13-2178(L)

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

M. C., a minor by and through his parents Pamela Crawford and John Mark Crawford,

Plaintiff-Appellee,

—v.—

DR. JAMES AMRHEIN,

Defendant-Appellant,

—and—

DR. IAN AARONSON; DR. YAW APPIAGYEI-DANKAH; KIM AYDLETTE; MEREDITH WILLIAMS; CANDICE DAVIS, a/k/a Candi Davis; MARY SEARCY; DOE 1, Unknown South Carolina Department of Social Services Employee; DOE 2, Unknown South Carolina Department of Social Services Employee; DOE 3, Unknown South Carolina Department of Social Services Employee,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA AT CHARLESTON
CASE NO. 2:13-CV-01303-DCN
THE HONORABLE DAVID C. NORTON

BRIEF OF THE PROGRAM FOR THE STUDY OF REPRODUCTIVE JUSTICE — INFORMATION SOCIETY PROJECT AT THE YALE LAW SCHOOL AND CONSTITUTIONAL SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

PRISCILLA J. SMITH
LAW OFFICE OF PRISCILLA J. SMITH
319 Sterling Place
Brooklyn, New York 11238
(718) 399-9241

Attorney for Amici Curiae The Program for the Study of Reproductive Justice — Information Society Project at The Yale Law School and Constitutional Scholars

April 9, 2014

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INTEREST OF AMICI CURIAE[1]

Amici are The Program for the Study of Reproductive Justice in the Information Society Project at Yale Law School,[2] and additional individual scholars[3] who teach, research, and write about constitutional law, with particular interests in the right to procreative autonomy, constitutional equality standards, privacy law, and first amendment issues. The Program for the Study of Reproductive Justice serves as a national center for academic research and development of new ideas to promote justice with respect to reproductive health issues. Amicus Kimberly Mutcherson is Professor of Law at Rutgers School of Law, Camden. Her scholarly work, including her paper *Procreative Pluralism*, -- BERKELEY J. OF GENDER LAW & JUSTICE – (forthcoming 2014), focuses on issues at the intersection of health law, bioethics, and family law with a particular interest

[1] The undersigned sought consent of the parties as required under F.R.A.P. 29. Plaintiffs counsel granted consent, but counsel for the MUSC Defendants and counsel for Defendant Amrhein refused consent. As of April 9, 2014, the undersigned had not been notified by counsel for DSS Defendants whether they would consent. According, this brief is accompanied by a motion to file an amicus brief. No counsel for a party authored the brief in whole or in part; no party or party's counsel contributed money to fund preparing or submitting the brief; and no person other than the amici curiae or their counsel contributed money intended to fund preparing or submitting the brief.

[2] This brief has been prepared and joined by a Program affiliated with Yale Law School, but does not purport to present Yale Law School's institutional views, if any.

[3] The Scholars participate in this case in their personal capacity, their titles are used only for purposes of identification, and they do not purport to present any institutional views of the institutions with whom they are affiliated.

in assisted reproduction and the right to procreate. Amicus Mary Ziegler is Assistant Professor of Law at the Florida State University College of Law and has served as a featured guest blogger on the Legal History Blog and JURIST. Her scholarship uses legal history to probe assumptions underlying current debates about constitutional, reproductive health and family law issues. Her book, *The Lost History of the Abortion Debate* (forthcoming from Harvard University Press Spring 2015), explores the reasons for the contemporary polarization of the abortion debate. Amicus Maya Manian is Professor of Law at the University of San Francisco College of Law where she teaches Constitutional Law, Family Law and Gender and the Law. Professor Manian's numerous publications focus on reproductive healthcare and related constitutional issues. Amicus Priscilla Smith is an Associate Research Scholar in Law and Director of the Program for the Study of Reproductive Rights in the Information Society Project at Yale Law School. She teaches, researches, and writes on constitutional law issues, focusing on the First, Fourth, and Fourteenth Amendments, religious freedom, reproductive rights, and privacy law. She has published in the Yale Law Review Online, the Harvard Journal of Gender & Law, and the Brooklyn Journal of Law and Policy, and has an article forthcoming in the Washington and Lee Law Review.

SUMMARY OF ARGUMENT

The Amici submit this Brief in support of Plaintiff, M.C., and ask this court to affirm the district court's opinion denying qualified immunity to defendants. As the trial court held, the right to procreate is clearly established by precedent from the U.S. Supreme Court and this court, and the unlawfulness of the defendants' alleged actions is apparent under the standards of *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).

