seek proper and fair remediation for the harms these unlawful practices have inflicted on him.

The Intercultural Development Research Association ("IDRA") is an independent, non-profit organization whose mission is to achieve educational opportunity for every child through strong public schools that prepare every student for college. IDRA engages in research, conducts policy analyses, provides trainings for educators, and supports community and student leadership to address issues, like harmful school discipline and school policing, that limit access to excellent and equitable schools for students.

Education Deans for Justice and Equity ("EDJE") is a nationwide alliance of deans of colleges and schools of education that advances equity and justice in education by speaking and acting collectively and in solidarity with communities regarding policies, reform proposals, and public debates. EDJE speaks on issues from the perspective of educational research, which soundly supports this amicus brief.

The Legal Aid Justice Center ("LAJC") partners with communities and clients to achieve justice by dismantling systems that create and perpetuate poverty. LAJC's mission is to seek equal justice for all by solving clients' legal problems, strengthening the voices of low-income communities, and rooting out the inequities that keep people in poverty.

Children's Law Center ("CLC") has worked on behalf of adolescents in a variety of settings, including adolescents involved in the juvenile and criminal justice systems. The Children's Law Center, Inc. is a non-profit organization committed to the protection and enhancement of the legal rights of children. CLC strives to accomplish this mission through various means, including providing legal representation for youth and advocating for systemic and societal change. For 30 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.

The Washington Lawyers' Committee for Civil Rights and Urban Affairs ("WLCCRUA") works to create legal, economic and social equity through litigation, client and public education and public policy advocacy. While WLCCRUA fights discrimination against all people, WLCCRUA recognizes the central role that current and historic race discrimination plays in sustaining inequity and recognizes the critical importance of identifying, exposing, combating and dismantling the systems that sustain racial oppression. WLCCRUA partners with individuals and communities facing discrimination and with the legal community to achieve justice.

Juvenile Law Center advocates for rights, dignity, equity and opportunity for youth in the child welfare and justice systems through litigation, appellate

advocacy and submission of amicus briefs, policy reform, public education, training, consulting, and strategic communications. Founded in 1975, Juvenile Law Center is the first non-profit public interest law firm for children in the country. Juvenile Law Center strives to ensure that laws, policies, and practices affecting youth advance racial and economic equity and are rooted in research, consistent with children's unique developmental characteristics, and reflective of international human rights values.

Public Counsel serves students and community organizers across California to disrupt the school to prison pipeline, confront racial bias in schools and support school climate transformation so all students can thrive in school. The California Education Code provides that school disciplinary consequences must be related to school activities and students across the country should have this same protection.

Gwinnett Parent Coalition to Dismantle the School to Prison Pipeline ("Gwinnett SToPP") is a grassroots parent-driven organization focused on dismantling the school to prison pipeline in Gwinnett County. Gwinnett SToPP seeks to build and strengthen relationships within the community by increasing public awareness of the injustice that all children face within the educational system as it relates to the pipeline and by promoting policy changes through data accountability and fact-based incident reporting.

Relevance of Proposed Brief

Amici offer the critical perspectives of organizations committed to protecting the civil rights of marginalized students. The national reach of ECRA's member organizations means that they are well-positioned to assist the Court in its consideration of this matter by presenting policy implications of the Court's holding and its potential impact on access to federal remedies, education equity, and low-income families of color.

Whether this Court affirms or reverses the lower court's application of *Younger* abstention will have serious implications for Amici and their ability to seek legal redress for the students and communities they serve. Accordingly, it is both desirable and appropriate that Amici be provided an opportunity to present their views, by way of the proposed brief. The matters presented therein are not duplicative and are directly relevant to the issues raised in the merits briefing. Thus, the proposed brief will assist the Court in its consideration of the applicability of *Younger* abstention.

