IN DEFENSE OF PRO SE PARENTS

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Who gets to represent children in federal court? Adults have long been permitted to represent themselves in federal court under the plain meaning of 28 U.S.C. § 1654. And, many adults do just that every year. But what if the real party in interest is a minor child? Who, if anyone, can exercise that child's right to proceed pro se?

This Note argues that the correct reading of 28 U.S.C. § 1654 would permit parents to litigate pro se in federal court where the real party in interest is their minor child. This is based on a straightforward, grammatically correct construction of 28 U.S.C. § 1654 which would compel courts to allow that practice. It is also further supported by the canon of constitutional avoidance, which should counsel courts to steer clear of the constitutional rights of parents and children implicated here. Parents have a constitutional right to rear and raise their children, and children have a fundamental right to access the courts.

This reading of the statute, however straightforward it may seem, is not the reading adopted by the majority of federal appellate courts that have addressed the question as to whether the parent of a minor can proceed pro se on behalf of the minor. Thus, in the alternative, this Note proposes a system of deference to state law based on Federal Rule of Civil Procedure 17 to determine if a parent can litigate pro se on behalf of their minor child in federal court. By reading state laws, federal courts can determine if parents may represent their children pro se in the federal courts of those specific states.

To properly address this legal issue, this Note also describes the history of the "counsel mandate" that has been imposed on minor children and their parents. From the recognition of an absolute counsel mandate in the U.S. Court of Appeals for the Tenth Circuit's decision in Meeker v. Kercher*, to the creation of inconsistent exceptions to the counsel mandate throughout the circuits, to the U.S. Supreme Court's decision to not reach the issue in* Winkelman v. Parma City School District*, courts have been unclear about whether and when parents may represent their children pro se in federal*

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court. Then, most recently, the U.S. Court of Appeals for the Fifth Circuit upended the counsel mandate again by opening the door to federal and state law overrides in Raskin v. Dallas Independent School District. *In effect, these decisions have left significant questions for litigants and courts dealing with adult representatives in federal court.*

Now, petitions for certiorari have been filed in Warner v. School Board of Hillsborough County *and* Grizzell v. San Elijo Elementary School *to address whether parents may litigate pro se on behalf of their minor children. This question implicates the constitutional rights of parents and children and fundamental access to justice–related issues. Because of the importance of this question, and the likelihood that the Supreme Court will grant certiorari on it, this Note will provide essential background and guidance to litigants, lawyers, and judges dealing with this complicated question moving forward.*

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INTRODUCTION

"[T]here is no question that a party may represent his or her own interests in federal court without the aid of counsel."[1] That very right—to litigate pro se—is enshrined in 28 U.S.C. § 1654 and supported by a rich history in the law. This statute ensures that "parties may plead and conduct their own cases personally or by counsel" in any court of the United States.[2] What, then, constitutes a case that is one's "own," as defined by this statute? For example, is a minor child's case their own? What about a parent who brings their child's case to court? This Note attempts to answer these questions and proposes a straightforward reading of this statute to permit parents to represent their kids pro se in federal court, and, in the alternative, recommends looking to state law of capacity to determine whether parents can bring their child's claim pro se in federal court.[3]

As a preliminary matter, the Federal Rules of Civil Procedure state that children lack capacity to sue on their own claims in federal court.[4] When children have claims, those claims must be brought by a guardian, committee, or conservator.[5] Circuit court precedent has long kept these guardians—often parents—from advancing their minor children's claims pro se in federal court.[6] This "counsel mandate" often prevents children from having their day in court, particularly where low-income families cannot afford legal

1. Winkelman v. Parma City Sch. Dist., 550 U.S. 516, 522 (2007).

2. 28 U.S.C. § 1654.

3. This Note discusses whether parents can represent their children pro se in civil proceedings in federal court. Given the right to counsel for minors in criminal proceedings, such cases are meaningfully distinct. Thus, they are outside the scope of this Note.

4. *See* FED. R. CIV. P. 17(c).

5. *See id.*

6. *See* Meeker v. Kercher, 782 F.2d 153, 154 (10th Cir. 1986) (holding that Federal Rule of Civil Procedure 17(c) and 28 U.S.C. § 1654, taken together, prohibit a parent from suing on behalf of a child without being represented by an attorney).

representation or other structural barriers prevent access to counsel.[7] In effect, the counsel mandate may "force minors out of court altogether."[8] Although claims dismissed for such procedural defects may be brought again with counsel or when the minor reaches adulthood, research suggests that, in reality, these claims are usually not refiled.[9] Thus, rather than simply delaying a minor's day in court, "justice delayed becomes justice denied."[10]

When given an opportunity to address this issue in *Winkelman v. Parma City School District*,[11] however, the U.S. Supreme Court declined to reach the issue of whether a parent could advance their child's claim pro se.[12] Without guiding Supreme Court precedent, the circuits remain split on whether parents can litigate a child's claim pro se in federal court. In the U.S. Courts of Appeals for the Second, Fifth, and Tenth Circuits, parents have been allowed to proceed pro se on behalf of their children exclusively in the context of social security benefits appeals.[13] The remaining circuits, however, have absolutely barred parents from bringing their child's claim pro se.[14]

Then, in 2023, the Fifth Circuit decided *Raskin v. Dallas Independent School District*,[15] ruling that a district court had wrongly dismissed a mother's claim without determining if federal or state law designated her children's claims as her "own," thus permitting her to litigate those claims pro se.[16] In *Raskin*, the court found that a child's case "only belongs to the parent under § 1654 if some other source of law alters the common-law

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7. *See* Lisa V. Martin, *No Right to Counsel, No Access Without: The Poor Child's Unconstitutional Catch-22*, 71 FLA L. REV. 831, 834–35 (2019).

8. Tindall v. Poultney High Sch. Dist., 414 F.3d 281, 286 (2d Cir. 2005).

9. *See* Lisa V. Martin, *Securing Access to Justice for Children*, 57 HARV. C.R.-C.L. L. REV. 615, 620 n.29 (2022); *see also* Sonja Kerr, Winkelman*: Pro Se Parents of Children with Disabilities in the Courts (or Not?)*, 26 ALASKA L. REV. 271, 285 (2009) ("As a policy matter, without the right to represent their children in regard to substantive rights, parents may not have the ability or resources to protect those rights. As a result, the children's underlying claims may be permanently lost.").

10. Martin, *supra* note 9, at 620.

11. 550 U.S. 516 (2007).

12. *See generally id.* (holding that parents had independent, actionable rights under the Individuals with Disabilities Education Act (IDEA) and declining to reach the issue of whether a parent could advance their child's claim pro se).

13. *See, e.g.*, Adams v. Astrue, 659 F.3d 1297, 1299–301 (10th Cir. 2011); Machadio v. Apfel, 276 F.3d 103, 106–07 (2d Cir. 2002); Harris v. Apfel, 209 F.3d 413, 414–17 (5th Cir. 2000).

14. *See, e.g.*, Crippa v. Johnston, 976 F.2d 724 (1st Cir. 1992) (unpublished table decision); Osei-Afriyie v. Med. Coll. of Pa., 937 F.2d 876 (3d Cir. 1991); Myers v. Loudoun Cnty. Pub. Schs., 418 F.3d 395 (4th Cir. 2005); Rawlings v. Littleton, 23 F.3d 408 (6th Cir. 1994) (unpublished table decision); Johnson v. Collins, 5 F. App'x 479 (7th Cir. 2001); United States v. Agofsky, 20 F.3d 866 (8th Cir. 1994); Johns v. County of San Diego, 114 F.3d 874 (9th Cir. 1997); Devine v. Indian River Cnty. Sch. Bd., 121 F.3d 576 (11th Cir. 1997). The U.S. Court of Appeals for the Seventh Circuit permitted an exception to the counsel mandate where an individual filing without counsel was allowed to stand while the litigant sought new counsel. *See* Elustra v. Mineo, 595 F.3d 699 (7th Cir. 2010).

15. 69 F.4th 280 (5th Cir. 2023).

16. *See id.* at 286–87 (holding that there is not an absolute bar to parents representing their children's claims pro se in federal court).

backdrop."[17] This opens the door to both federal and state law providing overriding rules that permit parents to represent their children's claims pro se.[18] Judge Andrew Oldham, in his separate opinion in *Raskin*, specifically referred to a Texas law stating that the parent has the right to "represent [their] child in legal action and to make other decisions of substantial legal significance concerning the child."[19] This, Judge Oldham stated, would permit the court to resolve the representation issue in favor of the mother, allowing her to litigate her children's claims pro se, "full stop."[20]

Furthermore, several circuits have expressed significant concerns about the counsel mandate and its effects on minors seeking relief. Together, these decisions have begun to reveal cracks in the counsel mandate's armor. For example, in *Tindall v. Poultney High School District*,[21] the Second Circuit suggested that a blanket counsel mandate would force some claims out of court where counsel was not available to litigants as a practical matter.[22] In *Elustra v. Mineo*,[23] the U.S. Court of Appeals for the Seventh Circuit permitted a pro se motion from a mother while she was unrepresented, allowing it to be ratified by counsel that she secured at a later date.[24] In *Grizzell v. San Elijo Elementary School*,[25] the U.S. Court of Appeals for the Ninth Circuit was moved by the policy justifications for allowing a parent to litigate pro se on behalf of their child, but was bound by precedent barring it.[26] And, as discussed above, the *Raskin* court suggested that an absolute imposition of the counsel mandate "may not protect children's rights at all."[27]

To describe and propose a solution to this circuit split regarding whether a parent may represent their children's claims pro se in federal court, this Note proceeds in three parts. Part I explores the history of pro se litigation, minors in federal court, and discusses the legal backdrop for pro se litigation on behalf of children. Part II lays out the three different regimes under which the counsel mandate currently exists in the circuits: (1) absolute, (2) absolute exclusive of Social Security appeals and some other equitable exceptions, and (3) counsel mandate presumption with potential state or federal law overrides. Part II also explores some potential state laws that would permit parents to litigate pro se on behalf of their minor children. Part III proposes a straightforward construction of 28 U.S.C. § 1654 which permits parents to

17. *Id.* at 284.

18. *See id.* at 286.

19. *Id.* at 292 (Oldham, J., dissenting in part and concurring in the judgment) (quoting TEX. FAM. CODE ANN. § 151.001(a)(7) (West 2023)).

20. *Id.* at 299.

21. 414 F.3d 281 (2d Cir. 2005).

22. *See id.* at 286 (holding that, due to binding circuit precedent, a nonattorney parent may not represent their child on appeal, despite concerns with the counsel mandate itself).

23. 595 F.3d 699 (7th Cir. 2010).

24. *See id.* at 705–06 (holding that the counsel mandate is "not ironclad" and that their decision to permit the pro se motion was the only decision consistent with the goal of protecting the rights of the represented party—the minor).

25. 110 F.4th 1177 (9th Cir. 2024).

26. *See id.* at 1180–81.

27. Raskin v. Dallas Indep. Sch. Dist., 69 F.4th 280, 286 (5th Cir. 2023).

litigate pro se on behalf of their minor children. In the alternative, Part III proposes reading state capacity law to determine if parents can litigate pro se on behalf of their minor children.

