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

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

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JURISDICTIONAL STATEMENT

As explained below, *infra* Part I, this lawsuit is moot because Tamara M. Loertscher ("Plaintiff") has left Wisconsin. *See United States v. Reyes-Sanchez*, 509 F.3d 837, 839 (7th Cir. 2007) ("[M]ootness [is] a jurisdictional question[.]").

Plaintiff claimed that the district court had jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343(a)(3) and (4), and 42 U.S.C. §§ 1983 and 1988, because the action alleged violations of the First, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution, as well as pursuant to 28 U.S.C. §§ 2201 and 2202 over the requests for declaratory relief. R. 66:23.

This Court has jurisdiction to decide the mootness issue, *see Delgado-Arteaga v. Sessions*, 856 F.3d 1109, 1114 (7th Cir. 2017), and would have jurisdiction over the merits if the case were not moot, pursuant to 28 U.S.C. § 1291. The district court held Act 292 unconstitutionally vague in an Opinion and Order entered on April 28, 2017. RSA 1–40.[1] The court entered judgment enjoining Act 292 statewide on May 3, 2017. RSA 41. Defendants[2] filed their Notice of Appeal that same day, on May 3, 2017, well within the 30-day deadline. Fed. R. App. P. 4(a)(1)(A).

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[1] The Required Short Appendix is cited as RSA __, the Separate Appendix as SA __, the District Court Record as R. __, and this Court's docket as Dkt. __.

[2] "Defendants," as used here, refers only to the Defendants-Appellants in this appeal: Eloise Anderson, Secretary of the Wisconsin Department of Children and Families, and Brad D. Schimel, Wisconsin Attorney General. *See infra* n.4.

STATEMENT OF THE ISSUES

1. Is Plaintiff's lawsuit challenging a Wisconsin law moot because she moved out of the State, with no expressed intention of moving back?

2. Is Act 292 unconstitutionally vague, even though it uses common terms, which the Supreme Court and this Court have held are not vague?

3. If this Court concludes that this case is not moot and Act 292 is unconstitutionally vague as written, should this Court certify the meaning of Act 292 to the Wisconsin Supreme Court, in order to permit that court to provide a narrowing construction?

INTRODUCTION

Twenty years ago, the Wisconsin Legislature enacted 1997 Wisconsin Act 292 ("Act 292") to address the crisis of prenatal substance abuse. This statute encourages women to seek voluntary treatment, while also including court-supervised, least-restrictive civil procedures for protecting unborn children in the rare cases where substance-addicted mothers decline voluntary help. The terms that the Legislature selected in crafting this careful regime—such as "habitually lacks self-control"—are precisely those that federal and state statutes regularly use when identifying severely addicted individuals, including in the federal Controlled Substances Act's core definition of an "addict." In the decision below, the district court invalidated Act 292 for using these same terms, declaring them to be unconstitutionally vague. The district court's unprecedented decision should be reversed.

As a threshold matter, this case is moot and therefore the federal courts lack subject-matter jurisdiction. Even before the district court entered its merits decision in this case, Plaintiff moved out of Wisconsin and has not alleged that she is likely to move back to the State at any point in the future. Under controlling caselaw, Plaintiff has no standing because she now lacks a "direct stake in the outcome of this case." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2662 (2013); *see*, *e.g.*, *Camreta v. Greene*, 563 U.S. 692, 709–11 (2011); *Ortiz v. Downey*, 561 F.3d 664, 668 (7th Cir. 2009).

Even if the federal courts had jurisdiction, Plaintiff's vagueness claim would lose on the merits. Act 292's terms—such as "habitually," "lack[ ] [of] self-control," and "substantial risk"—are not unconstitutionally vague under controlling caselaw.

Indeed, the Supreme Court in *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270 (1940), and this Court in *Sheehan v. Scott*, 520 F.2d 825 (7th Cir. 1975), already held that several of these very terms are not unconstitutionally vague, and the Supreme Court in *Johnson v. United States*, 135 S. Ct. 2551 (2015), specifically explained that "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, *id.* at 2561. In light of these precedents, it is unsurprising that federal and state laws around the country—from the federal Controlled Substances Act to federal immigration law to the model Uniform Alcoholism and Intoxication Treatment Act—all use the same qualitative terms as does Act 292 to identify serious, harmful substance abuse.

In all, the district court's decision should be vacated. But to the extent this Court disagrees with Defendants' arguments as to mootness and vagueness, it should certify the meaning of Act 292 to the Wisconsin Supreme Court so that court will have the option of addressing, through a narrowing construction, any constitutional infirmities that this Court identifies.

STATEMENT OF THE CASE

I. The Devastating Effects Of Substance Abuse On Unborn Children

The problem of prenatal substance exposure has reached an "epidemic crisis" in Wisconsin and nationwide. R. 137:8. In 2014, the Wisconsin Department of Health Services estimated that nearly 1,600 women tested positive for alcohol, opioid, heroin, or marijuana at the time of delivery. R. 172-1:24 (also available at

https://www.dhs.wisconsin.gov/publications/p01124.pdf). And these numbers are increasing, more than doubling since 2009. R. 172-1:24. The consequences of exposure to illicit drugs and alcohol in utero can be severe.

