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 REPLY BRIEF OF PLAINTIFF-APPELLANT

David H. Remes
Gregory M. Lipper*
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004
Phone: (202) 662-5212

Andrew A. Ruffino
Christine I. Magdo
COVINGTON & BURLING
1330 Avenue of the Americas
New York, NY 10019-5400
Phone: (212) 841-1097

**Admitted in California; not admitted in the District of Columbia; supervised by principals of the firm*

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. MYERS' ESTABLISHMENT CLAUSE CLAIM 1

II. PRUDENTIAL STANDING 3

III. MYERS' INDEPENDENT CHALLENGE TO "UNDER GOD" 5

TABLE OF AUTHORITIES

FEDERAL CASES

Bell v. Little Axe Independent School District No. 70, 766 F.2d 1391 (10th Cir. 1985) 3

Elk Grove School District v. Newdow, 124 S. Ct. 2301 (2004).......... 3, 4

Fleischfresser v. Directors of School District 200, 15 F.3d 680 (7th Cir. 1994) 3

Grove v. Mead School District No. 354, 753 F.2d 1528 (9th Cir. 1985) 3

Herndon by Herndon v. Chapell Hill-Carrboro City Board of Education, 89 F.3d 174 (4th Cir. 1996)..........3

Hill v. Braxton, 277 F.3d 701 (4th Cir. 2002) 1

Loe v. Armistead, 582 F.2d 1291 (4th Cir. 1978) 1-2

Meyer v. Nebraska, 262 U.S. 390 (1923) 2

Pierce v. Society of Sisters, 268 U.S. 510 (1925) 2

Steele v. Van Buren Public School District, 845 F.2d 1492 (8th Cir. 1988)..........2

Sullivan v. Syracuse Housing Authority, 962 F.2d 1101 (2d Cir. 1992) 3

ARGUMENT

I. MYERS' ESTABLISHMENT CLAUSE CLAIM

Respondents agree that this Court has jurisdiction to decide the Establishment Clause claims of Myers' children. US at 5-6; VA at 6-8; Board at 4-6. In addition, the School Board agrees that Myers has standing under the Establishment Clause to challenge the Pledge statute and School Board policy in his own right, *id*. at 7-8, and the United States agrees that the Supreme Court's cases "suggest" that conclusion, US at 6-7.

Virginia, however, has chosen not to tell the Court whether it believes Myers has standing to assert an Establishment Clause claim based on his children's alleged injury. Instead, Virginia states that Myers has not asserted such a claim, and that the only injury to himself that he has alleged is interference with his right to raise his children as he sees fit. Virginia states that this right "has been traditionally viewed as arising out of a parent's liberty interest under the Due Process clause" and "does not describe a violation of the Establishment Clause." VA at 8.

Virginia's focus on what injury Myers asserted ignores "the longstanding practice . . . to construe *pro se* pleadings liberally." *Hill v. Braxton*, 277 F.3d 701, 707 (4th Cir. 2002). That practice is "particularly appropriate where, as here, there is a *pro se* complaint raising civil rights issues." *Loe v.*

Armistead, 582 F.2d 1291, 1295 (4th Cir. 1978). As the Court's question recognizes, the proper focus is on what Establishment Clause interests of his own Myers *could* assert, based on the facts he has alleged. Virginia did not answer that question.

In any event, Virginia's factual premise is wrong. Myers did claim interference with his right to direct the religious education of his children, *see* J.A. 7, ¶ 5, but he also stated that he "does not want his children to be indoctrinated with a God and Country world view," *id.*, ¶ 7. The right not to have one's children subjected to religious indoctrination is recognized as a parental interest protected by the Establishment Clause. *See Steele v. Van Buren Pub. Sch. Dist.*, 845 F.2d 1492, 1495 (8th Cir. 1988) (recognizing, under the Establishment Clause, "the parental interest to have one's children educated in public schools that do not impose or permit religious practices").

Moreover, Virginia's legal premise – that objecting to government interference with a parent's right to direct the religious upbringing of his children states a Due Process claim but not an Establishment Clause claim – is also incorrect. To be sure, the Due Process Clause secures a general right to direct the education of one's children. *See Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). But, as sister Courts of Appeals have long recognized, the particular right to direct the *re-*

ligious upbringing of one's children is independently secured by the Establishment Clause.[1]

Indeed, as this Court suggested in *Herndon by Herndon v. Chapell Hill-Carrboro City Bd. of Educ.*, 89 F.3d 174, 177-79 (4th Cir. 1996), the right to direct the religious upbringing of one's children is secured by the Due Process Clause *only* because it is secured by the Establishment Clause. Thus, the District Court upheld the challenged statute and policy under the Due Process Clause *only* because the court had rejected Myers' claim that the Pledge promotes religion, and therefore deemed Myers to be asserting simply a right to dictate school curriculum. *See* J.A. 90-93. In doing so, the court disposed of a Due Process claim that Myers had not made, and it is the court's disposition of *that* supposed claim that Myers does not challenge.