I. SELF-REPRESENTATION, FAMILY MATTERS, AND CHILDREN: A LEGAL HISTORY

This part provides background on pro se litigation, minors as litigants in federal court, and the capacity of adult representatives to bring suit on their behalf. Part I.A defines and discusses pro se litigation generally with specific reference to the self-representation statutory anchor and the Federal Rules of Civil Procedure. Part I.B discusses the domestic relations exception, state law deference, and the constitutional rights of parents and children, all of which color the experience of parents and minors in federal court. Part I.C investigates the history of minors as parties in federal court.

A. Self-Representation: As Old as Our Legal System Itself

Parties in the United States have the right to bring claims pro se—that is, without legal representation.[28] And many do: each year, roughly one in four civil cases filed in federal district courts are pro se, making pro se litigation fundamental to the federal justice system.[29] To that end, pro se litigation has existed since at least 1789, when the First Congress enshrined the right to self-representation in U.S. courts.[30]

Part I.A.1 of this Note discusses the statutory basis for pro se litigation: 28 U.S.C. § 1654. Part I.A.2 describes Federal Rule of Civil Procedure 17, which prescribes requirements and procedures regarding capacity to sue and be sued in federal court. Finally, Part I.A.3 defines and describes special solicitude, which relates to the treatment of pro se litigants in federal court.

1. The Pro Se Statutory Hook: 28 U.S.C. § 1654

The full text of 28 U.S.C. § 1654 reads as follows: "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."[31]

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28. *See* 28 U.S.C. § 1654.

29. *See* Andrew Hammond, *The Federal Rules of Pro Se Procedure*, 90 FORDHAM L. REV. 2689, 2691 (2022). In the twelve-month period ending on September 30, 2023, there were 339,731 civil cases filed—of these 85,517 were pro se. ADMIN. OFF. OF THE U.S. CTS., TABLE C-13: U.S. DISTRICT COURTS—CIVIL PRO SE AND NON-PRO SE FILINGS, BY DISTRICT, DURING THE 12-MONTH PERIOD ENDING SEPTEMBER 30, 2023 (2023), https://www.uscourts.gov/sites/default/files/data_tables/jb_c13_0930.2023.pdf [https://perma.cc/X7A4-JEP4]. In particular, prisoner litigation makes up a sizeable percentage of the pro se litigation in federal courts. *See id.*

30. *See* Hammond, *supra* note 29, at 2696; *see also* Judiciary Act of 1789, ch. 20, § 35, 1 Stat. 73, 92.

31. 28 U.S.C. § 1654 (emphasis added).

The text of § 1654 has been taken to guarantee the right to self-representation in both civil and criminal cases.[32] In *Faretta v. California*,[33] the Supreme Court held that the Sixth Amendment included an implicit right to self-representation in both civil and criminal cases—as codified in 28 U.S.C. § 1654.[34] This was rooted, in part, in English common law, which conceived of legal counsel as assistance that an otherwise competent individual retained the right to waive.[35]

The English common law can be traced to the English Star Chamber, which required defendants to utilize politically-motivated, state-appointed counsel.[36] Even more, the deep distrust of lawyers in colonial America made the right to self-representation all the more important among the American founders.[37] To that end, the colonists and framers conceptualized counsel as a form of assistance that a litigant could simply decline to exercise.[38]

Some even trace the right to self-representation further—to the Magna Carta.[39] The actual text of § 1654 itself can be traced to the original Judiciary Act of 1789,[40] in which § 35 read: "in all courts of the United States, the parties may plead and manage their own causes personally or by assistance of . . . counsel."[41] Regardless of where (or when) the right is traced to, it is clear the right to self-representation has deep historical roots in American legal tradition.[42]

Some courts have also taken § 1654 to imbue a right or entitlement to counsel in child litigants.[43] There is, however, no federally recognized right to counsel in civil cases.[44] To that end, the "right" articulated in those cases is likely the right of a minor child to *decide to appoint* counsel.[45]

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32. *See* Faretta v. California, 422 U.S. 806, 813 (1975).

33. 422 U.S. 806 (1975).

34. *See id.* at 812–14.

35. *See id.*

36. *See* Martin, *supra* note 7, at 846 (citing RABEEA ASSY, INJUSTICE IN PERSON: THE RIGHT TO SELF-REPRESENTATION 2, 38 (2015)).

37. *See Faretta*, 422 U.S. at 826. The right to self-representation was enshrined in many colonial charters. *See id.* Further, state constitutions created after the Declaration of Independence generally featured language securing the right to represent oneself in a court of law. *See id.* The colonial era and Revolutionary War only heightened antilawyer sentiment in reaction to the king of England's lawyers bending of the law in favor of the Crown. *See id.*

38. *See id.* at 832.

39. *See* Raskin v. Dallas Indep. Sch. Dist., 69 F.4th 280, 290 (5th Cir. 2023) (Oldham, J., dissenting in part and concurring in the judgment).

40. Ch. 20, 1 Stat. 73 (1789).

41. *Id.* § 35.

42. *See Raskin*, 69 F.4th at 291.

43. *See* 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." (emphasis added)); *see also* Cheung v. Youth Orchestra Found. of Buffalo, Inc., 906 F.2d 59, 61 (2d Cir. 1990) ("Where [minors] have claims that require adjudication, they are *entitled to trained legal assistance* so their rights may be fully protected." (emphasis added)).

44. *See* Martin, *supra* note 7, at 848. Neither 28 U.S.C. § 1654 on its own nor the Judiciary Act of 1789 at large contain provisions regarding the appointment of counsel to ensure the right these courts seem to say exists. *See id.*

45. *See id.*

Alternatively, Judge Oldham of the Fifth Circuit has suggested that the phrase "their own" modifies both "personally" and "by counsel" in the text of § 1654.[46] As such, Judge Oldham contends that a "more natural" reading of the relevant language would permit parents to litigate on behalf of their children pro se.[47] He argues further that reading it otherwise would cause problems for the more "run-of-the-mill" cases where parents represent their children's claims via counsel.[48] Part II of this Note further explores Judge Oldham's textual analysis.[49]

2. Capacity to Sue and Be Sued: Federal Rule of Civil Procedure 17

Federal Rule of Civil Procedure 17 is also controlling when analyzing a minor's right to self-representation in federal court. For the purposes of this Note, both 17(b) and 17(c) are relevant.

Federal Rule of Civil Procedure 17(b) reads as follows:

> (b) Capacity to Sue or Be Sued. Capacity to sue or be sued is determined as follows:
>
> > (1) for an individual who is not acting in a representative capacity by the law of the individual's domicile;
> >
> > (2) for a corporation, by the law under which it was organized; and
> >
> > (3) for all other parties, by the law of the state where the court is located . . . .[50]

Rule 17(b)(3) states that the capacity to sue or be sued is controlled by the law of the state within which the relevant federal court is located.[51] Therefore, it may suggest that Rule 17(b)(3) controls when a parent attempts to sue pro se on behalf of their child, thus requiring reference to the relevant state capacity laws and rules.[52]

The relevant text of Federal Rule of Civil Procedure 17(c) is as follows:

> (c) Minor or Incompetent Person.
>
> > (1) *With a Representative.* The following representatives may sue or defend on behalf of a minor or an incompetent person:
> >
> > > (A) a general guardian;
> > >
> > > (B) a committee;
> > >
> > > (C) a conservator; or
> > >
> > > (D) a like fiduciary.

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46. *See Raskin*, 69 F.4th at 297 (Oldham, J., dissenting in part and concurring in the judgment).
47. *See id.*
48. *See id.*
49. *See infra* Part II.C.3.
50. FED. R. CIV. P. 17(b) (emphasis added).
51. *See id.* 17(b)(3).
52. *See id.*; *see also infra* Part III.B.1.

> (2) *Without a Representative.* A minor or an incompetent person who does not have a duly appointed representative may sue by a next friend or by a guardian ad litem. The court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor or incompetent person who is unrepresented in an action.[53]

This section of Rule 17 governs who can serve as a representative for a minor child.[54] Notably, where a minor does not have a duly appointed representative, the plain text of Rule 17(c)(2) does *not* require courts to appoint a guardian ad litem—rather, it provides judges the flexibility to issue another order.[55] Regardless of whether the court appoints a guardian ad litem or issues another order, the text of Rule 17(c) requires them to protect the interests of minors in federal court.[56]

Some courts and commentators note a possible inconsistency between the language of Rule 17(b) and Rule 17(c) related to the applicability of state law on standing.[57] However, "[t]he weight of both reason and authority" comports with the permissive language of 17(c) and 17(b), and suggests that when a parent is acting as representative, the relevant state law of capacity controls.[58]

3. Some Extra Help to Pro Se Litigants: Special Solicitude

Pro se litigants are generally afforded "special solicitude" by courts when they file complaints; that is, they are given more leeway in their pleadings.[59] In *Haines v. Kerner*,[60] the Supreme Court held that "however inartfully pleaded," pro se complaints are "[held] to less stringent standards than formal pleadings drafted by lawyers."[61] In *Estelle v. Gamble*,[62] the Supreme Court confirmed that documents submitted by pro se litigants should be liberally construed, further cementing the *Haines* special solicitude model.[63]

Courts justify granting special solicitude because pro se litigants are more likely to accidentally forfeit rights by virtue of their lack of legal knowledge.[64] But, courts are not entirely forgiving, and the Supreme Court

53. FED. R. CIV. P. 17(c).
54. *See id.*
55. *See id.*
56. *See id.*
57. *See* 6A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. § 1571, Westlaw (database updated June 2024); *see also* Lisa V. Martin, *Litigation as Parenting*, 95 N.Y.U. L. REV. 442, 453 (2020).
58. *See* 6A WRIGHT & MILLER, *supra* note 57, § 1571.
59. *See* Haines v. Kerner, 404 U.S. 519, 520–21 (1972); *see also* Estelle v. Gamble, 429 U.S. 97, 106 (1976).
60. 404 U.S. 519 (1972).
61. *Id.* at 520.
62. 429 U.S. 97 (1976).
63. *See id.* at 106.
64. *See* Tracy v. Freshwater, 623 F.3d 90, 101 (2d Cir. 2010) (upholding special solicitude for a pro se prisoner alleging civil rights violations); Treistman v. Fed. Bureau of Prisons, 470 F.3d 471, 475 (2d Cir. 2006) (granting special solicitude for a pro se prisoner suing under the Federal Tort Claims Act).

has "never suggested that procedural rules in ordinary civil litigation should be interpreted so as to excuse mistakes made by those who proceed without counsel."[65] In effect, the kinds of benefits pro se litigants receive vary based on the rules of individual district courts, and also are up to the discretion of individual judges.[66] That said, courts remain under a general obligation to make allowances to pro se litigants so as to protect against their mistaken forfeiture of various legal rights.[67]

Section 1654, Rule 17 of the Federal Rules of Civil Procedure, and common-law precedent surrounding special solicitude paint a holistic picture of pro se litigation in federal courts. Together, they outline the contours of the pro se experience and provide important background to consider when weighing whether parents should be permitted to litigate pro se on behalf of their minor children.

