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, Chief Judge

REPLY BRIEF OF DEFENDANTS-APPELLANTS, ELOISE ANDERSON AND BRAD D. SCHIMEL

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Oral Argument Requested

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INTRODUCTION

The district court blocked 1997 Wisconsin Act 292 ("Act 292") on a statewide basis, invoking a vagueness theory that is foreclosed by *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270 (1940), in a lawsuit brought by a plaintiff who lacks standing because she has moved out of Wisconsin. The district court's decision is so clearly erroneous that the Supreme Court granted Defendants' stay application while the case was still pending below, *see* Dkt. 29,[1] a rare, "extraordinary" remedy that is available only upon a showing that, among other things, there is a "fair prospect that a majority of the Court w[ould] vote to reverse" the district court's order, *Hollingsworth v. Perry*, 558 U.S. 183, 190, 197 (2010) (per curiam).

Nothing in Plaintiff's Response Brief suggests that this Court should take a more favorable view of the district court's ruling than did the Supreme Court. With regard to standing, Plaintiff offers no persuasive answer to the uniform caselaw from the Supreme Court, this Court, and courts of appeals around the country holding that a plaintiff who moves out of a State has no standing to seek an injunction against that State's law. Indeed, Plaintiff does not cite any case, from any court, holding that such a plaintiff has standing. And on the merits of the vagueness issue, Plaintiff fails to distinguish the Supreme Court's decision in *Pearson*, 309 U.S. 270, this Court's ruling in *Sheehan v. Scott*, 520 F.2d 825 (7th Cir. 1975), or the numerous statutes in

[1] The Required Short Appendix is cited as RSA __, the Separate Appendix as SA __, the District Court Record as R. __, this Court's docket as Dkt. __, Defendants' Opening Brief as Opening Br. __, and Plaintiff's Response Brief as Resp. Br. __.

the substance-abuse context—from the federal Controlled Substances Act to the model Uniform Alcoholism and Intoxication Treatment Act—that all use qualitative terms identical to those that the district court found unconstitutionally vague. Plaintiff does not even seriously disagree that the terms that Act 292 uses are the best ones the Legislature could have selected to achieve the State's legitimate goal of separating severe substance abuse by pregnant mothers that poses a substantial risk of serious harm to unborn children from moderate, less harmful use.[2]

The district court's decision should thus be reversed. But to the extent this Court finds that Plaintiff has standing and could prevail on her vagueness challenge, certification to the Wisconsin Supreme Court could be appropriate.

ARGUMENT

I. Plaintiff Fails To Cite Any Case Holding That A Plaintiff Who Has Moved Out Of A State Retains Standing To Challenge That State's Laws

This case is moot because Plaintiff left Wisconsin and thus lacks standing to seek injunctive relief against any of Wisconsin's laws, including Act 292. Opening Br. 23–29. This follows from precedent of the Supreme Court, this Court, and courts of appeals around the country, which have all consistently held that federal courts lack Article III jurisdiction to adjudicate challenges to laws brought by those that

[2] Plaintiff's brief gratuitously denigrates the judgment of the people of Wisconsin that "unborn child[ren]," Wis. Stat. § 48.01(1), are worthy of protection from serious harm for their own sake, even suggesting that refusal to use Act 292's term "unborn child" in a legal brief is mandated by Supreme Court "directive," Resp. Br. 7 n.4. The Supreme Court has taken a much more respectful approach. *See Gonzales v. Carhart*, 550 U.S. 124, 160 (2007) ("the fast-developing brain of her unborn child, a child assuming the human form").

have left the relevant jurisdiction. *See Camreta v. Greene*, 563 U.S. 692, 709–11 (2011); *Ortiz v. Downey*, 561 F.3d 664, 668 (7th Cir. 2009); *Cooley v. Granholm*, 291 F.3d 880, 881–83 (6th Cir. 2002); *Lucero v. Trosch*, 121 F.3d 591, 596 (11th Cir. 1997). After all, a person who leaves a State becomes a "concerned bystander[ ]," who would be using the case only "as a vehicle for the vindication of value interests." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013) (citations omitted).

