No. 17-1936

In the United States Court of Appeals
FOR THE SEVENTH CIRCUIT

TAMARA M. LOERTSCHER,
PLAINTIFF-APPELLEE,

v.

ELOISE ANDERSON, SECRETARY, DEPARTMENT OF CHILDREN AND FAMILIES, AND BRAD D. SCHIMEL, ATTORNEY GENERAL,
DEFENDANTS-APPELLANTS.

On Appeal From The United States District Court
For The Western District of Wisconsin, Case No. 14-cv-870
The Honorable James D. Peterson, Judge

DEFENDANTS-APPELLANTS' EMERGENCY MOTION TO STAY THE DISRICT COURT'S ORDER PENDING APPEAL

BRAD D. SCHIMEL
Wisconsin Attorney General

STATE OF WISCONSIN
DEPARTMENT OF JUSTICE
17 West Main Street
P.O. Box 7857
Madison, Wisconsin 53707-7857
tseytlinm@doj.state.wi.us
(608) 267-9323

MISHA TSEYTLIN
Solicitor General
Counsel of Record

LUKE N. BERG
Deputy Solicitor General

KARLA Z. KECKHAVER
Assistant Attorney General

Attorneys for Defendants-Appellants

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INTRODUCTION

The Wisconsin law challenged in this case, 1997 Wisconsin Act 292 ("the Act" or "Act 292"), helps expectant mothers protect their unborn children from the devastating effects of prenatal substance abuse. The law prioritizes "encourag[ing] [pregnant women who habitually abuse controlled substances] to seek treatment . . . voluntarily." Wis. Stat. § 48.01(1)(bm). Most of the women whom Act 292 has helped have received only voluntary services. In those rare instances where the Act is applied involuntarily to a woman who refuses to enter into treatment to protect her unborn child, a court may "order[ ] [her] to receive treatment, including inpatient treatment." Wis. Stat. § 48.01(1)(am).

Act 292's provisions—those relating both to voluntary and involuntary services—apply only in extremely serious cases: that is, when the woman's "habitual" drug abuse is so "severe" that there is a "substantial risk" to the "physical health of the unborn child." Wis. Stat. § 48.133. In one recent case from Milwaukee County, for example, a woman who was hospitalized at 23 weeks for preterm labor "repeatedly le[ft] her hospital bed to use heroin in the hospital parking lot." Dkt. 243:3. Her baby had only a "3% chance of survival" if she continued her drug abuse, so the court ordered treatment under Act 292. Dkt. 243:3–4.

The district court here held that the Act is void for vagueness and enjoined it statewide. Dkts. 240; 244. The court reached this conclusion even though the only plaintiff, Tamara M. Loertscher, has no standing (after all, she already had her child and then moved out of Wisconsin before the district court entered its order); and even

though the terms in Act 292 that the court found impermissibly vague—such as "habitual" and "lack of self control"—have been specifically held *not* to be vague by both the Supreme Court and this Court. *See Minnesota ex rel. Pearson v. Prob. Ct. of Ramsey Cnty.*, 309 U.S. 270 (1940); *Sheehan v. Scott*, 520 F.2d 825 (7th Cir. 1975). The district court then declined to stay the injunction pending appeal. However, the court soon thereafter issued a partial stay of its injunction—applicable *only* to currently ongoing cases under Act 292, but not for any new cases—which temporary stay will last only until this Court adjudicates the present stay motion.

The most widespread impact of the district court's injunction, if it is not stayed pending appeal, would be to shut off a vital avenue of assistance to pregnant women who *affirmatively want* help with their drug addiction under Act 292. If the injunction is not stayed, local county Child Protective Services ("CPS") agencies will be forced to cease providing many services to women who voluntarily entered treatment under Act 292, including no longer being able to provide these women with "housing, transportation, clothing, food, and obtaining diapers." Dkts. 243:2–3; 265:18–19. While these women will, in some cases, be able to obtain other services from other public or private actors, the injunction will cut off one of the most effective methods under Wisconsin law for helping pregnant women who want assistance.

In addition, without a stay, the injunction would also prevent state law from being able to protect unborn children in the rare cases of women who would be subjected to Act 292's involuntary provisions, such as the heroin-addicted mother described above. As of May 10, 2017, Defendants were aware of six pending petitions

for involuntary treatment orders and 19 cases under a final treatment order throughout the State. Dkt. 249:2. Under the district court's injunction, state law will no longer be able to enforce those treatment orders and will lose the ability to protect the unborn children involved. State law will also be unable to address new situations, including emergency threats to the lives of unborn children.