B. Family and State Law Matters in Federal Court

The question of whether parents or guardians can represent the claims of their minor children pro se necessarily raises questions about family and state law in federal courts. Proposed solutions must consider the unique positioning of these legal fields in the federal judicial system. As such, this section first discusses the general rule that federal courts should be deferential to states as it relates to family matters in Part I.B.1. Second, Part I.B.2 discusses the general rule that ambiguity in federal law should be met with deference to the relevant body of state law. Finally, Part I.B.3 discusses the constitutional rights retained by parents and minors, particularly as they relate to their experience as litigants in federal court.

1. Domestic Relations Exception

Federal courts have long recognized an exception to their jurisdiction as it relates to domestic relations.[68] This exception, the domestic relations exception, originated in the Supreme Court's decision in *Barber v. Barber*.[69] The *Barber* Court "disclaim[ed] altogether any jurisdiction in the courts of the United States upon the subject of divorce, or for the allowance of alimony, either as an original proceeding . . . or as an incident to divorce."[70] Although this was technically dicta—and did not cite any legal authority—it

65. McNeil v. United States, 508 U.S. 106, 113 (1993).

66. *See generally* Hammond, *supra* note 29. Professor Andrew Hammond proposes a classification system in which the special rules for pro se litigants are classified as either a "tax" or "subsidy," based on whether they impose a cost or provide a benefit to the pro se litigant, respectively. *See id.* at 2692. Professor Hammond's article also classifies the different rules governing pro se litigation across the district courts. *See id.* at 2729–754 (Appendix A).

67. *See Treistman*, 470 F.3d at 475.

68. *See* Ankenbrandt v. Richards, 504 U.S. 689, 693 (1992) (explaining the historical and statutory basis for the domestic relations exception though not applying it in the dispute before the Court).

69. 62 U.S. (21 How.) 582 (1858).

70. *Id.* at 584.

went on to inspire the domestic relations exception to federal jurisdiction, which has been recognized and applied for nearly two centuries.[71]

The Court extended the domestic relations exception further in *Ex parte Burrus*.[72] In that case, the Court heard a habeas petition in regard to the disputed custody of a child between a married couple.[73] *Burrus* fell beyond the previously recognized divorce and alimony contexts for the domestic relations exception, leading the Court to reaffirm and extend the exception, holding that "[t]he whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the states, and not to the laws of the United States."[74] *Burrus* therefore extended the domestic relations exception beyond just diversity jurisdiction, as recognized in *Barber*, to encompass all of federal jurisdiction.[75]

In *Ankenbrandt v. Richards*,[76] the Court went further to articulate the policy justifications that underlay the domestic relations exception. In particular, the Court stated that the judicial expertise of state and local courts helps them better address the collateral issues arising out of divorce, alimony, and custody decrees, thus weighing in favor of the domestic relations exception to federal jurisdiction.[77] Taken together, these cases create the basis for the domestic relations exception to federal jurisdiction.[78] The next part will discuss the related, but distinct, general deference to state law in federal courts.

2. State Law Deference

As suggested by Federal Rule of Civil Procedure 17, referencing state law is likely required when determining capacity to sue.[79] Therefore, principles of state law deference provide an important gloss in evaluating the rights of parents to litigate pro se on behalf of their children.

As a general matter, it is assumed that Congress, when enacting a statute, is not making that federal law dependent on state law.[80] This is due to the universal enactment of federal statutes across the nation, which incentivizes consistent application by making them independent of the relevant state law.[81] There are circumstances, however, in which federal courts must look to state law to fill in gaps or properly define material terms of a federal statute.[82]

71. *See id.*; *Ankenbrandt*, 504 U.S. at 694–95.
72. 136 U.S. 586 (1890).
73. *See id.* at 587–88.
74. *Id.* at 593–94.
75. *See id.*
76. 504 U.S. 689 (1992).
77. *See id.* at 704.
78. *See id.*; *Ex parte Burrus*, 136 U.S. at 593–94.
79. *See infra* Part I.A.2.
80. *See* Jerome v. United States, 318 U.S. 101, 104 (1943).
81. *See id.*
82. *See id.* at 104 ("At times it has been inferred from the nature of the problem with which Congress was dealing that the application of a federal statute should be dependent on state law.").

The Supreme Court was presented with one such circumstance in *Reconstruction Finance Corp. v. Beaver County*.[83] The dispute in that case was centered on Reconstruction Finance Corp. (RFC), a federal entity, which, under federal law, was subject to state and local taxes of only its "real property."[84] The conflict between state and federal law arose because federal law defined RFC's machinery as personal property not subject to state and local taxes, whereas state law defined the machinery as real property subject to the state and local taxes.[85] In considering the conflict between state and federal law, the Court looked to whether the federal statute was created by Congress intending uniform implementation across the states.[86] Ultimately, the Court held that the use of state rules was appropriate to achieve a congressional purpose where the state's rules do not effectively discriminate against the government or run counter to the terms of the federal statute in question.[87]

In *De Sylva v. Ballentine*,[88] the Court further refined and extended the rule established in *Reconstruction Finance*. In *De Sylva*, an author had a child via an extramarital affair with the plaintiff before the author himself passed away.[89] The plaintiff, the child's mother, sued the author's widow, seeking to establish that her child had an interest in the copyrights of the child's father.[90] The Court first addressed whether the copyrights would pass to widows and children as a class or individually.[91] The Court then considered whether a child born of an extramarital affair fit within the scope of the relevant federal statute, the Copyright Act.[92]

In addressing that very question, the Court adopted the *Reconstruction Finance* rule for determining the content of a federal law based on that of the relevant state law.[93] Thus, the Court held that the child fell within the Copyright Act's definition of children because the relevant California statute would have permitted the child to inherit his father's estate.[94] Importantly, the *De Sylva* Court chose to extend the rule, holding that the question of the

83. 328 U.S. 204 (1946).

84. *Id.* at 206.

85. *See id.* at 207–08. In an earlier proceeding, the Supreme Court of Pennsylvania held that the machinery was subject to state and local taxes pursuant to the state law definition of real property. *See id.* at 208.

86. *See id.* at 209. The Court found that Congress's allowance of local taxation of real property, regardless of its definition, precluded uniformity in the implementation of the federal statute across state lines. *See id.* Thus, the purpose of the federal statute was clearly not to be implemented uniformly across the various states. *See id.* Further, the Court held that Congress could have opted to include fixed payments in lieu of taxes, which would have permitted uniform implementation, and their failure to do so was further evidence of the federal statute's nonuniversal purpose. *See id.* at 209–10.

87. *See id.* at 210.

88. 351 U.S. 570 (1956).

89. *See id.* at 572.

90. *See id.*

91. *See id.*

92. Ch. 391, 61 Stat. 652 (1947) (amended 2020); *see id.* at 580.

93. *De Sylva*, 351 U.S. at 580.

94. *See id.* at 581–82.

scope of a federal right is a federal question, but the content of the right could be determined by state law.[95] As relevant to the given case, the *De Sylva* court held that deferring to the content of state law was important "especially . . . where a statute deals with a familial relationship."[96] The court further held that there "is no federal law of domestic relations, which is primarily a matter of state concern."[97]

To that end, both the domestic relations exception and the more general tendency to defer to state law have created a rule of deference to state law where necessary to implement federal statutes.

3. Constitutional Protections for Parents and Minors

Parents and minors also enjoy certain constitutional rights that may be implicated by federal litigation that involves them. Perhaps most fundamentally, the Supreme Court has held that parents maintain a "fundamental liberty interest . . . in the care, custody, and management of their child[ren]," protected by the Fourteenth Amendment.[98] That interest is among the oldest liberty interests recognized by the Supreme Court.[99] The Court decided first in *Meyer v. Nebraska*[100] that the Due Process Clause of the Fourteenth Amendment provided parents with the right to establish their homes, bring up their children, and control their education.[101] Just two years later, the Court reaffirmed in *Pierce v. Society of Sisters*[102] that parents retain the right to direct their child's upbringing and education.[103] A long line of cases since has repeatedly affirmed the constitutional nature of the right of parents to raise their children however they choose.[104] To that end, courts generally give special weight to the decisions of parents and largely presume that fit parents act in the best interests of their children.[105]

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95. *See id.* at 580.
96. *See id.*
97. *See id.*
98. Santosky v. Kramer, 455 U.S. 745, 753 (1982); *see also* Troxel v. Granville, 530 U.S. 57, 62 (2000).
99. *See Troxel*, 530 U.S. at 65.
100. 262 U.S. 390 (1923).
101. *See id.* at 399, 401.
102. 268 U.S. 510 (1925).
103. *See id.* at 534. The Court held, in particular, that this right to direct a child's upbringing permitted parents to choose the school their children would attend, and thus they could not be forced to attend Oregon's public schools. *See id.* at 535.
104. *See, e.g.*, Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (listing a series of freedoms protected by the Due Process Clause, including the right to "direct the education and upbringing of one's children"); 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."); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972) ("This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition.").
105. *See* Martin, *supra* note 57, at 477. Professor Lisa Martin goes on to note that courts have protected a number of "arguably bad" decisions made by parents, including terminating education after eighth grade and voluntarily committing them to mental institutions. *See id.*

Minors, like adults, also enjoy the right to have their claims heard in the courts. Access to the courts is a fundamental right.[106] To that end, the Supreme Court has protected the right to access the courts with a claim under both the First and Fourteenth Amendments.[107] Upholding the right to access the courts, the Supreme Court has specifically struck down transcript fees for indigent litigants appealing criminal convictions[108] and in the limited context of appeals to the termination of parental rights.[109]

These protections, and the Constitution in general, apply to minors in largely the same way as they do to adults.[110] As it relates to minors, not all statutes of limitations toll during infancy, and thus, if the statute of limitations runs on a minor's claim before they reach adulthood, children might lose the opportunity to bring that claim entirely.[111]

Related to the constitutional rights of parents and minors is the canon of constitutional avoidance. When a statute has more than one plausible interpretation, the canon of constitutional avoidance operates as a guide for the court to decide which construction should stand.[112] The canon is based on the presumption that Congress, when enacting a statute, did not intend to impede on the Constitution or rights protected by it.[113] To that end, the canon instructs that, among competing plausible constructions of a statute, if one construction may implicate constitutional rights, the reviewing court should adopt the other.[114]

With these constitutional rights and the canon of constitutional avoidance in the background, Part I.C discusses the statutes and federal rules that impact minors in federal court.

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106. Tennessee v. Lane, 541 U.S. 509, 533–34 (2004).

107. *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."); *see also* Bill Johnson's Rests., Inc. v. NLRB, 461 U.S. 731, 741 (1983) ("[T]he right of access to the courts is an aspect of the First Amendment right to petition the Government for redress of grievances.").

108. *See* Mayer v. City of Chicago, 404 U.S. 189, 198–99 (1971).

109. *See M.L.B.*, 519 U.S. at 124 (holding that cases terminating parental rights fall within the category of cases which cannot impose filing fees).

110. *See* Martin, *supra* note 7, at 863 n.177; *see also In re* Gault, 387 U.S. 1, 13 (1967) (clarifying that the Bill of Rights and Fourteenth Amendment are not limited to protecting adults).

