SUPREME COURT NO. 13-0505
POLK COUNTY CASE NO. GC60274

IN THE SUPREME COURT OF IOWA

IN THE MATTER OF THE GUARDIANSHIP
AND CONSERVATORSHIP
OF
STUART KENNEDY,

STUART KENNEDY, WARD-APPELLANT.

APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY
HONORABLE PETER A. KELLER

BRIEF OF *AMICI CURIAE:* AMERICAN CIVIL LIBERTIES UNION OF IOWA AND DISABILITY RIGHTS IOWA IN SUPPORT OF WARD-APPELLANT

RITA BETTIS
RANDALL WILSON
Counsel for Amicus Curiae
ACLU OF IOWA
505 Fifth Ave., Ste. 901
Des Moines, Iowa 50309
PHONE: (515) 243-3988
FAX: (515) 243-8506
EMAIL: rita.bettis@aclu-ia.org
randall.wilson@aclu-ia.org

CYNTHIA A. MILLER
Counsel for Amicus Curiae
DISABILITY RIGHTS IOWA
400 East Court Avenue, Ste. 300
Des Moines, Iowa 50309
PHONE: (515) 278-2502
FAX: (515) 278-0539
EMAIL: cmiller@driowa.org

CERTIFICATE OF FILING

I, Rita Bettis, hereby certify that I will file eighteen (18) copies of the attached brief with the Clerk of the Supreme Court, Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa, on September 16, 2013.

Rita Bettis

RITA BETTIS
Counsel for Amicus Curiae
ACLU OF IOWA
505 Fifth Ave., Ste. 901
Des Moines, Iowa 50309
PHONE: (515) 243-3988
FAX: (515) 243-8506
EMAIL: rita.bettis@aclu-ia.org

CERTIFICATE OF SERVICE

I, Rita Bettis, hereby certify that on September 16, 2013, I served a copy of the attached brief on all other parties to this appeal by mailing one (1) copy thereof to the respective counsel for said parties at the following addresses:

Attorney for Appellant:

William Bushell
Mason, Bushell, and Associates
541 31st St., Suite C
Des Moines, IA 50312

Attorney for Appellee:

John Judisch
1005 Hwy. 5
P.O. Box 517
Carlisle, IA 50047

RITA BETTIS
Counsel for Amicus Curiae
ACLU OF IOWA
505 Fifth Ave., Ste. 901
Des Moines, Iowa 50309
PHONE: (515) 243-3988
FAX: (515) 243-8506
EMAIL: rita.bettis@aclu-ia.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court

Iowa Supreme Court

Constitutional and Statutory Provisions

Record

Other Authorities

INTEREST OF *AMICUS CURIAE*

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization made up of more than 500,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The ACLU of Iowa, founded in 1935, is its statewide affiliate. Together, the two organizations work in the courts and legislature to safeguard the rights of all citizens. As an organization dedicated to protecting due process and the constitutional rights of all since 1935, the ACLU of Iowa has a longstanding interest in protecting the rights of due process and equal protection, specifically pertaining to the procreative and reproductive rights of people with disabilities, and has accumulated knowledge and expertise in this area on a national and statewide basis. The ACLU of Iowa takes an interest in the important question of whether involuntary sterilization requires court approval in Iowa.

Disability Rights Iowa (DRI), an independent, non-profit law firm, is the federally-mandated protection and advocacy system for individuals with disabilities in the state of Iowa. DRI's mission is to defend and promote the human and legal rights of Iowans with disabilities. As part of this mission, DRI provides legally-based advocacy on behalf of Iowans with disabilities to promote independence, choice and self-determination. DRI represents individuals who want to pursue less restrictive alternatives to guardianship, end guardianships which are no longer necessary and change guardians who are abusive or neglectful. DRI fully supports the goal of the amicus ACLU of Iowa to ensure that there is judicial oversight of any attempts of a

guardian to take away the fundamental right of an individual with a disability to reproduce.

