No. __-___

IN THE
Supreme Court of the United States

BLAKE WARNER,

Petitioner,

v.

SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

KELLY J. SHACKELFORD
JEFFREY C. MATEER
HIRAM S. SASSER, III
DAVID J. HACKER
JEREMIAH G. DYS
First Liberty Institute
2001 W. Plano Parkway
Suite 1600
Plano, TX 75075
(972) 941-4444

AARON M. STREETT
Counsel of Record
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, TX 77002
[redacted]

MATTHEW P. ERICKSON
MATTHEW M. HILDERBRAND
BENJAMIN C. HUNT
BAKER BOTTS L.L.P.
401 South 1st Street
Austin, TX 78704
(512) 322-2500

Counsel for Petitioner Blake Warner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTION PRESENTED

In federal court, "parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein." 28 U.S.C. § 1654.

The question presented is:

Whether children must hire an attorney to pursue their claims in federal court, or whether their parents may instead litigate *pro se* on their behalf.

PARTIES TO THE PROCEEDINGS BELOW

1. Blake Warner is petitioner here and was plaintiff-appellant below.

2. The School Board of Hillsborough County, Florida, is respondent here and was defendant-appellee below.

RELATED PROCEEDINGS

This case is directly related to the following proceedings in the U.S. District Court for the Middle District of Florida, the U.S. Court of Appeals for the Eleventh Circuit, and this Court:

- *Warner on behalf of J.W.* v. *School Board of Hillsborough Cnty., Fla.*, Nos. 8:23-cv-00181-SDM-JSS & 8:23-cv-01029-SDM-SPF (M.D. Fla.) (July 5, 2023) (granting motion to dismiss)

- *Warner* v. *School Board of Hillsborough Cnty., Fla.*, Nos. 23-12408 & 23-12411 (11th Cir.) (May 8, 2024) (affirming dismissal of Mr. Warner's claims on behalf of J.W.)

- *Warner* v. *School Board of Hillsborough Cnty., Fla.*, No. 24A474 (U.S.) (Nov. 13, 2024) (order granting application of Blake Warner to extend time to file petition for writ of certiorari)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Blake Warner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's opinion (App., *infra*, at 1a-9a) is unreported but available at 2024 WL 2053698. The district court's opinion (App., *infra*, at 10a-14a) is unreported but available at 2023 WL 4748133.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on May 8, 2024. App., *infra*, at 1a. A timely petition for rehearing en banc was denied on September 4, 2024. *Id.* at 15a. This Court extended the time in which to file a petition for certiorari to January 2, 2025. *Warner* v. *Sch. Bd. of Hillsborough Cnty., Fla.*, No. 24A474 (U.S.) (Nov. 13,

2024). This court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

28 U.S.C. § 1654 provides:

> In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.

STATEMENT

Blake Warner brought two lawsuits *pro se* in federal court on behalf of himself and his minor child, J.W. Mr. Warner sued the School Board of Hillsborough County, Florida, under 20 U.S.C. § 1703, 42 U.S.C. § 1983, and Florida state law, alleging that it engaged in racially discriminatory districting practices. App., *infra*, at 10a.

In the first complaint (the 181 Case), Mr. Warner alleged that the Board strategically drew district boundaries along demographic lines, to the disadvantage of minority students. *Id.* at 2a-3a. These boundaries caused minority students, like J.W., to be "assigned to lower-performing schools while white students were assigned to higher-performing schools." *Id.* at 3a.

In the second complaint (the 1029 Case), Mr. Warner alleged that the school board made new changes for the upcoming school year, "assigning J.W. to a further-away, minority-majority school despite there being a closer and higher-performing, majority-white school that he was not permitted to attend." *Ibid.* Mr. Warner then filed a motion to consolidate the two cases. *Ibid.*

Instead of ruling on that motion, the district court issued a show cause order, directing Mr. Warner to explain why the 1029 Case should not be dismissed for improper claim splitting. *Ibid.* Mr. Warner argued that the claims were temporally distinct—the 181 Case related to

previous harms, while the 1029 Case dealt with future harms related to the upcoming school year. *Ibid.* The Board then moved to dismiss the 1029 Case. *Ibid.*

The district court granted the Board's motion, noting two bases for its ruling: (1) improper claim splitting, and (2) Mr. Warner could not represent J.W. *pro se*. As to the first ground, the court granted Mr. Warner leave to "amend [his] complaint in the earlier-filed action," directing him to "assert his claims against the School Board in a single action." *Id.* at 13a. As to the second ground (which the court raised *sua sponte*), the court directed Mr. Warner to "appear through a lawyer" if he wanted "to appear as plaintiff on behalf of his minor child and assert his child's claims." *Ibid.* The court emphasized that "Warner may assert *pro se* claims on behalf of himself only." *Ibid.* The court then entered the order granting the motion to dismiss the 1029 Case on the docket in the 181 Case. *Id.* at 4a n.2.

Mr. Warner, still without the assistance of counsel, timely appealed, but secured *pro bono* counsel to help him prepare appellate briefs. He did not contest the part of the district court's order dismissing his own claims for improper claim splitting. *Id.* at 5a n.5. The only issue on appeal was whether "the district court erred in finding that a parent is not permitted to advance a child's causes *pro se*." *Id.* at 5a.

Despite conceding that Mr. Warner's "policy argument" against mandating counsel for children was "appealing," the court invoked *Devine* v. *Indian River County School Board*, which held that "parents who are not attorneys may not bring a *pro se* action on their child's behalf." 121 F.3d 576, 582 (11th Cir. 1997). The court held that it was "bound by *Devine*." App., *infra*, at 7a. Thus, it affirmed the district court's order dismissing Mr. Warner's claims on J.W.'s behalf. *Id.* at 8a-9a. The Eleventh Circuit denied rehearing en banc. *Id.* at 16a.

REASONS FOR GRANTING THE PETITION

In federal court, "parties may plead and conduct their own cases personally or by counsel." 28 U.S.C. § 1654. This right is deeply rooted in American legal tradition, stemming from colonists' "appreciation of the virtues of self-reliance and a traditional distrust of lawyers." *Faretta* v. *California*, 422 U.S. 806, 826 (1975). As a result, all Americans have a right to appear in court without a lawyer.

Except children.

Although § 1654 gives children the theoretical right to proceed *pro se*, they cannot exercise that right on their own because they lack capacity to sue. Fed. R. Civ. P. 17(c). Instead, a parent or guardian must sue on the child's behalf. See *id.* While parents are typically allowed to exercise their child's substantive and procedural rights on the child's behalf, courts have concocted an exception for the child's right to proceed without a lawyer.

According to these courts, it does not matter if parents cannot pay for counsel or if they decide that the case does not warrant the expense—they must pay the piper or forfeit the fight. Children thus face "a Hobson's choice: litigate with counsel, or don't litigate at all." *Raskin on behalf of JD* v. *Dall. Indep. Sch. Dist.*, 69 F.4th 280, 294 (5th Cir. 2023) (Oldham, J., dissenting in part and concurring in the judgment).

This so-called "counsel mandate," Lisa V. Martin, *No Right to Counsel, No Access Without: The Poor Child's Unconstitutional Catch-22*, 71 Fla. L. Rev. 831, 834 (2019) [hereinafter *Catch-22*], is an aberration. It infringes on multiple fundamental rights: a parent's right to make critical decisions for his children, and a child's rights to access the courts and do so without a lawyer.

Courts have not offered a valid justification for these infringements. The counsel mandate's purported

statutory- and policy-based rationales wilt under scrutiny. The statutory rationale is internally inconsistent and fundamentally misunderstands § 1654's purpose. Its policy rationales fare no better—far from giving children their day in court, in many cases the counsel mandate bars them from court altogether. Moreover, courts have grounded the counsel mandate in two different sources of law—§ 1654 on the one hand, and federal common law on the other. This circuit split reveals the counsel mandate's flawed conceptual foundation, while some circuits grant exceptions to the mandate that others refuse.

The lower courts have acknowledged these flaws but failed to remedy them. This Court should grant review and restore this important right.

I. The Counsel Mandate Violates Fundamental Rights Of Parents And Children That This Court Has Long Recognized

The counsel mandate encroaches on three fundamental rights long honored in this Court's decisions: a parent's right to make decisions for their children, and a child's rights to access the courts and do so without a lawyer. The counsel mandate cannot be reconciled with these principles and should be rejected.