111. *See* Martin, *supra* note 7, at 858–59.

112. *See* United States v. Hansen, 143 S. Ct. 1932, 1946 (2023) (emphasizing that the canon of constitutional avoidance can steer a court to adopt a construction that is "fairly possible" even if not the "best" construction); Jennings v. Rodriguez, 138 S. Ct. 830, 296 (2018) (explaining that the canon of constitutional avoidance only applies when the ordinary reading of a statute renders more than one plausible construction); Clark v. Martinez, 543 U.S. 371, 381 (2005) (explaining that the canon of constitutional avoidance is used as a means of deciding between plausible constructions of a statute's language).

113. *Clark*, 543 U.S. at 396 (Thomas, J., dissenting).

114. *See id.* at 380–81.

C. Minors in Federal Court

Understanding 28 U.S.C. § 1654 and Rule 17 of the Federal Rules of Civil Procedure is important because minors, just like adults, have claims that require action in federal court. But, as discussed above, they lack the capacity to bring those suits themselves.[115] To that end, this part will discuss the challenges, decisions, and issues which are uniquely relevant to minors as federal litigants.

Part I.C.1 discusses the U.S. Court of Appeals for the Tenth Circuit's decision in *Meeker v. Kercher*,[116] which established the counsel mandate for parents as representatives of their children in federal court. Part I.C.2 discusses the Supreme Court's decision in *Winkelman v. Parma City School District*,[117] which addressed the issue of parents' representation of their children's claims related to the Individuals with Disabilities Education Act[118] (IDEA). Finally, Part I.C.3 discusses the unique issues for minors in federal courts related to accessing counsel and justice.

1. *Meeker v. Kercher*: Minors as Parties to Be Protected

In 1986, Charles Meeker sought to appeal a district court's dismissal of a civil rights complaint he filed after a child abuse investigation into his treatment of his four daughters.[119] In a short opinion, the Tenth Circuit held that Federal Rule of Civil Procedure 17(c) and 28 U.S.C. § 1654, taken together, precluded Mr. Meeker from bringing a claim on behalf of his minor daughters without counsel.[120] In its decision, the Tenth Circuit neither specifically analyzed the text of the statute and rule it rested its opinion on, nor spoke to the policy implications of the rule it had constructed.[121]

In the nearly forty years since the *Meeker* decision, it has been cited hundreds of times in dismissing claims by a parent or guardian on behalf of their minor child.[122] These claims have arisen in many contexts: alleged

115. *See supra* Part I.A.2.
116. 782 F.2d 153 (10th Cir. 1986).
117. 550 U.S. 516 (2007).
118. Pub. L. No. 91-230, 84 Stat. 121 (1970) (codified as amended in 20 U.S.C. and 40 U.S.C.).
119. *See Meeker*, 782 F.2d at 154.
120. *See id.*
121. *See generally id.* (declining to conduct textual or policy analysis). The *Meeker* court adopted the reasoning of the district court but did not specifically address the details of the district court's reasoning. *See generally id.* To the best of this author's knowledge, the district court opinion was not published or made publicly available. Thus, this Note's analysis is limited to the Tenth Circuit's opinion.
122. As of September 12, 2024, *Meeker* has been cited in 420 cases according to Westlaw. More specifically, the first headnote (HN 1), which cites the general rule of *Meeker* that a minor's claim cannot be brought through a parent without an attorney, has been cited in 293 cases according to Westlaw.

discrimination based on national origin,[123] custody disputes,[124] and state law tort claims,[125] to name a few. And, notably, other circuits have opined on the issue and elaborated on the framework first implemented by the *Meeker* court.[126]

Thus, *Meeker* was the first step in establishing the legal backdrop which prevents parents from litigating a minor child's claim pro se in federal court.[127] Despite the lack of analytical foundation that *Meeker* presented, the federal judiciary's broad principles of paternalism and discomfort with representation by nonlawyers solidified this rule.[128]

2. *Winkelman* and the Supreme Court

The Supreme Court first faced the issue of parents litigating pro se on behalf of their children in *Winkelman v. Parma City School District*.[129] *Winkelman* presented the issue in the context of a proposed individualized education program (IEP).[130] In *Winkelman*, parents of a minor, Jacob, had exhausted their administrative remedies in attempting to challenge the formulation of his IEP under IDEA.[131] Jacob's parents filed a case in district court, claiming that his IEP was deficient in such a way that it violated his right to a "free appropriate public education" (FAPE) as provided for by IDEA.[132]

On appeal, the U.S. Court of Appeals for the Sixth Circuit dismissed the claim, stating that the right to a FAPE was the child's alone, and thus IDEA does not alter the common-law backdrop that nonlawyers may not represent someone else's claim pro se.[133] The Sixth Circuit based this dismissal on circuit precedent, which held that IDEA expressly granted parents the right to represent their children in the administrative phase, "but did not 'carve out an exception to permit parents to represent their child in federal proceedings,'

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123. *See, e.g.*, Cheung v. Youth Orchestra Found. of Buffalo, Inc., 906 F.2d 59 (2d Cir. 1990) (alleging discrimination based on Chinese-American identity in youth orchestra seating).

124. *See, e.g.*, Crippa v. Johnston, 976 F.2d 724 (1st Cir. 1992) (unpublished table decision) (alleging constitutional violations under 42 U.S.C. § 1983 based on the removal of children and their subsequent placement in foster care); Oltremari by McDaniel v. Kan. Soc. & Rehab. Serv., 871 F. Supp. 1331, 1340 (D. Kan. 1991) (alleging civil rights violations related to an extended custody battle).

125. *See, e.g.*, Osei-Afriyie v. Med. Coll. of Pa., 937 F.2d 876 (3d Cir. 1991) (bringing state law tort claims related to hospital treatment of daughters).

126. *See infra* Part II.

127. *See infra* Part II.

128. *See* Martin, *supra* note 7, at 840.

129. 550 U.S. 516 (2007).

130. *See generally id.*

131. *See id.* at 520–21.

132. *See id.* at 521.

133. *See id.* at 521–22.

an omission that prompted the inference 'that Congress only intended to let parents represent their children in administrative proceedings.'"[134]

In granting certiorari, the Supreme Court had the opportunity to resolve the question of whether parents could proceed pro se on behalf of their children in federal court.[135] However, the Court declined to reach the issue, instead finding independent, enforceable rights under the IDEA for parents.[136] The Court's analysis was predicated largely on two ideas: the whole act rule of statutory interpretation[137] and the potential for injustice by not permitting parents to litigate these claims pro se.[138]

Justice Anthony M. Kennedy wrote for the majority, arguing that prohibiting parents from litigating pro se under IDEA was inconsistent with allowing them to do so in the administrative stage of such complaints.[139] He thus suggested that the enforceable rights of parents at the administrative stage made clear that the statutory scheme should allow for parents to maintain those rights after the administrative stage as parties in court.[140] Justice Kennedy also addressed the significant potential for injustice that arose out of preventing parents from litigating these claims pro se.[141] He pointed to the statute's whole text, which sought to "ensure that the rights of children with disabilities and parents of such children are protected" as evidence that protecting children was the statute's purpose.[142]

Taken together, *Meeker* and *Winkelman* created and upheld a legal backdrop that has prevented minors from bringing claims in federal court through a parent litigating pro se. Interpretations of these cases have also created a web of circuit precedents and regimes that do not align with one another. Given the lack of conclusive Supreme Court precedent on the matter since, the circuits remain split, and the question of whether parents can litigate pro se on behalf of their children remains unanswered.

134. Winkelman v. Parma City Sch. Dist., 150 F. App'x 406, 407 (6th Cir. 2005) (quoting Cavanaugh v. Cardinal Local Sch. Dist., 409 F.3d 753 (6th Cir. 2005)), *rev'd*, 550 U.S. 516 (2007).

135. *See Winkelman*, 550 U.S. at 522.

136. *See id.* at 535 (declining to decide whether a parent could represent their child's claim pro se in federal court because parents enjoy rights under IDEA that allow them to prosecute IDEA claims on their own behalf).

137. *See id.* at 531 (holding that limiting parental status under IDEA to matters regarding procedure and cost recovery would "be inconsistent with the collaborative framework and expansive system of review established by [IDEA]"); *see also* United States v. Kozeny, 541 F.3d 166, 171 (2d Cir. 2008) ("The 'whole act' rule of statutory interpretation exhorts us to read a section of the statute not 'in isolation from the context of the whole Act' but to 'look to the provision of the whole law, and to its object and policy.'" (quoting United States v. Pacheco, 225 F.3d 148, 154 (2d Cir. 2000))).

138. *See Winkelman*, 550 U.S. at 533 ("The potential for injustice . . . is apparent. [The Court] finds nothing in the statute to indicate that . . . [Congress] intended that only some parents would be able to enforce [IDEA's] mandate.").

139. *See id.* at 531.

140. *See id.*

141. *See id.* at 533.

142. *See id.* at 528 (quoting 20 U.S.C. § 1400(d)(1)(B)).

3. Access to Justice and Counsel

The question of whether a parent can represent their child pro se is especially important because children face unique issues related to accessing counsel. These issues compound further as they relate to low-income children.

As a preliminary matter, there is no right to the assistance of counsel for civil litigants in the United States.[143] Without such a right, Americans—from low-income backgrounds in particular—often cannot access counsel in pressing civil matters.[144] According to a 2022 report by the Legal Services Corporation, low-income Americans do not get enough legal help, or any at all, for 92 percent of their substantial civil legal problems.[145] This is despite the fact that 74 percent of low-income households experienced more than one civil legal problem in 2021.[146]

The problems children, especially those from low-income families, face accessing counsel go even further and deeper. In 2021, 83 percent of low-income households with children experienced one or more civil legal problems.[147] "Children represent a disproportionate number of those living in poverty in the United States," and "[t]here is a dearth of legal services available" in this country "to meet the legal needs of those who cannot afford to pay."[148] The "root cause for this state of affairs is not hard to discern: legal services are expensive. Lawyers charge hundreds of dollars per hour for even the simplest of legal services. Even a single legal bill can prove financially devastating to many Americans."[149]

Given this state of affairs, the question of whether parents can represent their children pro se in federal court is of vital importance. To that end, Part II of this Note will explore the current state of the law across the country as it relates to that very topic.

II. CIRCUITS SPLIT ON PRO SE PARENTS: THE CURRENT STATE OF THE LAW

Circuit courts currently vary in their treatment of parents attempting to represent their minor children in federal court. Most circuit courts have adopted, and continue to maintain, an absolute bar to this practice.[150] Some

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143. *See* Turner v. Rogers, 564 U.S. 431, 441 (2011) (holding that there is no definitive right to counsel in civil cases, but the Sixth Amendment ensures a right to counsel in criminal cases).

144. *See* Caitlin Rubin, Comment, *Access to Civil Justice for Parents in the U.S. Child Welfare System*, 51 FORDHAM URB. L.J. ONLINE 1, 2 (2024).

145. *See* LEGAL SERVS. CORP., THE JUSTICE GAP: THE UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS 1, 7 (2022), https://lsc-live.app.box.com/s/xl2v2uraiotbbzrhuwtjlgi0emp3myz1 [https://perma.cc/5KSS-GSKD].