In her Response Brief, Plaintiff does not cite any case, from any court, holding (or even suggesting) that a plaintiff who has moved out of a State has standing to challenge that State's laws in federal court. Instead, Plaintiff argues that: (A) she has standing to challenge Act 292 notwithstanding her move, and (B) even if she lacks standing, this should be excused under the "capable of repetition, yet evading review" exception. Plaintiff is wrong as to both arguments, and her lawsuit must be dismissed.

A. *Lack of standing*. Plaintiff's argument that she has standing to challenge Act 292 even though she moved to another State, Resp. Br. 30–33, is legally unsupportable. Plaintiff is suffering no "concrete, particularized, and actual or imminent" injury resulting from Act 292 today, *Davis v. FEC*, 554 U.S. 724, 733 (2008), because she does not live in Wisconsin and Wisconsin's laws have "no extraterritorial effect," *Wisconsin v. Mueller*, 171 N.W.2d 414, 416 (Wis. 1969). As a resident of another State, Plaintiff stands in the same relation to Wisconsin's laws as the student in *Camreta* did to Oregon's rules after moving to Florida. 563 U.S. at 709–11.

Plaintiff makes several misleading factual assertions in support of her standing argument. Plaintiff first claims that she "visits Wisconsin periodically . . . and she has contemplated a move back to the state." Resp. Br. 30–31. But the only record evidence she cites to support this assertion are her answers to Defendants' question at her April 4, 2017, deposition, where Plaintiff *conceded* that she has visited her family in Wisconsin only once since she left years ago,[3] and that she has no plans to move back. *See* Resp. Br. 31 (citing R. 237:174:19–25; 175:14–22).[4] Plaintiff also suggests that she "moved out of the state in part because of fear of harassment or future intervention by local officials related to the issues in this case." Resp. Br. 31. However, the portion of her deposition testimony that she cites to support this serious allegation says nothing about Act 292 and does not even remotely suggest that Act 292 played any part in her decision to permanently leave Wisconsin. Resp. Br. 31 (citing R. 237:174:19–25; 175:14-22).[5] Finally, Plaintiff speculates that, if she ever did return to Wisconsin, "her past history of drug use" could be used against her under

[3] *See* SA 35 (November 6, 2015, amended complaint, where Plaintiff first revealed that she had already moved out of Wisconsin).

[4] Plaintiff's citation here is to her own deposition testimony, which remains sealed below. In an email correspondence on August 1, 2017, Plaintiff's counsel consented to Defendants discussing these same pages in this brief (and, if necessary, at oral argument), so long as the discussion is limited to the standing issue.

[5] Plaintiff also cites the district court's June 6, 2016, decision denying Defendants' motion to dismiss as supporting the assertion that Act 292 influenced her decision to permanently leave Wisconsin. Resp. Br. 31. But the district court was only recounting what Plaintiff "allege[d]" in her amended complaint. RSA 69–70. The only *record* evidence that Plaintiff cites is her deposition testimony discussed above, which offers no support for the assertions in her amended complaint.

Act 292. Resp. Br. 31–32. Act 292 requires a *current* risk to the unborn child, Wis. Stat. § 48.133, and the binding standards from the Wisconsin Department of Children and Families ("CPS Standards") mandate that Act 292 applies only to women "*currently* severely abusing alcohol, controlled substances, or controlled substance analogs." SA 50 (emphasis added).[6]

B. *"Capable of repetition, yet evading review" exception*. Plaintiff's argument under the evading-review exception is similarly flawed. She points to certain abortion- and election-law cases where the Supreme Court and this Court have applied a relaxed version of this exception's "same party" requirement. Resp. Br. 26; *see also* Opening Br. 27 (discussing the same abortion and election cases).[7] But none of the cases that Plaintiff cites involved an *independent* basis for mootness apart from the short duration of a pregnancy or an election, such as the plaintiff's leaving the jurisdiction with no probability of return. *See* Opening Br. 28–29.

