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**Court of Appeals of Maryland**

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**SEPTEMBER TERM, 2021  
PETITION DOCKET NO. 23**

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**IN RE: S.F.**

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**BRIEF OF THE NATIONAL CENTER FOR YOUTH LAW, AND  
PUBLIC JUSTICE CENTER AS  
AMICI CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI**

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On January 28, 2021, the Court of Special Appeals affirmed the judgment of the courts below in *In re S.F.*, Case Nos. C-10-JV-18-000271 & C-10-JV-19-000094. *In re S.F.*, 249 Md. App. 50 (2021). *Amici curiae*, the National Center for Youth Law (“NCYL”) and the Public Justice Center (“PJC”), respectfully urge the Court to grant the Petition for Writ of Certiorari filed on behalf of Petitioner, S.F. All parties to this Appeal have consented to the filing of this Amicus Curiae brief.

### **STATEMENT OF THE CASE**

Review in this Court is desirable and in the public interest because the Question Presented to this Court involves the critical issue of the impact of implicit biases and systemic racism on juvenile probation orders.

In 2019, Petitioner, a twelve-year-old boy, entered *Alford* pleas for two charges in the Circuit Court for Frederick County, Juvenile Division. *Id.* at 53. For both charges, and over the objection of S.F.’s counsel, the court included as a condition of probation that Petitioner not be suspended from school. *Id.* The Court of Special Appeals affirmed the decision of the lower court that the no-suspension condition of probation was not impermissibly vague.

The permissibility of a no-suspension condition on a youth’s probation is a timely and novel issue for this Court. The American justice and education systems have a long history of discrimination and inequitable treatment of Black Americans that continues to the present. As this Court’s own Chief Judge, the Honorable Judge Barbera, has explained:

[W]e, together, as members of the system of justice must re-examine how we administer justice. . . . We must assure that our courts do not

suffer bias, conscious or unconscious. We must examine, together, the reasons for disproportionate impact upon people of color, and address those reasons. ...

We are working to improve the justice responses to children involved in the courts. But we do still need to better address the problems of our young, our children, who have grown up in violence and in poverty, far too many of whom are of color...As long as they are not afforded the stability and opportunity that all children deserve and require, we risk our collective stability as a state and as a nation.<sup>1</sup>

Research consistently shows that Black students are suspended at higher rates and disciplined for less serious offenses than students of other races. Russell J. Skiba, et al., Ind. Educ. Pol’y Ctr., *The Color of Discipline: Sources of Racial and Gender Disproportionality in School Punishment*, 2 (2006); Travis Riddle & Stacey Sinclair, *Racial Disparities in School-based Disciplinary Actions are Associated with County-level Rates of Racial Bias*, 8255 (Jennifer A. Richardson, ed., 2019). Black students are more likely than students of other races to receive harsher discipline, or to be disciplined at all, for ambiguously defined misbehaviors that are susceptible to cultural misperceptions or implicit biases. Skiba et al., *supra*, at 13. Black students are also more likely to receive harsher discipline than students of other races for the same behavioral infractions because teachers or administrators more quickly label a Black student as a “troublemaker.” Jason Okonofua & Jennifer L. Eberhardt, *Two Strikes: Race and the Disciplining of Young Students*, 26(5) *Psychological Science* 617 (2015). Maryland law requires that terms of

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<sup>1</sup> See Mary Ellen Barbera, Chief Judge of Ct. of App. Of Md., Statement on Equal Justice under Law (June 9, 2020), <https://mdcourts.gov/sites/default/files/import/coappeals/pdfs/statementonequaljustice060920.pdf>.

probation “must not be vague, indefinite, or uncertain.” *Smith v. State*, 306 Md. 1, 7 (1986). Though the Frederick County Public School (“FCPS”) policies and regulations list the range of disciplinary procedures for associated behaviors, as noted by the Court of Special Appeals, many of the listed behaviors, such as “defiance of authority” or “disruptive behavior,” are ambiguous.<sup>2</sup> The suspension of a student is ultimately within the control and subject to the discretion of the teachers and administration of the school.<sup>3</sup> While the student may have control over their behavior, the student does not control school staff’s perception of that behavior, nor the disciplinary process or imposition of punishment. Given the racial disparity in instances of suspensions and the ambiguity of underlying justifications for suspensions, the no-suspension condition of S.F.’s probation is vague, largely outside of his control, and violates his right to due process.