Source of Authority

This Court possesses the inherent authority to designate amici curiae. *See* Fed. R. App. P. 29(a)(2) (authorizing the filing of *amicus* briefs either by leave of court or by consent of the parties). In the past, this Court has used briefs of *amici curiae* to provide additional background on complex constitutional issues. *See*,

e.g., *Evans v. Stephens*, 407 F.3d 1272, 1284 (11th Cir. 2005) (Carnes, J., concurring) (finding that some *amicus* briefs in the case were "helpful").

The proposed brief provides a broader policy perspective not found in the parties' briefing and does not "expand the scope of an appeal to implicate issues not presented by the parties to the district court." *Richardson v. Ala. State Bd. of Educ.*, 935 F.2d 1240, 1247 (11th Cir. 1991) (citing *McCleskey v. Zant*, 499 U.S. 467, 523 n.10 (1991) (Marshall, J., dissenting)). Neither is the proposed brief the work of a party or a means for a party to "evad[e] the page limitations on a party's briefs." *Glassroth v. Moore*, 347 F.3d 916, 919 (11th Cir. 2003).

Amici seek leave to file the proposed brief under this Court's inherent authority and are not aware of any opposition from the parties. It is appropriate for the Court to exercise its discretion and grant leave to file because the proposed brief will meaningfully contribute to the understanding of the issues presented.

Authorship and Funding

No party's counsel authored the proposed brief in whole or in part. In addition, counsel for Amici prepared the proposed brief *pro bono*. No party, no party's counsel, nor any other person contributed money that was intended to fund the preparation or submission of the proposed brief.

Conclusion

For these reasons, Amici respectfully request that their motion for leave to file the proposed brief as *amici curiae* be granted, and that the enclosed original and six copies of the brief of ECRA, et al. be accepted for filing.

Dated: March 13, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to F.R.A.P. 25(d), I hereby certify that the Motion of the Education Civil Rights Alliance, et al., for Leave to File Initial Brief of Amicus Curiae in Support of Appellant for Reversal has been filed with the Clerk of Court by filing with the Clerk of Court electronically and served on the counsel of record by the Court's electronic Notice of Docket Activity or regular mail, this 13th day of March, 2020.

/s/ Delia G. Frazier
Delia G. Frazier

EXHIBIT A

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Counsel for Amici

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Except for the following, all parties appearing before the district court and this Court are listed in the Brief for Appellant, Appellees, and Amici.

The Education Civil Rights Alliance, Lawyers' Committee for Civil Rights Under Law, Southern Poverty Law Center, National Center for Youth Law, Equal Justice Society, Intercultural Development Research Association, Education Deans for Justice and Equity, Legal Aid Justice Center, Children's Law Center, Washington Lawyers' Committee for Civil Rights and Urban Affairs, Juvenile Law Center, Public Counsel, Gwinnett Parent Coalition to Dismantle the School to Prison Pipeline, and DLA Piper, LLP did not participate in the district court below, but will appear as *amici curiae* for Appellant before this Court.

The foregoing organizations have no parent corporations and no publicly owned corporation owns 10% of more of their stock.

Respectfully submitted this 13th day of March, 2020.

/s/ *Delia G. Frazier*
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INTEREST OF AMICI

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Amici have sought leave from the Court to file this brief. No party's counsel authored the brief in whole or in part, or contributed money to its preparation or submission. No person, other than amici herein, contributed money to fund the preparation or submission of this brief.

Amici hereby adopt the arguments of Appellant in toto.

STATEMENT OF THE ISSUES

1. Whether *Younger* abstention effectively closes federal court doors and available provisional remedies to student litigants seeking to vindicate their constitutional rights in the face of irreparable harm.

2. Whether the sections of the Troup County School Code of Conduct ("TCSCC") are unconstitutionally vague and applied with racial animus by Appellees, in violation of E.F.'s rights of equal protection and due process.

3. Whether Appellees' conduct in expelling E.F. for filming a hip-hop music video off campus on a Saturday violated E.F.'s mother's Fourteenth Amendment substantive due process right to direct the upbringing of her son.