A. The counsel mandate infringes parents' right to raise and make decisions for their children

1. Parents possess a deeply rooted constitutional right to raise their children as they see fit. See *Santosky* v. *Kramer*, 455 U.S. 745, 753 (1982) (noting the "fundamental liberty interest of natural parents in the care, custody, and management of their child"); *Quilloin* v. *Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected."). While this right is not absolute, it "is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel* v.

Granville, 530 U.S. 57, 65 (2000) (plurality op.).

This right extends to many contexts: home life, *Meyer* v. *Nebraska*, 262 U.S. 390, 399 (1923) (noting a person's right to "establish a home and bring up children"); religious upbringing, *Wisconsin* v. *Yoder*, 406 U.S. 205, 214 (1972) (recognizing "the traditional interest of parents with respect to the religious upbringing of their children"); education, *Pierce* v. *Soc'y of Sisters*, 268 U.S. 510, 534-535 (1925) (recognizing the parent's right "to direct the upbringing and education of children under their control"); and health, *Parham* v. *J.R.*, 442 U.S. 584, 603-604 (1979) (noting that parents have "authority to decide what" medical decisions are "best for the child" and "can and must make those judgments"), among others.

2. It also necessarily includes the power to decide whether the child will proceed *pro se* or by counsel—a choice that is no different from the many other decisions parents make on behalf of their children. See Martin, *Catch-22*, *supra*, at 848. In making these decisions, the law presumes that parents possess the "maturity, experience, and capacity for judgment" that children lack. *Parham*, 442 U.S. at 602. It also presumes that parents act in their children's best interests because of the "natural bonds of affection" between the two. *Ibid.*

Time and again, however, courts applying the counsel mandate have disregarded the strong constitutional presumption that the parent knows best. See, *e.g.*, *Cheung* v. *Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990) ("There is *nothing* in the guardian-minor relationship that suggests that the minor's interests would be furthered by representation by the non-attorney guardian." (emphasis added)). Moreover, they have dismissed parents' power to make litigation decisions for their children as if parental rights were an afterthought. See, *e.g.*, *Osei-Afriyie by Osei-Afriyie* v. *Med. Coll. of Pa.*, 937 F.2d 876, 883 (3d Cir. 1991) ("The right to counsel

belongs to the children, and * * * the parent cannot waive this right.").

This reasoning significantly infringes parental authority. Parents might proceed *pro se* because they wish to pursue legal action but desire to use their limited financial resources on other aspects of their children's upbringing. They might also proceed *pro se* because they believe they would make a more passionate and effective advocate for their children than a third party. Or they might proceed *pro se* because they cannot persuade a lawyer to litigate their child's claims under the legal theory they prefer.

As these examples show, the choice to proceed *pro se* is a constitutionally protected exercise of parental discretion. If parents have the right "to direct the upbringing and education of children under their control," *Pierce*, 268 U.S. at 534-535, they perforce enjoy the right decide how to interact with the selected school on their child's behalf through the court system. Courts applying the counsel mandate, however, mislabel a decision to proceed *pro se* as nothing more than an ill-advised litigation strategy. See, *e.g.*, *Cheung*, 906 F.2d at 61 ("It goes without saying that it is not in the interests of minors or incompetents that they be represented by non-attorneys.").

Parents have valid reasons for choosing to proceed *pro se*, and the Constitution protects their right to make those choices. Courts "cannot 'infringe on the fundamental right of parents to make child rearing decisions simply because a . . . judge believes a "better" decision could be made.'" *Raskin*, 69 F.4th at 295 (Oldham, J., dissenting in part and concurring in the judgment) (alteration in original) (quoting *Troxel*, 530 U.S. at 72–73); see also Martin, *Catch-22*, *supra*, at 872 (noting that the choice to proceed *pro se* is "a parenting choice—a calculation made by parents of how (or whether) to allocate limited family resources to vindicate children's legal interests"). There is no way around it: The counsel mandate treads on parents' fundamental

constitutional right to raise their children as they see fit. Courts of appeals' decisions enforcing the counsel mandate conflict with this Court's precedents honoring parental rights.

B. The counsel mandate deprives children of their right to self-representation

The counsel mandate enforced by the judgment below conflicts with yet another well-established constitutional right recognized in this Court's cases: the right to self-representation.

1. The right to self-representation predates the United States and traces its roots to England, where it was "a bulwark against the abuses of the English Star Chamber, in which individuals were forced to be represented by state counsel in politically motivated trials." Martin, *Catch-22*, *supra*, at 846. This right acquired greater force in the Colonies. See *Faretta*, 422 U.S. at 826 ("In the American Colonies the insistence upon a right of self-representation was, if anything, more fervent than in England."). Inspired by "the 'natural law' thinking that characterized the Revolution's spokesmen," the "Founders believed that self-representation was a basic right of a free people." *Id.* at 830 n.39.

A corollary of the right to self-representation is protection from forced representation. This also traces to the Founding Era: "Equally strong as the Founding generation's belief in the 'virtues of self-reliance' was its 'distrust of lawyers.'" *Raskin*, 69 F.4th at 291 (Oldham, J., dissenting in part and concurring in the judgment) (quoting *Faretta*, 422 U.S. at 826). While this animus took root during the colonists' experience with the Justices of the King's Court, *ibid.*, it increased "as 'the lower classes came to identify lawyers with the upper class.'" *Faretta*, 422 U.S. at 827 (citation omitted). And because of this widely held

anti-lawyer sentiment, "the notion of compulsory counsel was utterly foreign to" the Founders. *Id.* at 833.

Accordingly, the right to self-representation was one of the first rights codified into American law. Many states guaranteed the right to self-representation in their constitutions. See *Raskin*, 69 F.4th at 292 (Oldham, J., dissenting in part and concurring in the judgment) (discussing the Pennsylvania and Georgia constitutions); *Faretta*, 422 U.S. at 829 n.38 (citing several founding-era state constitutional provisions).

The First Congress likewise enshrined the right in the Judiciary Act of 1789, which provided that "in all the courts of the United States, the parties may plead and manage their own causes personally or by the assistance of * * * counsel." Pub. L. No. 1-20, § 35, 1 Stat. 73, 92. And today, that right is codified in § 1654, which uses nearly identical language to the Judiciary Act of 1789. See 28 U.S.C. § 1654 ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel * * * .").

This right belongs to both children and adults. See *Raskin*, 69 F.4th at 292 (Oldham, J., dissenting in part and concurring in the judgment) ("Nothing in § 1654 limits the right to proceed 'personally'—that is, *pro se*—to those who are at least 18 years old."). As a result, "[s]ince the First Judiciary Act in 1789, every person—including a minor—has enjoyed a right to litigate *pro se* in federal court." *Id.* at 287.

2. While children have the right to sue and to represent themselves in court, they cannot exercise those rights in the same way adults can. Because "children usually lack the capacity to make [litigation] decision[s] * * * their interest is ordinarily represented in litigation by parents or guardians." *Smith* v. *Org. of Foster Fams. for Equal. & Reform*, 431 U.S. 816, 841 n.44 (1977). Federal law thus

permits "a general guardian" to make decisions on a child's behalf in federal court.[1] Fed. R. Civ. P. 17(c)(1)(A). This includes the right to decide "whether, when, and where to bring suit, what claims to advance, what information to disclose, and whom to sue," among others. Martin, *Catch-22*, *supra*, at 848; see also *In re Moore*, 209 U.S. 490, 496 (1908) (noting the "clear" principle that "a next friend may select the tribunal in which [a child's] suit shall be brought"), *abrogated on other grounds by Ex parte Harding*, 219 U.S. 363 (1911). Thus, although children lack legal capacity to independently vindicate their rights in court, they do so *through their parents*.

If not for the counsel mandate, a child's ability to act in court through his parents would necessarily include the right to self-representation. The Second Circuit therefore correctly noted that there is "some tension" between the counsel mandate and "the general notion that a person may appear in court without the benefit (or expense) of professional assistance." *Tindall* v. *Poultney High Sch. Dist.*, 414 F.3d 281, 286 (2d Cir. 2005).

The counsel mandate requires children to litigate with counsel or *not at all*, forbidding parents from vindicating their children's right to self-representation. As Professor Martin explained, "[t]he right to self-representation * * * provides a critical guarantee of court access for those who cannot afford counsel." Martin, *Catch-22*, *supra*, at 847. But the counsel mandate deprives children of access to the courts if they cannot afford or otherwise obtain counsel.