Defendants respectfully ask this Court to stay the injunction, pending appeal, so that Act 292 can continue to protect pregnant women and their unborn children. Defendants request emergency disposition of this motion because the Act is currently enjoined for any new unborn-child-abuse cases that may arise.

STATEMENT

A. Legal Background

While Act 292's "paramount goal" is "protect[ing]" "unborn children," the Act is at all times focused on "assisting" "expectant mothers of unborn children . . . in fulfilling their responsibilities as . . . expectant mothers." Wis. Stat. § 48.01(1)(a). The law imposes no criminal penalties. *See* Wis. Stat. ch. 948; § 948.01(1).

For the Act to apply at all, a pregnant woman must "habitually lack[ ] self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, to the extent that there is a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered unless the expectant mother receives prompt and adequate treatment." Wis. Stat. § 48.133. The Wisconsin Department of Children and

Families provides further standards, Dkt. 169-1 ("CPS Standards"), that are binding on the counties that implement the laws, *see* Dkt. 169-1:5; Wis. Stat. § 48.981(3)(c)(1).

As the statutes and binding CPS standards provide, a case begins under the Act when a person (often a doctor or relative) voluntarily reports to a CPS agency that an expectant mother is abusing drugs or alcohol. Wis. Stat. § 48.981(2)(d); Dkts. 174:2–3; 265:10. A CPS "[a]ccess worker" reviews the report to decide whether to "screen in" the case, considering whether there is "reasonable suspicion" (1) that the woman is pregnant; (2) that she is "currently severely abusing alcohol, controlled substances, or controlled substance analogs"; and (3) that there is "credible information that the abuse of the [ ] substance(s) could cause serious physical harm to the unborn." Dkt. 169-1:15, 23, 25; 174:3; 265:11–12. If the report is "screened in," a separate CPS "[a]ssessment [w]orker" begins a "diligent investigation," "gather[ing] information" relevant to the statutory criteria. Wis. Stat. § 48.981(3)(c)(1)(a); Dkts. 169-1:16; 174:3–4; 265:11–12. The assessment worker also contacts the mother to discuss her drug use and then, if the report turns out to be accurate, will "offer[ ] to provide appropriate services." Wis. Stat. § 48.981(3)(c)(3); Dkts. 174:3–4; 265:13–14.

In the majority of cases where the mother ultimately qualifies for Act 292's treatment provisions, the mother will choose to enter voluntary treatment. Dkt. 193:4; 249:2. In those circumstances, the CPS agency maintains "case management" services, which allow it to assist the woman with, *inter alia*, "housing, transportation, clothing, food, and obtaining diapers." Dkts. 243:2–3; 265:18–19. CPS assessment workers often "form a really close relationship with these women," providing many

types of "support[ ]" and "assist[ance]." Dkt. 265:18. Women will commonly contact the CPS workers afterwards and "thank them for caring about them and getting them the services they needed at that time." Dkt. 265:31.

Where the mother "refuses to accept [voluntary] services," the assessment worker must gather information from other "medical or [alcohol and other drug abuse] professionals" to determine whether there is sufficient evidence for a formal petition, called a "UCHIPS" petition (Unborn Child in Need of Protective Services). Wis. Stat. § 48.981(3)(c)(3); Dkt. 169-1:16; 174:4–5; *e.g.*, Dkt. 265:39–40. If sufficient evidence is found, the county refers the case to the district attorney. Dkt. 174:5–6.

At that point, if the mother is in temporary custody (described further below, *infra* 6–7), the case must also be referred to the "court intake worker," *id.* §§ 48.981(3)(b)(2m), (3)(c)(2m)(a), who may be one of the county workers already discussed or a separate employee of the court, Dkt. 169-1:18–19. The intake worker must conduct an "intake inquiry" to determine the proper disposition: dismissal, informal resolution, or a formal UCHIPS petition. *See* Wis. Stat. §§ 48.067(6); 48.24(1), (4). During the intake inquiry, the intake worker must "confer[ ] with" and "interview" the mother to determine the accuracy of the report and how to proceed, Wis. Stat. §§ 48.067(2); 48.243(1), inform her of the "nature and possible consequences of the proceedings," *id.* § 48.243(1)(b), and her "basic rights," *id.* § 48.243(3), and provide "counseling," *id.* § 48.067(5). If "the available facts [do not] establish prima facie jurisdiction," the intake worker must close the case. *Id.* § 48.24(1), (4); *see id.* § 48.133; Dkt. 169-1:25.

