No. 24-718

IN THE

Supreme Court of the United States

BLAKE ANDREW WARNER,

Petitioner,

v.

HILLSBOROUGH COUNTY SCHOOL BOARD,

Respondents.

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

BRIEF OF FLORIDA LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

KATIE JAY, ESQ.
JAY & CAMPBELL, PLLC
1 S.E. Ocean Blvd.
Stuart, Florida 34994
(844) 624-2361
katie@flfamilyformation.com

FRANK A. SHEPHERD
Counsel of Record
FRANK A. SHEPHERD, P.A.
1 S.E. 3rd Avenue
Suite 1700
Miami, Florida 33131
(305) 610-6255
frank@franksheplaw.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Florida Legal Foundation, Inc. is a 501(c)(3) non-profit organization founded in 1992, reorganized in 2020, that exists to participate in matters of interest to the people of the State of Florida. Its areas of interest include the advancement of limited government, separation of powers, individual liberty, and the rule of law. Among its more specific areas of interest are parental rights and equality of educational opportunity for all. To those ends, the Foundation has filed amicus briefs in the appellate courts of the State and in federal venues where issues of particular importance to the citizens of this State have been presented.

Florida Legal Foundation believes that this case presents questions of extraordinary importance regarding minors' access to the courts and parents' rights to advocate for their children in the State of Florida.

SUMMARY OF ARGUMENT

For many years federal courts have interpreted 28 U.S.C. § 1654 to mandate counsel for minor children, despite every other American's right to represent himself or herself *pro se* in state and federal courts (the "Counsel Mandate"). Ultimately, the Counsel Mandate "offers minors a Hobson's choice: litigate with counsel, or don't litigate at all.'" *Warner v. Sch. Bd. of Hillsborough Cnty, Florida*, No. 23-12408, 2024 WL 2053698, at *3 (11th Cir. May 8, 2024)

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of amicus curiae's intention to file this brief. Amicus curiae certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel, has made a monetary contribution to its preparation or submission.

(quoting *Raskin on behalf of JD v. Dallas Indep. Sch. Dist.,* 69 F.4th 280, 294 (5th Cir. 2023) (Oldham, J., dissenting in part and concurring in judgment)).

The Foundation respectfully submits that the Counsel Mandate should be eliminated for at least two reasons. First, the Federal Rules of Civil Procedure require federal courts to look to state law to determine a child's capacity to sue. Florida law allows parents to represent their children in court. Therefore, Blake Warner, the petitioner in this case, would have been able to sue on his child's behalf if Florida law had been applied by the district court.

Second, the lower federal courts routinely misapprehend the nature and breadth of the common law relating to legal representation for children. For example, Counsel Mandate decisions frequently make sweeping statements such as, "The rule that a non-lawyer may not represent another person in court is a venerable common law rule."[2] However, instead of citing to any original common law source, the courts cite only to recent American decisions[3] that cite to yet

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[2] *Collinsgru v. Palmyra Bd. of Educ.,* 161 F.3d 225, 232 (3d Cir. 1998), *abrogated on other grounds by Winkelman ex rel. Winkelman v. Parma City Sch. Dist.,* 550 U.S. 516 (2007).

[3] *Brown v. Ortho Diagnostic Sys., Inc.*, 868 F. Supp. 168, 170 (E.D. Va. 1994) ("federal courts have been uniformly hostile to attempts by non-attorneys to represent others in court proceedings."); *Herrera-Venegas v. Sanchez-Rivera*, 681 F.2d 41, 42 (1st Cir. 1982) ("The federal courts have consistently rejected attempts at third-party lay representation."); *Guajardo v. Luna*, 432 F.2d 1324, 1324 (5th Cir. 1970) ("The requirement that only licensed lawyers may represent others in court is a reasonable rule that does not offend any constitutional guarantee.")

other recent American decisions.[4] At that point, the research trail ends.