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[1] In fact, statutes of limitations often apply to children precisely because a parent "holds a legal duty to take action on behalf of the minor child" and is "responsible for initiation of suit in a timely manner." *Booth* v. *United States,* 914 F.3d 1199, 1206 (9th Cir. 2019).

C. The counsel mandate prevents children from accessing the courts

1. The result of preventing parents from vindicating children's right to appear *pro se* is yet another constitutional infringement. The counsel mandate violates the right of court access long recognized by this Court.

The right to sue and defend in the courts implicates several constitutional provisions, making it "one of the highest and most essential privileges of citizenship." *Chambers* v. *Balt. & Ohio R.R. Co.*, 207 U.S. 142, 148, (1907). Access to the courts implicates due process, equal protection, and First Amendment rights all at once. See *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 120 (1996) ("[T]he Court's decisions concerning access to judicial processes * * * reflect both equal protection and due process concerns."); *Bill Johnson's Rests., Inc.* v. *NLRB*, 461 U.S. 731, 741 (1983) (noting that "the right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances"). Unsurprisingly, then, this Court has described the right to access the courts as a fundamental constitutional right. *Bounds* v. *Smith*, 430 U.S. 817, 828 (1977).

2. The counsel mandate deprives children of this right altogether. When children attempt to proceed *pro se* through their parents, courts dismiss their claims without prejudice. See, *e.g.*, App., *infra*, at 13a; *Cheung*, 906 F.2d at 62 ("If Cheung does not retain counsel and if the district court declines to appoint counsel, the complaint should be dismissed without prejudice."). While state law often tolls children's claims until they can bring their claims as adults, see *Crozier for A.C.* v. *Westside Cmty. Sch. Dist.*, 973 F.3d 882, 888 (8th Cir. 2020) (per curiam) (holding that applying the counsel mandate would "not violate [the child's] fundamental right to access the courts" because Nebraska law tolled the accrual of her claims until she

turned twenty-one), that is cold comfort for children who need relief now. J.W.'s claims, for example, will be moot if he is required to wait until he turns eighteen to challenge his denial of admission to a particular school. Justice delayed is justice denied.

Far from enhancing children's likelihood of success *in* court (its supposed rationale), the counsel mandate instead keeps them *out* of court. As the Second Circuit explained, "although the [counsel mandate] serves the salutary purpose of making competent representation of children more likely, in some cases—perhaps in the appeal before us—it may force minors out of court altogether." *Tindall*, 414 F.3d at 286. This "unquestionably raises concerns with grave implications for children's access to justice." *Grizzell* v. *San Elijo Elementary Sch.*, 110 F.4th 1177, 1181 (9th Cir. 2024).

3. For children too poor to afford a lawyer, this requires procuring pro bono counsel to vindicate their rights. But because of "the severe shortage of free and low-cost legal services in the United States * * * the counsel mandate requires families to take on the substantial financial cost of attorney fees as a prerequisite to court access." Martin, *Catch-22*, *supra*, at 835. "[T]he counsel mandate thus imposes an insurmountable financial barrier to civil justice" on families who cannot afford an attorney. *Ibid.* There is no sugarcoating the issue—the counsel mandate shuts the courthouse doors on children, resigning them to defeat simply because they are poor. That is patently unconstitutional. See *M.L.B.*, 519 U.S. at 113 (noting that states "must provide access to its judicial processes without regard to a party's ability to pay court fees").

That result is also inconsistent with Rule 17(c), which gives federal courts broad authority "to protect a minor or incompetent person who is unrepresented in an action." Fed. R. Civ. P. 17(c)(2). In other words, Rule 17(c) exhorts courts to protect a child's access to courts, consistent with

the Constitution. The counsel mandate does the opposite—it dismisses their claims altogether and closes the courthouse doors behind them.

II. THE COUNSEL MANDATE LACKS A PRINCIPLED FOUNDATION

Courts have proffered statutory- and policy-based justifications for the counsel mandate. Neither rationale holds water. Nor can they justify this infringement of constitutional rights enshrined in this Court's decisions.

A. The statutory rationale is internally inconsistent and misunderstands § 1654's purpose

Section 1654 permits litigants to "plead and conduct their own cases personally or by counsel." 28 U.S.C. § 1654. Many courts have held that because § 1654 forbids parties from litigating any claims that are not "their own," parents are barred from litigating their children's claims *pro se*. See, *e.g.*, *Shepherd* v. *Wellman*, 313 F.3d 963, 970 (6th Cir. 2002) (holding that parents cannot appear on behalf of their children because § 1654 "does not permit plaintiffs to appear *pro se* where interests other than their own are at stake"). However, most circuit courts have recognized that this rule "is not ironclad" and admits of certain exceptions. *Elustra* v. *Mineo*, 595 F.3d 699, 705 (7th Cir. 2010).[2]

1. Textually speaking, this interpretation is clearly wrong. As the argument goes, a parent cannot represent his child "personally" because the child's claims are not the parent's "own." But the phrase "their own" modifies both "personally" *and* "by counsel." See 28 U.S.C. § 1654 (authorizing litigants to "plead and conduct their own cases personally or by counsel"). So if parents cannot bring their children's claims "personally" (i.e., *pro se*), neither can they bring them "by counsel." That cannot be right. See *Raskin*, 69 F.4th at 297 (Oldham, J., dissenting in part and

[2] For more on these exceptions, see *infra*, Parts III.C & D.

concurring in the judgment) (explaining that the prevailing interpretation "renders other run-of-the-mill cases problematic"). At the very least, that would contradict Rule 17(c), which authorizes parents to "sue or defend on behalf of a minor." Fed. R. Civ. P. 17(c). If not *pro se*, then certainly by counsel. An interpretation that produces such nonsensical results cannot sustain the counsel mandate.

2. Reading "their own" to limit the right to self-representation also conflicts with § 1654's evident purpose. Section 1654 aims to vindicate the right to self-representation, not to restrict it. The Judiciary Act of 1789, § 1654's predecessor statute, "guaranteed" the right, *Faretta*, 422 U.S. at 831, consistent with many other Founding Era documents. See *id.* at 828 (noting that "[t]he right of self-representation was guaranteed in many colonial charters and declarations of rights"). That is one reason why the counsel mandate did not appear in a judicial decision until 1986—197 years after the first Judiciary Act was passed. See *Meeker* v. *Kercher*, 782 F.2d 153 (10th Cir. 1986) (per curiam); Martin, *Catch-22*, *supra*, at 834 n.19 ("*Meeker* was the first case to announce the counsel mandate."). Simply put, there is no statutory basis for a rule barring *pro se* parent representation.

Courts that understand § 1654 as *prohibiting* parental *pro se* representation thus have it exactly backwards. Properly understood, § 1654 operates in tandem with the fundamental constitutional principles discussed above to confirm parental *pro se* representation, rather than empowering federal courts to restrict that fundamental right. And to the extent § 1654 is ambiguous, courts should construe it to be consistent with constitutional rights under the canon of constitutional avoidance. See *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (explaining that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will

construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress").

B. Courts invoke four mistaken policy rationales for the counsel mandate

Policy considerations should never be sufficient to override deeply rooted constitutional rights. But the lower courts have followed that misguided course.

1. Courts impose the counsel mandate as an application of the broader common-law rule prohibiting non-attorneys from representing others in court. See *Johns* v. *Cnty. of San Diego*, 114 F.3d 874, 877 (9th Cir. 1997) ("The issue of whether a parent can bring a pro se lawsuit on behalf of a minor 'falls squarely within the ambit of the principles that militate against allowing non-lawyers to represent others in court.'" (quoting *Brown* v. *Ortho Diagnostic Sys., Inc.*, 868 F. Supp. 168, 172 (E.D. Va. 1994))); *Myers* v. *Loudoun Cnty. Pub. Schs.*, 418 F.3d 395, 400 (4th Cir. 2005) (noting the common law rule that "[t]he right to litigate for *oneself* * * * does not create a coordinate right to litigate for *others*").