146. *See id.* at 8.

147. *See id.* at 10.

148. *See* Martin, *supra* note 7, at 856.

149. Neil M. Gorsuch, *Bridging the Affordability Gap*, 45 WYO. LAW., Apr. 2022, at 16–17.

150. *See infra* Part II.A.

circuits have acknowledged equitable exceptions to this absolute bar, specifically in the context of social security benefits appeals and situations where the pro se status of the parent is merely temporary.[151] And, most notably, the Fifth Circuit has adopted a new test for discerning when a parent may represent their child pro se in federal court, looking to state or federal law to see if they preempt the common-law counsel mandate.[152]

Part II explores these divergent regimes for parents litigating pro se on behalf of their children. Part II.A describes the majority approach: an absolute counsel mandate. Part II.B explores the approaches permitting limited equitable exceptions to the counsel mandate. Finally, Part II.C conducts a deep dive into the Fifth Circuit's approach and discusses some state law that might implicate the Fifth Circuit's new test.

A. Absolute Counsel Mandate

All but three circuits have followed the *Meeker* regime, absolutely barring parents from litigating their children's claims pro se.[153] The U.S. Courts of Appeals for the Second and Third Circuits were among the first appellate courts to respond to the *Meeker* decision in *Cheung v. Youth Orchestra Foundation of Buffalo*[154] and *Osei-Afriyie v. Medical College of Pennsylvania*,[155] respectively.

The Second Circuit considered the issue of pro se representation by parents when presented with the *Cheung* case.[156] There, a father alleged that a youth orchestra had given his daughter an inappropriate seat in the first violin section based on her Chinese-American national origin.[157] Despite the father's claims, discovery revealed that the first four seats were determined by audition results, and the remaining seats were determined by reverse alphabetical order.[158] The first and third seats were given to Asian American violinists, and several other Asian Americans participated in the orchestra without allegations of discrimination.[159] After the district court dismissed the father's complaint sua sponte for lack of subject matter jurisdiction, Cheung appealed to the Second Circuit.[160]

The Second Circuit remanded Cheung's claim without addressing the subject matter jurisdiction issue because they decided he could not bring the

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151. *See infra* Part II.B.
152. *See infra* Part II.C.
153. For a discussion of the circuits that have not followed the *Meeker* regime, see *infra* Parts II.B–C.
154. 906 F.2d 59 (2d Cir. 1990).
155. 937 F.2d 876 (3d Cir. 1991).
156. *See Cheung*, 906 F.2d at 60.
157. *See id.*
158. *See id.*
159. *See id.* at 61.
160. *See id.* The district court found that Cheung had failed to state any federal cause of action because he alleged violations of the Fourteenth Amendment related to purely private conduct. *See* Cheung v. Youth Orchestra Found. of Buffalo, Inc., No. CIV-88-984E, 1989 WL 153774, at *1–2 (W.D.N.Y. Dec. 7, 1989).

action pro se at all.[161] They extended the *Meeker* reasoning by holding that the "choice to appear pro se is not a true choice for minors."[162] To that end, the Second Circuit held that pro se representation by a parent does not adequately protect the interests of a minor who needs their claims adjudicated.[163] They wrote that children are "entitled to trained legal assistance so their rights may be fully protected," thus further supporting an absolute counsel mandate.[164] Despite articulating these policy considerations, the Second Circuit believed this case "hardly cr[ied] out for the appointment of counsel" due to its lack of merit.[165] Since its resolution, the *Cheung* case has been used repeatedly as support for the absolute counsel mandate throughout the Second Circuit.[166]

The Third Circuit similarly faced an opportunity to rule on whether parents could represent their children's claims pro se in *Osei-Afriyie*.[167] In that case, Mr. Osei-Afriyie brought suit against a hospital and doctor following their treatment of his two daughters for malaria.[168] After a visit to Ghana, his daughters exhibited symptoms such as diarrhea, convulsions, and fevers as high as 105.8 degrees.[169] They were brought to the emergency room at the Medical College of Pennsylvania, upon which they were tested for parasite levels.[170] The hospital claimed that the girls had parasite levels of nearly 25 percent, which was abnormally high, and quite dangerous.[171] Given their condition, the hospital administered the drug quinidine, which was not a Food and Drug Administration (FDA)-approved malaria treatment, but worked very well to treat the children.[172] By the time an FDA-approved drug arrived at the hospital, the treatment team declined to administer it because no one knew the effects of administering the two drugs together, and the girls had begun to improve significantly.[173] After their successful treatment, Osei-Afriyie brought his suit predicated largely on the failure of the hospital to ask for his permission to give his daughters quinidine until after it had already been administered.[174]

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161. *See* Cheung, 906 F.2d at 61.
162. *Id.* (emphasis omitted).
163. *See id.*
164. *Id.* Although the use of "entitled" might suggest a right to counsel, no such right exists in civil cases. *See supra* note 44 and accompanying text.
165. *Cheung*, 906 F.2d at 62.
166. As of October 27, 2024, and according to Westlaw, the *Cheung* decision has been cited twenty-six times by the Second Circuit and 284 times by the district courts of Connecticut, New York, and Vermont. *See, e.g.*, Lipsman v. N.Y.C. Bd. of Educ., No. 99-9337, 2000 WL 3322339 (2d Cir. May 30, 2000); Bryant v. N.Y.C. Bd. of Educ., No. 95 CIV. 3211, 1996 WL 537577 (S.D.N.Y. Sep. 20, 1996); McFarlane v. Roberta, 891 F.Supp.2d 275 (D. Conn 2012).
167. *See* Osei-Afriyie v. Med. Coll. of Pa., 937 F.2d 876 (3d Cir. 1991).
168. *See id.* at 877–78.
169. *See id.* at 878.
170. *See id.*
171. *See id.*
172. *See id.* Quinidine was only an experimental treatment for malaria but worked quite well for the treatment of irregular heartbeats. *See id.*
173. *See id.* at 878–79.
174. *See id.* at 878.

In considering whether Osei-Afriyie could proceed pro se on behalf of his children, the Third Circuit held that he, "a non-lawyer appearing pro se, was not entitled to play the role of attorney for his children in federal court."[175] They also noted that Osei-Afriyie did not want to retain counsel because he did not want to share any future recovery.[176] The *Osei-Afriyie* court also agreed with another court which stated: "[T]he [minor child] is always the ward of every court wherein his rights or property are brought into jeopardy, and is entitled to the most jealous care that no injustice be done to him."[177] In other words, the Third Circuit held that the right to counsel belongs to the child, and the parent cannot waive that right on their behalf, thus imposing an absolute counsel mandate.[178]

Most of the other circuits followed suit in many of their own cases. The First Circuit implemented an absolute counsel mandate in *Crippa v. Johnston*[179] and *Ethan H. v. New Hampshire*,[180] the Fourth in *Myers v. Loudoun County Public Schools*,[181] the Fifth in *Dobbs v. Warden*,[182] the Sixth in *Rawlings v. Littleton*,[183] the Seventh in *Johnson v. Collins*,[184] the Eighth in *United States v. Agofsky*,[185] the Ninth in *Johns v. County of San Diego*,[186] and the Eleventh in *Devine v. Indian River County School Board*.[187]

These decisions similarly echoed the policy justifications articulated by the courts in *Cheung* and *Osei-Afriyie*.[188] Many courts have also questioned the counsel mandate, even while keeping it in place. In *Tindall v. Poultney High School District*,[189] the Second Circuit acknowledged that "although the general rule serves the salutary purpose of making competent representation of children more likely, in some cases . . . it may force minors out of court altogether."[190] Furthermore, in *Grizzell v. San Elijo Elementary School*,[191] the Ninth Circuit heard a litigant who argued that the counsel mandate made "'the perfect the enemy of the good,' foreclosing paths to relief for children from low-income families whose options are representation by a pro se parent

175. *Id.* at 882.
176. *See id.* at 883.
177. Richardson v. Tyson, 86 N.W. 250, 251 (Wis. 1901).
178. *See id.*
179. 976 F.2d 724 (1st Cir. 1992) (unpublished table decision).
180. 968 F.2d 1210 (1st Cir. 1992) (unpublished table decision).
181. 418 F.3d 395 (4th Cir. 2005).
182. No. 21-10657, 2022 WL 4244283 (5th Cir. Sept. 15, 2022). The Fifth Circuit had previously applied the counsel mandate in unpublished opinions. *See id.* at *2.
183. 23 F.3d 408 (6th Cir. 1994) (unpublished table decision).
184. 5 F. App'x 479 (7th Cir. 2001).
185. 20 F.3d 866 (8th Cir. 1994).
186. 114 F.3d 874 (9th Cir. 1997).
187. 121 F.3d 576 (11th Cir. 1997).
188. *See* Cheung v. Youth Orchestra Found. of Buffalo, Inc., 906 F.2d 59, 61–62 (2d Cir. 1990); *see also* Osei-Afriyie v. Med. Coll. Of Pa., 937 F.2d 876, 882–83 (3d Cir. 1991).
189. 414 F.3d 281 (2d Cir. 2005).
190. *Id.* at 286.
191. 110 F.4th 1177 (9th Cir. 2024).

or no legal recourse at all."[192] The court agreed, stating that "Grizzell unquestionably raises concerns with grave implications for children's access to justice."[193] Despite these grave concerns, the court was bound by the Ninth Circuit's controlling precedent, which imposed the absolute counsel mandate.[194]

B. Equitable Exceptions: Social Security and Fairness

Despite the imposition of an absolute counsel mandate in nearly every circuit, the Second, Fifth, Seventh, and Tenth Circuits have created equitable exceptions where parents are permitted to litigate pro se on behalf of their children.[195] The Second, Fifth, and Tenth Circuits have permitted parents to litigate pro se on behalf of their children in the context of Supplemental Security Income (SSI) benefits appeals.[196] When establishing this exception to the absolute counsel mandate, the circuits heard appeals from denials of SSI benefits in which parents were representing their children pro se in the administrative proceedings.[197]

The Fifth Circuit was the first court of appeals to address this factual context in its decision in *Harris v. Apfel*.[198] In that case, Harris filed an application for SSI benefits on behalf of her minor daughter, asserting that she was disabled due to hyperactivity, poor vision, herpes simplex, and asthma.[199] Two separate applications for SSI benefits were denied both originally and on reconsideration.[200] Finally, Harris had a hearing before an administrative law judge, who found that her daughter was not disabled under the definition of 42 U.S.C. § 1382c.[201] Harris sought an appeal, but the judge found no grounds for review, and the findings of the administrative law judge thus became those of the commissioner.[202] Having exhausted her administrative options, Harris sought judicial review of the administrative law judge's decision pro se, which ultimately brought her to the Fifth Circuit.[203]

The Fifth Circuit had to consider whether Harris, as a parent, could appear pro se on behalf of her minor child in a social security benefits appeal.[204] In considering this question, the court was persuaded by the district court's