Where it appears that jurisdiction "would exist," and the mother consents, the intake worker may resolve the case informally through an agreement to participate in "counseling," an "alcohol [or] other drug abuse assessment," or an "outpatient treatment program." *Id.* § 48.245(1)(b), (1)(c), (2)(a). If the intake worker determines that a formal UCHIPS petition is necessary, the worker must refer the case to the "district attorney, corporation counsel, or other official" (hereafter collectively, "district attorney") authorized to file a petition, *id.* § 48.24(3).

The district attorney likewise must decide whether to "file the petition, close the case, or refer the case back to intake" for "further investigation" or "informal disposition." *id.* § 48.25(2). The filing of a petition initiates a full slate of procedural protections and requirements, *id.* § 48.27 et seq., and culminates in a fact-finding hearing before a judge or six-member jury, *id.* § 48.31. If the court ultimately finds that the "unborn child . . . is in need of protection or services," it must order a "care and treatment plan," which can include "counseling," "supervision," "alcohol or drug treatment or education," "placement" at the "home of an adult relative or friend" or "community-based residential facility," or "inpatient alcohol or drug treatment." *Id.* § 48.347. Any order must be the "least restrictive" "means necessary to . . . protect the well-being of the child." Wis. Stat. § 48.355.

While the case is pending, a woman subject to the Act may be temporarily held in custody. The temporary custody process is separate from, and concurrent with, the UCHIPS petition process outlined above. At the very beginning, when a law enforcement officer or CPS worker receives a report that "an unborn child is in immediate

danger," the officer may "take the adult expectant mother into custody and deliver [her] to the intake worker" if there are "reasonable grounds" to believe that there is a "substantial risk to the physical health of the unborn child." *Id*. §§ 48.981(3)(b)(2m), (3)(c)(2m)(a); 48.193(1)(d). The intake worker may only maintain custody if three requirements are met: (1) "probable cause" that the jurisdictional threshold, *id*. § 48.133, is met, (2) a "substantial risk" to the "physical health of the unborn child" if the mother "is not held," and (3) the mother "has refused to accept any alcohol or other drug abuse services offered to her or . . . has not made a good faith effort to participate." *Id*. § 48.205(d). Even if the requirements are satisfied, the intake worker must "immediately attempt to notify an adult friend or relative," *id*. § 48.193(2), and must "make every effort to release the adult expectant mother to an adult friend or relative," *id*. § 48.203(1). If the mother is not released to a friend or relative, there must be a hearing before a judge or court commissioner "within 48 hours" to determine whether to continue custody. *Id*. § 48.213(1)(a). As with the intake worker, the court may only continue custody if the mother "refuse[s]" the "abuse services offered to her," and place her only in the locations described above. *Id*. §§ 48.205(1m); 48.207(1m); 48.213(3).

B. Factual And Procedural Background

On August 5, 2014, a Wisconsin circuit court ordered the plaintiff in this case, Tamara M. Loertscher, into involuntary treatment after she self-reported "using [methamphetamine] two to three times a week" and using marijuana "throughout [her] pregnancy," Dkt. 1-2:15–16, and after she refused multiple offers for voluntary

treatment options, Dkts. 1-2:20–21, 168:33–34, 159:23. Loertscher refused to comply with the court order for treatment. Dkt. 1-9. Ultimately, she entered into a consent decree, under which she agreed to a drug-abuse assessment and weekly drug testing. Dkt. 1-13. Her baby was born healthy on January 23, 2015, and Loertscher is no longer subject to any requirements or consequences from the Act. Dkt. 61:7. Defendants then learned that Loertscher had moved out of Wisconsin, although Defendants do not know the date on which the move occurred. Dkts. 66:20; 118:2.

