

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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EDWARD R. MYERS,

Plaintiff-Appellant,

v.

LOUDOUN COUNTY SCHOOL BOARD and  
COMMONWEALTH OF VIRGINIA,

Defendants-Appellees.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA

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SUPPLEMENTAL BRIEF FOR INTERVENOR THE UNITED STATES

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IN THE UNITED STATES COURT OF APPEALS  
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No. 03-1364

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EDWARD R. MYERS,

Plaintiff-Appellant,

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COMMONWEALTH OF VIRGINIA,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
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**SUPPLEMENTAL BRIEF FOR INTERVENOR THE UNITED STATES OF AMERICA**

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The Court has directed the parties to file supplemental briefs addressing two questions: "Whether Myers may represent his minor children pro se in federal district court, and, if not, what effect that conclusion has on the preserved claims in this case." The Court also directed the parties to discuss whether Myers himself has standing to bring a claim under the Establishment Clause because of the alleged injury suffered by his minor children.

As we explain below, Myers was not entitled to represent his children pro se in district court. The children are represented by counsel on appeal, however, and there is no reason why the Court should not resolve the merits of their Establishment Clause claim, which is clearly foreclosed by Supreme Court precedent.

With respect to the second question, Supreme Court decisions suggest that Myers may assert an Establishment Clause claim on his own behalf challenging defendants' Pledge recitation statute and policy. That claim, however, which is materially identical to his childrens' claims, also is clearly foreclosed by Supreme Court precedent.

**1. The Pro Se Representation Issue**

a. It was error for the district court to permit Mr. Myers to represent his children. While a person is generally permitted to represent himself or herself pro se in federal court, the federal courts recognize that the right to appear pro se is not the right to represent others. Thus, "a non-attorney parent must be represented by counsel in bringing an action on behalf of his or her child." Cheung v. Youth Orchestra Found. of Buffalo, Inc., 906 F.2d 59, 61 (2d Cir. 1990). All the circuits that have addressed this issue, including this Court, agree on this point. See Doe v. Bd of Educ., 165 F.3d 260, 263 (4th Cir. 1998), cert. denied, 526 U.S. 1159 (1999); Collinsgru v. Palmyra Bd. of Educ., 161 F.3d 225, 230-237 (3d Cir. 1998); Wenger v. Canastota Cent. Sch. Dist., 146 F.3d 123, 125 (2d Cir. 1998), cert. denied, 526 U.S. 1025 (1999); Johns v. County of San Diego, 114 F.3d 874 (9th Cir. 1997); Meeker v. Kercher, 782 F.2d 153, 154 (10th Cir. 1986). See also Gallo v. United States, 331 F. Supp. 2d 446 (E.D. Va. 2004); Brown v. Ortho Diagnostic Systems, Inc., 868 F. Supp. 168 (E.D. Va. 1994).

As the cases explain, this rule is supported by two interests: the "interest in regulating the practice of law and the importance of adequate legal representation to the litigant." Gallo, 331 F. Supp. 2d at 447. Accord Brown, 868 F.Supp. at 171. Both of these interests, as they arise in cases brought in federal court, embody federal concerns.

The interest in regulating the practice of law in federal court, for example, implicates federal Article III concerns. The regulation that excludes non-lawyers from representing others "reflects that the conduct of litigation by a nonlawyer creates unusual burdens not only for the party he represents, but also for his adversaries and the court." Brown, 868 F. Supp. at 172 (noting, for example, that the lay litigant lacks the attorney's ethical responsibility to avoid litigating unfounded claims) (emphasis added).

The interest of a child who is made a party to a federal court action in adequate legal representation also implicates federal concerns. As the Ninth Circuit has correctly recognized, "[t]he infant is always the ward of every court wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care that no injustice be done to him." Johns, 114 F.3d at 877 (emphasis added).

b. In his March 22, 2005 Rule 28(j) letter, Myers suggested that the above rule is preempted by Va. Code Ann. 8.01-8, which he contends authorizes parents to represent their children pro se in any court. As explained above, however, the rule against pro se representation in federal court is a federal rule of procedure, emanating from Article III concerns. Thus, that rule necessarily would preempt any putative state law that would authorize a parent to represent a child in court pro se.

The Virginia statute to which Myers referred in his Rule 28(j) letter, however, does not in fact authorize a parent to "represent" the child pro se in any court action. To the contrary, it merely authorizes a parent to "sue on behalf of a minor as his next friend." No case of which we are aware has interpreted this statute as allowing a parent to represent a minor child pro se in court.

