RECORD 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,

Defendant-Appellees.

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

RESPONSE BRIEF OF APPELLEE COMMONWEALTH OF VIRGINIA

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I. Reliance on a Virginia Rule is Misplaced and FRAP 3(c)(2) Does Not Address the Question.

The Commonwealth does not disagree with the conclusion that the representation question is not jurisdictional, however Myers' reliance on a "Virginia rule" is misplaced and his effort to draw support from Federal Rule of Appellate Procedure 3(c)(2)—to argue that *pro se* representation in the district court was proper—must fail.

Of the several federal court decisions considering whether a parent may conduct a lawsuit as his child's representative, none decided the question with reference to state law. *See Collinsgru v. Palmyra Bd. of Educ.*, 161 F.3d 225 (3d Cir. 1998); *Devine v. Indian River County Sch. Bd.*, 121 F.3d 576 (11th Cir. 1997); *Johns v. County of San Diego*, 114 F.3d 874 (9th Cir. 1997); *Osei-Afriyie v. Med. Coll. of Pennsylvania,* 937 F.2d 876 (3d Cir. 1991); *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59 (2d Cir. 1990); *Meeker v. Kercher*, 782 F.2d 153 (10th Cir. 1986). This case should be no exception. Moreover, even if a state rule were somehow relevant, the decision in *Coffey v. Virginia Birth-Related Neurological Injury Comp. Program,* 558 S.E.2d 563 (Va. Ct. App. 2002) does not speak to the question.

Coffey was an appeal from an administrative denial of benefits, heard by Virginia's intermediate appellate court pursuant to its unique and limited

jurisdiction. In response to the claimant's due process challenge, the Court decided two things: i) that the failure of an administrative body to appoint counsel or a guardian *ad litem* did not deny it jurisdiction to decide a claim for benefits brought by a parent; and that ii) there was no showing of fraud, unfairness or failure by the body to consider the claim fully and fairly that formed any basis to conclude that there was a denial of due process. The Court of Appeals did not adopt a rule that parents may represent their children in state court.[1]

Likewise, neither Rule 3(c)(2), nor the case law interpreting it, go so far as to permit *pro se* representation of children and spouses.[2] See, e.g., *Mrs. S. ex rel. G v. Vashon Island School District*, 337 F.3d 1115 (9th Cir. 2003); *Carballo-Sandoval v. Honsted*, 35 F.3d 521 (11th Cir. 1994); *Colle v. Brazos County*, 981 F.2d 237 (5th Cir. 1993); *King v. Otasco, Inc.*, 861 F.2d 438 (5th Cir. 1988). In fact, when the Ninth Circuit applied Rule 3(c)(2) to permit a parent to act on behalf of her child for the limited purpose of filing a notice of appeal in *Mrs. S. ex rel G.*, it declared that "a non-attorney parent

[1] If a "Virginia rule" is in anyway relevant, the opinion seems to indicate that it would have to be discerned with reference to the statutes requiring appointment of a Virginia attorney as guardian *ad litem* and cases considering the best interests of the child. *See Coffey*, 558 S.E. 2d at 398-99

[2] Indeed, the application of the Rule to preserve a child's right to appeal advances the same interest in protecting children that is advanced by refusing to permit their parents to represent them in federal court.

'*cannot* bring an action on behalf of a minor child without retaining a lawyer.'" 337 F.3d at 1125 n.15 (quoting *Johns*, 114 F.3d at 877) (emphasis added). Quite simply, Rule 3(c)(2) cannot be read as broadly as Myers suggests.

Similarly, the Second Circuit permitted a parent to represent his child *pro se* in a social security benefits case because the parent, as "representative payee," had a significant stake in securing benefits to pay for needs arising from the child's disabling condition. It expressly limited the permission, however to cases where the interests of parent and child are so intertwined. *See Harris v. Apfel*, 276 F.3d 103, 106 (2nd Cir. 2002) (quoting *Cheung*, 906 F.2d at 61). Myers would not benefit from any declaratory or injunctive relief afforded his children as a third-party payee of monetary benefits. Therefore, his claim does not fit into the limited framework adopted by the Second Circuit in *Harris*.

II. Myers Does Not Have Standing to Assert His Own Establishment Clause Claim Arising Out of His Children's Exposure to the Pledge of Allegiance.

The question of whether or not Myers himself has standing to bring a claim under the Establishment Clause because of the alleged injury suffered by his minor children is not resolved by *McCollum v. Board of Education,* 333 U.S. 203 (1948), *Engel v. Vitale*, 370 U.S. 421 (1962), or *Abingdon v.*

Schempp, 374 U.S. 203 (1963). Those cases were appealed from decisions of state courts. In 2003, the Supreme Court explained that "our standing rules limit only the federal courts' jurisdiction over certain claims. '[S]tate courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law.'" *Virginia v. Hicks*, 539 U.S. 113, 120 (2003) (citations omitted). The question of whether the state court should have heard the challenge in *Hicks* was "entirely a matter of state law." *Id.* Thus, the fact that the plaintiffs in *McCollum*, *Engel* and *Schempp* were able to bring an Establishment Clause challenge in state court does not establish that a parent may bring an Establishment Clause challenge in federal court.[3]

Under both *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982) (denying standing to challenge federal transfer of land to church affiliated college) and *Suhre v. Haywood Co.*, 131 F.3d 1083 (4th Cir. 1997) (finding standing to challenge Ten Commandments display in a courthouse), Myers does not have standing to bring his own Establishment Clause claim. In *Valley Forge,* the Court

[3]Indeed, Justice Brennan's concurrence in *Schempp* expressly acknowledged that the question remained unresolved. 372 U.S. at 266 n.30 ("[N]o question has been raised in these cases concerning the standing of these parents to challenge the religious practices conducted in the schools which their children presently attend.").

held that the "injury in fact" standing requirement means a plaintiff must state an injury that can be differentiated from "the right, possessed by every citizen, to require that the government be administered according to law . . . ." 454 U.S. at 482-83. In other words, there must be some sort of personal or direct contact or encounter with the challenged practice or policy. *See Suhre,* 131 F.3d at 1088 ("direct contact with unwelcome religious symbolism endorsed by the State" is sufficient to satisfy the injury in fact requirement).

Myers cannot demonstrate a personal direct contact or encounter with the requirements of Virginia's Pledge statute. His purported Establishment Clause injury cannot be differentiated from the right of every other Virginia citizen. *See Valley Forge,* 454 U.S. at 487 n.22 (emphasizing that the plaintiffs in *Schempp* were children and that, in a case where a child graduated from the school engaging in the challenged practice, the appeal was dismissed). For purposes of a facial challenge to a state statute, Myers does not have sufficient contact with the recitation of the Pledge to assert that its mention of "God" violates the Establishment Clause. To extend standing to Myers to assert such a claim on his own behalf would be to expand the principles of Establishment Clause standing beyond the bounds heretofore established by this Court or the Supreme Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief has been prepared using fourteen point, proportionally spaced, serif typeface: Microsoft Word 7, Times New Roman, 14 point.

2. Exclusive of the table of contents, table of citations and the certificate of service, this brief contains 1,093 words.

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