The Supreme Court has been clear that government officials "can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). While the lack of a case holding the defendant's identical conduct to be unlawful does not prevent the denial of qualified immunity, *see Edwards v. City of Goldsboro*, 178 F.3d 231, 250-51 (4th Cir. 1999), the existence of a case holding almost identical conduct unlawful goes a long way to *support* the denial of qualified immunity. Though the precise medical condition which the defendants claimed to be "treating" is unique in the case law, the circumstances plaintiff alleges occurred—where government officials, recommend, consent to and perform unnecessary medical treatment which results in a violation of his constitutional rights to procreate and bodily integrity—is hardly novel in this Circuit. Precedent in this Circuit establishes that a plaintiff who alleges that an unnecessary medical procedure was recommended

and performed by state actors resulting in a violation of his right to procreate and his bodily integrity deserves his day in court.

First, the Amici argue that the Plaintiff alleges violation of the clearly established rights to procreate and bodily integrity that a) grew out of a history of government indifference, and sometimes outright hostility, to the procreative capacities of certain disfavored groups; and therefore b) demand the highest level of judicial scrutiny of state action alleged to have violated these important rights; and c) the law in this circuit is clearly established that the right to procreate can be violated when an individual is subjected to unnecessary medical treatment, even where the individual—or the individual's legal guardian in the case of a minor—consents to the treatment. Second, Amici argue that the defendants' attempts to reframe the rights alleged by Plaintiff must be rejected because they a) misidentify the right at issue as one belonging uniquely to people born with intersex traits; b) rely on disputed facts at odds with the allegations; c) incorrectly suggest that parents or those acting *in loco parentis* cannot be liable under any circumstances for authorizing unnecessary surgery; and d) incorrectly suggest that medical providers are not liable for recommending or providing unnecessary medical treatment to a child resulting in sterilization or castration if the child's legal guardian consents.

ARGUMENT

I. The Trial Court's Denial of the Motions to Dismiss Should Be Upheld Because the Plaintiff Alleges Violation of Clearly Established Rights to Procreate and to Bodily Integrity.

As this Court has explained, "[q]ualified immunity protects government officials from civil damages in a § 1983 action 'insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999) (quoting *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982)). The first step in evaluating a claim of qualifed immunity is to identify "the specific right[s] that the plaintiff asserts w[ere] infringed by the challenged conduct at a high level of particularity." *Id.* (citing *Anderson v. Creighton,* 483 U.S. 635, 639, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)). The court then determines whether at the time of the claimed violation the rights were clearly established. *See id.* In determining whether a right was clearly established at the time of the claimed violation, "courts in this circuit [ordinarily] need not look beyond the decisions of the Supreme Court, this court of appeals, and the highest court of the state in which the case arose...." *Jean v. Collins,* 155 F.3d 701, 709 (4th Cir. 1998) (*en banc*).

A. The U.S. Supreme Court and the State of South Carolina Have Firmly Repudiated the Practice of Sterilization Abuse Occurring Nationwide in the Twentieth Century.

The case law establishes more than that, as DSS defendants admit, in "a broad sense" constitutional rights to procreate and to bodily integrity have a basis in constitutional jurisprudence. Corrected Br. of Aydlette at 11. Case law establishes these rights in a very specific sense in response to concerns arising out of a history of sterilization abuse.

In the first half of the twentieth century, laws in many states authorized the involuntary sterilization of certain disfavored groups, such as the mentally disabled, mentally ill, epileptic and some criminal populations. Elizabeth S. Scott, *Sterilization of Mentally Retarded Persons: Reproductive Rights and Family Privacy*, 1986 Duke L.J. 806, 809 & n.11. Between 1907, when Indiana adopted the first involuntary sterilization law, and 1925, twenty-three states enacted eugenic sterilization laws. Id. These laws were often upheld by state courts in the interests of preventing the birth of "defective children" and those who would become dependent on state support, id.; others were used to punish habitual criminals and rapists. Id.[4] It is estimated that almost 64,000 persons had been involuntarily sterilized under state eugenic sterilization laws by 1963. California,

[4] For an historical account of the eugenics movement, *see generally* Robert J. Cynkar, Buck v. Bell: *'Felt Necessities' v. Fundamental Values?,* 81 COLUM. L. REV. 1418, 1433 (1981).

which considered itself a "pioneer" in the field, *see Conservatorship of Valerie N.*, 707 P.2d 760, 765 (Cal. 1985), is estimated to have sterilized more people than any other state, sterilizing an estimated 20,108 people out of almost 64,000 people sterlized nationwide. Scott, at 806 n.2 (citing EUGENIC STERLIZATION App. at 1 (J. Robitscher ed. 1973); Comment, *Constitutional Law—Sterilization of Defectives* (1927) 1 So. Cal. L. Rev. 73, 74, n. 5.)). *See also* Lutz Kaelber, *Eugenics: Compulsory Sterilization in 50 American States*, *available at* http://www.uvm.edu/~lkaelber/eugenics/.