STATEMENT OF FACTS AND PROCEDURAL BACKGROUND

Ward-Appellant Stuart Kennedy is a twenty-one year old young man with a diagnosis of developmental delays, which manifest in intellectual disabilities and speech difficulties. Order Re: Petition to Terminate Guardianship at 1. Because of this diagnosis, in December 2009, the Iowa district court ordered that Maria Kennedy, Mr. Kennedy's mother, would serve as Mr. Kennedy's guardian. Appointment of Guardian. Mr. Kennedy has continued to mature and grow as a young man, and has increasingly taken on the responsibility of his own care. Hr'g Tr. 30, ln. 5-15. As of February 2013, Mr. Kennedy was living in an assisted living apartment where he cooked his own meals, cleaned and cared for his apartment, and washed his own laundry. *Id.* at 44, ln. 15-16; 30 ln. 5-15. Mr. Kennedy is active in the community, has held a number of jobs, and currently works at Sam's Club in West Des Moines. *Id.* at 15 ln. 10-11. He has made doctor's appointments on his own, and knows that if he hurts himself or is in trouble that he should call 911. *Id.* p. at 97, ln. 1-10.

On February, 18, 2013, Mr. Kennedy met his mother at the medical office of Dr. Anderson and, against his wishes, underwent a vasectomy procedure. *Id.* at 86, ln. 13-14; 95, ln. 25-96, ln. 2; 87 ln. 2. According to the trial transcript, the procedure had been discussed prior to that day, but Mr. Kennedy was clear in his averment that he did not want the procedure and that he had voiced his non-consent, even to the

physician who ultimately performed the procedure. *Id.* at 95, ln. 12-24. Mrs. Kennedy, his guardian, did not seek nor obtain prior court approval before sterilizing her son. Order Re: Pet. to Terminate Guardianship 1-2.

Mr. Kennedy's attorney, William Bushell, filed a Petition to Terminate Guardianship on behalf of Mr. Kennedy soon after learning of the involuntary sterilization procedure from Mr. Kennedy, and a hearing was held in the Iowa District Court for Polk County on February 27, 2013. *Id.* at 1. The court denied the petition and ordered that Mrs. Kennedy continue to serve as Mr. Kennedy's guardian. *Id.* at 3. The court found that a vasectomy is not major elective surgery requiring prior court approval:

> While it is true that Stuart had a vasectomy on February 18, 2013 a vasectomy, unlike a tubal ligation, is not major elective surgery under Iowa Code § 633.635(2) (a) such that prior Court approval was/is required. A vasectomy is approximately a 20 minute procedure which is performed in a doctor's office as opposed to a surgical center or operating room and it does not require the use of anesthesia and the recovery is rather quick. Furthermore, a vasectomy is reversible, albeit by a more intrusive procedure which could be deemed to be major elective surgery.

Id. at 2 Mr. Kennedy appeals Judge Keller's decision to deny his Petition to Terminate Guardianship.

ARGUMENT

I. INTRODUCTION AND HISTORICAL BACKGROUND

On appeal, this Court is asked to decide whether the Iowa District Court erred in finding that involuntary sterilization of a developmentally delayed adult male Ward ("Ward") does not necessitate a pre-deprivation hearing based on the judge's finding that a vasectomy is not "major elective surgery" under Iowa Code § 633.635 (2013).

The sterilization of individuals with disabilities is rooted in a shameful history of eugenics in this country, from which Iowa was not spared. *See, e.g.*, Martha A. Field and Valerie A. Sanchez, Equal Treatment for People with Mental Retardation: Having and Raising Children 67 (1999); Deborah Richards et al., Sexuality and Human Rights of Persons with Intellectual Disabilities, in Challenges to the Human Rights of People with Intellectual Disabilities 184, 184 (Frances Owen & Dorothy Griffiths eds., 2009). By 1940, more than two-thirds of states, including Iowa, adopted laws providing for involuntary sterilization of mentally incompetent persons. *See* Norman L. Cantor, The Relation Between Autonomy-Based Rights and Profoundly Mentally Disabled Persons, 13 Annals Health L. 37, 51 (2004). The proliferation of state eugenics boards and statutes authorizing involuntary sterilization was emboldened following the 1927 U.S. Supreme Court decision *Buck v. Bell*, 274 U.S. 200, 207 (1927). In *Buck*, the Court upheld Virginia's involuntary sterilization statute on principles of eugenics that have been entirely discredited, and which today shock and appall the conscience. (For example, writing for the majority, Justice Holmes wrote "the principle that sustains