SUMMARY OF THE ARGUMENT

When a student is suspended or expelled as a result of the student's exercise of free speech, the availability of federal courts to vindicate the student's constitutional rights is paramount to any policy concerns in support of *Younger* abstention. Provisional remedies available in federal court—but not in school discipline proceedings—are crucial to protect a student's constitutional rights in these circumstances and ensure that any injury to a student's right to public education, reputation, and future livelihood can be adequately mitigated. Abstention here deprives students like E.F. of an adequate remedy for the unconstitutional infringement upon and irreparable harm to their rights.

These concerns are paramount in a situation in which, under the rule announced in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), the school violated the First and Fourteenth Amendments by expelling E.F. for an off-campus music video that was neither connected to nor caused any interference with the school. *Id.* at 509. Furthermore, the impermissibly vague school code did not define terms like "street gang" or "gang activity." *See Stephenson v. Davenport Cmty. Sch. Dist*., 110 F.3d 1303, 1309–11 (8th Cir. 1997) ("We find no federal case upholding a regulation, challenged as vague or overbroad, that proscribes 'gang' activity without defining that term."). Without any definitions, no person of reasonable intelligence would have fair warning as to the type of conduct that would constitute a violation. Moreover, the evidence shows that the discretion allotted to school administrators causes black students to suffer disproportionate discipline, especially for perceived "gang related" activity. These students require a neutral forum where they can vindicate their rights.

Finally, abstention threatens to deny parents an opportunity to protect their rights to direct the upbringing of their children when schools reach into their homes to punish students when, as in this case, that their parents expressly support their artistic talent and development. As the Supreme Court has directed, "[i]t is cardinal . . . that the custody, care and nurture of the child reside first in the parents, whose

primary function and freedom include preparation for obligations the state can neither supply nor hinder." *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

ARGUMENT

I. Because Appeals to the School Board Do Not Afford the Same Protections as Federal Litigation, Students Need Access to Federal Courts to Vindicate Their Constitutional Rights.

In cases where a student's suspension or expulsion violates the student's First Amendment rights, it is imperative that the student have access to federal courts to prevent irreparable harm. Abstention in cases such as this would effectively foreclose students from seeking federal remedies.

As a general rule, federal courts have a "virtually unflagging obligation" to hear cases within their jurisdiction but can abstain in exceptional cases where there is an ongoing state judicial proceeding that implicates important state interests and provides an adequate opportunity to raise constitutional challenges. *See Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 70 (2013); *31 Foster Children v. Bush*, 329 F.3d 1255, 1274 (11th Cir. 2003) (describing the three-factor abstention analysis and noting that "non-abstention remains the rule"); *see also M.R. v. Bd. of Sch. Comm'rs of Mobile Cty.*, No. 11-0245-WS-C, 2012 WL 3778283, at *6 (S.D. Ala. Aug. 30, 2012) (finding *Younger* abstention inapplicable when students sued school officials over practices related to long-term suspensions because the federal court could provide constitutional relief without intruding on state proceedings). A school's

interest is limited when determining school discipline measures for alleged conduct taking place outside of the school. *See Holloman ex Rel. Holloman v. Harland*, 370 F.3d 1252, 1297 (11th Cir. 2004) (finding "[t]he school has a more compelling interest to establish order and discipline in the classroom" than outside of it "because that is where the curriculum portion of the school day occurs").

In addition, factors such as timeliness, presence of bias, and the lack of sufficient remedies may render the state proceeding inadequate. *See, e.g.*, *Butler v. Ala. Judicial Inquiry Comm'n*, 261 F.3d 1154, 1160 (11th Cir. 2001). For example, bias can render a proceeding inadequate in cases of prejudgment or when the decisionmaker is involved in the underlying case. *See Gibson v. Berryhill*, 411 U.S. 564, 578 (1973); *see also Davis v. Monroe Cty. Bd. of Educ.*, 120 F.3d 1390, 1403–04 (11th Cir. 1997) (finding that school officials facing potential personal liability could be rendered "impermissibly biased"), *rev'd on other grounds*, 526 U.S. 629 (1999). Moreover, a federal court should not abstain if irreparable injury, including a flagrant constitutional violation, would result. *See New Orleans Pub. Serv., Inc. v. Council of the City of New Orleans*, 491 U.S. 350, 366 (1989).