South Carolina did not avoid this unfortunate history, although it resisted the move towards involuntary sterilization longer than most states. South Carolina's first sterilization bill encountered opposition on introduction in 1933, but was eventually enacted in 1935, making South Carolina the thirty-first state and second-to-last to implement a sterilization law. Edward J. Larson, SEX, RACE, AND SCIENCE: EUGENICS IN THE DEEP SOUTH 125 (Johns Hopkins Univ. Press 1995) (hereafter "SEX, RACE AND SCIENCE") (discussing S.C. CODE ANN. §§ 44-47-10--44-47-100 (1976) (repealed 1985). Under the law, superintendents of mental health and penal institutions could petition for an order to have any inmate or patient who was afflicted with any "hereditary form of insanity that is recurrent, idiocy, imbecility, feeble-mindedness or epilepsy" sterilized. S.C. CODE ANN. § 44-47-10. One scholar reports that in all 277 people were sterilized involuntarily

in South Carolina. Kaelber, *Eugenics: Compulsory Sterilization in 50 American States*, *available at* http://www.uvm.edu/~lkaelber/eugenics/SC/SC.html.

Even under this law, however, South Carolina insured the inmate or patient was protected by procedural safeguards, reflecting the state's acknowledgement of the importance of procreative abilities to individuals. The inmate or patient had the right to a notice and a hearing, S.C. CODE ANN. §§ 44-47-20 & 44-47-30, at which he or she was to be appointed a guardian ad litem to defend his or her rights and interests. S.C. CODE ANN. § 44-47-30. Moreover, an order granting the petition to sterilize could only be granted if it was determined that: a) the inmate or patient "would be the probably potential parent of socially inadequate offspring likewise afflicted; b) that such inmate may be sexually sterilized without detriment to his or her general health; and c) that the welfare of such inmate and of society will be promoted by such sterilization." S.C. CODE ANN. § 44-47-50. *See also* Larson, SEX, RACE, AND SCIENCE at 126. South Carolina statutes also expressly prohibited castration or the removal of sound organs from the body unless "for sound therapeutic reasons." S.C. CODE ANN. § 44-47-90.

South Carolina firmly rejected these eugenic practices, repealing its law in 1985. Act 316 Relating to sexual sterilization, 1985 S.C. Acts, available at http://www.scstatehouse.gov/sess106_1985-1986/bills/483.htm. In 2003, South Carolina Governor Jim Hodges issued a public apology for the forced sterilizations

that took place in his home state, and for all of the people that were robbed of their rights to have children. Jaymi Freiden, *South Carolina governor apologizes for forced sterilizations*, THE STATE (Jan. 9, 2003).

B. This Court Must Strictly Scrutinize State Action Alleged to Violate the Right to Procreate and to Bodily Integrity.

Over seventy years ago, in *Skinner v. Oklahoma*, 316 U.S. 535 (1942), a unanimous U.S. Supreme Court specifically recognized that procreation is a "fundamental" right, one of the "basic civil rights of man." *Id.* at 541. The Court struck down a law authorizing involuntary sterilization of prisoners convicted of two or more felonies involving "moral turpitude." The Court points out some of "the inequalities in th[e] law," which, for example, authorized sterilization of a person who is convicted of grand larceny twice but not someone convicted of embezzlement twice, even though the nature of the two crimes is intrinsically the same and they otherwise are punishable in the same manner. *Id.* at 539. As the Court wrote:

> [W]e are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race. . . [A person subjected to the law is] forever deprived of a basic liberty.

Id. at 541. Because of the importance of the rights at issue, the Court distinguished an earlier case which gave only minimal scrutiny to an involuntary sterilization statute and demanded that strict scrutiny apply, noting that this exacting standard

of review is essential "in a sterilization law . . . lest *unwittingly or otherwise* invidious discriminations are made against groups or types of individuals in violation of the constitutional guaranty of just and equal laws." *Id.* at 541 (emphasis added). *See also Vaughn v. Ruoff,* 253 F.3d 1124, 1130 (8th Cir. 2001) (discussing numerous cases establishing that special protections are required to protect individuals from sterilization).