compulsory vaccination is broad enough to cover cutting the Fallopian tubes.... Three generations of imbeciles are enough."). While *Buck* has not been overturned, it is unquestionably no longer reflective of scientific and medical knowledge, nor legal, cultural, moral, and social norms. In 1942, the Court ruled that Oklahoma's statute providing for involuntary sterilization of "habitual criminals" was a violation of Equal Protection under the Fourteenth Amendment of the U.S. Constitution, applying strict scrutiny:

> Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, farreaching and devastating effects. In evil or reckless hands it can cause races or types which are inimical to the dominant group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to his irreparable injury. He is forever deprived of a basic liberty. We mention these matters not to reexamine the scope of the police power of the States. We avert to them merely in emphasis of our view that strict scrutiny of the classification which a State makes in sterilization law is essential, 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.

Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (finding that the distinction underlying which classes of theft crimes subjected criminals to sterilization was "clear, pointed, unmistakable discrimination.").

And yet, in Iowa, as in other states, the effects of the eugenics movement on persons with intellectual disabilities lingered. It was not until 1977 that the Iowa legislature enacted "an act to abolish the state board of eugenics." 1977 Iowa Acts ch. 77. *In the Matter of the Guardianship of Matejski*, 419 N.W.2d 576, 580 (Iowa 1988). Prior

to its repeal, the mandatory sterilization law in Iowa provided for the mandatory sterilization of people who were "mentally ill or retarded, syphilitic, habitual criminals, moral degenerates, or sexual perverts and who are a menace to society." Iowa Code § 145.2 (1977); *Matejski*, 419 N.W. at 580. At the time of the repeal, no judicial procedure specifically providing for involuntary sterilization was created in its stead, but in 1988, this Court decided that district courts possessed subject matter jurisdiction to hear and determine applications by legal guardians for authority to subject their wards to sterilization procedures, under the same language embodied in the current Iowa Code § 633.635 and cited by the District Court in this case. *Matejski*, 419 N.W. at 578 ("§ 633.635 of the Probate Code specifies which powers and duties of a guardian may be exercised without prior court approval and which may not. Appellants applied for court approval under 633.635 (2)(b) to arrange for "major elective surgery or any other nonemergency major medical procedure.").

In *Matejski*, the Court limited its holding to a finding that the District Court had subject matter jurisdiction over sterilization petitions, and declined to address the substantive rights of the parties in the case or outline a series of procedural protections and substantive criteria to guide district courts in making those weighty determinations. *Id.* at 580 (However, the Court acknowledged that the issue of sterilization "is important or unavoidably includes a constitutional dimension."). In the intervening decades, the legislature has similarly declined to outline those

protections and criteria, with the apparent result of a complete failure of the system to require any pre-sterilization hearing in this case.

The district court's interpretation of Iowa Code § 633.635 was factually and legally in error, because it mischaracterized the nature of a vasectomy procedure and violated the Ward's substantive and procedural due process rights, as well as equal protection rights, under the U.S. and Iowa Constitutions. This case demonstrates the need for further clarification from this Court that any involuntary surgical procedure that implicates a Ward's fundamental rights is "major elective surgery" requiring pre-approval by the court under Iowa Code § 633.635 (2013). Additionally, this court should clarify that men are entitled to the same strict legal safeguards as women prior to undergoing a forcible sterilization procedure. This Court should reverse the finding by the district court that a vasectomy is not major elective surgery requiring court approval under Iowa Code § 633.635 and remand for reconsideration of the Ward's Motion to Terminate Guardianship in light of that reversal.