Many youth have a similar no-suspension condition on their terms of probation, making this a question of broad-reaching consequence and state-wide import. Considering the public interest in keeping youth engaged in school and away from the justice system, the Court should grant certiorari.

### **INTEREST OF AMICI CURIAE**

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

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<sup>2</sup> Office of the Superintendent, Frederick Cty. Pub. Schs., 400-08, Discipline (2020) [hereinafter FCPS Reg.], <https://apps.fcps.org/legal/doc.php?number=400-08> [<https://perma.cc/9P9Q-74KC>].

<sup>3</sup> See Md. Code Regs. 13A.08.01.11 (2021).



that serve them. Two of NCYL's priorities are to ensure that youth have access to appropriate education services to improve their educational outcomes and to reduce the number of youth subjected to harmful and unnecessary incarceration. For 50 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. NCYL provides representation to youth in cases that have broad impact, and has represented many students in litigation and class administrative complaints to ensure access to adequate, appropriate and non-discriminatory education, including in school discipline.

The Public Justice Center (PJC) is a private, non-profit civil rights and anti-poverty legal services organization which seeks to advance social justice, economic and racial equity, and fundamental human rights in Maryland. PJC's Education Stability Project seeks to combat the overuse of exclusionary school discipline practices, like suspension, expulsion, and school policing, through individual representation, impact litigation, and policy advocacy. Representing Maryland students, PJC has filed numerous administrative appeals before the Maryland State Board of Education, as well as local school boards, challenging disciplinary and behavior-related exclusions from school. Additionally, PJC has appeared before the Court of Appeals and Court of Special Appeals in cases involving the rights of children. The resolution of the present appeal will determine, in part, whether Maryland students who have had contact with the justice system will face incarceration or other consequences if they are subject to a disciplinary exclusion from school, even for a minor or subjective offense. PJC represents such students as part of its practice, and thus has a significant stake in the outcome of this case.

Amici hereby adopt the arguments of Petitioners in toto.

### **QUESTION PRESENTED**

Amici hereby adopt the Question Presented by Petitioner in his Petition for Certiorari.

### **STATEMENT OF FACTS**

Amici hereby adopt the Petitioner's Statement of Facts in toto.

### **ARGUMENT**

#### **I. The Purpose of Probation in the Juvenile Justice System is to Restore and Rehabilitate.**

Whether a no-suspension condition of juvenile probation is permissible is an important question with major public interest implications. It is generally recognized that restorative practices and rehabilitation are favored over punishment where possible; probation is a mechanism designed for that purpose. *See Turner v. State*, 61 Md. App. 1, 9 (1984), rev'd, 307 Md. 618 (1986) (quoting *Scott v. State*, 238 Md. 265, 275 (1965)) (“[Probation] permits the court ... to suspend what would be the normal penalty ... in favor of conditions which, if performed, tend to promote the rehabilitation of the [juvenile] as well as the welfare of society.”). Likewise, the Maryland Code recognizes that one of the objectives of the juvenile justice system is the “[c]ompetency and character development to assist children in becoming responsible and productive members of society.” Md. Code Ann., Cts. & Jud. Proc. § 3-8A-02.

The purpose of S.F.'s juvenile probation term is to allow him the opportunity to demonstrate growing responsibility for his own actions and increasing maturation toward

becoming a productive member of society. The intent is that, at the completion of a successful probation term, a youth is restored and rehabilitated so that they may avoid further justice involvement. For this purpose to be achieved, however, the terms of his probation must be “clear, definite and capable of being properly comprehended and understood” by S.F. *Watson v. State*, 17 Md. App. 263, 274 (1973). The no-suspension condition of S.F.’s probation is premised on ambiguous rules such that compliance is not fully within his control, so it will not encourage his rehabilitation. Instead, because he is a Black student, it is disproportionately likely to set up S.F. for failure.

**II. No-Suspension Conditions of Probation Do Not Serve the Restorative Purpose of Juvenile Probation When Students May Be Unfairly Suspended For Subjective Misbehavior.**

**A. Bias In School Discipline For Subjective Categories of Misbehavior Disproportionately Impacts Black Students.**

Neither the restorative purpose of probation in the juvenile justice system nor the requirement that terms of probation be clear are accomplished where the youth has little control over whether he can meet those terms. Here, S.F. lacks full control over the no-suspension condition of his probation because the subjective nature of school suspensions denies him agency in complying with that condition. Further, as a Black student, he is likely to experience discipline for behavior that would not result in discipline for his White peers. S.F. is thereby put into an impossible position; he has no reliable way to discern what behavior will result in his suspension. Thus, the issue of permissibility of the no-suspension condition intersects questions of racial equity in education and the justice system, which are crucial for this Court to address.