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[6] Plaintiff's situation—living in another State with no intent to return to Wisconsin—bears no similarity to *Killian v. Concert Health Plan*, 742 F.3d 651 (7th Cir. 2013), Resp. Br. 31, in which there were unquestionably "direct financial interests at stake" in the lawsuit at issue, 742 F.3d at 662.

[7] *Jones v. Illinois Department of Rehabilitation Services*, 689 F.2d 724 (7th Cir. 1982), Resp. 28–29, does not show that this doctrine extends to student-graduation cases. Even before *Camreta*, this Court explained that *Jones* applied where "the suit was over something that had happened at the end of one school year but could happen again at the end of the next year and the plaintiff would still be in school then." *Brandt v. Bd. of Educ.*, 480 F.3d 460, 464 (7th Cir. 2007). And this Court has held that the evading-review exception does not apply in a case where the plaintiff-student graduates and a younger student could challenge the policy. *See Stotts v. Cmty. Unit Sch. Dist. No. 1*, 230 F.3d 989, 991 (7th Cir. 2000). Here, a woman still living in Wisconsin could challenge Act 292 without facing the difficulties that have deprived Plaintiff of standing.

Trying to escape this insuperable difficulty, Plaintiff asserts that the pregnancy and election cases *categorically* excuse mootness based upon the "nature of the claim, not the characteristics of the specific plaintiff." Resp. Br. 29. Plaintiff's argument thus boils down to the assertion that when the "nature of the claim" is pregnancy- or election- related, mootness is *always* excused as a matter of law, even when there is an entirely independent reason for mootness. Plaintiff cites no caselaw to support this radical thesis, which would create an unnecessary loophole in Article III of the Constitution. Courts have relaxed the evading-review exception's same-party requirement "only for classes of cases that, absent an exception, would *always* evade judicial review," *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 836 (9th Cir. 2014) (citation omitted), because, absent that rare accommodation, "the issue will recur between *the defendant and the other members of the public at large* without ever" being fully litigated, *see Honig v. Doe*, 484 U.S. 305, 335–36 (1988) (Scalia, J., dissenting). A holding that a plaintiff who has moved out of a State lacks standing to challenge that State's laws—be it in an election case, a pregnancy case, or any other controversy—would not mean that any law would "always" evade review.

Finally, Plaintiff asserts that the "confidential" nature of Act 292 proceedings should excuse mootness. Resp. Br. 7. Yet Plaintiff does not explain how the Act's provisions designed to protect women's privacy would undermine any woman's standing to challenge Act 292. A woman impacted by any of Act 292's provisions would, of course, have standing to challenge the relevant provisions at that time (including by

seeking injunctive relief, if justified). And if Act 292 no longer applied to this Wisconsin-based woman thereafter because she gave birth, "she would be free to argue that the caselaw dispensing with the same-party requirement for abortion and election law cases should be extended to Act 292 cases." Opening Br. 28–29. The *only* impact resulting from a mootness holding here would be to confirm the long-standing, uniform rule that those individuals who leave a State lose standing to seek to enjoin that State's laws—lawsuits that could benefit only those still living in the State.