II. A VASECTOMY, A PERMANENT STERILIZATION PROCEDURE, IS A "MAJOR ELECTIVE SURGERY"

At the outset, it should be noted that the District Court's substitution of its own judgment for medical experts was not only in error, but erroneous in its assertions. A vasectomy is not a temporary form of birth control; rather, it is intended as a permanent sterilization procedure used to render the patient unable to reproduce. In its guidelines governing vasectomy procedures, the American Urological

Association includes amongst the minimum necessary concepts that must be discussed with patients before the procedure the fact that a "[v]asectomy is intended to be a permanent form of contraception." American Urological Association Vasectomy Guideline 6 (May 2012). While it is sometimes possible to reverse a vasectomy, the process is expensive and uncertain. *Id.* at 13. Generally, only "approximately one in two couples" who attempt to get pregnant after a reverse vasectomy are able to do so, which is noticeably "less than the pregnancy rate in couples in whom the male partner has not had a vasectomy." *Id.*, citing Tanrikut C. and Goldstein M, Obstructive Azoospermia: A Microsurgical Success Story (2009). The American Society for Reproductive Medicine has concluded that vasectomy reversal cannot guarantee that sperm will return to a patient's semen, and that the odds of pregnancy after reversal are diminished considerably. Am. Soc'y for Reproductive Med., The Practice Committee of the American Society for Reproductive Medicine, Vasectomy Reversal (Elsevier, Inc. 2004). *See also Matter of Guardianship of Eberhardy*, 307 N.W.2d 881, 893 (Wis. 1981) (Wisconsin Supreme Court decision finding vasectomies are permanent). Notably, Michigan's guardian-ward liability statute specifically includes vasectomy in its enumeration of "extraordinary procedures" along with abortion, organ transplant, and experimental treatment. Mich. Comp. Laws Ann. § 330.1629(3)(2009).

The Court should take into account that, as scientific and medical technology advances, an increasing number of serious and/or permanent medical procedures are

possible safely through decreasingly invasive measures (ready examples would include gene therapies, laparoscopy, laser surgical procedures, medication abortion, and radiation therapy). Especially in light of the fact that Iowa's probate code does not define "major elective surgery," the Court must not use duration of the procedure itself, the necessity of anesthesia, healing time, or common complications or medical risks as the sole basis to decide whether a procedure is "major." Without understanding that term to encompass any procedure which is permanent, non-emergency, and which affects the fundamental rights of the patient, the existing statute threatens to subject adult dependents in Iowa to improper, unjust, unnecessary deprivations of procreative and reproductive rights.

III. SUBSTANTIVE DUE PROCESS VIOLATION

In permitting the sterilization of the Ward in the manner it took place, the district court violated the Ward's substantive due process rights under the U.S. and Iowa Constitutions. The Fourteenth Amendment to the U.S. Constitution provides that no state may "deprive any person of life, liberty, or property, without due process of law..." U.S. Const. amend. XIV § 1. Article 1, Sec. 9 of the Iowa Constitution provides that "no person shall be deprived of life, liberty, or property, without due process of law." Iowa Const. art. 1, sec. 9.

"The due process clauses of the United States and Iowa Constitutions are nearly identical in scope, import, and purpose." *State v. Sanders*, Slip Copy, 2009 WL 3337616 (Iowa Ct. App. Oct. 7, 2009) (citing *State v. Hernandez-Lopez*, 639 N.W.2d

226, 240 (Iowa 2002)). However, this Court has jealously guarded its constitutional independence in the area of protection of fundamental rights and liberties, and has on occasion interpreted state due process to be more protective of its citizens than under the U.S. Constitution. *See State v. Cox*, 781 N.W.2d 757, 761 (Iowa 2010); *Callender v. Skiles*, 591 N.W.2d 182, 187, 189 (Iowa 1999). This Court is free to consider either state or federal claims first, should the Court determine the State due process clause provides greater protection than the federal counterpart. *See State v. Dudley*, 766 N.W.2d 606, 624 (Iowa 2009); *State v. Baldon*, 829 N.W.2d 785, 820-21(Iowa 2013).