Nationally, Black students are overrepresented in suspensions for all types of behaviors, and are more likely to be disciplined for “less serious and more subjective reasons.” Skiba et al., *supra*, at 13; Linda M. Raffaele Mendez & Howard M. Knoff, *Who Gets Suspended from School and Why: A Demographic Analysis of Schools and Disciplinary infractions in a Large School District*, 26 *Education and Treatment of Children* 30, 32 (2003). Where White students tend to be disciplined for “more objectively observable” offenses, like smoking or vandalism, Black students tend to be disciplined for behaviors that are “subjective in nature,” like disrespect, defiance, or noncompliance. Anne Gregory et al., *The Achievement Gap and the Discipline Gap: Two Sides of the Same Coin?*, 62 (*Educational Researcher*, 2010); Riddle & Sinclair, *supra*, at 8255. These behaviors are not only subjective, they are frequently typical “exploratory” behaviors by which adolescents assess boundaries as they develop, but which do not require exclusion from school or justice system involvement.<sup>4</sup> The subjectivity of the offenses for which Black students are disciplined demonstrates that students do not have full control over whether they are suspended.

State and local data reinforce the national trend of race-based disproportionality in suspensions, especially for subjective offenses. In Maryland, Black children comprise about a third of the student population, but they receive 60% of out-of-school suspensions overall, and 60% of suspensions for “disruption” and “disrespect” specifically.<sup>5</sup> By

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<sup>4</sup> Mahsa Jafarian & Vidhya Ananthakrishnan, *Just Kids: When Misbehaving is a Crime*, Vera Institute of Justice (2017), <https://www.vera.org/when-misbehaving-is-a-crime>.

<sup>5</sup> See Maryland State Dep’t of Educ., *Maryland Public School Suspensions By School and Major Offense Category, Out-of-School Suspensions and Expulsions 2018-19*, \*1,

contrast, for the offense of possession of “dangerous substances”—more objectively observable in nature—Black students receive only 33% of suspensions, consistent with their representation in the student population generally. *Id.* Similarly, within FCPS, Black students receive 30% of suspensions overall and 32% of suspensions for disruption and disrespect, despite being only 13% of the student population. *Id.* at 12. Again, the discipline gap disappears when looking at the more concrete offense of possession of dangerous substances—Black FCPS students receive 13% of suspensions in this category, consistent with the percentage of Black students in the district’s population. *Id.*

Much of the disparity in what constitutes discipline-worthy offenses between Black and White students stems from teachers’ cultural misperceptions, which themselves are manifestations of implicit or explicit biases, of their Black students. In one study, researchers found that, solely based on viewing how a student walked, teachers made assumptions about a student’s academic ability and behavior. *See generally* LaVonne I. Neal et al., *The Effects of African American Movement Styles on Teachers’ Perceptions and Reactions*, 37 *J. of Special Educ.* 49 (2003). Teachers viewed students who used “African-American culture-related movement styles”<sup>6</sup> as lower achievers and more aggressive. *Id.* at 52-53; *see also* Skiba et al., *supra* at 17 (“Teachers who are prone to accepting stereotypes of adolescent African-American males as threatening or dangerous

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<http://www.marylandpublicschools.org/about/Documents/DCAA/SSP/20182019Student/2019SuspensionsbySchoolOUT.pdf>.

<sup>6</sup> This study involved teachers assigning values to their perception of a student’s achievement capability, need for special education, and level of aggression based on whether they walked in a “standard” European style walk or in a “stroll” style walk made popular by African-American males. Neal et al., *supra* at 50.

may overreact to relatively minor threats to authority...”). Perceptions of aggression, wholly disconnected from the student’s behavior, can lead to teachers being fearful of their students and more likely to discipline them. *Id.*

