

No. 03-1364

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

EDWARD R. MYERS,
Plaintiff-Appellant,

v.

LOUDOUN COUNTY SCHOOL BOARD and
COMMONWEALTH OF VIRGINIA,
Defendants-Appellees,

and

UNITED STATES OF AMERICA,
Intervenor-Appellee.

On Appeal from the United States District Court
for the Eastern District of Virginia

SUPPLEMENTAL BRIEF OF PLAINTIFF-APPELLANT

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District of Columbia; supervised by principals
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ARGUMENT

I. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING MYERS TO REPRESENT HIS CHILDREN *PRO SE*.

A. The Federal Rules and Case Law Allow a District Court To Permit a Parent To Represent His Minor Children *Pro Se*.

Federal courts generally decline to allow *pro se* non-lawyers to represent others,¹ including their own minor children,² in federal district court. In declining to do so, they have variously invoked the common law, *see Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225, 232 (3d Cir. 1998), limitations inferred from 28 U.S.C. § 1654, *see, e.g., Shepherd v. Wellman*, 313 F.3d 963, 970 (6th Cir. 2002), and their general supervisory powers, *see Reshard v. Britt*, 839 F.2d 1499, 1502-04 (11th Cir. 1988) (aff'g *en banc* by equally divided court) (Tjoflat, J., dissenting).

The federal rules, however, recognize that courts may permit such *pro se* representation. Federal Rule of Appellate Procedure 3(c)(2) provides that a *pro se* notice of appeal “is considered filed on behalf of the signer and the signer’s spouse and minor children (if they are parties), unless the notice clearly indicates otherwise.” *See also* Advisory Committee’s Notes to 1993 Amendments. This rule

¹ *E.g., Jones ex rel. Jones v. Correctional Med. Servs., Inc.*, 401 F.3d 950, 951-52 (8th Cir. 2005); *United States ex rel. Lu v. Ou*, 368 F.3d 773, 775 (7th Cir. 2004).

² *E.g., Navin v. Park Ridge Sch. Dist. 64*, 270 F.3d 1147, 1148-49 (7th Cir. 2001) (per curiam); *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990).

would serve little purpose if a parent is categorically barred from representing his spouse or minor children *pro se*.

Since its adoption in 1993, the Courts of Appeal have recognized Fed. R. App. P. 3(c)(2) as allowing a *pro se* party to appeal on behalf of his spouse or minor child. *See, e.g., Ms. S. ex rel. G. v. Vashon Island Sch. Dist.*, 337 F.3d 1115, 1125 n.15 (9th Cir. 2003) (applying rule to find daughter of *pro se* plaintiff a proper party on appeal); *Caraballo-Sandoval v. Honsted*, 35 F.3d 521, 524 (11th Cir. 1994) (applying rule to find spouse of *pro se* plaintiff a proper party on appeal); *Colle v. Brazos County*, 981 F.2d 237, 241 (5th Cir. 1993) (minor child); *see also King v. Otasco, Inc.*, 861 F.2d 438, 443 (5th Cir. 1988) (“ . . . King's children did not sue as independent parties; King sued in the children's behalf as their representative and next friend. Thus, this case does not concern the omission of a party from a notice of appeal, but only a party's failure to designate all of the *capacities* in which he brought suit.”).

Unpublished decisions of other Courts of Appeals furnish other examples. *Higgins v. City of Tulsa*, 103 Fed. Appx. 648, 650, 2004 WL 1447971, at *1 n.1 (10th Cir. June 29, 2004) (spouse); *United States v. Willis*, 91 F.3d 157, 1996 WL 393682, at *1 n.1 (9th Cir. July 9, 1996) (spouse).

Other case law confirms that district courts have discretion to allow parents to represent their minor children *pro se* in appropriate circumstances. *Machadio v. Apfel*, 276 F.3d 103, 107 (2d Cir. 2002) (SSI benefits); *Harris v. Apfel*, 209 F.3d 413, 417 (5th Cir. 2000) (same).³ Although the Courts of Appeal in these cases addressed the particular circumstances of SSI appeals, their decisions show that such *pro se* representation is not automatically foreclosed.

B. It Was Appropriate To Permit Myers To Represent His Minor Children *Pro Se* in This Case.

In permitting Myers to represent his children *pro se*, the District Court did not abuse its discretion.

First, allowing Myers to sue on behalf of his children *pro se* was not contrary to the policies of his state of residence. Virginia's next-friend statute has been construed to permit non-lawyer parents to represent their minor children *pro se*. *Coffey v. Va. Birth-Related Neurological Injury Comp. Program*, 558 S.E.2d 563, 566 (Va. Ct. App. 2002) (relying on next-friend statute as source of mother's authority to represent her minor son *pro se* before state agency). Although who

³ See also *Maroni v. Pemi-Baker Reg'l Sch. Dist.*, 346 F.3d 247, 258 (1st Cir. 2003) (treating parents of disabled student as "aggrieved parties" for IDEA purposes, and therefore able to seek IDEA relief for their child *pro se*); *id.* at 250 (citing *Kirkpatrick v. Lenoir County Bd. of Educ.*, 216 F.3d 380, 383 (4th Cir.2000) (same result)); *but see Wheat v. United States*, 486 U.S. 153, 159 (1988) (stating that a criminal defendant's Sixth Amendment right to counsel of choice is subject to the limitation that "an advocate who is not a member of the bar may not represent clients (other than himself) in court").