II. Plaintiffs' Vagueness Theory Is Foreclosed By Binding Caselaw

In their Opening Brief, Defendants demonstrated that the district court's holding that Act 292 is facially unconstitutionally vague is deficient in numerous respects. Opening Br. 29–48. The terms that Act 292 uses—such as "habitually lacks self-control" and "substantial risk," Wis. Stat. § 48.133—permissibly call for "the application of a qualitative standard . . . to real-world conduct." *Johnson v. United States*, 135 S. Ct. 2551, 2561 (2015) (explicitly identifying "substantial risk" as an example). That is why the Supreme Court in *Pearson*, this Court in *Sheehan*, and the Ninth Circuit recently sitting *en banc* in *Ledezma-Cosino v. Sessions*, 857 F.3d 1042, 1047 (9th Cir. 2017) (en banc), have upheld materially indistinguishable qualitative terms against vagueness challenges. And not only are Act 292's terms constitutionally permissible, they are the *best* terms that a legislature can select in the difficult endeavor of identifying particularly serious, harmful substance addiction. *See United States v. Petrillo*, 332 U.S. 1, 5–8 (1947). This explains why these very terms make up the core definition of "addict" in the federal Controlled Substances Act and guide the reach of

the model Uniform Alcoholism and Intoxication Treatment Act. Opening Br. 35–36. Act 292 also contains numerous procedural protections, which further support the conclusion that the Act is not vague. Opening Br. 31–32, 37; *see Schall v. Martin*, 467 U.S. 253, 277–80 (1984). At a minimum, the district court's facial invalidation of Act 292 was unjustified. Opening Br. 38–39.

In her Response Brief, Plaintiff fails to distinguish binding decisions such as *Pearson* and *Sheehan* and merely offers a series of unpersuasive or irrelevant points.

First, Plaintiff argues that because Act 292 can implicate "fundamental liberty interest[s]," this Court should view its commonly used terms with skepticism. Resp. Br. 34–35. While most of Act 292's reach involves the provision of services on a voluntary basis, Opening Br. 38, to the extent that Plaintiff's facial challenge is narrowed to only Act 292's involuntary applications, women's liberty interests would of course be affected. Those liberty interests would not, however, be any more "fundamental" than those at issue in *Pearson*, which involved *involuntary* civil confinement, *see Kansas v. Hendricks*, 521 U.S. 346, 356–60 (1997), or those at stake in the application of 18 U.S.C. § 922(g)(3), which imposes *criminal* consequences on an "addict[ ]" under the Controlled Substances Act who possesses a firearm. Act 292's provisions are constitutionally adequate for the same reason those statutes are not vague.

Second, Plaintiff asserts that Act 292's use prong—"habitually lack[ ] self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree," Wis. Stat. § 48.133—is unlawful because it uses "indeterminate terms of degree covering a wide range of actions." Resp. Br. 37. But

the statutes in *Pearson* and *Sheehan*—as well as the federal Controlled Substances Act, federal immigration law, and the many state statutes based on the Uniform Alcoholism and Intoxication Treatment Act—use precisely the *same* "terms of degree" to forward the same type of inquiry. Opening Br. 34–36. Indeed, in the substance-abuse area, these same "terms of degree," applied on a case-by-case basis, are the best way to separate severely addicted substance abusers from only moderate users. Opening Br. 34–36.

Plaintiff fails to distinguish the controlling caselaw upholding statutes using the same "terms of degree" that Act 292 employs, Opening Br. 33–34, while citing *no* cases invalidating such terms. In *Pearson*, the Supreme Court held that the terms "*habitual* course of misconduct" and "utter lack of *power to control*," adopted in a narrowing construction of a state statute by the Minnesota Supreme Court, were not unconstitutionally vague. 309 U.S. at 273–74 (emphases added). Plaintiff's only response to this unanimous United States Supreme Court decision is to assert that the Minnesota law in *Pearson* "placed *all individuals* on notice that a repeated pattern of criminal sexual assault could subject them to the law," whereas Act 292 applies only to pregnant women. Resp. 41 (emphasis added). Missing from Plaintiff's response is any explanation of why this factual difference makes Act 292's phrase "habitually lacks self-control" any more unconstitutionally vague than *Pearson*'s phrases of "habitual course of misconduct" and "utter lack of power to control." Similarly inadequate is Plaintiff's response to this Court's binding decision in *Sheehan*, which held that "habitual truancy" is not unconstitutionally vague. 520 F.2d at 829–30. Plaintiff's