The common law forbids non-attorneys from representing corporations, yet it allows guardians and next friends to sue on behalf of children. And so, even without applying state law, 28 U.S.C. § 1654 does not clearly abrogate the common law right of parents to represent their children.

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[4] *Osei-Afriyie by Osei-Afriyie v. Med. Coll. of Pennsylvania*, 937 F.2d 876, 883 (3d Cir. 1991) (cited by *Brown*, 868 F. Supp. 168) (citing policy reasons for the Counsel Mandate); *Cheung v. Youth Orchestra Found. of Buffalo, Inc.*, 906 F.2d 59, 61 (2d Cir. 1990) (cited by *Brown*, 868 F. Supp. 168) (citing policy reasons for the Counsel Mandate); *Meeker v. Kercher*, 782 F.2d 153, 154 (10th Cir. 1986) (cited by *Brown*, 868 F. Supp. 168) (but providing no analysis of common law or statutory language); *Johnson v. Avery*, 393 U.S. 483, 488 (1969) (cited by *Guajardo*, 432 F.2d 1324) (discussing policy reasons for allowing jailhouse lawyers to file writs of habeas corpus for their fellow inmates); *United States v. Taylor*, 569 F.2d 448, 451 (7th Cir. 1978) (cited by *Herrera-Venegas*, 681 F.2d at 42) ("Indeed, the question [of allowing unlicensed counsel to represent criminal defendants] is so well settled by now that further discussion seems to us fruitless."); *but see Faretta v. California*, 422 U.S. 806, 820 n.16 (1975) (In refusing to force counsel upon a pro se criminal defendant, this Court noted that it was not an uncommon practice for colonial defendants to be represented at trial by personal friends who had received no formal training in the law.)

ARGUMENT

I. FLORIDA LAW ALLOWS PARENTS TO DIRECTLY REPRESENT THEIR CHILDREN IN COURT.

A. State law governs who may sue on behalf of a child in federal court, and how they may sue.

It is axiomatic that federal courts must consult state law when determining whether a parent has capacity to sue on behalf of their child, and the manner in which it may be done. "Capacity to sue or be sued is determined…by the law of the state where the court is located." Fed. R. Civ. P. 17(b)(3).

B. Florida Rule of Civil Procedure 1.210(b) allows parents to represent their children in court.

Florida allows minors to bring suit through a legal guardian, next friend, or guardian ad litem. Florida Rule of Civil Procedure 1.210(b) provides:

> Minors or Incompetent Persons. *When a minor or incompetent person has a representative, such as a guardian or other like fiduciary, the representative may sue or defend on behalf of the minor or incompetent person.* A minor or incompetent person who does not have a duly appointed representative may sue by next friend or by a guardian ad litem. The court shall appoint a guardian ad litem for a minor or incompetent person not otherwise represented in an action or shall make such other order as it deems proper for the protection of the minor or incompetent person.

Id. (emphasis added). "Representative" is defined by an enactment era dictionary[5] as "One who represents or stands in the place of another." *Black's Law Dictionary* (Rev. 4th ed. 1968) (citing *Lee v. Dill*, 1863 WL 4136 (N.Y. Gen. Term. 1863), *aff'd sub nom. Lee v. Dill.*, 1869 WL 7798 (N.Y. Mar. 1, 1869) ("representative" includes both real and personal representatives, i.e., next of kin, as well as administrators and executors); *Staples v. Lewis*, 71 Conn. 288, 41 A. 815, 815 (Conn. 1898) (terms "representatives," "legal representatives," and "personal representatives" of deceased persons used interchangeably).

The majority in *Raskin* admits that "Congress left open to states the choice to authorize non-attorney parents to *represent* their children." *Raskin.,* 69 F.4th at 285 (emphasis added). The *Raskin* dissent concurs, stating that Texas law (much like the Florida law referenced above) allows parents to "represent" their children. *Id*. at 297.