Loertscher sued various state and county officials, raising a number of constitutional claims. Dkts. 1; 66. Without citing even one comparable authority, the district court allowed her to continue her lawsuit even after she moved out of the State and her case was plainly moot. Dkt. 118. Then, at summary judgment, the district court held the Act void for vagueness and enjoined it statewide. Dkts. 240; 244. In reaching this decision, the court held that the Act "suffers from several critical ambiguities," Dkt. 240:24, focusing first on the words "severe" and "habitually." Dkt. 240:25–26. The court recognized that "these terms are intended to prevent enforcement . . . against minimal users," but nevertheless held them vague because they are "terms of degree" that do not specify the precise "quantum" of prohibited activity or exactly "where to draw the line." Dkt. 240:25–26. Similarly, the court held that the phrase "substantial risk" was "doubly indeterminate" because both "substantial" and "risk" are "matter[s] of degree"—again suggesting that the Act should have "*quantif[ied]* the risk." Dkt. 240:27–28. The "substantial risk" standard was also vague, according to the court, because "current medical science cannot tell us what level of

drug or alcohol abuse will pose a substantial risk of serious damage to an unborn child." Dkt. 240:29.

Defendants immediately appealed and asked the district court for a stay pending appeal and a temporary stay while the district court decided the motion to stay pending appeal. Dkts. 241; 242. The court granted the temporary stay, and scheduled an evidentiary hearing on the motion to stay. Dkt. 247. After hearing testimony and arguments, the court denied Defendants' motion to stay pending appeal. Dkt. 263. Defendants then sought a second temporary stay to allow this Court to decide whether to grant a stay pending appeal without any temporary disruption of ongoing services under Act 292, Dkt. 264, which the court granted, Dkt. 266. So, until this Court rules on this stay motion, the order is stayed for currently ongoing cases, but the Act is blocked statewide for any new unborn-child-abuse cases that may arise.

LEGAL STANDARD

"The standard for granting a stay pending appeal mirrors that for granting a preliminary injunction." *In re A & F Enters., Inc. II*, 742 F.3d 763, 766 (7th Cir. 2014). This Court "consider[s] the moving party's likelihood of success on the merits, the irreparable harm that will result to each side if the stay is either granted or denied in error, and whether the public interest favors one side or the other." A "sliding scale approach applies; the greater the moving party's likelihood of success on the merits, the less heavily the balance of harms must weigh in its favor, and vice versa." *Id.* (citations omitted).

ARGUMENT

I. Defendants-Appellants Are Likely To Succeed On Appeal

A. This Case Is Moot

A case may become moot if it no longer involves an "actual controversy." *Alvarez v. Smith*, 558 U.S. 87, 92 (2009). Here, there is no dispute that the case became moot when Loertscher's child was born, so the only issue is whether the "capable of repetition yet evading review" exception applies. This "narrow" exception is only applicable where: "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Ostby v. Manhattan Sch. Dist. No. 114*, 851 F.3d 677, 682–83 (7th Cir. 2017) (quotation omitted).

Loertscher cannot possibly satisfy the "reasonable expectation" element of this exception, especially because she voluntarily moved out of Wisconsin. *See supra* 8. Courts will dismiss a case as moot when the plaintiff leaves the relevant jurisdiction, *see Camreta v. Greene*, 563 U.S. 692, 710–11 (2011), and will find that the capable-of-repetition exception does not apply, *see Higgason v. Farley*, 83 F.3d 807, 811 (7th Cir. 1996). Neither Loertscher nor the district court has cited any case, from any court, holding that the capable-of-repetition exception applies in these circumstances; and for good reason, since someone who leaves a jurisdiction cannot possibly satisfy the "reasonable expectation" element unless they show, *inter alia*, that it is "likely" that they will return *and* then be subject to the relevant law. *Id.* And the fact that Loertscher cannot show that there is "reasonable expectation" that she will be subject

to Act 292 in the future is even clearer in this case than in most cases where the plaintiff leaves the jurisdiction. Not only did Loertscher voluntarily move out of Wisconsin, but she is not pregnant and has not alleged that she will likely be pregnant, in Wisconsin, *and* engage in substance abuse serious enough to fall within Act 292's reach again.

B. Act 292 Is Not Vague

A law is unconstitutionally vague if its terms are so unbounded that it is "standardless." *United States v. Williams*, 553 U.S. 285, 304 (2008). "Laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct" are not, "[a]s a general matter," constitutionally suspect. *Johnson v. United States*, 135 S. Ct. 2551, 2561 (2015). Likewise, statutes that use words such as a "habitual," *Pearson*, 309 U.S. at 274; *Sheehan*, 520 F.2d at 829, and "utter lack of power to control," *Pearson*, 309 U.S. at 274, as part of statutory definitions are not thereby rendered unconstitutionally vague. In addition, the tolerable degree of vagueness depends, in part, on what level of clarity is possible or desirable in a particular field, *see United States v. Petrillo*, 332 U.S. 1, 5–8 (1947), and "the nature of the enactment," *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982).