only answer to *Sheehan* is that "truancy" "is an easily identifiable and avoidable condition." Resp. Br. 41. But "the use of alcohol beverages [or] controlled substances," Wis. Stat. § 48.133, is similarly "easily identifiable"; the critical point is that "habitual" modifies both truancy (*Sheehan*) and use of controlled substances (Act 292). As *Sheehan* explained, "courts have construed [the word 'habitual'], without apparent difficulty, as sufficiently definite to pass constitutional muster." 520 F.2d at 829.[8]

Plaintiff's assertion that Defendants have altered their interpretation of "habitual lack of self control" before this Court, Resp. Br. 39–40, is incorrect. Defendants' position before this Court is fully consistent with the statutory text and their arguments below: Act 292's "use" prong "call[s] for evidence of drug use," Opening Br. 34, and that use must *also* be "habitual" *and* "severe," *and* must demonstrate a "lack of self control," Wis. Stat. § 48.133; *accord* R. 189:2–8 (Defendants' brief at the summary-judgment stage making the same argument). This is the same lawful approach that the federal Controlled Substances Act, federal immigration law, and the state statutes based upon the Uniform Alcoholism and Intoxication Treatment Act employ to identify "severely addicted" individuals. *See* Opening Br. 3, 35–36.[9]

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[8] Plaintiff responds to the Ninth Circuit's recent *en banc* decision in *Ledezma-Cosino*, by noting that the case involved an as-applied vagueness challenge to conduct that was arguably covered. Resp. Br. 42 n.25. Plaintiff's premise appears to be that a facial challenge to the same statute might well prevail. But this gets matters backwards, as a facial challenge requires the plaintiff to make a *more* demanding showing than an as-applied challenge. Opening Br. 38–39. In any event, the Ninth Circuit explained that "the term 'habitual drunkard' readily lends itself to an objective factual inquiry," 857 F.3d at 1047, reasoning which directly applies to Act 292's use of that same term for the same purpose.

[9] Plaintiff's suggestion that Act 292 is unnecessary because state law may be able to help women with severe addiction under other provisions, Resp. Br. 40, misunderstands the

Third, Plaintiff argues that Act 292's effects prong—"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—is vague because it does not explain "how to assess risk in the context of an ongoing pregnancy." Resp. Br. 43. In making this argument, Plaintiff relies primarily on her characterization of "the state of medical knowledge" as not sufficiently certain on the subject of prenatal fetal impact. Resp. Br. 37. But the Supreme Court's vagueness doctrine does not require scientific certainty, or anything approximating such certitude, when dealing with risk-based standards in statutes. Instead, "laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct," are, "[a]s a general matter," not unconstitutionally vague. *Johnson*, 135 S. Ct. at 2556. There is no scientific certainty in *Pearson*'s standard regarding risk of "like[lihood]" of "inflict[ing] injury" on others, 309 U.S. at 273–74, the federal Controlled Substance Act's effects prong of "endanger[ing] the public morals, health, safety, or welfare," 21 U.S.C. § 802(1), or the Uniform Alcoholism and Intoxication Treatment Act's "likely to inflict physical harm on another" requirement, *see* http://goo.gl/cQV7ZS, at § 14(a); *see* Opening Br. 44.

Indeed, each of the probabilistic judgments that those other statutes require involves *less* scientific certainty than does Act 292's case-specific judgments of substantial risk to the unborn child, after taking into account "credible" testimony from

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Act's design. The Legislature created Act 292 to address one subset of severely addicted women, with provisions tailored for those women's particular needs. *See* Opening Br. 8–14.