When school board tribunals are unable to provide adequate constitutional remedies, students must bring constitutional claims separately. If federal courts abstain, they force students to wait for the conclusion of slow and inadequate processes before they can vindicate their rights. In the interim, students suffer

permanent, irreparable harm. Georgia law limits relief to the parties in a given case. O.C.G.A. § 20-2-1160. Because the record is closed in these proceedings, students are also unable to raise claims of disparate treatment, as they would be able to do in federal court. Students do not receive the "impartial decision-maker" to which they are entitled if proceedings occur before the same school board that may be liable when its rules violate the Constitution, as in complaints such as E.F.'s. *See Davis*, 120 F.3d at 1403 n.20. Furthermore, a wrongfully suspended student might wait months or even years to receive a final decision after appeals to the State Board of Education ("SBOE") and the state judiciary. *See* Ga. Comp. R. & Regs. § 160-1-3-.04 (providing 130 days in deadlines between a local hearing and an SBOE decision); *see also Henry Cty. Bd. of Educ. v. S.G.*, 301 Ga. 794 (2017). Provisional remedies available in federal courts are crucial to ensure mitigation of any injury to a student's right to public education, reputation, and future livelihood. *See*, *e.g.*, *Goss v. Lopez*, 419 U.S. 565, 575 (1975) (holding that arbitrary 10-day suspension violated students' property interests in education and liberty interests in their reputations); *Jones v. Bd. of Governors of the Univ. of N.C.*, 704 F.2d 713, 716 (4th Cir. 1983) (holding preliminary injunction appropriate where student nurse would be barred from taking courses during spring semester, delaying her entry into the workforce and leaving a permanent gap in her education on her resume).

Here, without access to federal courts and available provisional remedies, students will suffer irreparable harm through loss of education and reputation. Students like E.F. will be thrown off track and, at best, forced into alternative schooling, unable to graduate on time with their peers. As many scholars note, a suspension or expulsion greatly increases the chance that a student will suffer permanent educational loss, since removed students are more likely to drop out of school.[1] Even a favorable SBOE decision could arrive months too late, after the harm has already occurred. Students arbitrarily and subjectively charged with "gang activity" also face irreparable harm to their reputations, and their future education and career prospects could suffer from undeserved and unsupported associations with criminal activity on their records. The SBOE lacks authority to provide injunctive relief, and, without federal court intervention, school administrators would be free to continue enforcing unconstitutional policies against future students. To uphold the district court's ruling would create a dangerous precedent that forces students to wait years for a final decision and may lead to further irreparable injuries.

[1] *See* Randee J. Waldman & Stephen M. Reba, *Suspending Reason: An Analysis of Georgia's Off-Campus Suspension Statute*, 1 J. MARSHALL L.J. 1, 19 (2008). And without a high school diploma, students face a bleak economic future, earning almost $10,000 less per year, as compared to high school graduates. *Id.* In turn, greater society is greatly impacted as the loss of potential earnings substantially diminishes contributions to tax bases. *See* HENRY LEVIN ET AL., THE COST AND BENEFITS OF AN EXCELLENT EDUCATION FOR ALL OF AMERICA'S CHILDREN 7–9 (2007).

II. Federal Courts Must Have Power to Review Unconstitutionally Vague School Disciplinary Provisions that Violate Students' Rights to Freedom of Expression, Due Process, and Equal Protection.