Misbehaviors such as “defiance” or “disruptive behavior,” for which Black students are disproportionately disciplined, are impossible to define clearly or consistently, which is required for a condition of probation. *Watson*, 17 Md. App. at 274. Instead, they are violations of “unspoken and unwritten rules of linguistic conduct that cannot be neatly delineated in school discipline policy” to which “African-American ... students may not have as much access as their Anglo-American classmates.” Frances Vavrus & KimMarie Cole, “*I Didn’t Do Nothin’*”: *The Discursive Construction of School Suspension*, 34 *Urban Review* 87, 91 (2002). Research demonstrates that “suspensions are often preceded by a complex series of nonviolent events when one disruptive act among many is singled out for action by the teacher.” *Id.* at 87. They found that Black students were more likely to use “discursive strategies to get the teacher’s attention and to ask him questions that were different from the strategies expected or preferred” by the teacher. *Id.* at 108. The teacher was thus more likely to interpret “a particular utterance as hostile or disruptive” to the point that it “precipitated the removal of the student from the classroom.” *Id.* at 109. In these circumstances, the teacher’s capabilities and feelings—not the student’s behavior—ultimately precipitates the removal.

Additionally, the disproportionality of Black student suspensions is variable based on the racial composition of a school. Black students are more likely to be disciplined in schools with a higher proportion of Black students, consistent with the “racial threat”

hypothesis. Michael Rocque & Raymond Paternoster, *Understanding the Antecedents of the “School-to-Jail” Link: The Relationship Between Race and School Discipline*, 101 J. of Crim. Law & Criminology 633, 655 (2019). “As the black student population increases, teachers may perceive black student misconduct different, as perhaps more menacing or more of a threat to their control, and respond to such conduct by African-Americans more punitively.” *Id.*

Moreover, schools with higher proportions of Black students are more likely to have on-site police officers.<sup>7</sup> On-site police in heavily Black schools exacerbates race-based disparities in suspension because school police presence itself results in increased student suspension rates.<sup>8</sup>

Maryland’s most populous public school systems all have significant populations of Black students. For example, 55.32% of the student population in Prince George’s County is Black,<sup>9</sup> 39.4% of the student population in Baltimore County is Black,<sup>10</sup> and 21.4% of

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<sup>7</sup> See Kristen Harper & Deborah Temkin, Compared to White Majority White Schools Majority Black Schools Are More Likely to Have Security Staff, Child Trends (2018), <https://www.childtrends.org/compared-to-majority-white-schools-majority-black-schools-are-more-likely-to-have-security-staff>.

<sup>8</sup> See Jeremy D. Finn & Timothy J. Servoss, Misbehaviors, Suspensions, and Security Measures in High School: Racial/Ethnic and Gender Differences, J. Applied Research on Children: Informing Policy for Children at Risk (2014), <https://digitalcommons.library.tmc.edu/cgi/viewcontent.cgi?article=1211&context=childrenatrisk>.

<sup>9</sup> *About PGCPs: Facts and Figures* (last visited Apr. 13, 2021), <https://www.pgcps.org/facts-and-figures/>.

<sup>10</sup> *Overview of Baltimore County Public Schools*, U.S. News and World Report, (last visited Apr. 13, 2021) <https://www.usnews.com/education/k12/maryland/districts/baltimore-county-public-schools-108287#:~:text=Students%20at%20Baltimore%20County%20Public,Hawaiian%20or%20Other%20Pacific%20Islander>.

the student population in Montgomery County is Black.<sup>11</sup> The significant populations of Black students underscores the statewide import of the issues presented in this case. In short, a no-suspension clause risks trapping S.F., and other Black students in Maryland, in a vicious cycle: suspension for a subjective offense due to the impacts of implicit bias, racial threat, and race-based disparities in the allocation of school police, which leads to a violation of probation and possible arrest and incarceration, which further separates him from school.

**B. Because Black students are more likely to be disciplined harshly for subjective misbehavior, they have less control over the consequences than other students.**

The research demonstrating that Black students are disciplined and suspended disproportionately for subjective behaviors demonstrates the difficulty for a student like S.F. to determine whether his actions will subject him to suspension and puts that decision—and his ability to comply with the conditions of his probation—farther from his control. The Court of Special Appeals determined that a no-suspension condition was a sufficiently defined term of probation. *In re S.F.*, at 60. It cited to the FCPS regulations and procedures as a source for students to understand behaviors and their disciplinary consequences. FCPS Reg. Such reasoning assumes that a student can predict, based on his behavior, whether a teacher will view him as complying with the FCPS regulations. The FCPS Handbook, however, lists “Disruptive Behavior,” defined as “[a]ctions which