"medical or [alcohol and other drug abuse] professionals" with regard to the specific mother and unborn child involved, SA 51, 60.[10] This is especially the case given the physical link between a mother and her unborn child at issue in Act 292 cases, a scientifically crucial factor not present in the above-described risk-based statutes. *See* Opening Br. 5–6 (cataloguing extensive record evidence of the substantial risks of prenatal substance abuse for heroin, cocaine, methamphetamine, marijuana, and alcohol). As medical professionals explained in the record below, "a pregnant woman who habitually uses opiates, methamphetamine, and/or marijuana to a severe degree . . . places her child at risk of harm . . . with the *magnitude of the effects . . . dependent upon the degree of usage, dosage, and gestational timing at usage*." SA 117 (emphasis added). Act 292 permits intervention only upon a finding that, *inter alia*, the "magnitude of the effect[ ]" is such that there is a "substantial risk" to the unborn child.

Notably, Plaintiff does not explain what terms the Legislature could have selected to "carry out . . . [its] purpose" as "effectively," *Petrillo*, 332 U.S. at 6–7, as Act 292's qualitative terms like "substantial risk," Opening Br. 43. Plaintiff does not, for example, defend the district court's speculation that the Legislature should have set forth the precise "quantum" of each substance that would trigger the statute's reach.

[10] In a footnote, Plaintiff objects that such expert evidence is not *always* required at the preliminary, screen-in stage, Resp. Br. 45 n.26, because the CPS Standards provide only that such expert evidence is "generally best" at this stage, SA 51. While Act 292 does not require expert testimony at all stages of the process, the binding CPS Standards' strong preference for such evidence even at the preliminary stage is consistent with the fact that, if the case does advance to an adversarial posture (where Plaintiff is statutorily entitled to counsel, to a jury trial, to present and subpoena witnesses, and to confront and cross-examine witnesses, among many other rights, Opening Br. 11–12), such expert testimony would be by far the best evidence for adjudicating whether Act 292's jurisdictional standard has been met.

RSA 26; *see* Opening Br. 46. That Plaintiff cannot dispute that the Legislature selected the qualitative terms that best achieve the State's legitimate objectives strongly supports Act 292's constitutionality. *See Petrillo*, 332 U.S. at 5–8.

Fourth, Plaintiff raises various objections to Act 292's procedures. Plaintiff complains, for example, that Act 292 "delegates enforcement authority to a broad range of individuals." Resp. Br. 46. But Act 292's multi-layered process provides women additional procedural safeguards, further supporting the Act's constitutionality. *See Schall*, 467 U.S. at 277–80. Before any treatment order issues, all of the following typically occurs: (1) a county access worker screens-in the case, Opening Br. 9; SA 50–51, 58, 60, 137; (2) another county worker investigates and decides to pursue a formal petition, Opening Br. 9–10; SA 137–38; Wis. Stat. § 48.981(3)(c); (3) a medical or drug abuse professional testifies to a substantial risk of harm to the unborn child, Opening Br. 10; SA 51, 60; (4) a district attorney (or other authorized official) agrees to file a formal UCHIPS petition, Opening Br. 10–11; Wis. Stat. §§ 48.24(3); 48.25(2); (5) a Wisconsin court agrees that the statutory standard is met and that the treatment order is the "least restrictive" option sufficient to protect the unborn child, Opening Br. 12; Wis. Stat. §§ 48.347; 48.355; and (6) an approved treatment facility conducts an assessment for alcohol or other drug abuse, Opening Br. 12; Wis. Stat. § 48.31(4). And while Plaintiff claims that a "[county] intake worker may unilaterally decide to keep [a] pregnant woman detained," Resp. Br. 11, Act 292 allows that worker *only* to place a least-restrictive-means hold for, at most, "48 hours," Wis. Stat. § 48.213(1)(a), and only until a court can decide whether to continue custody, *id.*