Jurisdiction for the purposes of Act 292 is determined by the phrase: "*habitually lack[ ] self-control* in the use of alcohol beverages, controlled substances or controlled substance analogs, *exhibited to a severe degree*, to the extent that there is a *substantial risk that the physical health of the unborn child*, and of the child when

born, will be seriously affected or endangered unless the expectant mother receives prompt and adequate treatment." Wis. Stat. § 48.133 (emphases added). The allegedly vague terms in dispute—"habitual," "lack of self control," and "substantial risk"—do not come close to meeting the extremely high threshold for facial invalidity. In particular, the controlling caselaw addressing the very terms in dispute, as well as various other considerations, establish that Act 292 is not unconstitutionally vague.

Controlling caselaw. The Supreme Court's decision in *Pearson*, 309 U.S. 270, held that terms similar to those in dispute with regard to Act 292 are not unconstitutionally vague. In that case, the Minnesota Supreme Court had interpreted the state involuntary commitment law to apply when three showings were made: (1) "a *habitual* course of misconduct in sexual matters"; (2) "evidence[ ] [of] an utter *lack of power to control* [ ] sexual impulses"; and (3) "as a result, [a] like[lihood]" of "inflict[ing] injury" on others. *Id*. at 273. The United States Supreme Court unanimously held that "[t]his construction of the statute destroys the contention that it is too vague and indefinite to constitute valid legislation." *Id.* at 274. The three "conditions"—a "habitual course of misconduct," an "utter lack of power to control" the conduct, and a likelihood of inflicting injury—"call[ed] for evidence of past conduct pointing to probable consequences" and therefore were "as susceptible of proof as many of the criteria constantly applied in prosecutions for crime." *Id*. So too with Act 292's use of the words "habitual," "lack of self control," and "substantial risk"; all call for evidence of past drug use and probable consequences to the unborn child.

Similarly, this Court's decision in *Sheehan*, 520 F.2d 825, strongly supports Act 292's constitutionality. There, this Court rejected a vagueness challenge to a law that prohibited "habitual[ ] truan[cy]," explaining that statutes "often use the word 'habitual' and the courts have construed it, without apparent difficulty, as sufficiently definite to pass constitutional muster." *Id*. at 829. As this Court articulated, "[i]t means constant, customary, accustomed, usual, common, ordinary or done so often and repeatedly as to form a habit." *Id*. (citation omitted). The word "habitual" in Act 292 can likewise be construed "without [ ] difficulty." *Id*. at 829. The full phrase in the Act is "habitually lacks self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree." Wis. Stat. § 48.133. The words "habitual," "lack of self-control," and "to a severe degree" make clear that the Act does not cover occasional or sporadic drug or alcohol use.

The district court relied upon only two cases to support its holding that Act 292 is unconstitutionally vague—*Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Coates v. City of Cincinnati*, 402 U.S. 611 (1971), Dkt. 240:24, 28—but neither case suggests that Act 292 is unlawful.

Contrary to the district court's suggestion, *Johnson* strongly *supports* the Act's constitutionality. In *Johnson*, the Supreme Court held that the phrase "burglary, arson, or extortion, involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*," 18 U.S.C. § 924(e)(2)(B)(ii) (emphasis added), was unconstitutionality vague. In reaching this conclusion, the Court made clear that, "as a general matter," statutes like Act 292, "which call for

the application of a qualitative standard such as 'substantial risk' to real-world conduct," are not unconstitutionally vague. *Johnson,* 135 S. Ct. at 2561. The problem with the statute at issue in *Johnson* was that it "require[d] application of [a] 'serious potential risk' standard to an idealized ordinary case of the crime," rather than to a defendant's "conduct . . . *on a particular occasion*." *Id.* at 2561. After all, "[i]t is one thing to apply an imprecise 'serious potential risk' standard to real-world facts; it is quite another to apply it to a judge-imagined abstraction." *Id.* at 2558. Of course, Act 292 calls precisely for the application of a "substantial risk" standard "to real-world conduct," and does not involve any "judge-imagined abstraction[s]." *Id.*