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192. *Id.* at 1179 (emphasis omitted).
193. *Id.* at 1181.
194. *See id.*
195. *See infra* notes 196–215.
196. *See, e.g.*, Adams v. Astrue, 659 F.3d 1297, 1299–1301 (10th Cir. 2011); Machadio v. Apfel, 276 F.3d 103, 106–07 (2d Cir. 2002); Harris v. Apfel, 209 F.3d 413, 414–17 (5th Cir. 2000).
197. *See supra* note 196.
198. 209 F.3d 413 (5th Cir. 2000).
199. *See id.* at 414.
200. *See id.*
201. *See id.*
202. *See id.*
203. *See id.*
204. *See id.*

reasoning in *Maldonado v. Apfel*,[205] where the district court found that a nonattorney parent could represent their child in SSI appeals.[206] The *Maldonado* court articulated four policy justifications for their decision: (1) parents may represent their children in SSI administrative proceedings; (2) an SSI appeal is a fairly common and simple proceeding; (3) plaintiffs are often unable to obtain counsel in this context; and (4) SSI benefits for disabled children are meant to be given when they are children, so these rights must be vindicated in a timely manner.[207] The *Harris* court agreed with these justifications, and specifically focused on the idea that children's rights can be adequately protected in SSI appeals without legal counsel.[208] They further wrote that "prohibiting non-attorney parents from proceeding *pro se* in appeals from administrative SSI decisions, on behalf of a minor child, would seriously jeopardize the child's statutory right to judicial review."[209] Notably, they also concluded that Harris had a personal stake in the litigation; as the custodial parent of her daughter, Harris was likely to serve as the representative payee of her daughter's payments.[210]

The Second Circuit echoed the reasoning of the Fifth Circuit in *Machadio v. Apfel*,[211] with a particular emphasis on the fact that SSI benefits have stringent income level restrictions.[212] They reasoned that the stringent income level restrictions of SSI benefits meant that such pro se appeals would generally be limited to families that could very rarely afford to hire counsel.[213] The Tenth Circuit, in *Adams v. Astrue*,[214] agreed with the Fifth and Second Circuits' reasoning, and permitted parents to litigate pro se in the context of SSI benefits appeals.[215] These decisions collectively discuss SSI appeals as sufficiently unique to justify, from a policy perspective, parents litigating them on behalf of their children.[216]

The Seventh Circuit also created an equitable exception to the counsel mandate in *Elustra v. Mineo*.[217] In *Elustra*, a mother sued a police officer and restaurant owners over alleged false imprisonment and civil rights claims on behalf of her daughters.[218] The Seventh Circuit considered whether the court should disregard the mother's Rule 59(e) motion filed pro se on behalf

205. 55 F. Supp. 2d 296 (S.D.N.Y. 1999).
206. *See id.* at 297.
207. *See id.* at 305.
208. *See Harris*, 209 F.3d at 417.
209. *Id.*
210. *See id.* at 416.
211. 276 F.3d 103 (2d Cir. 2002).
212. *See id.* at 107.
213. *See id.*
214. 659 F.3d 1297 (10th Cir. 2011).
215. *See id.* at 1301.
216. *See* Jessica R. Gunder, *Why Can't I Have a Robot Lawyer?: Limits on the Right to Appear Pro Se*, 98 TUL. L. REV. 363, 386–87 (2024) (discussing the *Machadio* and *Harris* decisions); *see also Adams*, 659 F.3d at 1301 ("We are persuaded by the analyses in *Harris* and *Machadio* . . . .").
217. 595 F.3d 699 (7th Cir. 2010).
218. *See id.* at 702.

of her children.[219] Significantly, Ms. Elustra had retained counsel for the original filing of the claim and was in the process of finding new counsel when she filed this one motion pro se.[220] This fact, taken with the goal of protecting the rights of the minors to have their claim heard, persuaded the court to permit the mother's Rule 59(e) motion to stand.[221]

Thus, parents are permitted to litigate in federal court pro se on behalf of their children in the Second, Fifth, and Tenth circuits when their case is an appeal related to social security benefits.[222] And, pro se actions taken by parents while temporarily without counsel might be permitted in the Seventh Circuit under the *Elustra* rule.[223]

C. The Fifth Circuit and the Raskin *Ruling*

This section explores the decision in *Raskin v. Dallas Independent School District* in depth. Part II.C.1 discusses the majority decision in *Raskin* and, specifically, how the majority grappled with the statutory text of 28 U.S.C. § 1654 and the *Meeker* precedent. Part II.C.2 discusses the alternative approach put forth by a court-appointed amicus curiae in *Raskin*. Part II.C.3 discusses Judge Oldham's separate opinion, which contains a unique analysis of 28 U.S.C. § 1654 and Federal Rule of Civil Procedure 17(b) as it relates to parents representing their children pro se. Finally, Part II.C.4 explores the law in some states as it relates to parents representing their children.

1. The *Raskin* Ruling

On October 4, 2021, Alyson Raskin filed a pro se action in federal district court alleging that the Dallas Independent School District (DISD) violated her children's rights under the Genetic Information Nondiscrimination Act[224] (GINA).[225] Ms. Raskin also alleged that by imposing a mask mandate across their schools in response to the COVID-19 pandemic, the school district had violated her children's due process rights under the U.S. and Texas Constitutions.[226] The district court dismissed her case because she lacked standing to bring the case on behalf of her children without legal counsel; in other words, it applied the counsel mandate.[227]

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219. *See id.* at 704.
220. *See id.* at 705.
221. *See id.* at 707.
222. *See supra* notes 196–216.
223. *See supra* notes 217–21.
224. Pub. L. No. 110-233, 122 Stat. 881 (2008) (codified as amended in scattered sections of 29 and 42 U.S.C.).
225. *See* Raskin v. Dallas Indep. Sch. Dist., No. 21-CV-2429, 2021 WL 5396001, at *1 (N.D. Tex. Nov. 17, 2021), *vacated and remanded*, 69 F.4th 280 (5th Cir. 2023).
226. *See id.*
227. *See id.* at *3. The district court dismissed Ms. Raskin's federal claims at the "infancy of the lawsuit" and thus declined to exercise supplemental jurisdiction over her state law claims. *Id.* at *4.

On appeal, Ms. Raskin argued that the district court erred in ruling that she could not represent her children in federal court.[228] DISD, on the other hand, contended that the Fifth Circuit should uphold the district court's decision, consistent with precedent from ten other circuits and the Fifth Circuit's own unpublished precedent.[229]

The Fifth Circuit reasoned that § 1654 does not absolutely bar parents from proceeding pro se on behalf of their children.[230] The Fifth Circuit pointed to the language of § 1654—"[i]n all courts of the United States the parties may plead and conduct their own cases personally or by counsel"[231]—to indicate that to proceed pro se, the only requirement is that a case must be one's "own."[232] Although nothing in the language of § 1654 clearly states when a child's claim is their parent's own, the Fifth Circuit reasoned that state or federal law might designate a child's claim as the parent's own.[233] In that sense, a relevant federal or state law would alter the common-law backdrop which has prevented such a practice.[234]

In reaching that conclusion, the Fifth Circuit also relied on the fact that other federal statutes have been found to permit pro se parent representation, such as the Social Security Act.[235] Additionally, it noted that the Supreme Court left the question open as it relates to IDEA.[236]

The Fifth Circuit further specified that state law is instructive when determining whether a child's claim is their parent's "own."[237] It referred to *Rodgers v. Lancaster Police & Fire Department*[238] as an example of turning to state law to determine whether a case is someone's other than the injured party's "own."[239] In *Rodgers*, the Fifth Circuit held that "a person with capacity under state law to represent an estate in a survival action may proceed pro se if that person is the only beneficiary and the estate has no creditors."[240]

Accordingly, the Fifth Circuit found in *Raskin* that, unless the relevant state law significantly damages clear and substantial federal interests, the state law will not be overridden.[241] Notably, they also specifically separated out Federal Rule of Civil Procedure 17 and 28 U.S.C. § 1654, stating that a minor has the right to proceed pro se under § 1654, but they are prevented

228. *See* Raskin v. Dallas Indep. Sch. Dist., 69 F.4th 280, 282 (5th Cir. 2023).
229. *See id.*
230. *See id.* at 286.
231. 28 U.S.C. § 1654.
232. *See Raskin*, 69 F.4th at 283.
233. *See id.*
234. *See id.* at 284.
235. 42 U.S.C. §§ 301-1397mm; *see also Raskin*, 69 F.4th at 284; *supra* Part II.B.
236. *See Raskin*, 69 F.4th at 284; *see also supra* Part I.C.1.
237. *See Raskin*, 69 F.4th at 284.
238. 819 F.3d 205 (5th Cir. 2016).
239. *Raskin*, 69 F.4th at 284.
240. *See Rodgers*, 819 F.3d at 211.
241. *See Raskin*, 69 F.4th at 284–85.

from personally exercising that right due to Rule 17, under which they do not have capacity to sue.[242]

On remand, the U.S. District Court for the Northern District of Texas dismissed with prejudice Ms. Raskin's GINA claims.[243] They found her GINA claims to be "patently frivolous," as GINA applies to employer-based discrimination, and thus had no relevance to the claims she made.[244] Given the frivolousness of Ms. Raskin's claims, the district court declined to consider whether Texas state law permitted her to proceed pro se on behalf of her children.[245]

2. Amicus Brief

Though Ms. Raskin's claim was ultimately dismissed, a court-appointed amicus provided support to Ms. Raskin's claim in the Fifth Circuit. That court-appointed amicus argued that the court should have adopted a multifactor test to determine when a parent can proceed pro se on behalf of their child.[246] The court did not address the amicus brief in its decision, but the brief itself provided a unique perspective on whether parents should be able to proceed pro se that is instructive for the purposes of this Note.

The amicus argued, first, that equitable exceptions already existed that circumvent the complete bar on parent representation of their children in federal courts, specifically in the SSI context.[247] It further argued that these exceptions existed precisely to protect the rights of minors as they litigate their claims.[248]

The amicus contended that a strict application of the counsel mandate would contravene the language of Rule 17(c),[249] which says, "[t]he court must appoint a guardian ad litem—or issue another appropriate order—to protect a minor . . . who is unrepresented in an action."[250] Implementing a rigid counsel mandate, it argued, would fail to provide the flexibility

242. *See id.* at 285 n.5 ("[W]e must not conflate capacity, which concerns 'a party's personal right to come into court,' and representation, which asks who gets to act as the legal representative of the party in court proceedings.").

243. *See* Raskin v. Dallas Indep. Sch. Dist., No. 21-CV-2429-L, 2024 WL 4361608, at *1 (N.D. Tex. Sept. 30, 2024), *vacated and remanded*, 69 F.4th 280 (5th Cir. 2023).

244. *Id.* at *6–7.

245. *See id.* at *7. The court noted further that Ms. Raskin was ordered to brief the issue upon remand, but she failed to do so. *See id.* By failing to brief the issue of her standing, the court held that she had waived any issue regarding her standing. *See id.* at *9. This, the court ruled, operated as an alternative ground upon which they denied Ms. Raskin's request to further amend her pleadings. *See id.*

246. *See Raskin*, 69 F.4th at 282.

247. *See* Brief of Court-Appointed Amicus Curiae Supporting Appellant Allyson Raskin and Reversal at 10–13, Raskin v. Dallas Indep. Sch. Dist., 69 F.4th 280 (5th Cir. 2023) (No. 21-11180); *see also supra* Part II.B.