Vague provisions of school codes that punish alleged "gang activity" off-campus have the dangerous potential to violate students' rights to freedom of expression and due process rights to education, and such vague language grants school administrators wide enforcement discretion, leading to the disproportionate discipline of black students. The Supreme Court's decision in *Tinker* requires that a school official's restriction of speech be justified by a "reasonable fear" that such speech would "appreciably disrupt the appropriate discipline in the school." *Denno v. Sch. Bd.*, 218 F.3d 1267, 1271 (11th Cir. 2000). This Court has declined to find such fear where no disruption actually occurs. *See Holloman*, 370 F.3d at 1279 (finding that school administrators could not punish student's silent Pledge of Allegiance protest under *Tinker* when it "had virtually no impact on the class"). Courts applying *Tinker* have recognized a high constitutional bar to regulate a student's off-campus speech and, thereby, assert authority "before and after school, off school grounds, and with regard to [students'] rights of expressing their thoughts." *Shanley v. N.E. Ind. Sch. Dist.*, 462 F.2d 960, 964 (5th Cir. 1972); *see Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir. 2011) (holding "[i]t would be an unseemly and dangerous precedent to allow the state, in the guise of school authorities, to reach into a child's home and control his/her

actions there to the same extent that it can control that child when he/she participates in school sponsored activities"); *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 929–30 (3d Cir. 2011) (finding no foreseeable substantial disruption with school activities where student created, on a weekend and on her home computer, a MySpace profile containing adult language and content that made fun of her middle school principal). This Court has only applied *Tinker* to off-campus speech in the narrow situation of school administrators "disciplining a student for off-campus conduct that violates the rights of another student." *Doe v. Valencia Coll.*, 903 F.3d 1220, 1231 (11th Cir. 2018).

"A sufficiently vague policy may fail to put students on fair notice of what is prohibited and provides insufficient standards for enforcement." *Sypniewski v. Warren Hills Reg'l Bd.*, 307 F.3d 243, 258 (3d Cir. 2002). An impermissibly vague law or code also risks offending due process through enforcement in "an arbitrary or discriminatory way." *Fed. Commc'ns Comm'n v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). Fear of arbitrary punishment can chill speech, and this Court has recognized that, in the school setting, discipline "from an authority figure with tremendous discretionary authority . . . cannot help but have a tremendous chilling effect on the exercise of First Amendment rights." *Holloman*, 370 F.3d at 1269.

Courts have long found that terms like "gang" and "gang-related" can be "notoriously imprecise." *See, e.g.*, *Stephenson*, 110 F.3d at 1309 (citing *Lanzetta v.*

New Jersey, 306 U.S. 451 (1939)) (describing various common meanings of the word "gang" across decades). When such terms remain undefined in school codes, students lack notice of prohibited conduct, and school officials can exercise broad discretion—and discrimination—in enforcement. *See Lopez v. Bay Shore Union Free Sch. Dist.*, 668 F. Supp. 2d 406, 421 (E.D.N.Y. 2009) (finding that a rule forbidding "all 'affiliation, activity, and/or communication in connection with . . . a gang'" created "the plausible inference that administrators exercised wide-ranging discretion in its implementation"); *Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 669 (S.D. Tex. 1997) (finding that the term "gang-related apparel" "failed to provide adequate notice . . . regarding prohibited conduct").

Section 7.10 of the Troup County Student Code of Conduct ("TCSCC") prohibits students from actively participating in any "street gang with knowledge that its members engage in or have engaged in a pattern of gang activity and who willfully promotes, furthers, or assists any criminal conduct or violation of school rules, or represents himself or herself as being a gang member." Yet, nowhere does the TCSCC define "street gang" or "gang activity." *See Stephenson*, 110 F.3d at 1309–11 (voiding the school district's regulation prohibiting "[g]ang related activities such as display of 'colors', symbols, signals, signs, etc." and noting that the Court could not find any precedent upholding a challenged regulation "that proscribes 'gang' activity without defining that term"). Section 7.10 reaches

expression sheltered by the First Amendment, while providing no fair warning to students like E.F. that their off-campus artistic expression is prohibited. Section 7.10 is so ambiguous that it encompasses an extraordinary amount of protected activity, like wearing clothing that could resemble gang symbols. *See Chalifoux*, 976 F. Supp. at 665 (finding that wearing a rosary as a necklace is protected symbolic speech).