Although the Court in *Skinner* ruled on Equal Protection grounds, and thus declined to rule explicitly on the procedural due process and cruel and unusual punishment claims, *id.* at 538, later opinions have consistently cited *Skinner* as placing procreation among the rights of privacy protected by the due process clauses as well. *See Developments in the Law—The Constitution and the Family: V. Procreative Rights,* 93 Harv. L. Rev. 1296 (1980) (citing *Carey v. Population Servs. Int'l,* 431 U.S. 678, 685 (1977); *North Carolina Ass'n for Retarded Children v. North Carolina*, 420 F. Supp. 451, 458 (M.D.N.C. 1976); *In re Moore*, 289 N.C. 95 101-02, 221 S.#.2d 307, 311 (1976)). As the Supreme Court has held, where the government infringes fundamental liberty interests, such as the right to procreate and the right to bodily integrity, the U.S. Constitution requires courts to apply the strictest judicial scrutiny to the government's actions. As the U.S. Supreme Court explained in its 1997 decision in *Washington v. Glucksberg*, the Fourteenth Amendment:

> forbids the government to infringe ... 'fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.

Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (quoting *Reno v. Flores*, 507 U.S. 292 302(1993)). *See also*, e.g., *Carey v. Population Services, Int'l*, 431 U.S. 678, 688 (1977) (regulation of contraception "may be justified only by a 'compelling state interest' . . . and . . . must be narrowly drawn to express only the legitimate state interests at stake."); *Kramer v. Union Free School District*, 395 U.S. 621, 627 (1969) (where "fundamental rights" to freedom of speech are involved, regulation limiting these rights may be justified only by a "compelling state interest"); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969) (First Amendment); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (First Amendment); *Griswold v. Connecticut*, 381 U.S. 479, 485 (right to contraception).

The South Carolina Supreme Court has similarly recognized in *State v. Brown*, 284 S.C. 407, 410-11, 326 S.E.2d 410, 411-12 (1985), that "castration [is] a form of mutilation" which cannot be inflicted under the South Carolina Constitution's prohibition on the infliction of cruel and unusual punishment. *See* S.C. Const. Article I §15. Accordingly, the court even rejected attempts by defendants to obtain suspended sentences in exchange for their consent to undergo surgical castration by the state.

Moreover, over thirty years ago, this court was faced with a case where a 15 year old girl sued a Virginia county for unnecessarily sterilizing her, even though both she and her mother had consented to the procedure. This court noted that "the right of procreation central to [the plaintiff's] complaint is constitutionally protected by the due process and equal protection clauses of the fourteenth amendment." *Avery v. Burke County*, 660 F.2d 111, 115 (4th Cir. 1981) (citing, *inter alia*, *Skinner v. Oklahoma*, 316 U.S. 535, 538 (1942); *Downs v. Sawtelle,* 574 F.2d 1, 11 (1st Cir. 1978); *Cox v. Stanton*, 529 F.2d 47, 50 (4th Cir. 1975)). The plaintiff in *Avery*, a pregnant 15 year old, had sought pre-natal care at a county health department. After a blood test, county nurses told Avery that she had sickle cell trait and recommended she be sterilized. Nursing personnel and physicians advised her that childbirth would endanger her life and health, that pregnancy would make her more susceptible to numerous diseases, and that she would be unable to take birth control pills in the future. Based on these representations, Avery and her mother consented to the sterilization. *Id.* at 113.[5] After she was sterilized, Avery discovered that she did not in fact have sickle cell trait.

Asserting claims strikingly similar to those in this case, the plaintiff sued the county, its Boards of Health and of Social Services, individual government

[5] Although the court does not specify that an abortion occurred as a result of the sterilization, the timing of the sterilization and the discussion of the medical personnel's advice to avoid childbirth imply that she was encouraged to terminate the pregnancy at the same time as she was sterilized. *Avery,* 660 F.2d at 113.

officials, and government medical personnel, for violation of her rights of privacy and procreation. Avery contended that she was wrongfully sterilized, and that sterilization is "not medically recommended or proper," even when there has been a correct diagnosis of the sickle cell trait. She consented to the sterilization, she alleged, "solely because of the misrepresentations and exhortations of individuals associated with or employed by the [defendant boards of health and social services]." *Id.* The trial court denied the motions for summary judgment filed by the individual defendants, but granted motions for summary judgment filed by the county and its boards of health and of social services, finding insufficient evidence to establish county or Board liability. *Id.* at 113. Only the county defendants appealed.