248. *See* Brief of Court-Appointed Amicus Curiae Supporting Appellant Allyson Raskin and Reversal, *supra* note 247, at 11–12.

249. *See id.* at 13–14.

250. FED. R. CIV. P. 17(c)(2).

necessary for federal courts to faithfully execute the directive of Rule 17.[251] Importantly, the amicus analyzed Rule 17 as requiring federal courts to protect minor litigants, but providing flexibility in *how* they do so.[252] By dismissing a suit simply because a parent has not retained counsel, the amicus argued, federal courts would ignore their obligations under Rule 17(c).[253]

The amicus went on to argue that the rigid imposition of a counsel mandate is unnecessary to protect against the unauthorized practice of law.[254] It argued that, although there are reasonable concerns about parents abusing the judicial process by filing frivolous suits, those concerns are no different than in any other pro se case.[255] No court prevents other pro se litigants from proceeding based on the potential for frivolous suits.[256]

It also contended that the counsel mandate is likely to prevent low-income families from accessing the federal courts.[257] Even where families *can* afford legal representation, the quality of attorneys within an affordable range or willing to take cases with minimal financial incentive, is likely to be quite low.[258] It argued that, in keeping minors out of court, the First, Fifth, and Fourteenth Amendment rights to petition, due process, and equal protection of minors might be violated.[259] Further, failing to allow parents to bring their children's claims pro se might implicate the fundamental liberty interests of families in the "care, custody, and control of their children."[260]

Perhaps most notable in the amicus brief, though, is the proposed multifactor test for when and how courts should apply the counsel mandate to parents litigating pro se on behalf of their children.[261] The amicus proposed that federal courts should: (1) consider the reasons why a parent is suing pro se; (2) evaluate the complexity of the case; (3) prioritize cases involving fundamental rights, constitutional deprivations, or claims unlikely to survive until adulthood; and (4) dismiss frivolous, abusive, or meritless claims.[262] This test would permit courts, the amicus argued, to employ the flexibility implied in the text of Rule 17(c).[263]

On the first factor, courts considering—and developing a record of—the reasons a parent is suing pro se will better inform their decision to impose the mandate in a given case.[264] Parents might, the amicus argued, have limited financial means, difficulty retaining counsel, or strongly held family

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251. *See* Brief of Court-Appointed Amicus Curiae Supporting Appellant Allyson Raskin and Reversal, *supra* note 247, at 13–14.

252. *See id.* at 13.

253. *See id.* at 14.

254. *See id.* at 14–16.

255. *See id.* at 15.

256. *See id.*

257. *See id.* at 16–17.

258. *See id.* at 17.

259. *See id.* at 18.

260. *Id.* at 19 (quoting Troxel v. Granville, 530 U.S. 57, 65 (2000)).

261. *See id.* at 22–24.

262. *See id.* at 24–25.

263. *See id.* at 24.

264. *See id.*

beliefs that prevent them from having counsel.[265] Further, the creation of that record would be important for circuit courts to review those reasons on appeal.[266]

On the second factor, the amicus proposed that evaluating the complexity of the case would help inform the court's decision to impose the mandate because cases with more necessary fact development or novel issues of law would benefit more from counsel.[267] Interestingly, the amicus also noted that even more complicated cases need not necessarily be dismissed, but they could be referred to magistrate judges for discovery and fact finding without dismissal.[268]

The third factor would ensure that cases of significant importance are still given some consideration on the merits.[269] The amicus argued that this would ensure a "basic level of judicial oversight."[270]

Fourth, maintaining the practice of dismissing frivolous, abusive, or meritless claims would protect against concerns related to the unauthorized practice of law.[271] If a given case filed pro se by a parent on behalf of their child qualified as one of those, the amicus argued that the court should dismiss them.[272]

3. Judge Oldham's Separate Opinion in *Raskin*

Judge Andrew Oldham of the Fifth Circuit issued a long opinion dissenting in part and concurring in the judgment in the *Raskin* case.[273] Judge Oldham began by laying out three ways in which the court had subject matter jurisdiction over this case: (1) the two minor children had standing; (2) Ms. Raskin properly established jus tertii standing; and (3) failure to hire an attorney is a procedural, not jurisdictional, defect.[274] Judge Oldham further disagreed with the majority's determination that the plaintiff's amendment to complaint superseded her original complaint, rather than just amending it.[275]

Judge Oldham then turned to the merits of the case, specifically, whether Ms. Raskin could represent her minor children without retaining an

265. *See id.*
266. *See id.*
267. *See id.*
268. *See id.* at 24–25.
269. *See id.* at 25.
270. *Id.*
271. *See id.*
272. *See id.*
273. *See* Raskin v. Dallas Indep. Sch. Dist., 69 F.4th 280, 287–99 (5th Cir. 2023) (Oldham, J., dissenting in part and concurring in the judgment).
274. *See id.* at 288–89.
275. *See id.* at 289–90. Judge Oldham lays out various reasons for why Ms. Raskin's amendment to complaint would be understood to amend, rather than supersede, her original complaint: (1) she explained that there was new information not originally available; (2) she added five new counts on top of the original four; (3) she numbered the new claims V through IX, rather than starting at I; (4) she entirely omitted prefatory statements like the list of parties and; (5) she titled it "Amendment to Complaint," not "Amended Complaint." *See id.*

attorney.[276] He chronicled the long history of self-representation in the United States.[277] He then noted that the parties in *Raskin* agreed—federal law permits children to litigate pro se.[278] To Judge Oldham, nothing in 28 U.S.C. § 1654 specifically restricts minors from litigating pro se.[279] He also stated that the parties agree on the language of Federal Rule of Civil Procedure 17(b)(3), which states "[c]apacity to sue is determined . . . by the law of the state where the court is located."[280]

Thus, he said, the parties simply disagreed on how to understand the relevant state law.[281] He wrote that the Texas Family Code provided parents with the "right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child."[282] Although minors are not allowed to sue or be sued in their individual capacity, he argued that the Texas Family Code clearly allows parent representation via that very language.[283]

Although no court has yet adopted Judge Oldham's analysis of this issue, his separate opinion is the most comprehensive attempt to address the issue yet. Judge Oldham's proposed reading of the relevant texts thus provides valuable insight in addressing whether parents can litigate pro se on behalf of their children.

4. State Law Survey

As Judge Oldham referenced in his separate opinion in *Raskin*, Texas state law may permit parents to represent their children pro se.[284] Texas law specifically states that parents have the "right to represent the child in legal action and to make other decisions of substantial legal significance concerning the child."[285] Further, as Judge Oldham noted, the Texas Supreme Court has permitted legal guardians to sue on their child's behalf.[286]

In Georgia, parents are "necessary parties to all legal proceedings involving their child."[287] This requirement that parents are parties to legal actions involving their children "implicitly recognizes that the parents are the natural custodians of their child" and thus must be involved in any legal decisions that pertain to them.[288] This provides parents the right to be heard

276. *See id.* at 290.
277. *See id.*; *supra* Part I.A.1.
278. *See Raskin*, 69 F.4th at 292.
279. *See id.* Judge Oldham goes on to specify that § 1654 does not contain any language distinguishing minors. Further, unless context indicates otherwise, minors and adults are equally considered "persons" under the law. *See id.*; 1 U.S.C. § 8(a).
280. *See Raskin*, 69 F.4th at 292 (quoting FED. R. CIV. P. 17(b)(3)).
281. *See id.*
282. *See id.* (quoting TEX. FAM. CODE ANN. § 151.001(a)(7) (West 2023)).
283. *See id.* at 292–93.
284. *See id.*
285. TEX. FAM. CODE ANN. § 151.001(a)(7) (West 2023).
286. *See Raskin*, 69 F.4th at 293.
287. *In re* J.L.B., 634 S.E.2d 514, 516 (Ga. Ct. App. 2006) (citing D.C.A. v. State, 217 S.E.2d 470 (Ga. Ct. App. 1975)).
288. *See id.*

at proceedings and to represent themselves and, by extension, their children pro se.[289]

Some other states permit minors to enforce their own rights in the same manner as adults, except that the actions and proceedings must be conducted by a guardian.[290] Whether that would permit the guardian to proceed pro se on behalf of the child is an open question, as federal courts in these jurisdictions have not permitted that practice.[291]

To that end, most states simply do not have statutes that *clearly* provide for parents to represent their children pro se in civil proceedings.[292]

III. COURTS SHOULD READ 28 U.S.C. § 1654 CLEARLY OR, ALTERNATIVELY, LOOK TO STATE LAW

To ensure minors have proper access to the courts and are treated fairly and consistently in federal courts, this Note recommends a straightforward construction of 28 U.S.C. § 1654 which comports with the established practice of parents hiring counsel for their children[293] and the canon of constitutional avoidance.[294] This construction would permit parents to litigate pro se on behalf of their minor children in federal civil claims.

In the alternative, this Note recommends looking to the relevant state law of capacity to determine if a parent can litigate pro se on behalf of their child in federal court. Even if a court were to look to state law, constitutional avoidance would still mandate liberally construing state law provisions to permit parents to litigate pro se on behalf of their children.

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289. *See id.* at 516–17.

290. *See, e.g.*, CAL. FAM. CODE § 6601 (West 1994) ("A minor may enforce the minor's rights by civil action or other legal proceedings in the same manner as an adult, except that a guardian must conduct the action or proceedings."); MONT. CODE ANN. § 41-1-202 (2023) ("A minor may enforce the minor's rights by civil action or other legal proceedings in the same manner as a person of full age, except that a guardian shall conduct the action or proceedings."); N.D. CENT. CODE § 14-10-04 (2023) ("A minor may enforce the minor's rights by civil action or other legal proceedings in the same manner as an adult, except that a guardian ad litem must be appointed to conduct the same.").

291. *See, e.g.*, Grizzell v. San Elijo Elementary Sch., No. 21-CV-863, 2021 WL 3940848 (S.D. Cal. Aug. 12, 2021) (dismissing a California case because a parent was not allowed to represent her child pro se); Price v. Heedon, No. CV 09-173, 2010 WL 88986 (D. Mont. Mar. 9, 2010) (dismissing a pro se parent's children from the suit because their parent was not permitted to represent them); Roedel v. Gardner, No. CV 08-30, 2008 WL 5416388 (D. Mont. June 12, 2008) (same).

292. Research conducted by this author found that most states are either silent or ambiguous as to whether parents can litigate pro se on behalf of their minor children in civil proceedings. Although outside the scope of this Note, it is worth highlighting that many state courts have permitted parents and their minor children to waive the right to counsel in delinquency proceedings, allowing parents to represent their children without counsel. *See, e.g.*, Huff v. K.P., 302 N.W.2d 779, 783 (N.D. 1981) (permitting a father to waive his child's right to counsel in a delinquency proceeding and "rather ineffectively" represent the child himself); *see also* Catherine J. Ross, *From Vulnerability to Voice: Appointing Counsel for Children in Civil Litigation*, 64 FORDHAM L. REV. 1571, 1585 n.72 (1996).