Yet, the *Warner* court followed precedent set in *Devine v. Indian River County School Bd*., 121 F. 3d 576, 581 (11th Cir. 1997). The *Devine* court found that the federal statute and rule were inapposite:

> [N]either 28 U.S.C. § 1654 nor Fed. R. Civ. P. 17(c)…permits a parent to represent his/her child in federal court. Section 1654 authorizes parties in federal cases to "plead and conduct their own cases personally or by counsel," but is inapposite because it does not speak to the issue before us—whether [the parent] may plead or conduct his son's case. Likewise, Rule 17(c) is unavailing; it permits authorized

[5] The first version of Florida Rule of Civil Procedure 1.210(b) was initially enacted as Rule 1.17(b) in 1954.

> representatives, including parents, to sue on behalf of minors, but does not confer any right upon such representatives to serve as legal counsel.

Id.

The *Devine* court reasoned—without analyzing the common law—that parents do not have the right to represent their children *pro se.* But parents do not need express statutory authority to represent their children in court because they had this right at common law:

> Infants have various privileges, and various disabilities: but their very disabilities are privileges; in order to secure them from hurting themselves by their own improvident acts. An infant cannot be sued but under the protection, and joining the name, of his guardian; for he is to defend him against all attacks as well by law as otherwise": but he may sue either by his guardian, or *prochein amy*, his next friend who is not his guardian. This *prochein amy* may be any person who will undertake the infant's cause[.]

1 William Blackstone, *Commentaries on the Laws of England* *452 (1st ed. 1765).

Lest there be any doubt, Florida law has not abrogated this common law right. *See* § 2.01, Fla. Stat. (2024) ("The common…laws of England…[until July 4, 1776,] are declared to be of force in this state; provided, the said statutes and common law be not inconsistent with the Constitution and laws of the United States and the acts of the Legislature of this state."); *see also* Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 318 (2012). ("A statute

will be construed to alter the common law only when that disposition is clear…A fair construction ordinarily disfavors implied change.") Florida Rule 1.210(b) uses the common law terms "guardian" and "next friend" and adopts their common law meanings. *See Nunes v. Herschman*, 310 So. 3d 79, 83 (Fla. 4th DCA 2021) (*citing Reading Law* at 320). In fact, in light of Florida Rule 1.210(b)'s codification of child representation under the common law, the ability of a parent to directly represent their child in legal proceedings in Florida state courts has gone unchallenged, even when judges are unhappy about the quality of representation. *See e.g., Brown v. Hous. Auth. of City of Orlando*, 680 So. 2d 620, 621 (Fla. 5th DCA 1996).

C. Guardians and next friends of a child are officers of the court.

Ironically here, the right to representation by a parent has become so well established in Florida law that, rather than challenging a child's representation by non-attorneys, it has been the next friend's right to *hire an attorney* that has been challenged. Presented with the challenge, however, the Supreme Court of Florida explained that a child's next friend may *choose* to hire an attorney to assist with litigation:

> In the conduct of the suit the attorney of record who is employed by the next friend of the minor would be bound by the same rules and limitations of power as the prochein ami or next friend.
>
> …
>
> The next friend or prochein ami is not in the strict sense a party to the suit, but he is considered an *officer of the court*, *especially appearing to look after the interests of the*

> *minor whom he represents*. One of his duties is to employ attorneys for the conduct of the suit who, *when* such employment is made, the attorney becomes the general agent of the minor and responsible to him for the faithful discharge of his duties required of him as an officer of the court under oath.

Garner v. I. E. Schilling Co., 174 So. 837, 839-40 (Fla. 1937) (emphasis added); *see also Youngblood v. Taylor*, 89 So. 2d 503, 504 (Fla. 1956).