II. PRUDENTIAL STANDING

Virginia hints that, as in *Newdow*, this Court should affirm the District Court's judgment on prudential standing grounds. VA at 8-10. In *Newdow*,

---

[1] *See Fleischfresser v. Dirs. of Sch. Dist. 200*, 15 F.3d 680, 683-84 (7th Cir. 1994) ("we hold that parents have standing to raise their claim alleging a violation of the Establishment Clause because the impermissible establishment might inhibit their right to direct the religious training of their children"); *Sullivan v. Syracuse Hous. Auth.*, 962 F.2d 1101, 1109-10 (2d Cir. 1992) (parent had Establishment Clause standing to challenge community center program on the ground that it interfered with parent's right to guide and develop his son's religious upbringing); *Bell v. Little Axe Indep. Sch. Dist. No. 70*, 766 F.2d 1391, 1398-99 (10th Cir. 1985) (same); *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1532 (9th Cir. 1985) (same).

the Supreme Court held that Newdow lacked prudential standing because Newdow – lacking legal custody of his daughter and having no authority to sue on her behalf as next friend – sought a result opposed by the mother, who had legal custody; and because Newdow's standing to sue on his own behalf rested on disputed family law rights. *Elk Grove Sch. Dist. v. Newdow*, 124 S. Ct. 2301, 2311-12 (2004). Based on these factors, the Court stated: "When hard questions of domestic relations are sure to affect the outcome, the prudent course is for the federal court to stay its hand rather than reach out to resolve a weighty question of federal constitutional law." *Id.* at 2312.

Those factors are not present here. Myers has legal custody of his children; the children's mother, to whom Myers is married, does not oppose the result Myers seeks; Myers is authorized by Virginia law and the Federal Rules of Civil Procedure to sue on his children's behalf as their next friend; and no disputed issues of state family law cloud his standing to sue on his own behalf. And even if Myers were required to demonstrate that his interests and those of his minor sons were "parallel" as a condition of his bringing this action, *see* VA at 9-10 – which he is not – Myers' factual allegations, taken as true, demonstrate that their interests are aligned. *See* Pl.'s

Mem. of Corrections and Amendments to Compl. 9-10 (submitted to this Court as an attachment to Myers' Rule 28(j) letter).

III. MYERS' INDEPENDENT CHALLENGE TO "UNDER GOD"

Myers respectfully seeks to reinforce one of the points made in his Rule 28(j) letter – that under the liberal standards that apply to *pro se* plaintiffs, Myers may be fairly regarded as having stated an independent Establishment Clause objection to the inclusion of "under God" in the Pledge. In addition to the District Court memorandum that Myers submitted to the Court with his Rule 28(j) letter, Myers repeated this objection in his informal brief in this Court: "[S]ince the addition of the words 'under God' and the removal of sectarian prayer from [public] schools, the Pledge has become a religious tenet of God and Country," Appellant's Informal Br. 9; "A Pledge of Allegiance ritual references God and Country civil religion by including the phrase "under God" in the Pledge," *id.* Counsel similarly stated during oral argument that it is the inclusion of "under God" in the Pledge that makes the Pledge part of "God and Country" religion.

Respectfully submitted,

____

David H. Remes
Gregory M. Lipper*
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, DC 20004
Phone: (202) 662-5212

Andrew A. Ruffino
Christine I. Magdo
COVINGTON & BURLING
1330 Avenue of the Americas
New York, NY 10019-5400
Phone: (212) 841-1097

**Admitted in California; not admitted in the District of Columbia. Supervised by principals of the firm.*

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Supplemental Brief of Plaintiff-Appellant were sent by first-class mail, postage pre-paid, this 21st day of April, 2005 to:

Lowell V. Sturgill, Jr.
Appellate Staff
Civil Division, Room 7241
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, DC 20530
Attorney for Intervenor-Appellee The United States

Maureen Riley Matsen, Esq.
Office of the Attorney General of Virginia
900 East Main Street
20th Floor Erieview Tower
Richmond, VA 23219
Attorney for Defendant-Appellee Commonwealth of Virginia

Earl William Chapman, Esq.
Reed Smith Hazel & Thomas LLP
Suite 300
44084 Riverside Parkway
Leesburg, VA 22075
Attorney for Defendant-Appellee Loudoun County School Board

Troy King
John J. Park, Jr.
Charles B. Campbell
Office of the Attorney General
State of Alabama
11 South Union Street
Montgomery, AL 36130-0152
Attorneys for Amici 30 States

____
David H. Remes