The substantive due process inquiry is two-step. First, the Court determines the nature of the individual right that is affected by the challenged government action. *See State v. Seering*, 701 N.W.2d 655, 662 (Iowa 2005). Second, if the Court determines that the right implicated is fundamental, it applies strict scrutiny to the government action; if non-fundamental, it applies rational basis review. *Id.; State v. Groves*, 742 N.W.2d 90, 93 (Iowa 2007); *State v. Krier*, 772 N.W.2d 270 (Iowa Ct. App. 2009). For a government action to survive strict scrutiny, it must be narrowly tailored to serve a compelling state interest. *Id.; State v. Hartog*, 440 N.W.2d 852, 854 (Iowa 1989); *Sanders* at *5; *In the Interest of J.L., L.R., and S.G.*, 779 N.W.2d 481, 491 (Iowa Ct. App. 2009)(finding the state Indian Child Welfare Act's prohibition on a child's ability to object to a motion to transfer based upon their best interests, and from introducing evidence of their best interests violated the children's substantive due process rights in familial association and personal safety.).

As a permanent sterilization procedure, a vasectomy clearly impacts the Ward's right to procreate. The right to procreate is firmly established as a fundamental right warranting strict scrutiny. *See Albright v. Oliver,* 510 U.S. 266, 271-72 (1994)("The protections of substantive due process have for the most part been accorded to matters relating to marriage, family, procreation, and the right to bodily integrity."). The challenged government action—the after-the-fact sanction of the involuntary sterilization of the Ward—was never shown to be narrowly tailored to serve any compelling state interest. *See* Order Re: Petition to Terminate Guardianship. For an illustrating case from another jurisdiction on this point, see *In the Matter of Truesdell,* 329 S.E.2d 630, 636 (N.C. 1985). In the absence of evidence to prove that an adult woman with substantial intellectual disabilities was substantially likely to engage in sexual activity that was likely to result in pregnancy, that she was in imminent danger to her life or that her health would be severely jeopardized if a hysterectomy was not immediately performed, and in the absence of evidence showing the hysterectomy was the least drastic means to prevent conception, the court held that the sterilization order could not be properly granted. *Id.* Likewise, in the present case, the district court never even inquired into the necessity of sterilization, or whether it was demonstrably in the Ward's best interest. *See* Order Re: Petition to Terminate Guardianship.

Additionally, there was no inquiry into whether sterilization was truly narrowly tailored to accomplish the best interests of the Ward, rather than an alternative, less

permanent and/or less invasive means. *Id.* For example, in this case, the Ward continues to learn and grow. As he gets older and acquires new skills, he has become increasingly independent and capable of taking care of himself and making his own decisions. Hr'g Tr. 30, ln. 5-15. Yet there was no inquiry or finding that he either now or will forever in the future be unable to learn and utilize alternative forms of birth control such as prophylactics, nor was there a finding that he would be an unsuitable parent. *See* Order Re: Petition to Terminate Guardianship. It is equally troubling that in this case, whether or not the Ward was even sexually active was never proven, and was disputed by both the Ward and the woman his mother named as having a sexual relationship with the Ward. Hr'g Tr. 53, ln. 15-54, ln. 9. In light of the fundamental nature of the procreative right, an unclear government objective, and total lack of narrow tailoring, this case represents a clear failing of the district court to meet the rigors of strict scrutiny analysis.

IV. PROCEDURAL DUE PROCESS VIOLATION

Given the core and essential importance of procreative and reproductive rights, as a matter of procedural due process under the U.S. and Iowa Constitutions, the Ward has the right to notice and a full evidentiary hearing, with assistance of counsel and the opportunity to be heard and cross-examine witnesses as to the need and appropriateness of sterilization, before being subjected to a sterilization procedure. "A person is entitled to procedural due process when state action threatens to deprive the

person of a protected liberty interest." *State v. Seering*, 701 N.W.2d 655, 665 (Iowa 2005).