In this regard, it should be noted that Justice Thomas has recently pointed out in two opinions that "next friends" are not third-party intervenors because they serve as "officers of the court," appointed to look after the interests of the minor child, who remains the real party in interest. *June Medical Services, L.L.C. v. Russo*, 591 U.S. 299, 365, n.2 (2020) (Thomas, J., dissenting) (quoting *Blumenthal v. Craig*, 81 F. 320, 321-322 (CA3 1897); *see also Food and Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. 367, n.1 (2024) (Thomas, J., concurring) (citing *June Medical* and observing that next friend standing is "representational in a general sense."); *see also In re Moore*, 209 U.S. 490, 499 (1908) ("The next friend derives his authority from the court which appoints him; and, as he is appointed to institute and conduct the suit, it follows that he has authority to do every act which the interest of the infant demands and the law authorizes.") (quoting *Raming v. Metro. St. Ry. Co*., 57 S.W. 268, 275 (Mo. 1900)).

Finally, Amicus wishes to point out that *Morgan v. Potter*, 157 U.S. 195 (1895), is distinguishable from the case before this Court. In *Morgan*, this Court dismissed a case because the mother had filed her case

in her own name. This Court upheld the dismissal of the complaint stating:

> It is the infant, and not the next friend, who is the real and proper party. The next friend, by whom the suit is brought on behalf of the infant, is neither technically nor substantially the party, but *resembles an attorney*, or a guardian ad litem, by whom a suit is brought or defended in behalf of another. The suit must be brought in the name of the infant, and not in that of the next friend.

Id. at 198-99 (emphasis added). However, unlike the mother in Morgan, who filed claims in her name only, Mr. Warner has appeared in this case *pro se* on behalf of himself *and* his minor child and has clearly asserted claims on his child's behalf. *See* Order at 1, 3-4, *Warner v. Schoolboard of Hillsborough County*, No. 8:23-cv-1029 (M.D. Fla. July 6, 2023), ECF No. 37.

D. Florida law protects parents' unenumerated rights.

The parent-child relationship is "the most universal in nature." *See* 1 Blackstone *434. Florida courts recognize and value the uniqueness of this relationship. *See H.S. v. Dep't of Children & Families*, 384 So. 3d 280, 285 (Fla. 4th DCA 2024) ("[F]ather has a right under the common law and section 1014.04(1)(b) to rely upon his moral or religious beliefs to direct his child's upbringing.")

In 2021, the Florida legislature codified parents' common law rights and recognized their fundamental constitutional rights when it declared that parental rights may be limited only where expressly provided by law:

> A parent of a minor child in this state has inalienable rights that are more comprehensive than those listed in this section, unless such rights have been legally waived or terminated. This chapter does not prescribe all rights to a parent of a minor child in this state. Unless required by law, the rights of a parent of a minor child in this state may not be limited or denied. This chapter may not be construed to apply to a parental action or decision that would end life.

Fla. Stat. § 1014.04(4); *see also* section 1014.03 (mandating strict scrutiny review of any state action that "infringe[s] on the fundamental rights of a parent to direct the upbringing, education, health care, and mental health of his or her minor child[.]") The Counsel Mandate's "litigate with counsel or don't litigate at all" choice infringes on parents' rights: requiring counsel creates an insurmountable barrier for many parents' to protect their children's rights, which are inextricably intertwined with their own rights to direct their children's upbringing.

Although next friends and guardians ad litem may also represent children, courts recognize that parental authority is entitled to special consideration:

> [T]here are two important differences between a parent and a guardian or other person acting in loco parentis. First, the parent and child enjoy a natural bond that is absent from the relationship between a person acting in loco parentis and his or her stepchild or ward. Second, the status of a person acting in loco parentis is temporary. A person acting in loco parentis may disavow or abandon such status at any time. In the

> absence of an order for adoption or a judgment terminating a parent's rights, the parent-child relationship is permanent.

K.A.S. v. R.E.T., 914 So. 2d 1056, 1063 (Fla. 2d DCA 2005).

Finally, it may be worth noting that in 1925, Florida criminalized the unauthorized practice of law in a statute enacted to regulate the legal profession.[6] The modern version, Section 454.23, makes it a third-degree felony for any person not licensed in this state to "practice law." *Id*. Notably, however, this law has not been used to prosecute parents who represent their children in court.