293. *See, e.g.*, Cheung v. Youth Orchestra Found. of Buffalo, Inc., 906 F.2d 59, 62 (2d Cir. 1990) (remanding to allow parent to retain counsel for their child).

294. *See supra* notes 112–14 and accompanying text.

Part III.A proposes a construction of 28 U.S.C. § 1654 that would provide parents the right to litigate pro se on behalf of their children generally. Then, Part III.B proposes an alternative solution—referring to state capacity law as instructed by Federal Rule of Civil Procedure 17—and explores some statutory language that should be liberally construed. Finally, Part III.C calls upon state legislatures to take action and pass legislation enshrining the right of a parent to represent their child pro se.

A. A Straightforward Reading of § 1654 Should Permit Parents to Litigate Pro Se on Behalf of Their Children

Permitting parents to litigate pro se on behalf of their children in federal court without any legal caveats should begin and end with the plain text of § 1654. This Note's proposed construction of § 1654 makes it anomalous to permit parents to retain counsel on behalf of their child—a normal practice in federal court[295]—but not extend the right to litigate pro se on behalf of their child to parents.

The relevant language of § 1654 states: "parties may plead and conduct their own cases personally or by counsel . . . ."[296] Here, "plead and conduct their own cases" is modified by *both* "personally" and "by counsel," indicating that parties can litigate their own cases either pro se or with an attorney. Thus, to permit parents to appoint counsel, but not to proceed pro se when litigating a child's claim, would run afoul of the statute's plain language.[297] Under this grammatically correct reading of the statute, the widely permitted practice of allowing parents to retain counsel for their children necessarily makes any child's claim the parent's "own."[298] Given that parents are already permitted to sue on behalf of their children when they are represented,[299] the statutory text plainly commands that parents should enjoy the right to litigate pro se on behalf of their children broadly.

This reading is also a sensible construction of the statutory language to the extent that it steers clear of conflicts with constitutional rights.[300] By utilizing the canon of constitutional avoidance to permit parents to litigate the claims of their children pro se, courts will refrain from substituting their own judgment for that of parents. That is consistent with the liberty interest parents have in directing the upbringing of their own children.[301] To that

295. Courts enforcing the counsel mandate have often remanded so that the parent retain counsel, evincing their power to do so. *See, e.g.*, *Cheung*, 906 F.2d at 62 ("We remand to give [the parent] an opportunity to retain counsel or to request the appointment of counsel.").

296. 28 U.S.C. § 1654.

297. *See* Raskin v. Dallas Indep. Sch. Dist., 69 F.4th 280, 297 (5th Cir. 2023) (Oldham, J., dissenting in part and concurring in the judgment). Judge Oldham suggested that to read the statute otherwise would inappropriately "give Ms. *Raskin* [authority] to exercise her children's 'own' option to proceed 'by counsel.'" *See id.*

298. *See id.*; *supra* note 295 and accompanying text.

299. *See Raskin*, 69 F.4th at 285 n.5.

300. *See supra* Part I.B.3.

301. *See supra* notes 98–105 and accompanying text.

end, this reading is consistent with the general practice of courts presuming parents are acting with the best interests of their children in mind, and thus giving parental decisions special weight.[302] This construction of the statute is also consistent with the idea that how a parent chooses to enforce their child's rights in court (or whether they decide to at all) is a parenting choice that should be given due respect by the courts.[303]

Even more compelling, though, is that this construction of 28 U.S.C. § 1654 avoids intruding upon a child's constitutional right to access the courts.[304] Children from low-income families are particularly and disproportionately unable to access legal counsel.[305] Thus, the constitutional right of low-income children to access the courts is particularly and disproportionately implicated by the imposition of an absolute counsel mandate. This Note's proposed construction of 28 U.S.C. § 1654 would broadly permit parents and guardians to proceed pro se on behalf of their children, thus ensuring children have access to the courts no matter their financial situation.

Despite the reasonableness of this reading, no court has read § 1654 in the way this Note suggests. Thus, this Note proposes, in the alternative, a new test for federal courts to utilize when considering whether a parent should be permitted to litigate pro se on behalf of their child in a given case.

B. Alternatively, Federal Courts Should Look to State Law to Determine Whether Parents Can Litigate Pro Se on Behalf of Their Children

This Note proposes, in the alternative, that courts reference state capacity law to determine if a parent can represent their child pro se. Guided by Federal Rule of Civil Procedure 17(b)(3), if a state law permits parents to litigate pro se on behalf of their children, those parents should be allowed to do so in federal court.[306] Again here, this Note proposes the application of the canon of constitutional avoidance. To that end, state statutes, where unclear or ambiguous as to the ability of parents to litigate pro se on behalf of their kids, should be read liberally so as to avoid impeding the constitutional rights of parents and children.

It is worth noting again that children have an unambiguous right to proceed pro se in federal courts.[307] That statutory right is glossed over by Federal Rule of Civil Procedure 17, which articulates the requirements for capacity to sue and be sued as it relates to federal courts.[308] Rule 17(b)(3) clearly states that "[c]apacity to sue or be sued is determined . . . by the law of the

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302. *See supra* note 105 and accompanying text.
303. *See* Martin, *supra* note 57, at 488–89.
304. *See supra* notes 106–11.
305. *See generally* LEGAL SERVS. CORP. *supra* note 145 and accompanying text. Moreover, 46 percent of the low-income Americans surveyed by the Legal Services Corporation stated cost as a reason why they did not seek legal help. *See id.* at 8.
306. *See supra* notes 50–52 and accompanying text.
307. *See* 28 U.S.C. § 1654; *see also supra* note 279 and accompanying text.
308. *See generally* FED. R. CIV. P. 17.

state where the court is located . . . ."[309] So, the relevant state law that determines capacity to sue should, in the absence of a blanket right for parents to litigate pro se on behalf of their children, control whether a parent can litigate pro se on behalf of their child.

That federal courts should defer to state law on the matter is further supported by the existing domestic relations exception and the federal courts' general deference to state law when federal law is ambiguous.[310] As Part I.B.1 discussed above, the domestic relations exception is the long recognized understanding that federal jurisdiction largely does not extend to matters related to families, and specifically parent-child relationships, where, instead, state law should control.[311] Whether a parent can represent their child's claim pro se is necessarily a question related to family law, which is widely considered to be a creature of state law and thus should be governed by it.[312]

Furthermore, the general practice of deferring to state law when federal law is unclear supports referencing state law to determine if a parent can litigate pro se on behalf of their minor child. Where federal statutes have material gaps, federal courts look to state law to fill those gaps.[313] Here, the ambiguity is clear—given the divergence of the circuit courts—as to whether the law permits a parent to litigate pro se on behalf of their children under § 1654 and Rule 17, and thus, state law should be referenced to answer that question.

In several states, statutes provide clear language permitting parents to litigate pro se on behalf of their minor children.[314] In Texas, the state family code permits parents to represent their children and make substantial legal decisions about them.[315] And, in California, Montana, and North Dakota, minor children may enforce their rights in the same manner as adults except that the legal action or proceedings must be conducted by their guardian or representative.[316]

The statutory language in both examples should be interpreted to permit parents to litigate pro se on behalf of their children. In Texas, parents are given explicit statutory authority to represent their children. In California, Montana, and North Dakota, the statutory language should be read to permit a child's guardian to exercise the child's right to proceed without counsel on their behalf. To the extent that these statutory examples are ambiguous, constitutional avoidance weighs heavily in favor of permitting parents to litigate pro se on behalf of their children.

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309. *Id.* 17(b)(3).
310. *See supra* Part I.B.
311. *See supra* Part I.B.
312. *See supra* Part I.B.
313. *See supra* Part I.B.2.
314. *See supra* Part II.C.4.
315. *See supra* note 285 and accompanying text.
316. *See supra* note 290 and accompanying text.

And, in Georgia, parents are required parties in all legal actions involving their children.[317] As parties themselves, parents thus have the right to represent their minor children pro se in Georgia.[318] That parents have already represented their children pro se in the state necessarily means that the practice should be authorized in federal courts in Georgia.

Although these examples are fairly explicit, the legal reality is that the majority of states are silent or it is ambiguous as to whether parents can represent their children pro se.[319] As such, the relevant state law may often be unavailing. However, this straightforward rule would accommodate any future state legislature action on the matter, and would likely be conclusive in many legal contexts, such as federal cases in Georgia and Texas.[320]

This Note explicitly takes the position that a presumption in favor of permitting parents to proceed pro se on behalf of their children best serves justice. As noted extensively, there is no federally recognized right to counsel in civil cases.[321] As such, children and parents that cannot otherwise access counsel are far too often left with no legal recourse when suffering a harm.[322] Courts maintain important levers of control over claims filed, such as dismissal of frivolous suits and special solicitude[323] to ensure the orderly and proper progression of any legal action. Those levers should be used judiciously in cases where parents proceed pro se on behalf of their children and can certainly alleviate some of the lingering concerns a court might have about permitting parents to litigate their child's claim pro se.

C. State Legislatures Should Actively Legislate to Permit Parents to Litigate Pro Se on Behalf of Their Children.

This Note's alternative solution requires determining whether state law would permit a parent to litigate pro se on behalf of their child. That step is rooted in a sound reading of both the relevant statutory text and the relevant text of the Federal Rules of Civil Procedure. But, it is also based in the belief that state policymakers are uniquely positioned to understand the needs of families and children within their state.[324] That long-held, core federalism principle should be an important guide as members of the legal community address access to justice issues.

To that end, it is clear that low-income families struggle to access counsel and have their claims heard.[325] The proximity to the people and purview over domestic relations of state legislatures make them best positioned to address these issues. Thus, state legislatures must ensure that access to

317. *See supra* note 287 and accompanying text.
318. *See supra* note 289 and accompanying text.
319. *See supra* Part II.C.4.
320. *See supra* Part II.C.4.
321. *See supra* note 44 and accompanying text.
322. *See* Martin, *supra* note 7.
323. *See supra* Part I.A.1.
324. *See supra* note 77 and accompanying text.
325. *See generally supra* Part I.C.3.

counsel and justice related issues do not prevent children from having their day in court—as is their constitutional right.[326] This Note envisions that, for this alternative to last, long-term solutions must emanate from state legislatures after thoughtful consideration by policymakers, community advocates, parents, and judicial experts.

CONCLUSION

Children retain an unambiguous statutory right to represent themselves in federal court. However, Federal Rule of Civil Procedure 17 requires an adult representative, often a parent, to sue and be sued on behalf of the child. That a child has both the right to self-representation and must have a parent serve as their representative raises the question: Can a parent exercise the child's right to litigate pro se themselves? This question is particularly important given the dearth of legal services for low-income Americans, especially those with children.

A court should reasonably read the relevant 28 U.S.C. § 1654 to simply imbue parents with the broad right to represent their child pro se. To read the statutory language this way comports with longstanding practice permitting parents to retain counsel on behalf of their children, as well as properly applies the canon of constitutional avoidance. In the alternative, this Note recommends federal courts refer to the capacity laws of the given state in which the federal court is situated based on Federal Rule of Civil Procedure 17. No matter the path forward, the complex constitutional and access to justice–related issues presented by the current state of affairs should compel courts to address this question head on.

326. *See supra* notes 106–11 and accompanying text.