Notably, this court did not entertain the notion that the right to procreate was not a clearly established right in 1981, nor did the court question that the plaintiff had a proper claim against the individual state actors who caused her sterilization. Both the questions of who would be liable for the incorrect diagnosis of the sickle cell trait and the resulting improper sterilization, and whether sterilization was a medically recommended or proper treatment where there is a correct diagnosis of the sickle cell trait was left to the trial court to determine. *See id.* at 116 (holding that "issues that divide the parties should be resolved by plenary rather than summary procedures."). Instead, the only issue on appeal concerned the liability of

the County and its Boards.[6] As to that issue, this court reversed the portion of the trial court's decision granting summary judgment for the county and its boards. *Id.* at 116. The court held that, as to the county defendants, two controverted issues remained—(1) whether an inference of deliberate indifference or tacit authorization may be drawn from the facts pertaining to the boards' inaction; and (2) whether the boards thereby caused a deprivation of Avery's constitutionally protected right to procreation. *Id.* at 116.

II. The Defendants' Attempts to Reframe The Rights Alleged Must be Rejected.

Given the strength of the precedent establishing that the rights to procreate and bodily integrity are clearly established rights, *see Skinner*, 316 U.S. at 541; *Washington v. Glucksberg*, 521 U.S. 702 (1997) (discussing right to bodily integrity),[7] it is not surprising that each set of defendants in this case attempts to reframe the rights at issue to evade responsibility for the impact of their actions on

[6] As the court held, citing *Monell v. Department of Social Services*, 436 U.S. 658, 694 (1978), and *Estelle v. Gamble*, 429 U.S. 97, 105-106, a local government can be liable under §1983 if its policies or customs caused the constitutional injury alleged or if its failure to promulgate policies rose to the level of deliberate indifference. *Avery,* 660 F.2d at 116.

[7] Indeed it is hard to imagine an infringement of the right to bodily integrity that is greater than castration, resulting as it does not just in the loss of a body part but also in the loss of sexual function and identity that goes with the phallus. *Compare State v. Brown*, 284 S.C. 407, 410-11, 326 S.E.2d 410, 411-12 (1985) (recognizing "castration [is] a form of mutilation") *with Marshall v. Kansas City Life Ins. Co.*, 171 S.C. 321, 172 S.E. 504, 505-06 (1934) (fact that plaintiff did not lose both hands or one hand and one foot did not preclude him from recovering under the policy for total and permanent disability, but question was one for the jury).

M.C., claiming that only their formulation properly describes the right alleged when viewed at the required "high level of particularity," *see Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999), and pointing their fingers at the other defendants. First, the DSS defendants argue that the right alleged at the appropriate "high level of particularity" is the right of a "sixteen-month old child to avoid, disagree with, or delay a medical procedure recommended by a team of specialized physicians and agreed to by DSS which was acting as his guardian or otherwise *in loco parentis*." Corrected Brief of Appellants Aydlette, Williams, Davis and Searcy at 11 ("Corrected Brief of Aydlette"). Second, Dr. Amrhein, the referring physician, argues that "it has never been held that a young child's right to procreate supersedes his parents' and/or legal guardians' right to authorize a surgery which they deemed, after consulting with doctors, to be in the best interest of the child." Corrected Brief of Appellant Amrhein at 7. Third, the MUSC physicians argue that the Plaintiff is asking the court to carve out a "new area" of substantive due process law, one that would protect intersex individuals from sex assignment surgery "until they are old enough to consent for themselves." Brief of Drs. Aaronson and Appiagyei-Dankah at 15 ("Brief of Dr. Aaronson").

All three suggestions miss the mark. When viewed with the appropriate degree of particularity, the rights claimed by M.C. are his rights not to be sterilized or castrated as a result of *unnecessary* surgery recommended by, consented to

and/or performed by the defendants. Case law from this Circuit establishes that where a plaintiff alleges that infringement of these rights has occurred without a compelling interest, because of negligence and the performance of unnecessary mutilating surgery, for example, the plaintiff deserves his day in court. *Avery*, 660 F.2d at 115-16. The defendants attempts to reframe the rights fail for four reasons.