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<sup>11</sup> *Summary: County Schools* (last visited Apr. 13, 2021) <https://www.montgomeryschoolsmd.org/departments/regulatoryaccountability/glance/currentyear/schools/county.pdf>.



interfere with the effective operations of the school” and “Continued Willful Disobedience,” defined as “[r]epeated refusal or failure to follow school rules and regulations,” as misbehaviors punishable by “Support, Removal, Administrative and Exclusionary Responses.” *Id.* at 11.<sup>12</sup> The FCPS regulations include the same types of behaviors for which Black students are disproportionately suspended due to their teachers’ perceptions, misunderstandings, or grasps at authority, rather than the students’ own actions. Indeed, 33% of annual suspensions in FCPS are for disruption and disrespect—precisely the types of subjective offenses that are vulnerable to the influence of bias. MSDE Data at \*12.

The Court of Special Appeals observed that “the possibility that a suspension could be imposed too quickly or arbitrarily would represent ... an opportunity for the probation officer to decide whether to pursue a violation and the trial court to decide whether to find one ....” *In re S.F.*, at 59-60. Probation officers and trial courts likely do not, however, represent a strong procedural safeguard for suspensions based on subjective behaviors. Instead, when a suspension is not based on objective behaviors, the probation officer or judge is more likely to defer to the judgment of the suspending teacher or administrator. *See e.g. Doe v. Superintendent of Schools of Stoughton*, 437 Mass. 1, 767 N.E.2d 1054 (2002) (“Because school officials are in the best position to determine when a student’s actions threaten the safety and welfare of other students, courts must grant school officials

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<sup>12</sup> Less severe forms of discipline in response to these behaviors may also be imposed, including “support” and “administrative responses.” FCPS Reg. The range of recommended responses to behaviors adds an additional layer of uncertainty to how S.F.’s teachers will react to his behavior.

substantial deference in their disciplinary choices.”); *Sabol v. Walter Payton College Preparatory High School*, 804 F. Supp. 2d 747, (N.D. Ill. 2011) (“[C]onstitutional protections afforded students in disciplinary proceedings” are diminished “because courts are extremely hesitant to second-guess the disciplinary decisions made by those entrusted with educating the nation’s children.”).

Because S.F. is subject to, and more likely to receive, suspension for undefinable behaviors at the discretion of those who may misunderstand or have biases against him, including a no-suspension condition in his probation is impermissibly vague and in violation of his right to due process.

**III. Teachers and administrators escalate discipline of Black students more severely than other students once the student is perceived as a troublemaker.**

Teacher and administrator perceptions have a further impact on S.F.’s ability to comply with the no-suspension condition of his probation because, due to his juvenile court involvement, they are more likely to consider him a “troublemaker.” Teachers are more likely to view the behavior of Black students as “indicative of a long-term problem and deserving of suspension,” as opposed to White students. Riddle & Sinclair, *supra*, at 8255. In their “Two Strikes” study, researchers found that “[a]fter the second infraction,” regardless of the seriousness of infractions or their similarity to each other, “teachers thought the Black student’s misbehavior should be met with more severe discipline ... than the White student’s misbehavior.” Okonofua & Eberhardt, *supra* at 619-20. Teachers are “more likely to view multiple infractions as connected to a pattern when the student is

Black as opposed to White” and it only takes “two strikes” for “racial disparities in discipline to emerge.” *Id.* at 620.

Black students like S.F. who have interacted with the juvenile justice system have to operate in the reality that this research illuminates. Not only are they more likely to be suspended than a White student based on misperceptions of their behavior, but they are also more likely to be suspended for any of those misperceived behaviors because they already carry the stigma of being perceived as a “troublemaker.” Their actions are more likely to be viewed as patterned misbehavior deserving of harsher punishments, solely because of their skin color. Conditioning probation upon avoiding suspension when the cause of suspension for Black students is so likely to be disconnected from their behavior results in the vagueness of that term and a violation of the students’ rights of due process. Therefore, the Court should grant certiorari to examine the factors that increase the likelihood of suspension which are affected more by the student’s race than by their actions and ultimately determine that no-suspension conditions in probation agreements are not permissible.

## CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

April 16, 2020

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**CERTIFICATION OF WORD COUNT AND COMPLIANCE  
WITH MD. RULE 8-112**

1. This Motion contains 3,900 words, excluding the parts exempted from the word count by Md. Rule 8-503.
2. This Motion complies with the font, spacing, and type size requirements stated in Md. Rule 8-112.

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