may appear in federal courts is a question of federal law, *see In re G.L.S.*, 745 F.2d 856, 860 (4th Cir. 1984), decisions of state courts “are entitled to deference,” *id.*, and the policy of Myers’ home state is therefore relevant. *Cf. Resolution Trust Corp. v. Maplewood Invs.*, 31 F.3d 1276, 1290-1291 (4th Cir. 1994) (where federal court has jurisdiction to apply a federal common-law rule, court must consider, as a matter of discretion and judicial prudence, whether or not to adopt the relevant state law rule as the federal rule of decision).

Second, allowing Myers to sue on behalf of his children *pro se* was not contrary to any federal statutory purpose. This case is unlike *Doe v. Board of Education*, 165 F.3d 260 (4th Cir. 1998), in which this Court held that the fee-shifting provision of the Individuals with Disabilities Education Act did not allow an award of attorney’s fees for the services of an attorney-parent who had obtained special-education benefits for his son. The rationale for the Court’s decision was not that parents may not seek IDEA benefits for their children *pro se*, but that awarding attorney’s fees to *pro se* parents would defeat the purpose of the IDEA fee-shifting provision – “to *encourage* parents to obtain independent legal services.” *Id.* at 264 (emphasis added); *see also Maroni v. Pemi-Baker Reg’l Sch. Dist.*, 346 F.3d 247, 253 (1st Cir. 2003) (“It is one thing to say Congress intended to encourage attorneys to represent plaintiffs in IDEA claims by allowing attorneys’ fees. It is en-

tirely another to say that Congress intended to preclude plaintiffs' suits from going forward *pro se* without counsel.”).

Third, allowing Myers to sue on behalf of his children *pro se* was appropriate in light of the nature of the case. As in the SSI cases, Myers' interests and those of his children were “closely intertwined,” *Machadio*, 276 F.3d at 106, for Myers and his children challenge the same statute and school board policies, and the disposition of either challenge will determine the disposition of the other. *See* U.S. Supp'l Br. 2 (claims are “materially identical”). As in the SSI cases, moreover, Myers has “a personal financial stake” in this action, *Harris*, 209 F.3d at 416, for if Myers' children are unable to obtain relief in this action, Myers' only remaining remedies would be to send his children to private school or move to another jurisdiction.

Nor did this case involve “the complexities present in other actions.” *Machadio*, 276 F.3d at 107. Unlike a medical malpractice case, *see Gallo v. United States*, 331 F. Supp. 2d 446 (E.D. Va. 2004), or a products liability case, *see Brown v. Ortho Diagnostic Sys., Inc.*, 868 F. Supp. 168 (E.D. Va. 1994), this case did not require scientific proof or expert testimony, development of an extensive factual record, or mastery of esoteric rules of evidence and procedure.

Finally, like an SSI case, this action was tried not to a jury but to a federal judge, who could and did make due allowance for Myers' limitations as a non-

lawyer. (See J.A. 51-57, 58-59 (hearing transcript); *id.* at 90-95 (opinion)). If the court had concluded that Myers was not competent to represent his children *pro se*, it could have denied him permission to do so; and the court could have appointed or required Myers to retain counsel at any time during the proceedings if the need to do so became apparent. See *Machadio*, 276 F.3d at 107-08; see also *Maroni*, 346 F.3d at 258 (discussing benefits and burdens of *pro se* parent advocates).

For all of these reasons, Myers was entitled to represent his minor children *pro se*, and the District Court did not abuse its discretion in allowing him to do so.

II. THIS COURT HAS JURISDICTION EVEN IF THE DISTRICT COURT ERRED IN ALLOWING THE REPRESENTATION.

Even if the District Court should not have allowed Myers to represent his children *pro se*, the District Court had jurisdiction to decide their Establishment Clause claims because representation by counsel is not a jurisdictional requirement. And even if the District Court did not have jurisdiction to decide the children's claims, this Court has jurisdiction to review the District Court's disposition of Myers' claims.

Moreover, Myers himself had standing to assert an Establishment Clause claim and, as the United States has suggested (U.S. Supp'l Br. 7), Myers did not intend to waive and should not be understood to have waived his right to object as a parent to the Pledge statute and policy. In his complaint, Myers asserted that objection directly under the Establishment Clause. (J.A. 6-8.)

A. The District Court Had Jurisdiction To Decide the Children’s Claims Regardless of Whether Myers Could Represent Them.

Myers was authorized to bring this action on behalf of his children under Fed. R. Civ. P. 17(b) and (c). If allowing Myers to proceed on their behalf *pro se* was error, the error was not jurisdictional. This conclusion is implicit in Fed. R. App. P. 3(c)(2) and buttressed by *Becker v. Montgomery*, 532 U.S. 757 (2001).