First, M.C. is not asking, as the MUSC physicians argue, that the court carve out a "new area" of substantive due process law to protect intersex individuals from sex assignment surgery "until they are old enough to consent for themselves." Brief of Dr. Aaronson at 15. To the contrary, M.C. is asking to be treated like all other individuals, like the Plaintiff Avery who this Court recognized had a right not to be sterilized by the state based on bad medical advice, and like the prisoners in *State v. Brown* for whom the South Carolina Supreme Court held that castration, even when consented to, was mutilation in violation of the State Constitution's prohibition against cruel and unusual punishment. *Brown*, 326 S.E.2d at 410. Treating babies born with some female and some male genitalia as citizens entitled to the same rights to procreate and bodily integrity as all citizens, means that the State must have a compelling interest prior to consenting to or conducting sterilizing or castrating procedures. M.C. has alleged they did not have that interest in these circumstances. He deserves his opportunity to prove his case.

Second, in reframing the rights, the defendants attempt to introduce facts disputes over which go to the heart of the case, that is, the appropriateness of the treatment recommended and performed by the defendants in light of M.C.'s condition, and the degree of loss of procreative capacity. *See, e.g.,* Br. Of Amrhein at 1 (describing treatment of M.C. as a "generally accepted" treatment option); *id.* at 4-5 (claiming that treatment was within standard of care); *id.* at 5 (claiming MUSC physicians made "ultimate decision"); *id.* at 18 (claiming sterilization was not the "intent" of the treatment). These may or may not end up being relevant factual determinations that require the consideration of expert testimony, but in any case they are inappropriate considerations on a motion to dismiss. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974). As the United States Supreme Court has said, the "issue [on a motion to dismiss] is not whether [the] plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Id.* The necessity of the surgery, the "appropriateness" of the recommendation as alleged by the physician defendants, and the appropriateness of consent in light of what DSS was told were the benefits and risks of surgery, are all fact questions to be determined at trial. All that can be considered on a motion to dismiss are M.C.'s allegations that the treatment was unnecessary and destroyed his reproductive function and violated his bodily integrity. *See Avery*, 660 F.2d at 116

(holding that issues concerning necessity of treatment "should be resolved by plenary rather than summary procedures.").

Third, the DSS defendants seem to suggest that because they were acting in *loco parentis* and because the physician defendants recommended this treatment, they cannot be held liable. Br. of Aydlette at 11. This is simply incorrect. First, the law is clear that even a parent does not have a right to authorize *any* unnecessary surgery on a child without consequence. In some circumstances, authorization of unnecessary surgery can even rise to the level of abuse. *See e.g., Green v. Montana Dep't of Pub. Health & Human Servs.,* 2014 WL 229828 at *4, 11 (D. Mont. Jan. 21, 2014) (removal of child from custody of parents was appropriate where mother suffered from Munchausen's Syndrome by Proxy, and child was in danger of abuse in the form of being subjected to unnecessary medical treatment). It might be possible for the DSS defendants to establish that the representations made to them concerning the appropriateness of the treatment plan in conjunction with any disclosure of risks provided relieves them of liability for the error in treatment made. But this determination requires a number of factual predicates that must be considered in the first instance by the finder of fact. Moreover, where the surgery will result in mutilation and sterilization, and the state is the legal guardian, the burden on DSS will be to establish it had a compelling interest to consent to the surgery to overcome the important rights that

M.C. has in his own right to procreation and bodily integrity. *See Skinner*, 316 U.S. at 541 (strict scrutiny applies to right to procreate).

Finally, like the DSS defendants, but with a twist pointing back at DSS, the medical defendants seem to suggest that consent by DSS, the legal guardian, absolves the medical defendants of responsibility for any rights violations that are established. But defendants ignore that *Avery* directly contradicts this point. In *Avery*, both the 15 year old plaintiff and her mother consented to sterilization procedure but stated a valid claim for violation of the child's right to procreate as a result of the physician's error in recommending treatment. *Avery,* 660 F.2d at 115.

CONCLUSION

For the foregoing reasons, the Amici respectfully request that this Court affirm the district court's order denying the motions to dismiss.

Respectfully submitted,

/S/ PRISCILLA J. SMITH

PRISCILLA J. SMITH
LAW OFFICE OF PRISCILLA J. SMITH
319 STERLING PLACE
BROOKLYN, NY 11238
PRISCILLA.SMITH@YALE.EDU

Counsel for Amici Curiae

April 9, 2014

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 13-2178 **Caption:** M.C. v. Dr. Amrhein, et al.

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(s) Priscilla J. Smith

Attorney for Amicus PSRJ et al

Dated: 4/9/14

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