But there is no historical evidence that the parent-child relationship was subject to this general common-law rule. The parent-child relationship has long held a unique place in the law. Judge Oldham explained why: "[T]he parent-child relationship is far different from the relationship between an unlicensed non-attorney and a would-be client from the neighborhood or church. The parent-child relationship is a sacred, pre-political bond that preexists both the United States and Texas, and which is uniquely enshrined into state and federal law." *Raskin*, 69 F.4th at 298 (Oldham, J., dissenting in part and concurring in the judgment). Thus, "*none* of the cases" cited by the court in *Raskin* "points to *any* evidence that parents were

prohibited from making legal decisions for their children at common law." *Ibid.*

As Judge Oldham's dissent makes clear, our nation has a long history and tradition of (1) permitting non-lawyers to represent themselves and (2) allowing parents to steward their children's legal interests. That history strongly suggests that the general common law rule did not apply to the parent-child relationship, and that the counsel mandate is thus an erroneous extension of that rule.

2. Courts often claim that the counsel mandate protects children from being represented "by unskilled, if caring, parents." *Devine*, 121 F.3d at 582; see also *Cheung*, 906 F.2d at 61 (holding that children "are entitled to trained legal assistance so their rights may be fully protected"); *Myers*, 418 F.3d at 401 (recommending remanding proceedings so that "children's interests are not prejudiced by their well-meaning, but legally untrained parents"). Other courts similarly invoke their long-established "duty to protect the minor's interests" as a basis for the counsel mandate. *Salmeron* v. *United States*, 724 F.2d 1357, 1363 (9th Cir. 1983); see also *Osei-Afriyie*, 937 F.2d at 883.

While courts are obliged to ensure children's rights are protected, that is hardly a license to extinguish those rights altogether. Courts would never countenance overriding a parents' right to direct their children's educational or religious upbringing because some parents are "unskilled" compared to professional teachers or clergy. But here, in the name of protecting children from their "unskilled, if caring, parents," *Devine*, 121 F.3d at 582, courts dismiss their claims, hindering the rights of parents and children alike. It strains logic to say that *closing* the courthouse doors protects children's rights. More likely, it deprives children of their rights to self-representation and access to courts, among others.

Put another way, the counsel mandate does not consider

the "extent to which child litigants' constitutional rights or fit parents' constitutionally protected sphere of decision-making constrain the courts' discretion to require parents to retain counsel." Martin, *Catch-22*, *supra*, at 880. Apparently, permitting untrained parents to represent their children is worse than depriving children of their fundamental rights altogether. That policy judgment cannot be squared with the Constitution or common sense.

3. Some courts justify the counsel mandate as a means to regulate the practice of law. See, *e.g.*, *Myers*, 418 F.3d at 400 (noting that the counsel mandate "jealously guards the judiciary's authority to govern those who practice in its courtrooms"). The Second Circuit used more transparent language, noting that the counsel mandate weeds out frivolous claims that abuse the court system. See *Cheung*, 906 F.2d at 61. ("To allow guardians to bring *pro se* litigation also invites abuse, as the present case may demonstrate."). Courts similarly claim that the counsel mandate guarantees "a minimum level of competence" to protect opposing parties "and the court from poorly drafted, inarticulate, or vexatious claims." *Collinsgru* v. *Palmyra Bd. of Educ.*, 161 F.3d 225, 231 (3d Cir. 1998); see also *Myers*, 418 F.3d at 400 (explaining that the counsel mandate "protects the rights of those before the court").

This rationale proves too much and would extinguish all *pro se* representations—not just parent-child ones—in stark violation of *Faretta* and Section 1654. See *Faretta*, 422 U.S. at 812 (noting that "the right of self-representation has been protected by statute since the beginnings of our Nation"). But even accepting the validity of such concerns, the blanket counsel mandate is not tailored to address them. It forbids even competent parents from representing their children *pro se*. See *Tindall*, 414 F.3d at 286 (holding that the counsel mandate forbade a mother from representing her child *pro se*, "irrespective of our judgment as to whether his mother would be capable of

doing so"). The counsel mandate therefore does not regulate *how* parties litigate in federal court, but instead blindly limits *who* can litigate without considering a parent's representative competence or the merit of the claim the parent seeks to litigate.

Mr. Warner exemplifies the shortcomings of this policy rationale. He submitted initial and amended pleadings, a notice of related action, a motion to consolidate, and a timely notice of appeal, among others. App., *infra*, at 2a-5a. And in one instance, he proved himself *more* competent than licensed attorneys by correctly identifying the School Board's failure to file a motion to dismiss that complied with local rules. *Id.* at 13a-14a. In fact, the district court eventually "WARNED" the School Board's counsel (but not Mr. Warner) "to comply carefully with all applicable rules, including the Local Rules." *Id.* at 14a.

Likewise, Ms. Raskin filed "cogent" and "persuasive" pleadings in the district court, which "included citations to relevant legal authorities." *Raskin*, 69 F.4th at 287 (Oldham, J., dissenting in part and concurring in the judgment). She then "filed two excellent briefs" on appeal and "was a passionate and effective advocate" at oral argument. *Id.* at 288.

As these examples show, the competency-based rationale is deficient. Mr. Warner and Ms. Raskin did not abuse the court system. They did not inadvertently waive their children's rights. They did not prove themselves incompetent to represent their children. Their litigation conduct did not confuse opposing parties or waste a judge's time. And their efforts should not be dismissed simply because they are not licensed attorneys.

As this Court noted in the context of prisoner access to courts, "the cost of protecting a constitutional right cannot justify its total denial." *Bounds*, 430 U.S. at 825. That maxim is no less true here. While some *pro se* parents

might impose burdens on the court system, that is no excuse for punishing parents, like Mr. Warner and Ms. Raskin, who competently bring good-faith claims to vindicate their children's rights. A blanket prohibition on *pro se* parental representation does not advance the ends it is supposed to vindicate.

4. Lastly, "courts reason that the right to self-representation aims to respect autonomy by reserving to the individual litigant the choice of whether to present one's claims through counsel or oneself." Martin, *Catch-22*, *supra*, at 846; see *Cheung*, 906 F.2d at 61 ("The choice to appear *pro se* is not a true choice for minors who under state law * * * cannot determine their own legal actions. There is thus no individual choice to proceed *pro se* for courts to respect * * * ."); *Osei-Afriyie*, 937 F.3d at 883 ("The right to counsel belongs to the children, and * * * the parent cannot waive this right.").

This rationale misunderstands the parent-child relationship and upends the presumption that parents act in their children's best interests. Because "children usually lack the capacity to make [litigation] decision[s]," "their interest is ordinarily represented in litigation by parents or guardians." *Smith*, 431 U.S. at 841 n.44. While children possess rights, parents (acting on their children's behalf) choose whether to exercise those rights. This is why Rule 17(c) authorizes parents to bring or defend lawsuits on their children's behalf. Fed. R. Civ. P. 17(c).

It makes little sense to deny parents the right to choose whether to proceed *pro se* while preserving their right to choose whether to bring the lawsuit in the first place, "when, and where to bring suit, what claims to advance, what information to disclose, and whom to sue." Martin, *Catch-22*, *supra*, at 848. Once again, the counsel mandate undermines the interests of children and the rights of parents.

* * *

Neither the governing statutory text nor policy rationales justify the counsel mandate, especially given the fundamental rights it abridges. On that basis alone, this Court's review is warranted.

III. Courts Are Split On Whether The Counsel Mandate Is A Creature Of Federal Statute Or Federal Common Law

Disagreement among the courts of appeals also warrants this Court's review. Some courts understand the counsel mandate to be required by the text of § 1654, while other courts apply the rule as a matter of federal common law. While both approaches are erroneous, that divergence has real consequences.

A. Courts differ on the source of the counsel mandate

The Fifth Circuit's opinion in *Raskin* best captures the confusion. On the one hand, the court noted that "at common law, non-attorneys could not litigate the interests of others," and concluded that "[n]othing in § 1654 abrogates this common-law rule or its corollary that non-attorney parents cannot act as attorneys for their children," *Raskin*, 69 F.4th at 283–284. But on the other hand, the court said that the "case starts and ends with the text of" § 1654, and concluded that the statute generally (though "not absolutely") "bar[s] parents from proceeding *pro se* on behalf of their children." *Id.* at 283, 286. In other words, the court seemingly described the counsel mandate as *both* a federal common law rule *and* required by § 1654.