To determine what process is due, the Court balances three factors. First, the Court considers the private interest implicated by the challenged government action. *State v. Sanders*, Slip Copy, 2009 WL 3337616, *4 (Iowa Ct. App., Oct. 7, 2009); *Seering*, 701 N.W.2d at 665; *Hernandez-Lopez*, 639 N.W.2d at 241. Second, the Court considers the risk of an erroneous deprivation of the private interest by the current procedures and the probative value, if any, of additional or alternative procedural safeguards. *Id.* Finally, the Court balances the government's interest in the status quo, including burdens imposed by the proposed additional procedures. *Id.* This Court has previously held that, at minimum, constitutionally protected rights require notice and an opportunity to be heard. *Seering*, 701 N.W.2d at 665-66 (internal citations omitted).

The right to procreate is a basic, constitutionally protected liberty interest demanding of the highest procedural safeguards prior to deprivation. "Protected liberty interests have their source in the United States Constitution and 'include . . . the right to marry and raise children'" *State v. Sanders*, citing *State v. Willard*, 756 N.W.2d 207, 214 (Iowa 2008). The right to procreate is an established fundamental right. *See Skinner*, 316 U.S. 535, 541 ("Marriage and procreation are fundamental. . . The power to sterilize, if exercised, may have subtle, farreaching and devastating effects."). *See also Griswold v. Connecticut*, 381 U.S. 479 (1965)(extending the fundamental right to privacy to marital sexual relationship and contraception);

Eisenstadt v. Baird, 405 U.S. 438 (1972)(right to decide to use contraception must apply equally to married and single persons); *Roe v. Wade*, 410 U.S. 113 (1973)(fundamental right to privacy extending to pre-viability abortion and abortion to protect the health or life of a pregnant woman); *Carey v. Population Servs. Int'l*, 431 U.S. 678 (1977)(extending *Griswold* to find constitutional protection against unjustified intrusion into individual decisions about childbearing).

The procedures utilized in this case—no hearing prior to the procedure, no opportunity to call or cross examine witnesses, including expert witnesses, no opportunity to express his preferences and articulate his concerns about the proposed procedure, and no exploration of possible less invasive, less permanent, or less restrictive means to accomplish birth control, no finding of fact, even, that the Ward was sexually active—were inadequate to safeguard the procreative rights of the Ward. In this case, because vasectomy procedures are intended to provide permanent sterilization of a patient, and thus permanently deprive the Ward of his procreative rights, a hearing must take place *prior* to the procedure.

At a hearing to decide a petition to sterilize an adult incompetent ward, the proper standard to apply is clear and convincing evidence; a preponderance of the evidence standard has been deemed not to meet constitutional standards. 53 Am. Jur. 2d, *Mentally Impaired Persons* § 119; *see, e.g., Michigan Prot. & Advocacy Serv. v. Kirkendall*, 841 F.Supp. 796, 801 (E.D. Mich. 1993), *opinion adopted*, 863 F.Supp. 482 (E.D. Mich. 1994)("the due process and equal protection clauses of the United States Constitution

demand that any involuntary sterilization [of a ward] ... occur only after a full evidentiary hearing has been held to determine the propriety of such an extreme measure in relation to the rights of the patient."). Finally, the additional burden imposed on the government, which in this case would be the additional cost of the hearing and potential appeals to the judicial system, is not only commensurate with a post-sterilization process, it is clearly necessary to safeguard the procreative right, because both vasectomy and tubal-ligation procedures are permanent. Therefore, in this case, the lack of a full evidentiary hearing (indeed, any hearing at all) constituted an astounding procedural due process violation under the Iowa and U.S. Constitutions.

V. EQUAL PROTECTION VIOLATION

The Fourteenth Amendment to the U.S. Constitution provides that a state shall not "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, § 1. Under the Iowa Constitution, "All men and women are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty. . . and pursuing and obtaining safety and happiness." Iowa Const. art. I, § 1. The Constitution further guarantees that "All laws of a general nature shall have a uniform operation; the general assembly shall not grant to any citizen, or class of citizens, privileges or immunities, which, upon the same terms shall not equally belong to all citizens. Iowa Const. art. I, § 6.