In *Becker*, the Supreme Court held that a *pro se* party’s failure to sign a notice of appeal was not a jurisdictional defect because the signature requirement is grounded in Fed. R. Civ. P. 11(a), and a failure to comply with Rule 11(a) can be cured once called to the attention of the party. *Id.* at 765. *See also* 5A Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 1333, at 520-21 (3d ed. 2004); *id.* § 1336.3, at 666-67; *Holley Coal Co. v. Globe Indem. Co.*, 186 F.2d 291, 295 (4th Cir. 1950) (“an unsigned pleading is not invalid”).

The Fifth Circuit has applied *Becker* where a *pro se* plaintiff had improperly filed a notice of appeal on behalf of all of the *pro se* plaintiffs in the action in the district court. Citing *Becker*, the Fifth Circuit held that the district court clerk should have permitted the other plaintiffs to file their own notices of appeal based on the notice that had been filed, even though the time to appeal had expired. *Wash v. Johnson*, 343 F.3d 685, 688-89 (5th Cir. 2003). The First Circuit reached a similar result in *Casanova v. Dubois*, 289 F.3d 142 (1st Cir. 2002); *see also de Aza-Paez v. United States*, 343 F.3d 552, 552-53 (1st Cir. 2003) (per curiam).

If a parent otherwise authorized to act as his minor children's next friend may not represent them *pro se* but nonetheless files a *pro se* action on their behalf, that defect, like the filing of an unsigned complaint or notice of appeal, is not jurisdictional and can be cured once brought to the parent's attention. The defect was not brought to Myers' attention in the District Court, but when this Court suggested that Myers retain counsel on appeal, he promptly did so. *See also* U.S. Supp'l Br. 5-6 (presenting similar analysis of jurisdictional issue).

Now that Myers and his children have counsel, no useful purpose would be served by dismissing the children. The effect would simply be to require Myers to engage counsel to bring a new action on their behalf, reasserting the very claims already before the Court in this appeal. In the meantime, the children would remain subject to the conduct that Myers claims is unconstitutional. *Cf. Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ.*, 297 F.3d 195, 201 (2d Cir. 2002) (stating that the district court "should have" ordered *pro se* parents to retain counsel in IDEA action brought on behalf of their minor son, but declining to reverse district court's decision in son's favor).

B. This Court May Decide Myers' Claims Even If the District Court Lacked Jurisdiction To Consider His Children's Claims.

The Supreme Court has long recognized that parents may object on Establishment Clause grounds to government sponsorship of religion in public schools. In *McCullum v. Board of Education*, 333 U.S. 203 (1948), and *Engel v. Vitale*, 370

U.S. 421 (1962), the Supreme Court invalidated a programs of religious instruction or prayer in public schools as violative of the Establishment Clause. In each case, the Court acted solely at the behest of parents. There is no indication in the Court's opinions or those of the state courts that the parents in these cases were asserting claims of their children. The Court relied on the Fourteenth Amendment only insofar as it makes the Establishment Clause applicable to the states. *See also Abington Township Sch. Dist. v. Schempp*, 374 U.S. 203, 266 n. 30 (1963) (Brennan, J., concurring) (discussing parental standing to assert Establishment Clause claims).

In *Schempp*, the Court invalidated another program of religious instruction in public schools, this time at the behest of parents and two of their children. In its opinion, the Court specifically recognized the distinct standing of the parents to object to the program on Establishment Clause grounds. *Id.* at 225 n.9. *See also Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 487 n.22 (1982) (discussing *Schempp*).

The Courts of Appeals – including this Court – understand *Schempp* as having recognized a distinct and independent right of a parent to object to Establishment Clause violations in schools in which their children are enrolled. *See Suhre*

v. Haywood County, 131 F.3d 1083, 1086-87 (4th Cir. 1997).⁴ Accordingly, Myers has standing to object to the Pledge statute and implementing statute, and this Court has appellate jurisdiction to review the District Court's disposition of that objection.

CONCLUSION

For the foregoing reasons, the District Court properly permitted Myers to represent his children *pro se*; this Court has jurisdiction to decide the children's claims even if the District Court erred in permitting Myers to represent them *pro se*; and Myers himself stated a distinct and independent Establishment Clause claim, the disposition of which this Court has appellate jurisdiction to review.

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⁴ See also, e.g., *Doe v. Sch. Bd. of Ouachita Parish*, 274 F.3d 289, 291-92 (5th Cir. 2001) (en banc); *Fleischfresser v. Dir. of Sch. Dist.*, 15 F.3d 680, 683-84 (7th Cir. 1994); *Sullivan v. Syracuse Hous. Auth.*, 962 F.2d 1101, 1109-10 (2d Cir. 1992); *Steele v. Van Buren Pub. Sch. Dist.*, 845 F.2d 1492, 1495 (8th Cir. 1988); *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1532 (9th Cir. 1985); *Bell v. Little Axe Indep. Sch. Dist.*, 766 F.2d 1391, 1398 (10th Cir. 1985); *ACLU v. Rabun County Chamber of Commerce*, 698 F.2d 1098, 1106-07 (11th Cir. 1983); *Caldwell v. Craighead*, 432 F.2d 213, 220 (6th Cir. 1970).

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