1. Several circuits have held that § 1654 prohibits *pro se* parent representation because it forbids parties from litigating any claims that are not "their own." See *Berrios* v. *N.Y.C. Hous. Auth.*, 564 F.3d 130, 134 (2d Cir. 2009) (noting "the principle embodied in § 1654 that a non-attorney is not allowed to represent another individual in federal court litigation without the assistance of counsel");

Shepherd, 313 F.3d at 970 (adopting the counsel mandate because § 1654 "does not permit plaintiffs to appear *pro se* where interests other than their own are at stake"); *Ethan H.* v. *New Hampshire*, No. 92-1098, 1992 WL 167299, at *1 (1st Cir. July 21, 1992) (per curiam); *Meeker*, 782 F.2d at 154 (holding "under [Rule 17(c)] and [§ 1654], a minor child cannot bring suit through a parent acting as next friend if the parent is not represented by an attorney"); *Kennedy* v. *Sec'y of Health & Hum. Servs.*, 99 Fed. Cl. 535, 546 (2011) (noting that § 1654 "preclude[s] a non-attorney from representing another individual in federal court"), aff'd by 485 F. App'x 435 (Fed. Cir. 2012) (per curiam).

2. Other courts understand the counsel mandate as an extension of the common law rule forbidding non-lawyers from representing others in court. See, *e.g.*, *Johns*, 114 F.3d at 877 ("The issue of whether a parent can bring a pro se lawsuit on behalf of a minor 'falls squarely within the ambit of the principles that militate against allowing non-lawyers to represent others in court.'" (quoting *Brown*, 868 F. Supp. at 172)); *Myers*, 418 F.3d at 400 (rooting the counsel mandate in the common law rule that "[t]he right to litigate for *oneself* * * * does not create a coordinate right to litigate for *others*"); *Cheung*, 906 F.2d at 61 (adopting the counsel mandate because "the sole policy at stake concerns the exclusion of non-licensed persons to appear as attorneys on behalf of others").

Courts that have adopted the rule as a matter of federal common law necessarily rely on *policy* grounds—guided by their common-lawmaking discretion—and *not* any statutory mandate. In fact, the Eleventh Circuit adopted "the usual [common-law] rule" after noting that § 1654 "does not speak to the issue" whether a parent "may plead or conduct his son's case" and was thus "inapposite." *Devine*, 121 F.3d at 581–582; *see also* App., *infra*, at 5a (quoting *Devine*).

3. In sum, some courts have imposed the common-law rule after finding that § 1654 is altogether "inapposite," *Devine*, 121 F.3d at 581, while other courts have squarely held that the counsel mandate is "embodied in § 1654," *Berrios*, 564 F.3d at 134. These differing approaches reflect more than mere semantics. The counsel mandate must stem either from federal statute or federal common law—it cannot be both. Federal common law, after all, exists only in a few "limited areas," *Rodriguez* v. *Fed. Deposit Ins. Corp.*, 589 U.S. 132, 136 (2020), and only "[i]n the absence of an applicable Act of Congress." *United States* v. *Standard Oil Co. of Cal.*, 332 U.S. 301, 305 (1947). But regardless of the source of the counsel mandate, both the statutory and common law approaches embody judicial overreach that compounds the need for this Court's scrutiny.

B. If the counsel mandate is a common-law prohibition, then courts are unlawfully exceeding their federal common-law authority

If the counsel mandate is a creature of federal common law, federal courts are exceeding their common-law powers in two ways.

1. The counsel mandate is often justified on the ground that it protects children from their "unskilled, if caring, parents." *Devine*, 121 F.3d at 582; accord *Cheung*, 906 F.2d at 61; *Myers*, 418 F.3d at 401.

This rationale sounds in the *parens patriae* doctrine, which includes the sovereign's "right or responsibility to take care of persons who 'are legally unable, on account of mental incapacity, whether it proceed from 1st. nonage: 2. idiocy: or 3. lunacy: to take proper care of themselves and their property.'" *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592, 600 (1982) (citation omitted); see also *Raskin*, 69 F.4th at 295 (Oldham, J., dissenting in part and concurring in the judgment) (noting

that "[t]he best-interest-of-the-child doctrine derives from the *parens patriae* doctrine").

Federal courts, however, *lack* this common law power—it was given exclusively to the states. See *Hawaii* v. *Standard Oil Co. of Cal.*, 405 U.S. 251, 257 (1972) ("In the United States, the 'royal prerogative' and the 'parens patriae' function of the King passed to the States."). That is why federal courts must consult *state* law when determining whether a child has the capacity to sue or, alternatively, who can exercise that right on their behalf. Fed. R. Civ. P. 17(b).

Federal courts, therefore, *cannot* unilaterally impose the counsel mandate on the ground that it protects children. They "cannot exercise any equity powers, except those conferred by [federal statute], and those judicial powers which the high court of chancery in England, acting under its judicial capacity as a court of equity, possessed and exercised, at the time of the formation of the constitution of the United States." *Fontain* v. *Ravenel*, 58 U.S. (17 How.) 369, 384 (1854). Thus, to the extent the counsel mandate rests on a common law *parens patriae* foundation, the rule is a legal nullity, plain and simple.

2. "The cases in which federal courts may engage in common lawmaking are few and far between." *Rodriguez*, 589 U.S. at 133. Federal courts use their common-law powers when Congress has not spoken and when uniquely federal interests are at stake, such as "the rights and obligations of the United States, interstate and international disputes implicating the conflicting rights of States or our relations with foreign nations, and admiralty cases." *Tex. Indus., Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 641 (1981) (internal footnote omitted). Moreover, common law rules should never be crafted in derogation of constitutional rights. See *Vidal* v. *Philadelphia*, 43 U.S. (2 How.) 127, 198 (1844) (noting that while "the Christian religion is a part of the common law of Pennsylvania," that common-

law tradition is limited by the Pennsylvania's constitutional provision providing "complete protection of every variety of religious opinion").

Federal courts lack common-law power to impose the counsel mandate because Congress addressed the right of self-representation when it passed the Judiciary Act. That statute, now codified at § 1654, *guarantees* children's rights to proceed *pro se* through their parents. See *supra*, Part II.A. Additionally, whether parents can represent their children *pro se* in federal court is not a question that implicates uniquely federal interests, but rather at most the states' *parens patriae* powers. And while federal courts retain authority to regulate how parties litigate in federal court, see 28 U.S.C. § 1654 (granting parties the right to proceed "personally or by counsel" in federal court under "the rules of such courts"), the counsel mandate is not tailored to that end because it unconstitutionally bars competent, rule-following parents from appearing on behalf of their children. See *supra*, Part II.B.

C. If § 1654 prohibits *pro se* parent representation, then lower courts are unlawfully and inconsistently creating exceptions to the counsel mandate

If § 1654 forbids *pro se* parent representation, then courts have no authority to create policy-based exceptions to the statutory prohibition. Federal courts fashion governing rules of law only "[i]n the absence of an applicable Act of Congress." *Standard Oil Co. of Cal.*, 332 U.S. at 305. When Congress has spoken on an issue, courts cannot fashion common-law rules inconsistent with that command.

1. To be sure, courts have divined some limits on the counsel mandate from Section 1654 itself. As the Fifth Circuit recently held, a parent can represent his child *pro se* under § 1654 if a state or federal statute makes the child's claim the parent's "own." *Raskin*, 69 F.4th at 284–285. For example, parents can represent their children

pro se when appealing the denial of Supplemental Security Income (SSI) benefits because the parent's and child's interests are so closely intertwined that the claim is effectively the parent's own. See *Adams ex rel. D.J.W.* v. *Astrue*, 659 F.3d 1297, 1299–1301 (10th Cir. 2011); *Harris* v. *Apfel*, 209 F.3d 413, 416–417 (5th Cir. 2000). This rationale has also been applied to claims under the Vaccine Act. See *Kennedy*, 99 Fed. Cl. at 547 (relaxing the counsel mandate because, "as in the social security context, the interests of parent and child here are 'closely intertwined'").

2. Other judicially crafted exceptions, however, cannot be tied to the text of § 1654. The Seventh Circuit, for example, permitted a parent to file a Rule 59(e) motion *pro se* because of the unique facts of the case, citing various "concern[s]" and "[r]emedial considerations" that led it to relax the counsel mandate. *Elustra*, 595 F.3d at 706. And in the SSI context, courts often permit parents to proceed *pro se* for a variety of policy reasons—*e.g.*, because the legal proceedings are simple enough that a non-attorney can capably participate. See *Maldonado ex rel. Maldonado* v. *Apfel*, 55 F. Supp. 2d 296, 305–308 (S.D.N.Y. 1999) (listing four policy rationales for relaxing the counsel mandate in SSI contexts).