Plaintiff's remaining procedural objections fare no better. Plaintiff asserts that "[t]he Act does not require . . . the court to consider the interests of the pregnant woman." Resp. Br. 11. But the Act requires courts to employ only "those means necessary to . . . protect the . . . unborn child which are the least restrictive of the rights . . . of the . . . mother." Wis. Stat. § 48.355. Plaintiff and one of its *amici* also argue that Act 292's right-to-appointed-counsel provisions are unduly narrow. Resp. Br. 12; Dkt. 49. However, the Act provides that the mother has an unfettered "right to legal counsel regardless of ability to pay," Wis. Stat. § 48.27(4)(b)(2), and requires that the court provide "written" notice to the woman of that statutory right, *see id.* § 48.27(3)(c). The provision that Plaintiff and her *amici* focus on does not confine this right to *appointed* counsel in any way, but merely provides that a woman cannot "be placed outside of her home unless [she] is [actually] represented by counsel," or "knowingly and voluntarily" "waive[s]" counsel, *id.* § 48.23(2m)(b).

Fifth, Plaintiff argues that facial invalidation of Act 292 is appropriate even as to substances other than alcohol, arguing that even though *possession* of heroin, methamphetamine, or cocaine is illegal, pregnant women do not have notice that they cannot *ingest* those same substances. Resp. Br. 47–48. But someone who ingests an illegal substance generally possesses that same substance the moment prior. Accordingly, since heroin, methamphetamine, and cocaine are illegal substances that people cannot lawfully possess, a civil regime for a subset of people who take those substances in large quantities does not "operate as [a] trap[ ] for the unwary . . . induc[ing] careful people to . . . forgo[ ] *lawful* activity because they can't be sure what

. . . [is] lawful and what [is] unlawful." *Parvati Corp. v. City of Oak Forest*, 709 F.3d 678, 684–85 (7th Cir. 2013) (emphasis added); *accord Sheehan*, 520 F.2d at 830.

Finally, Plaintiff repeatedly relies on her own experience under the Act. *See, e.g.*, Resp. Br. 16, 17, 24, 37, 40–41. To extent that one person's specific experiences have any meaningful relevance to the broader showing necessary for a successful *facial* challenge, *but see* Opening Br. 32, Plaintiff does not fairly represent the record as to her situation.[11] Plaintiff repeatedly asserts that she "had stopped all drug use upon confirmation of pregnancy." Resp. Br. 24; *see also* Resp. Br. 16, 37, 40–41. But the record shows that she tested positive for methamphetamine, amphetamines, and THC during her pregnancy, R. 169-4:6, 4:18, and admitted to medical professionals that she regularly used methamphetamine *after* she knew she was pregnant (and, indeed, felt "guilty for taking illicit meds during pregnancy"). R. 179-19:3; *see also* R. 1-2:14–15. Plaintiff also claims that Taylor County conducted "no independent investigation," Resp. Br. 17, but the County took all prudent steps to protect both Plaintiff and her unborn child. Taylor County "screened in" Plaintiff's case based on her "test[ing] positive for methamphetamines, amphetamines, and THC"; her use of marijuana "1–2 times per week"; her "us[ing] alcohol during her pregnancy . . . to the point of blacking out"; and a physician's opinion that her "behavior [was] putting the fetus in serious danger of harm." R. 169-4:6. Taylor County worker Julie Clarkson then immediately began investigating, including by attempting to contact Plaintiff

[11] Any material factual disputes must be resolved in Defendants' favor, as this case was decided at summary judgment against Defendants. *See Brown v. Milwaukee Bd. of Sch. Dirs.*, 855 F.3d 818, 820 (7th Cir. 2017).

multiple times. R. 159:27; R. 169-4:13. When Plaintiff finally agreed to speak to Clarkson, R. 169-4:11–12, Plaintiff denied having "any drug issues," R. 169-4:12, and when Clarkson raised Plaintiff's drug-test results, Plaintiff declared that she did not "want to work with Taylor County," R. 169-4:12.