Here, school administrators punished a student for creating a rap music video filmed off-campus and without any nexus whatsoever to LaGrange High School, other than that E.F. was a black student there. Such an attenuated connection does not give rise to the "reasonable fear" of disruption to the school environment necessary to discipline a student under *Tinker*. This is particularly true, where, as here, there is no evidence of any "substantial disruption" beyond mere speculation: there is no evidence to show that any student viewed the music video. Doc. 5, ¶¶ 51–53. It is not enough for school administrators to claim that the internet blurs the line between on-campus and off-campus speech when this claim attempts to justify giving school administrators unfathomable authority to discipline today's students' speech in all aspects of their well-connected lives. This approach could justify punishing anything posted on the internet at any time, so long as it involves a student.

Furthermore, vague codes like Section 7.10 have a chilling effect on student speech. Students other than E.F. have no doubt contemplated rapping and creating music videos. When these students see their peers punished arbitrarily, they know

that they must either risk punishment by expressing themselves musically or stay silent. Some will undoubtedly choose the latter, and their expression will have been silenced. Though there are legitimate interests served in protecting schools from violence, the significant breadth of free speech swallowed up by overinclusive prohibitions of "gang activity" dwarfs those interests and places black students, especially, at peril. When school board tribunals can't consider remedies for these kinds of chilling effects, courts are necessary to determine the balance of those interests and provide the prospective relief necessary to protect student speech.

Further, the discretion allowed in vague school regulations allows ad hoc and subjective enforcement, which, in this case, has seemingly been applied in a discriminatory manner in violation of the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. *See* 42 U.S.C. § 2000d *et seq*. An illegal racial discrimination claim brought under the Equal Protection Clause or Title VI against a facially neutral policy must show that the policy had an adverse effect and that it was motivated by discriminatory animus. *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 484–85 (1982); *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264–65 (1977).

With no definition of "street gang" or "gang activity," school officials can freely impose their subjective viewpoints on artistic impression and free speech disproportionately as to certain races in a manner that violates students' equal

protection rights. Studies have demonstrated pervasive stereotypes that link rap music to crime disproportionately compared to other genres. *See, e.g.*, Adam Dunbar et al., *The Threatening Nature of "Rap" Music*, 22 PSYCHOL., PUB. POL'Y & L. 280, 281 (2016). These stereotypes, which can reinforce existing biases that associate black and brown men with crime, create a particular risk for youth of color who create and consume rap music when unfamiliar listeners interpret rap hyperbole and metaphor literally and erroneously conclude that these youth are more violent. *See, e.g.*, Adam Dunbar & Charis E. Kubrin, *Imagining Violent Criminals: An Experimental Investigation of Music Stereotypes and Character Judgments*, 14 J. EXPERIMENTAL CRIMINOLOGY 507, 508 (2018); Andrea L. Dennis, *Poetic In(Justice)? Rap Music Lyrics as Art, Life, and Criminal Evidence*, COLUM. J.L. & ARTS 1, 4 (2007); *see also* ICE-T & DOUGLAS CENTURY, ICE: A MEMOIR OF GANGSTER LIFE AND REDEMPTION—FROM SOUTH CENTRAL TO HOLLYWOOD 142 (2011) (comparing popular public interpretations that took the rap song "Cop Killer" more literally than the glam rock "Space Oddity").