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[6] Section 454.18 (2024) of Florida Statutes, first enacted in 1925, provides:

> **Officers not allowed to practice.**—No sheriff or clerk of any court, or full-time deputy thereof, shall practice in this state, nor shall any person not of good moral character, or who has been convicted of an infamous crime be entitled to practice…And any person, whether an attorney or not, or whether within the exceptions mentioned above or not, may conduct his or her own cause in any court of this state, or before any public board, committee, or officer, subject to the lawful rules and discipline of such court, board, committee, or officer. The provisions of this section restricting the practice of law by a sheriff or clerk, or full-time deputy thereof, do not apply in a case where such person is representing the office or agency in the course of his or her duties as an attorney.

Guardians and next friends have never been classified as "officers not allowed to practice."

II. FEDERAL COURTS HAVE MISAPPLIED THE COMMON LAW BAR ON NON-ATTORNEY REPRESENTATION OF CORPORATIONS TO PARENTS' REPRESENTATION OF THEIR CHILDREN.

At common law, guardians and next friends could "undertake the infant's cause" in court. No such analogue existed for corporations. As explained by Blackstone:

> There are also certain privileges and disabilities that attend an aggregate corporation, and are not applicable to such as are sole; the reason of them ceasing, and of course the law. *It must always appear by attorney;* for it cannot appear in person, being, as sir Edward Coke says, invisible, and existing only in intendment and consideration of law.

1 Blackstone at *464 (emphasis added). This principle, which coexisted with the child's right to sue by their guardian, differentiated between attorneys and non-attorneys. Under the common law, however, not only could a parent or guardian sue on the child's behalf, but so could a non-guardian—a "next friend" or *prochein amy*—who could be "*any*" person. 1 Blackstone at *452. Unlike corporations, children are real people, not "invisible, and existing only in intendment and consideration of law."

Florida courts recognize these common law roots relating to *pro se* representation of corporations. "It is well recognized" in Florida, "that a corporation, unlike a natural person, cannot represent itself and cannot appear in a court of law without an attorney." *Szteinbaum v. Kaes Inversiones y Valores, C.A.*, 476 So. 2d 247, 248 (Fla. 3d DCA 1985) (out-of-state attorney's

signature on complaint was an amendable defect); *see also Torrey v. Leesburg Reg'l Med. Ctr.,* 769 So. 2d 1040, 1046 (Fla. 2000).

Rather than adhering to the law, much of the justification for the Counsel Mandate rests instead on courts' policy preferences. The courts have been transparent in so stating. *See e.g.*, *Brown,* 868 F. Supp. At 171 ("The near uniform proscription on non-lawyers representing others in court is soundly based on two separate, but complementary policy considerations."); *Devine,* 121 F.3d at 582 ("In the absence of [congressional] intent, we are compelled to follow the usual rule—that parents who are not attorneys may not bring a *pro se* action on their child's behalf—because it helps to ensure that children rightfully entitled to legal relief are not deprived of their day in court by unskilled, if caring, parents."); *Cheung,* 906 F.2d at 61 ("It goes without saying that it is not in the interests of minors or incompetents that they be represented by non-attorneys."). None of these courts cite a common law rule prohibiting parents from representing their children in court. These policy arguments should be disregarded.

CONCLUSION

Nothing in this Court's precedents, Florida law, or the common law supports the Counsel Mandate. This Court should grant the Petition and reverse the Eleventh Circuit ruling.

Respectfully submitted,

KATIE JAY, ESQ.
JAY & CAMPBELL, PLLC
1 S.E. Ocean Blvd.
Stuart, Florida 34994
(844) 624-2361
katie@flfamilyformation.com

FRANK A. SHEPHERD
Counsel of Record
FRANK A. SHEPHERD, P.A.
1 S.E. 3rd Avenue
Suite 1700
Miami, Florida 33131
(305) 610-6255
frank@franksheplaw.com

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