While these nontextual exceptions mitigate the harshness of the counsel mandate, they are inconsistent with the underlying rationale that § 1654 prohibits parents from litigating children's claims that are not the parent's own. In other words, if § 1654 prohibits *pro se* parent representation, then many courts are improperly creating policy-based exceptions to the counsel mandate that exceed the federal common lawmaking power.

D. Some courts have refused to create exceptions to the counsel mandate, including the panel below

While many courts have recognized that the counsel mandate is not absolute, others have gone the opposite

direction. For example, the panel below expressly rejected the argument that the counsel mandate is "flexibl[e]" and contains "exceptions in the best interests of the child." App., *infra*, at 7a. It instead suggested that, at least in the Eleventh Circuit, the counsel mandate poses "an ironclad bar to parental representation." *Ibid.*

The Ninth Circuit explained that the exceptions in other circuits extend "beyond the SSI context" and analyzed several "other potential positions on the 'counsel mandate'" drawn from the existing case law. *Grizzell*, 110 F.4th at 1180 & n.3. Nonetheless, the court rejected a parent's efforts to represent her child *pro se* after declaring that the Ninth Circuit's approach differs from the "more flexible approach" of "other circuits." *Id.* at 1179.

Both courts, in other words, suggested that the outcome might have been different had Mr. Warner and Ms. Grizzell brought their claims in a different court. The confusion percolating in the lower courts is therefore not merely an academic trifle, but instead is prone to generating inconsistent outcomes.

* * *

Neither federal statutes nor federal common law justify abridging a parent's or child's fundamental rights, and on that ground alone this case cries out for this Court's review. The Court's review would also clarify confusion in the lower courts about the proper interpretation of § 1654 and its relationship with the common-law rule barring a non-attorney from representing another person.

IV. This Case Is An Excellent Vehicle To Answer An Important And Oft Recurring Question

1. It is difficult to imagine a more crucial question than the one this case presents. The right of parents to represent their children *pro se* rests at the crossroads of at least three deeply rooted, fundamental rights. Children—especially poor children—are being denied access

to the courts based on a tragic misunderstanding of the governing statute and common-law principles.

This petition cleanly presents the issue. The district court's only basis for denying J.W.'s claims was that Mr. Warner was proceeding *pro se* on his behalf. App., *infra*, at 12a-13a. The only issue on appeal was whether "the district court erred in finding that a parent is not permitted to advance a child's causes *pro se*." *Id.* at 5a.

The question presented is also frequently recurring. J.W. is just one of many children to be denied justice because of the counsel mandate. From January 1986 through May 2019, the counsel mandate was imposed at least 523 times. See *Martin*, *Catch-22*, *supra*, at 839 n.45. Unless this Court grants review, that number will continue to grow. See *Raskin*, 69 F.4th at 286 (noting that from 2000 to 2019, "twenty-seven percent of all civil cases had at least one *pro se* plaintiff or defendant," and in 2022, "forty-six percent of filings in federal courts of appeals were pro se").

2. Lower courts have recognized the harm wrought by the counsel mandate, even as they adhere to circuit precedent decided decades ago "with little discussion." *Maras* v. *Mayfield City Sch. Dist. Bd. of Educ.*, No. 22-3915, 2024 WL 449353, at *2 (6th Cir. Feb. 6, 2024), cert. denied, No. 23-1203, 2024 WL 449353 (U.S. Oct. 7, 2024) (mem.). While the counsel mandate was adopted ostensibly to protect children, courts have come to see that it has the opposite effect. See *Tindall*, 414 F.3d at 286 (noting that the counsel mandate "undermine[s] a child's interest in having claims pursued for him or her when counsel is as a practical matter unavailable"); *Raskin*, 69 F.4th at 286 (recognizing that "in some circumstances, the [counsel mandate] may not protect children's rights at all"); *Grizzell*, 110 F.4th at 1181 (noting that the counsel mandate "unquestionably raises concerns with grave implications for children's access to justice").

Sadly, these realizations have come long after circuit precedent tied the hands of today's courts. See *id.* at 1180 ("As a three-judge panel, however, we are bound by the rule set forth in *Johns*."); App., *infra*, at 8a-9a (applying the counsel mandate because it was "bound by * * * precedent" to do so). And despite the concerns raised by respected judges, courts have denied rehearing en banc without comment time and again. See *id.* at 16a; *Raskin*, No. 21-11180 (5th Cir. Oct. 30, 2023) (order denying petition for rehearing en banc); *Grizzell*, No. 21-55956 (9th Cir. Oct. 1, 2024) (same).

Faced with a careless misinterpretation of federal law that is infringing important constitutional rights, this Court should step in to correct the entrenched indifference of the lower courts.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

KELLY J. SHACKELFORD
JEFFREY C. MATEER
HIRAM S. SASSER, III
DAVID J. HACKER
JEREMIAH G. DYS
First Liberty Institute
2001 W. Plano Parkway
Suite 1600
Plano, TX 75075
(972) 941-4444

AARON M. STREETT
Counsel of Record
BAKER BOTTS L.L.P.
910 Louisiana Street
Houston, TX 77002
[redacted]

MATTHEW P. ERICKSON
MATTHEW M. HILDERBRAND
BENJAMIN C. HUNT
BAKER BOTTS L.L.P.
401 South 1st Street
Austin, TX 78704
(512) 322-2500

Counsel for Petitioner Blake Warner

January 2025

APPENDIX

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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No. 23-12408
Non-Argument Calendar

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BLAKE ANDREW WARNER,

Plaintiff-Appellant,

versus

SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA,

Defendant-Appellee.

———

Appeals from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:23-cv-00181-SDM-JSS

———

No. 23-12411
Non-Argument Calendar

———

BLAKE ANDREW WARNER,

Plaintiff-Appellant,

versus

SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA,

Defendant-Appellee.

———

Appeals from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:23-cv-01029-SDM-SPF

Before WILSON, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

Blake Warner, acting on behalf of himself and his minor child, J.W., sued the School Board of Hillsborough County in two separate actions both alleging that the School Board engages in racially discriminatory districting practices.[1] The district court dismissed the action brought by Warner's minor child because Warner, as a nonlawyer, could not represent his minor child *pro se*. Warner appeals the order dismissing his minor child's claims. For the reasons that follow, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Warner's child, J.W., is a Black student in the Hillsborough County school system. On January 26, 2023, Warner, acting *pro se* and asserting claims for both himself and J.W., filed the 181 Case alleging that the School Board intentionally segregated students by race. The School Board achieved this, Warner says, by strategically drawing district boundaries along demographic lines resulting in a discriminatory effect on minority students, including J.W. According to Warner, these districting decisions caused minority students to

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[1] Warner filed two separate cases, both alleging similar facts and harms. *See Warner v. School Board of Hillsborough County, Florida*, No. 23-cv-181 (M.D. Fla.) and *Warner v. School Board of Hillsborough County, Florida*, No. 23-cv-1029 (M.D. Fla.). Where the distinction does not matter, we refer to these together as "Warner's cases" and, where the distinction does matter, we refer to them separately as "the 181 Case" and "the 1029 Case."

be assigned to lower-performing schools while white students were assigned to higher-performing schools. The School Board moved to dismiss the complaint for lack of subject-matter jurisdiction, which the district court denied.

A few days after the district court denied the motion to dismiss in the 181 Case, Warner filed a separate complaint, initiating the 1029 Case. There, Warner alleged that the School Board made additional changes to district boundaries since the commencement of the 181 Case, causing J.W. to have to choose between "a failing racially segregated school in his community" or "driving approximately two hours per day to distant schools" for the 2023–24 school year. In sum, Warner alleged, the School Board's new redistricting created a greater degree of segregation by assigning J.W. to a further-away, minority-majority school despite there being a closer and higher-performing, majority-white school that he was not permitted to attend.

Warner then filed a notice of related action and a motion to consolidate in the 181 Case, informing the district court of his 1029 Case. Without ruling on the motion to consolidate in the 181 Case, the district court entered an order to show cause in the 1029 Case, directing Warner to demonstrate why that case should not be dismissed for improper claim-splitting. Warner responded, explaining that the 181 Case alleged past harms, while the 1029 Case alleged future harms for the then-upcoming school year based on J.W.'s new school placement. At the same time, Warner amended his complaint in the 181 Case and the School Board filed its answer.