As in the case of due process protections, this Court has found that the Iowa Constitution is more protective of the right of its citizens to enjoy equal protection under the law than the federal Constitution. *See, e.g., Varnum v. Brien,* 763 N.W.2d 862, 896 (Iowa 2009); *Racing Ass'n of Cent. Iowa v. Fitzgerald (RACI),* 675 N.W.2d 1, 7 (Iowa 2004); *Bierkamp v. Rogers,* 293 N.W.2d 577, 579 (Iowa 1980). Regarding the equal protection of the sexes, as recalled in *Varnum*:

> Iowa was also the first state in the nation to admit a woman to the practice of law, doing so in 1869. *Admission of Women to the Bar,* 1 Chicago Law Times 76, 76 (1887). Her admission occurred three years before the United States Supreme Court affirmed the State of Illinois' decision to *deny* women admission to the practice of law, *see Bradwell v. Illinois,* 83 U.S. (16 Wall.) 130, 139, 21 L.Ed. 442, 445 (1873), and twenty-five years before the United States Supreme Court affirmed the refusal of the Commonwealth of Virginia to admit women into the practice of law, *see Ex parte Lockwood,*154 U.S. 116, 118, 14 S.Ct. 1082, 1083, 38 L.Ed. 929, 930 (1894). In each of those instances, our state approached a fork in the road toward fulfillment of our constitution's ideals and reaffirmed the "absolute equality of all" persons before the law as "the very foundation principle of our government." *See Coger,* 37 Iowa at 153.

Varnum v. Brien, 763 N.W.2d at 877. Iowa's constitutional guarantee of equal protection "'is essentially a direction that all persons similarly situated should be treated alike.'" *Racing Ass'n of Cent. Iowa v. Fitzgerald,* 675 N.W.2d 1, 7 (Iowa 2004) (quoting *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439 (1985)). *Id. at 878-79.*

Under both Fourteenth Amendment Equal Protection and Iowa Equal Protection analysis, the party seeking to uphold a government classification based on gender must show an exceedingly persuasive justification for the classification, in

addition to meeting intermediate scrutiny review. Intermediate scrutiny requires a party to show that the classification serves an important government interest and that the gender-based classification is substantially related to the government's ability to achieve that interest. *U.S. v. Virginia*, 518 U.S. 515 (1996); *Mississippi University for Women v. Hogan*, 458 U.S. 718 (1982); *Sherman v. Pella Corp.*, 576 N.W.2d 312, 317 (Iowa 1998).

In the present case, the district court proffered an untenable double standard for the treatment of similarly situated male and female wards facing involuntary sterilization procedures. The district court distinguished between the rights and legal protections of the procreative and reproductive rights of male and female wards vis-à-vis their guardians. Specifically, the lower court found that while a tubal ligation procedure (to sterilize a woman) would necessitate prior court approval under the definition of major surgical procedure in Iowa Code § 633.635(2), a vasectomy procedure (to sterilize a man) would not:

> While it is true that Stuart had a vasectomy on February 18, 2013 a vasectomy, unlike a tubal ligation, is not major elective surgery under Iowa Code § 633.635(2)(a) such that prior Court approval is/was required. A vasectomy is approximately a 20 minute procedure which is performed in a doctor's office as opposed to a surgical center or operating room and it does not require the use of anesthesia and the recovery is rather quick. Furthermore, a vasectomy is reversible, albeit by a more intrusive procedure which could be deemed to be major elective surgery.