The data from the Georgia Governor's Office of Student Achievement regarding the Troup County School District's discipline of black students for "gang related" activity is alarming and reflects a larger pattern of disproportionately punishing black students in Troup County, and specifically at LaGrange High School. In 2019, at Troup County schools, the ***only*** students who received discipline

for "gang related" incidents were black, of whom 89% received out-of-school suspension. At LaGrange High School, where only 44% of the student body is black, 100% of students disciplined in 2018 and 2019 for "gang related" activity were black, and all received out-of-school suspension.[2] In the present case, when E.F.'s mother met with school administrators to ask why school administrators delayed punishment for a month if they genuinely believed E.F. was a threat, the assistant principal replied, "I thought he was going to drop out, so that's why I didn't say anything earlier." Doc. 3-3, ¶ 14. E.F. and other students deserve their day in court, in front of an impartial decision-maker that can decide if their punishments were constitutionally permissible and, if not, can protect other students from facing the same. If students cannot seek redress in federal court in cases like the one present before this Court, then they don't merely shed their constitutional rights once they enter the school house gates but abandon them for the duration of their childhood.

III. When Schools Reach Into the Home to Discipline, Parents Need Access to Federal Courts to Protect Their Fourteenth Amendment Rights to Direct the Upbringing of Their Children.

[2] The statistics for other forms of discipline also reflect bias against black students. Although black students were only 44% of the student population at LaGrange High School in 2019, they accounted for 66% of the student population that received discipline. Governor's Office of Student Achievement, *K-12 Discipline Dashboard*, https://public.gosa.ga.gov/noauth/extensions/DisciplineDASHV1/DisciplineDASHV1.html (last visited Feb 20, 2020). Conversely, white students comprised of 42% of the student population but only accounted for 24% of the student population that received discipline. *Id.* These statistics were largely the same as the previous year.

When federal courts abstain from hearing cases where school discipline exceeds on-campus authority and reaches into the home, not only do students lose the ability to protect their rights, but so do their parents. "[T]he interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65–66 (2000); *see also Prince*, 321 U.S. at 166 (finding that there is a boundary for "the private realm of family life which the state cannot enter"). To determine whether a violation of such a fundamental right has occurred, the Supreme Court has balanced the interests of individual liberty against the state's "demands of an organized society" and "asserted reasons for restraining individual liberty." *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982).

Bonds such as that between parent and child can "act as critical buffers between the individual and the power of the State." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 618–19 (1984). Therefore, the parent's Fourteenth Amendment interest is particularly strong when it encompasses other constitutionally protected interests. *Cf. Wisconsin v. Yoder*, 406 U.S. 205, 233 (1972) ("[W]hen the interests of parenthood are combined with a free exercise claim . . . more than merely a 'reasonable relation to some purpose within the competency of the State' is required to sustain the validity of the State's requirement under the First Amendment."). The school's rights are not coterminous with those of the parent. *See Friedenberg v. Sch.*

Bd. of Palm Beach Cty., 911 F.3d 1084, 1102 (11th Cir. 2018) (explaining that "a parent's power and responsibility is multi-faceted and comprises much more than just [the power of restraint and correction]"); *see also New Jersey v. T.L.O.*, 469 U.S. 325, 334 (1985) ("The Fourteenth Amendment . . . protects the citizen against the State itself and all of its creatures"). Schools do not exercise parental authority when regulating student speech, and thus the Constitution limits their power to suppress student expression. *See id.* at 336 (observing that "school authorities are state actors for purpose[] of the constitutional guarantee[] of freedom of expression"); *see also Tinker*, 393 U.S. at 513 (finding that a school may only usurp the parent's authority and suppress a student's off-campus speech if it "materially and substantially disrupt[s] the work and discipline of the school").

Parents like E.F.'s mother, Ms. Ford, have a fundamental right to foster their children's artistic ambitions. Ms. Ford supports and believes in her son's pursuit of a hip-hop career, stating, "He's got a story to tell, and I think he should have a chance to share his story." Doc. 3-3 ¶ 5. She even paid for and was present during the filming of the music video at issue. *Id.* ¶ 10. Yet the school, against her wishes, silenced him, violating the Fourteenth Amendment by usurping her sole parental authority to support and protect her son's legitimate exercise of his right to freedom of expression. Applying abstention when a state school board appeal is pending threatens to deprive parents like Ms. Ford of a forum for asserting their rights.