Two weeks later, before the district court took any action on the show-cause order, the School Board moved to dismiss the complaint in the 1029 Case. There, the

School Board argued that Warner engaged in improper claim splitting, his claims were barred by a previous settlement agreement, and he failed to state a claim. After full briefing from the parties, the district court granted the motion and dismissed the complaint in the 1029 Case. In that order, the district court explained two bases for its ruling: first, it found that Warner improperly split his claims between the two cases, both of which involved the same plaintiffs, the same defendant, and closely interrelated claims of school segregation. Further, the district court reasoned, discovery in both cases would overlap and would form "a convenient trial unit." Finally, while the injuries alleged in each case reportedly occurred at different times, they arose from the same allegedly ongoing segregation scheme. As a second independent basis for dismissal, the district court sua sponte raised the issue of Warner's *pro se* representation of his son, J.W. Citing our decisions in *FuQua v. Massey*, 615 F. App'x 611 (11th Cir. 2015) and *Devine v. Indian River County School Board*, 121 F.3d 576 (11th Cir. 1997), the district court determined that Warner was not permitted to assert his minor child's claims *pro se* and would need to appear through a lawyer to pursue an action on J.W.'s behalf. For these reasons, the district court dismissed both of Warner's complaints[2] without prejudice and afforded him the opportunity to file an amended complaint in the 181 Case asserting all of his own claims there.[3] As for J.W.'s claims, the district

[2] The district court entered its dismissal order in the 1029 Case and then filed a copy on the docket in the 181 Case.

[3] Warner timely amended his complaint in the 181 Case, asserting only his own claims. That case has proceeded during the pendency of this interlocutory appeal.

court cautioned Warner that, if he intended to assert J.W.'s claims, he was required to appear through counsel.

This appeal timely followed.[4]

II. STANDARD OF REVIEW

The interpretation of a statute or Federal Rule of Civil Procedure is a question of law subject to de novo review. *Burlison v. McDonald's Corp.*, 455 F.3d 1242, 1245 (11th Cir. 2006); *Pickett v. Iowa Beef Processors*, 209 F.3d 1276, 1279 (11th Cir. 2000).

III. ANALYSIS

On appeal, Warner contends that the district court erred in finding that a parent is not permitted to advance a child's causes *pro se*.[5] Our binding precedent forecloses that argument, as we explain below.

In *Devine*, we held that "parents who are not attorneys may not bring a *pro se* action on their child's behalf." 121 F.3d at 582. We reasoned as much because neither 28 U.S.C. § 1654 nor Federal Rule of Civil Procedure 17(c)—authorizing *pro se* litigation and representative litigation on behalf of minors, respectively—permits a parent to represent his or her child *pro se* in federal court. *Id.* at 581. Section 1654 authorizes parties in federal court to plead and conduct their own cases personally or by counsel, but, as we said in *Devine*, "it is inapposite because it does not speak to the issue before us—whether [a parent] may plead or conduct his son's case." *Id.* Rule 17(c), on the other hand, provides for certain representatives, including

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[4] Warner appealed the dismissal of both cases, and those appeals have been consolidated here.

[5] Warner has not argued on appeal that the district court erred in dismissing his complaints for improper claim-splitting, and we express no opinion on that portion of the district court's order.

parents, to sue on behalf of minors—but it does not confer on those representatives a right to act as legal counsel for such minors. *Id.*

Under our prior-panel-precedent rule, "a prior panel's holding is binding on all subsequent panels unless and until it is overruled or undermined to the point of abrogation by the Supreme Court or by this [C]ourt sitting *en banc*." *United States v. Archer*, 531 F.3d 1347, 1352 (11th Cir. 2008). We are, therefore, bound by our holding in *Devine*: a parent cannot represent a child *pro se*.[6]

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[6] We do not stand alone in reaching this conclusion. *See, e.g.*, *Navin v. Park Ridge Sch. Dist. 64*, 270 F.3d 1147, 1149 (7th Cir. 2001) ("Patrick was free to represent himself, but as a non-lawyer he has no authority to appear as J.P.'s legal representative."); *Johns v. Cnty. of San Diego*, 114 F.3d 874, 877 (9th Cir. 1997) ("The issue of whether a parent can bring a pro se lawsuit on behalf of a minor falls squarely within the ambit of the principles that militate against allowing non-lawyers to represent others in court. Accordingly, we hold that a parent or guardian cannot bring an action on behalf of a minor child without retaining a lawyer." (internal quotation omitted)); *Osei-Afriyie by Osei-Afriyie v. Med. Coll. of Pennsylvania*, 937 F.2d 876, 883 (3d Cir. 1991) ("The right to counsel belongs to the children, and . . . the parent cannot waive this right. In accord with the decisions discussed above, we hold that Osei–Afriyie was not entitled, as a non-lawyer, to represent his children in place of an attorney in federal court."); *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990) ("[A] non-attorney parent must be represented by counsel in bringing an action on behalf of his or her child. The choice to appear *pro se* is not a true choice for minors who under state law, *see* Fed. R. Civ. P. 17(b), cannot determine their own legal actions. There is thus no individual choice to proceed *pro se* for courts to respect, and the sole policy at stake concerns the exclusion of non-licensed persons to appear as attorneys on behalf of others."), *overruled on other grounds by Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 535 (2007); *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986) ("We hold that under Fed. R.

Warner's arguments to the contrary are unavailing. First, Warner argues that *Devine*'s holding was narrow and applies only to cases under the Individuals with Disabilities Education Act ("IDEA"). But that reading ignores *Devine*'s discussion of § 1654 and Rule 17(c), both of which are broadly applicable to all manner of federal litigation. Second, Warner contends that, even if *Devine* were binding outside of the IDEA context, it was overruled in *Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 535 (2007). But in *Winkelman*, the Supreme Court resolved only the narrow question of whether parents have their own rights to vindicate under IDEA, and the Court explicitly did "not reach petitioners' alternative argument, which concerns whether IDEA entitles parents to litigate their child's claims *pro se*." 550 U.S. at 535. Third, Warner urges us to read *Devine* as not "establish[ing] an ironclad bar to parental representation, admitting of no exceptions," and to instead consider exceptions in the best interests of the child. But there is simply nothing in *Devine*'s text that would allow us to read in such flexibility.

Finally, Warner asks us to overturn *Devine* en banc. This we cannot do. Under our prior panel precedent rule, we as a panel are bound by *Devine* "unless and

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Civ. P. 17(c) and 28 U.S.C. § 1654, a minor child cannot bring suit through a parent acting as next friend if the parent is not represented by an attorney.") This is consistent, too, with our caselaw addressing *pro se* litigation in other representative contexts. *See, e.g.*, *Iriele v. Griffin*, 65 F.4th 1280, 1284–85 (11th Cir. 2023) ("[W]e hold that, under the terms of § 1654, an executor may not represent an estate *pro se* where there are additional beneficiaries, other than the executor, and/or where the estate has outstanding creditors. In such a situation as exists here, an executor of such an estate does not bring his 'own case' and thus the estate must be represented by counsel.").

until it is overruled or undermined to the point of abrogation by the Supreme Court or by this court sitting en banc." *Archer*, 531 F.3d at 1352.

One final consideration: Warner advances an appealing policy argument, explaining that our extant rules have created a "counsel mandate." As a starting point, under both federal and Florida law, children cannot sue on their own because they lack legal capacity. *See* Fed. R. Civ. P. 17(c); Fla. R. Civ. P. 1.210(b). If parents cannot represent their children *pro se*, Warner says, "parents must pay the piper or forfeit the fight." All of this, Warner contends, is inconsistent with three bedrock rights: the statutory and constitutional right to self-representation; the parental right to make critical decisions for the child; and the child's own constitutional right to access the courts without a lawyer. At least one of our colleagues in a sister court agrees that this "counsel mandate" model is in conflict with our deep-rooted right to self-representation, a right that has been firmly enshrined since our foundation. *See Raskin on behalf of JD v. Dallas Indep. Sch. Dist.*, 69 F.4th 280, 290–99 (5th Cir. 2023) (Oldham, J., dissenting in part and concurring in judgment); *see also id.* at 294 ("But under [the Appellee's] understanding, § 1654 offers minors a Hobson's choice: litigate with counsel, or don't litigate at all. Dallas ISD's heads-I-win-tails-you-lose approach to § 1654 plainly defies the text of the statute and centuries of Anglo-American law dating as far back as the Magna Carta. Dallas's position also would have baffled the Founders. As the Supreme Court explained in *Faretta* [*v. California*, 422 U.S. 806, 827–28 (1975)], 'the basic right to self-representation was never questioned' at the Founding, and 'the notion of compulsory counsel was utterly foreign to the Founders.'" (alteration adopted)). This Court, however, is bound by our

precedent, which holds that a parent may not advance his child's cause of action *pro se*. *See Devine*, 121 F.3d at 581–82; *Archer*, 531 F.3d at 1352. For this reason, we affirm the district court's dismissal of Warner's claims on behalf of J.W.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

CASE NO. 8:23-cv-1029-SDM-SPF

BLAKE WARNER, on behalf of himself and his minor child, J.W.,

Plaintiff,

v.