The Wisconsin trial court, in turn, found probable cause that Plaintiff satisfied Act 292's statutory standards, including after hearing testimony from her doctor, and then merely ordered an assessment, with which Plaintiff refused to cooperate. *See* SA 26–28; R. 169-4:16–19; R. 1-8:23–37; R. 1-9. Once Plaintiff decided to no longer stand in contempt of court, her "treatment plan" was "attend[ing] all prenatal appointments" at the "medical provider of her choice" and periodically submitting to "random drug tests." SA 33, 108–10, 113.

III. In The Alternative, Certification To The Wisconsin Supreme Court May Be Appropriate

Defendants strongly believe that Act 292 is constitutional as written, a conclusion that would make certification unnecessary. In enacting Act 292, the Wisconsin Legislature already used the very terms that the Minnesota Supreme Court employed in its narrowing constructing leading to *Pearson*, and the Supreme Court of the United States thereafter unanimously held that this narrowing construction "destroy[ed]" any vagueness challenge. 309 U.S. at 274.

If, however, this Court disagrees with Defendants' primary position and concludes that Act 292 is unconstitutionally vague on some basis, then certification to the Wisconsin Supreme Court under Seventh Circuit Rule 52 might well be appropriate. Opening Br. 48. To take just three examples from Plaintiff's Response Brief,

Plaintiff asserts that Defendants misunderstand the meaning of the use prong, *see supra* p. 8, that Defendants are incorrect about the extent to which Act 292 relies upon testimony by medical experts, *see supra* p. 12 & n.10, and that Defendants overstate the generosity of Act 292's right-to-counsel provisions, *see supra* p. 14. If this Court believes that these (or any other) disputed understandings of Wisconsin law are outcome-determinative on the vagueness issue and could be amenable to a "narrowing construction," *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397–98 (1988), those disagreements might well be fit for certification to the Wisconsin Supreme Court. The Wisconsin Supreme Court could, for example, agree with Defendants' understanding of Act 292's use prong, right-to-counsel provisions, and centrality of expert testimony if any adversarial process takes place.

Plaintiff criticizes Defendants for not specifying previously which aspects of Act 292 are amenable to a "narrowing construction," and for not asking for certification below. Resp. Br. 48–50. But those objections are a function of the fact that Defendants believe that Act 292 is already narrowly confined—indeed, carefully tailored under the Supreme Court's decision in *Pearson*. If this Court disagrees, it has authority to order certification, especially since Seventh Circuit Rule 52(a) specifically authorizes this Court to issue certification orders *sua sponte*.

Plaintiff's argument that certification is inappropriate because she still has other challenges to Act 292 that the district court did not resolve below, Resp. Br. 49, misunderstands the purpose of the procedure. Certification forwards "cooperative judicial federalism," *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974), by giving a

State's highest court the opportunity to adopt a saving construction of a statute. If a saving construction could avoid any unconstitutional vagueness that this Court would otherwise find, such certification would advance "cooperative judicial federalism." *Id.* To the extent that Plaintiff's other objections remained in the case after a certification process completed, those issues could be adjudicated in the ordinary course of litigation (and, if Plaintiff prevailed on some other issue, might well lead to a narrower remedy than the district court's facial invalidation at issue in this appeal).

CONCLUSION

The judgment of the district court should be reversed.

Dated, August 3, 2017

Respectfully Submitted,

BRAD D. SCHIMEL
Wisconsin Attorney General

/s/ Misha Tseytlin
MISHA TSEYTLIN
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g), I certify the following:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and Circuit Rule 32(c) because this brief contains 5,211 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and Circuit Rule 32(b), and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using the 2013 version of Microsoft Word in 12-point Century Schoolbook font.

Dated: August 3, 2017

/s/ Misha Tseytlin

MISHA TSEYTLIN

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of August, 2017, I filed the foregoing brief 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: August 3, 2017

/s/ Misha Tseytlin

MISHA TSEYTLIN