In his Rule 28(j) letter, Myers argued that the Virginia Court of Appeals construed Va. Code 8.01-8 as authorizing a parent to represent a child pro se in court in Coffey v. Virginia Birth-Related Neurological Injury Compensation Program, 558 S.E.2d 563 (Va. Ct. App. 2002). Coffey, however, merely held that an infant was not entitled to the appointment of counsel to prosecute a claim before a Workers' Compensation commission. Thus, the case did not concern whether the parent could have represented the child pro se in court. The Virginia Court of Appeals did state, in dicta, that

Va. Code 8.01-8 "contains no provision either requiring or authorizing the appointment of legal counsel for a minor who sues by his next friend." 558 S.E.2d at 566. This statement does not, however, suggest that Va Code 8.01-8 affirmatively authorizes a parent to represent a child pro se in any court, and the statute cannot be read in that manner, as we have explained.<sup>1</sup>

## 2. Jurisdictional Implications

### a. The Childrens' Claims

The fact that Myers lacked the authority to represent his children pro se in the district court did not deprive that court of jurisdiction over those claims. If the district court had been made aware of this issue, it would have had a number of options, including giving Myers the opportunity to retain counsel to represent his children, dismissing the claims with or without prejudice, appointing counsel to represent the children, or appointing a guardian to represent the children with respect to the claims Myers has raised on their behalf in this litigation.<sup>2</sup>

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<sup>1</sup> The child in Coffey was represented by counsel in court. See 558 S.E.2 at 565.

<sup>2</sup> See generally Gallo, 331 F. Supp. 2d at 449 (ordering Ms. Gallo to retain counsel for her daughter or face consideration of whether daughter's claims should be dismissed); id. at 449 n.6 (noting possibility of appointment of attorney or guardian); Brown, 868 F. Supp. at 16 n.16 (noting that court had sua sponte appointed counsel to represent child in tort action).

There is no need for this Court, however, to take any of those steps. Myers and his children have been represented by counsel on appeal, and, as our Brief explains, the record is fully adequate to allow this Court to resolve Myers' and his childrens' claims. Those claims, as we explained in our Brief and at oral argument, are in fact clearly precluded by controlling Supreme Court precedent. Thus, the Court should simply affirm the dismissal of the childrens' claims on the merits.

**b. Myers' Own Claims**

A parent has a liberty interest, protected by the Fourteenth Amendment to the Constitution, in directing the education and upbringing of his or her child. See Herndon by Herndon v. Chapel Hill-Carroboro City Bd of Educ., 89 F.3d 174 (4th Cir. 1996), cert. denied, 519 U.S. 1111 (1997), citing, e.g., Meyer v. Nebraska, 262 U.S. 390 (1923) (state law that barred teaching of German language in public schools violated parental due process rights to "establish a home and bring up children"), and Pierce v. Soc'y of Sisters, 268 U.S. 510 (1925) (state law making it unlawful to send children to private school "unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children").

The Supreme Court also has allowed parents to assert a claim under the Establishment Clause challenging religious practices in their childrens' public schools. See Engel v. Vitale, 370 U.S.

421, 423 (1962) (Establishment Clause suit challenging official prayer in public school brought by students' parents); McCullum v. Bd. of Educ., 333 U.S. 203, 205 (1948) (Establishment Clause suit challenging provision of religious instruction in public school during school day brought by parent). See also School Dist. of Abington Township v. Schempp, 374 U.S. 203, 225 n.9 (1963) (noting that the parties, "school children and their parents," are "directly affected" by the school's prayer and Bible reading practices, and thus have standing to challenge those practices).

As the Court's supplemental briefing order observes, Myers' opening appeal brief disavows reliance on any theory on appeal other than the Establishment Clause. As explained above, however, Engel, McCullum, and Schempp, suggest he has standing under to challenge defendants' Pledge recitation statute and policy under the Establishment Clause.


Moreover, Myers' opening appeal brief does not expressly waive his claim, articulated in his complaint, that defendants' Pledge recitation policy "undermines Plaintiff's right to direct the religious education of his children . . . ." Complaint, ¶ 5. Thus, it is not clear to us that Myers intended, by advising the Court that he is abandoning his Fourteenth Amendment claim, to be waiving his right to object as a parent to defendants' Pledge statute and policy.

Respectfully submitted,

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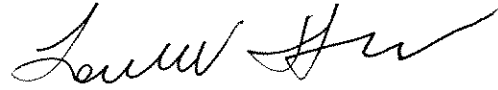
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APRIL 2005

**CERTIFICATE OF COMPLIANCE**

I hereby certify that the text of the foregoing brief is composed in monospaced, 12-point Courier typeface, which has 10 characters per inch.



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Lowell V. Sturgill Jr.

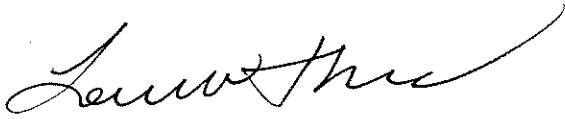
**CERTIFICATE OF SERVICE**

I hereby certify that on this 8th day of April, 2005, I filed the Supplemental Brief for Intervenor the United States by delivering 8 copies of the brief to Federal Express for next-day delivery to the Clerk of the United States Court of Appeals for the Fourth Circuit. On the same day, I also served the Brief upon all counsel listed below by hand delivery or by causing a two copies of the Brief to be delivered to Federal Express for next-day delivery:

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