THE SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA,

Defendant.

ORDER

Alleging that the Hillsborough County School Board unlawfully both segregates the schools and refuses to assign his child to the school closest to his place of residence, Blake Warner, appearing *pro se* on behalf of himself and his minor child, sues (Doc. 19) the School Board and asserts claims under 20 U.S.C. § 1703; under 42 U.S.C. § 1983; and under Florida law.

In a pending, earlier-filed action, *Warner v. School Board of Hillsborough County, Florida*, No. 8:23-cv-181-SDM-JSS (M.D. Fla.), Warner on behalf of himself and his minor child alleged racial segregation and asserted claims under 20 U.S.C. § 1703, 42 U.S.C. § 1983, and 42 U.S.C. § 3604. Under *Kennedy v. Floridian Hotel, Inc.*, 998 F.3d 1221, 1236 (11th Cir. 2021), a plaintiff may not "improperly split [] claims"

between or among two or more actions. The claims in this action and the claims in the earlier-filed action appear premised on a common aggregate of facts, that is, appear premised on the "same transaction or series of transactions" — the alleged segregation of the schools in Hillsborough County. For that reason, an order directs Warner to "explain why an order should not dismiss this action for improperly splitting his claims between two actions."

In the earlier-filed action, Warner moves to consolidate the actions and amends the complaint to include only claims under 42 U.S.C. § 3604 and asserted only on behalf of himself. *Warner*, Docs. 27 and 29, No. 8:23-cv-181-SDM-JSS. In this action, Warner reports (Doc. 15) the amendment in the earlier-filed action and contends (1) that the actions are "temporally distant" and (2) that the earlier-filed action "focuses on harm" to Warner but this action "focuses on harm" to Warner's child. Arguing, among other things, that despite the amendment in the earlier-filed action Warner continues to impermissibly split his claims between the two actions, the School Board moves (Doc. 18) to dismiss.

In response to the motion to dismiss, Warner in this action amends the complaint (the amendment moots the motion to dismiss), adds himself as a plaintiff asserting a claim under 20 U.S.C. § 1703, adds a claim under 42 U.S.C. § 1983 on behalf of himself and his child, and replaces the claim under Florida law with a request for a writ of mandamus. But by adding himself as a plaintiff in the amended complaint in this action, Warner undercuts his attempt to avoid claim splitting by removing his child as a plaintiff in the earlier-filed action. As previously stated, Warner cannot "improperly split [his] claims" between or among actions that "arise

from the same transaction or series of transactions." *Kennedy*, 998 F.3d at 1236. According to *Vanover v. NCO Fin. Servs., Inc.*, 857 F.3d 833, 842–43 (11th Cir. 2017), actions originate in the same transaction or series of transactions if the actions "are related in time, origin, and motivation, and they form a convenient trial unit[.]" Further, *Vanover* affirms the decision that "splitting the time frame into two different periods does not create a separate transaction." Indeed, *Curtis v. Citibank, N.A.*, 226 F.3d 133, 138 (2d Cir. 2000); *Zerilli v. Evening News Association*, 628 F.2d 217, 222 (D.C. Cir. 1980); and *Walton v. Eaton Corp.*, 563 F.2d 66, 70 (3d Cir. 1977); persuasively hold that a plaintiff may not "maintain two separate actions involving the same subject matter at the same time in the same court and against the same defendant."

In both this action and the earlier-filed action, Warner appears as a plaintiff; sues the same defendant, the School Board; and asserts claims based on the School Board's allegedly ongoing segregation of the schools in the county. These actions "form a convenient trial unit." Discovery in each action will overlap. Although the injury alleged in one action reportedly occurred at a time different from the injury alleged in the other action, the allegedly ongoing segregation caused each alleged injury. Thus, Warner must assert his claims about the School Board's alleged segregation in a single action.

Further, neither party discusses Warner's ability to prosecute *pro se* his child's claims. Although a parent may appear as plaintiff on behalf of a minor child, who lacks the capacity to sue, "parents who are not attorneys may not bring a *pro se* action on their child's behalf." *FuQua v. Massey*, 615 Fed. App'x 611, 612 (11th Cir. 2015) (quoting *Devine v. Indian River Cnty.*

Sch. Bd., 121 F.3d 576, 581 (11th Cir. 1997) *overruled in part on other grounds, Winkelman ex rel. Winkelman v. Parma City Sch. Dist.*, 550 U.S. 516, 535 (2007)). Thus, if Warner intends to appear as plaintiff on behalf of his minor child and assert his child's claims, Warner must appear through a lawyer. (Again, Warner may assert *pro se* claims on behalf of himself only.)

For these reasons and because (as the parties agree) Warner cannot assert a claim for a writ of mandamus against a state official, *Butt v. Zimmerman*, 2022 WL 5237916 (11th Cir. 2022), *cert. denied*, 143 S. Ct. 1059 (2023), the complaint is DISMISSED WITHOUT PREJUDICE. Warner must assert his claims against the School Board in a single action. No later than JULY 28, 2023, Warner may amend the complaint in the earlier-filed action, *Warner*, 8:23-cv-00181-SDM-JSS, and assert his claims against the School Board. The clerk is DIRECTED to file a copy of this order in the earlier-filed action.

If Warner intends to appear as a plaintiff to assert his son's claims, Warner must appear through a lawyer. No later than JULY 28, 2023, a lawyer must appear, or an order will dismiss this action without further notice. The motion (Doc. 18) to dismiss the original complaint in this action is DENIED AS MOOT. The motion (Doc. 11) for a preliminary injunction and the motion (Doc. 20) to amend the motion for a preliminary injunction are DENIED AS MOOT. Warner may amend the motion for a preliminary injunction after a lawyer appears and amends the complaint. The motion (Doc. 27) to rule on the pending show-cause order is DENIED AS MOOT.

Also, after Warner amended the complaint in this action, the School Board again moved (Doc. 21) to dismiss but failed to include a certificate in accord with

Local Rule 3.01(g). In response, Warner (1) filed (Doc. 22) a "notice of lack of Local Rule 3.01(g) compliance," which reports that the School Board failed to confer before filing the motion to dismiss, and (2) separately responded (Doc. 24) to the motion to dismiss. The response conceded that "federal mandamus is inappropriate[]" but otherwise opposed the motion to dismiss. To remedy the Local Rule violation, the School Board unilaterally amended (Doc. 23) the motion to dismiss to add a Local Rule 3.01(g) certificate, which states that the parties conferred by e-mail and telephone and that the parties disagree about the motion. Warner responded to the amended motion and asserted that the 3.01(g) certificate falsely represented the conference. The first motion (Doc. 21) to dismiss the amended complaint is STRICKEN for failure to comply with Local Rule 3.01(g). And counsel is WARNED to comply carefully with all applicable rules, including the Local Rules. The amended motion (Doc. 23) to dismiss the amended complaint is DENIED AS MOOT.

ORDERED in Tampa, Florida, on July 5, 2023.

/s/ Steven D. Merryday
STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 23-12408

BLAKE ANDREW WARNER,

Plaintiff-Appellant,

versus

SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:23-cv-00181-SDM-JSS

No. 23-12411

BLAKE ANDREW WARNER,

Plaintiff-Appellant,

versus

SCHOOL BOARD OF HILLSBOROUGH COUNTY, FLORIDA,

Defendant-Appellee.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 8:23-cv-01029-SDM-SPF

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

Before WILSON, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. FRAP 35, IOP 2.