The Supreme Court's decision in *Coates* does not support the district court's conclusion. *Coates* invalidated an anti-loitering ordinance that criminalized three or more people assembling in some public places and "conduct[ing] themselves in a manner annoying to persons passing by, or occupants of adjacent buildings." 402 U.S. at 611, n.1. The Court held that the ordinance was vague because "[c]onduct that annoys some people does not annoy others." *Id.* at 614. The Court's decision was also predicated on the infringement of the ordinance on the right of assembly: "[t]he First and Fourteenth Amendments do not permit a State to make criminal the exercise of the *right of assembly* simply because its exercise may be 'annoying' to some." *Id.* (emphasis added). Unlike the ordinance at issue in *Coates*, Act 292's jurisdictional threshold is not based upon any person's *subjective* view; rather, it involves the application of objective, "qualitative standard[s]." *Johnson*, 135 S. Ct. at 2561. Act 292

also does not create any problems under the First Amendment, as shown by the fact that Loertscher abandoned her First Amendment claim below. *See* Dkt. 240:19 n.2.

Other Considerations. "[T]he nature of the enactment," *Vill. of Hoffman Estates*, 455 U.S. at 498, strongly supports Act 292's constitutionality. Act 292 is not a criminal statute, or one dealing with the First Amendment, where vagueness concerns are heightened. *See, e.g.*, *Coates*, 402 U.S. at 614. Rather, this is a civil statute. And while Act 292's involuntary aspects involve an intrusion into personal liberty, as the district court noted, Dkt. 240:21, the nature of that intrusion is typically less severe than the civil confinement at issue in *Pearson*. Under the Act, any involuntary impositions must be the "least restrictive" "means necessary to . . . protect the well-being of the child," Wis. Stat. § 48.355, ranging from "counseling," "supervision," and "alcohol or drug treatment or education," to "placement" at the "home of an adult relative or friend" or "community-based residential facility," to "inpatient alcohol or drug treatment." Wis. Stat. § 48.347.

Act 292 is further not vague because the subject matter involved requires a broad standard such that the Act's application is neither over- nor under-inclusive. *See Petrillo*, 332 U.S. at 5–8. The district court suggested that the law could have prohibited "some quantum of . . . use of alcohol or controlled substances," Dkt. 240:26, but every human body is different, so the precise level of substance abuse that will create a "substantial risk" to an unborn child will vary, often significantly. *See*, *e.g.*, Dkt. 173-1:2. Act 292's standard allows "medical . . . professionals" to testify, before

several levels of neutral decisionmakers, based on their knowledge of the expectant mother. *See* Dkt. 169-1:16.

Finally, the conduct that the Act prohibits is either clearly illegal already, *see*, *e.g.*, Wis. Stat. § 961.41(3g)(g) (criminalizing possession of methamphetamine); 21 U.S.C. § 844(a) (same), or indisputably harmful to the unborn child, *see* Dkt 171-1:2 (alcohol is well-known to be "one of the leading preventable causes of intellectual disabilities, birth defects, and other developmental disorders in newborns"), or both.

II. Defendants, Expectant Mothers, And Unborn Children Will Suffer Irreparable Harm Without A Stay, Whereas Loertscher Will Suffer No Harm From A Stay

Failure to enter a stay of the injunction will result in immediate and irreparable harm to expectant mothers, unborn children, and Defendants' responsibility to protect those mothers and children under Act 292. *See Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) ("Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." (citation omitted)).

Act 292 "protect[s] . . . unborn children" from "physical harm" due to "severe" alcohol and drug abuse. Wis. Stat. § 48.01(1)(a), (am). Alcohol and drug abuse during pregnancy can cause significant and life-long damage to unborn children. Dkt. 167:26–36. Methamphetamine use during pregnancy has been associated with "preterm birth, low gestational weight, smaller head circumference, [and] intrauterine growth restrictions." Dkt. 170-7:2. Marijuana use has been associated with "stunted growth outcomes," Dkt. 171-1:4, "memory impairment," and "learning difficulties,"

Dkt. 172-1:5. Heroin exposure can cause "neonatal abstinence syndrome," the symptoms of which include "irritability," "tremors," "seizures," "vomiting and diarrhea," "excessive weight loss," "apnea" (suspension of breathing), and "hyperthermia." Dkt. 170-5:13. In one case out of Milwaukee, for example, a doctor testified that a mother's "repeated[ ]" use of heroin "in the hospital parking lot" gave her baby only a "3% chance of survival." Dkt. 243:3. In another, a physician recounted a woman who was "5–6 months pregnant" "found unconscious on the floor" with a "blood alcohol level of .50%." Dkt. 171-1:2. The physician "advised the county that this mother and fetus were at risk of death." Dkt. 171-1:2.