Order Re: Pet. to Terminate Guardianship 2. The Court's distinction, founded on dubious medical assertions as to permanence, reversibility, and the recommended use

of anesthesia, fails to adequately take into account that the fundamental procreative rights of the Ward are severely limited if not entirely obstructed by either procedure. Thus, absent an exceedingly persuasive justification and survival under intermediate scrutiny review, both men and women wards are entitled to equal protection of the law prior to being stripped of their fundamental procreative rights. The only justification provided was the court's own judgment, uninformed by medical experts, as to the medical circumstances of vasectomies versus of tubal ligation procedures. This justification, which is not supported by medical literature, is grossly inadequate. Absent a medical emergency (which exception would also properly apply to both sexes), there is no governmental interest, other than efficiency, in foregoing full inquiry and consideration of the appropriateness of sterilization in light of the needs, desires, and best interests of the Ward. Such a distinction is unacceptable and an unjustified denial of equal protection of the law guaranteed by the U.S. and Iowa Constitutions.

VI. THE DISTRICT COURT'S INTERPRETATION OF "MAJOR ELECTIVE SURGERY" IGNORED LONGSTANDING PRINCIPLES OF STATUTORY CONSTRUCTION

The district court erred in interpreting the undefined term "major elective surgery" in Iowa Code § 633.635 in such a way as to conflict with constitutional protections. Rather, in order to protect the fundamental procreative and reproductive rights of Wards, "major elective surgery" in the context of § 633.635 must be

interpreted to include any sterilization procedure: "Rather than reach the constitutional issue, however, the doctrine of constitutional avoidance suggests that the proper course in the construction of a statute is to steer clear of potential constitutional shoals if possible." *Noll Inc., v. Eviglo*, 816 N.W.2d 391, 398 (Iowa 2012) (where multiple possible interpretation of Iowa Code § 617.3 existed, the court chose to apply the interpretation that did not conflict with the Iowa Constitution). *See also Simmons v. State Public Defender*, 791 N.W.2d 69, 74 (Iowa 2010)("If fairly possible, a statute will be construed to avoid doubt as to constitutionality."); *State v. Nail*, 743 N.W.2d 535, 539 (Iowa 2007)("In order to provide due deference to our legislature, this court has applied what has been called avoidance theory in the context of due process challenged to legislative acts. . . For example, in determining whether a statute is unconstitutionally vague, this court presumes that statute is constitutional and gives *any* reasonable construction to uphold it.")(internal citations omitted)(emphasis in original); *State v. Bower*, 725 N.W.2d 435, 441 (Iowa 2006)(interpreting the term "fighting words" in a statute to only prohibit speech that is not protected by the First Amendment). This Court should reverse the district court's interpretation and provide guidance as to the proper interpretation of Iowa Code § 633.635 so as to conform to due process and equal protection guarantees under the U.S. and Iowa Constitutions.

CONCLUSION

Amici ACLU of Iowa and Disability Rights Iowa respectfully request this Court reverse the decision of the district court on the issue of whether prior court approval is required before a Guardian may subject her Ward to sterilization, and remand the district court's denial of the Ward's Petition to Terminate Guardianship in light of that reversal.

RITA BETTIS, AT#0011558
ACLU OF IOWA
505 Fifth Ave., Ste. 901
Des Moines, Iowa 50309
PHONE: (515) 243-3988
FAX: (515) 243-8506
EMAIL: rita.bettis@aclu-ia.org

RANDALL WILSON
ACLU OF IOWA
505 Fifth Ave., Ste. 901
Des Moines, Iowa 50309
PHONE: (515) 243-3576
FAX: (515) 243-8506
EMAIL: randall.wilson@aclu-ia.org

CYNTHIA A. MILLER, AT#0005382
DISABILITY RIGHTS IOWA
400 East Court Avenue, Ste. 300
Des Moines, Iowa 50309
PHONE: (515) 278-2502
FAX: (515) 278-0539
EMAIL: cmiller@driowa.org

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Rita Bettis

RITA BETTIS
Counsel for Amicus Curiae
ACLU OF IOWA
505 Fifth Ave., Ste. 901
Des Moines, Iowa 50309
PHONE: (515) 243-3988
FAX: (515) 243-8506
EMAIL: rita.bettis@aclu-ia.org