The majority of women impacted by the district court's injunction will be those who affirmatively want voluntary treatment under Act 292, so they can protect their unborn children. Under the Act, the counties begin by offering voluntary-treatment options to women who qualify as covered by the Act. *See supra* 4, 7. Under the injunction, Milwaukee County, for example, would no longer be able to provide "case management services" under Act 292 to those who accept this voluntary option, which services include assistance with "housing, transportation, clothing, food, and obtaining diapers," among other things, because the county would lack jurisdiction over the unborn child. Dkts. 243:2–3; 265:18–19; *see* Wis. Stat. § 48.981(3)(c). CPS agencies would also have much more limited abilities to identify substance-abusing women who want to receive voluntary treatment. Dkt. 243:4–5. If the injunction is left unstayed and a CPS agency received a report that a pregnant mother is engaging in habitual substance abuse, the agency will only be able to refer the reporter to *other*

resources. Dkt. 265:21. When that occurs, women may well not get "one-on-one attention that they need" and that CPS staff frequently provide. Dkt. 265:22–23. Given CPS agencies' "experience and knowledge working with children and families," they are "uniquely positioned to provide mothers with continuous care and services during pregnancy and after birth." Dkt. 250:3. Simply put, the injunction, if left unstayed, will reduce the range of options available to these vulnerable women.

The district court's injunction will also prevent state law from protecting unborn children, in the cases where the mother would otherwise be subjected to Act 292's involuntary provision. As of May 10, 2017, Defendants were aware of six pending UCHIPS petitions and 19 UCHIPS cases under a dispositional order throughout the State. Dkt. 249:2. In each of these cases, state and county officials, medical and substance abuse professionals, and/or courts have already concluded that the unborn child's physical health is at "substantial risk" from the mother's "severe" substance abuse. Wis. Stat. § 48.133. Without a stay, state law will not be able to enforce those treatment orders and protect the unborn children involved. And, of course, additional such cases may well arise during the appeal, given the "epidemic crisis" of substance abuse during pregnancy in Wisconsin. Dkts. 137:8–9; 172-1:7–8.

When compared to the harm the injunction imposes upon expectant mothers and unborn children who benefit from services under Act 292, as well as on Defendants, any negative consequences of a stay are comparatively minor. Most relevant here, Loertscher herself would suffer absolutely no harm from a stay because she has left Wisconsin and there is no reasonable possibility that she would ever be subject

to the Act again, *see supra* 1, 8, let alone during the limited pendency of a stay pending appeal. As to those that do have a reasonable possibility of being subject to the Act—none of whom are plaintiffs here or appeared before the district court to voice any disagreement with the Act—it is important to emphasize that the Act applies only to "severe" and "habitual" drug abuse that imposes a "substantial risk" to the "physical health of [an] unborn child." Wis. Stat. § 48.133. Any possibility of misuse of the Act to apply to less severe cases is significantly mitigated by the fact that multiple actors filter out any unjustified cases, including the CPS "access worker," district attorney, and a Wisconsin court, not to mention the need for "medical or [alcohol and other drug abuse] professionals" to provide testimony. *See* Wis. Stat. §§ 48.24(1), (4); 48.25; 48.347; 48.981(3)(c); Dkts. 169-1:15–16, 23, 25; 174:3–6.

CONCLUSION

The district court's injunction should be immediately stayed.

Dated: May 19, 2017

Respectfully Submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

/s/ Misha Tseytlin

MISHA TSEYTLIN
Solicitor General
Counsel of Record

LUKE N. BERG
Deputy Solicitor General

KARLA Z. KECKHAVER
Assistant Attorney General

Attorneys for Defendants-Appellants
Wisconsin Department of Justice
17 West Main Street
P.O. Box 7857
Madison, Wisconsin 53707-7857
(608) 267-9323
tseytlinm@doj.state.wi.us

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of May, 2017, I filed the foregoing Motion with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: May 19, 2017

/s/ Misha Tseytlin
MISHA TSEYTLIN