Heroin and other opioids / opiates. Heroin and other opiates "readily pass[ ] from the placenta to the fetus" and "accumulat[e]" there. SA 124. A commonly "documented" risk of prenatal opiate exposure is premature labor, which itself can lead to "death, brain bleeding, and developmental delay." SA 116–17. "[N]eonatal [A]bstinence [S]yndrome" (NAS), another well-known side effect of heroin exposure, causes affected babies to exhibit a "high pitched cry[ ]," "tremors," "[s]eizures," "vomiting," "diarrhea with skin breakdown . . . [that] may become infected," "excessive weight loss," "apnea" (suspension of breathing), and "hyperthermia." R. 170-5:13; SA 117, 124–25. The average hospital stay for babies born with NAS is "3 weeks," and they often "require narcotics for treatment." SA 125. Heroin-exposed babies are "three to fourfold" more likely to die from SIDS (Sudden Infant Death Syndrome), R. 170-3:14, and have "low[er] birth weights" and "decreased head circumference," SA 117. Longer term, exposed children "show increased behavioral problems, including cognitive impairment." SA 125.

Cocaine. Like heroin, cocaine "easily passes from mother to fetus." SA 122. Cocaine is "toxic" and can cause "serious alteration in essential brain neurotransmitters." SA 122. It can also cause "severe developmental delay," including to "brain function and brain structure," by "reduc[ing] blood flow" and "oxygen delivery" to the unborn child. SA 122. Cocaine exposure is associated with "significantly decreased [ ]

birth weight[s]" and "head circumferences." R. 170-6:5; SA 122–23. Longer-term studies have statistically correlated cocaine exposure with "slower [growth] rate[s]," R. 170-6:5, "behavior[al]" "problems," "diminished memory," and "visual-motor deficits," SA 122–23. A "growing body of research" also indicates that cocaine exposure affects "early language development, increasing the risk for language delays in early childhood." R. 170-6:7.

Methamphetamine. Methamphetamine, like heroin and cocaine, "has toxic effects" on the brain, by "block[ing] the reuptake of neurotransmitters," "such as [d]opamine." SA 124; R. 170-5:15. Exposure to methamphetamine in utero is associated with "preterm birth, low gestational weight, smaller head circumference, and intrauterine growth restriction[s]," R. 170-7:2, as well as "a high perinatal mortality rate" "and abnormal neurological signs, including drowsiness, poor feeding, and seizures," R. 170-5:15. Additionally, "prenatal methamphetamine exposure [is] related to changes in infant neurobehavior, fine motor deficits," and "delayed gross motor development over the first three years of life." SA 116. One study reported that exposed children exhibited "mood difficulties and acting out behaviors" "as early as age 3." SA 116, 124.

Marijuana. Marijuana's main psychoactive compound, THC, "readily crosses the placenta," "frequently alter[ing]" "[b]rain transmitter concentrations," and substantially lowering "[b]rain synthesis of protein, nucleic acid and lipid." SA 123. "Newer synthetic marijuana" is particularly dangerous—it can "bind as much as

1,000 times more powerfully to brain receptors." SA 123–24 (citations omitted). Marijuana can "remain in the mother for as long as 30 days," causing "prolonged fetal exposure." SA 123. Exposed infants have "decrease[d] [ ] birth weight[s]" and are more frequently "place[d] in the NICU." R. 154-7:7. Longer term, prenatal exposure has been associated with "stunted growth outcomes," SA 117, "academic underachievement," "memory impairment," and "learning difficulties," SA 123.

Alcohol. Alcohol is "one of the leading preventable causes of intellectual disabilities, birth defects, and other developmental disorders in newborns." SA 115. Alcohol-exposed infants "common[ly]" exhibit "irritability, inability to establish normal sleep and eating patterns, and altered patterns of alertness." SA 132. Many of alcohol's effects are "lifelong" due to the "injury [it causes] to the brain during its development." SA 131. These lifelong effects include, among other things, "learning deficits," "difficulty understanding rules and instructions," "problems with language comprehension . . . and social interaction," inability to "inhibit impulses," "hyperactivity," "aggressiveness," "deficits of executive function," "inability to understand and conform to social norms," and a "higher risk of developing dependence on alcohol and other drugs." SA 132; *see also* SA 122. Alcohol can also permanently "affect the development of other organs," causing "[h]eart defects, cleft palate, and [ ] other major and minor birth defects." SA 132. Adults who were exposed to alcohol in utero often face "chronic pain related to joint degeneration, recurrent infections, heart disease, increased risks for certain types of cancer and a range of other medical issues." SA 132.

II. Wisconsin Responds To Prenatal Substance Abuse By Enacting Act 292

A. States have adopted a variety of responses to this epidemic. For example, some States subject women to criminal prosecution for prenatal substance abuse. *See*, *e.g.*, *Ferguson v. City of Charleston*, 532 U.S. 67, 70 n.2 (2001) (citing *Whitner v. South Carolina*, 492 S.E.2d 777 (S.C. 1997), *cert. denied*, 523 U.S. 1145 (1998)); *Ex parte Ankrom*, 152 So. 3d 397, 411 (Ala. 2013). Minnesota, on the other hand, allows "local welfare agenc[ies]" to "conduct an appropriate assessment and offer services indicated under the circumstances" to pregnant women who "used a controlled substance," or "consumed alcohol[ ]" in a "habitual or excessive" way, during the pregnancy. Minn. Stat. § 626.5561(1)–(2). If the woman "refuses recommended voluntary services or fails recommended treatment," the local agencies can seek involuntary civil commitment. *Id.* § 626.5561(2); Minn. Stat. ch. 253B. South Dakota allows service providers to "refer[ ]" substance-abusing pregnant women to a "prevention or treatment program," S.D. Codified Laws § 34-23B-6, and allows for involuntary commitment if the woman is "abusing alcohol or drugs" and "habitually lacks self-control as to [their] use," S.D. Codified Laws § 34-20A-70.

B. After the Wisconsin Supreme Court held, as a matter of statutory construction, that Wisconsin's Children's Code did not protect unborn children, *Wis. ex rel. Angela M.W. v. Kruzicki*, 561 N.W.2d 729, 740 (Wis. 1997), the Wisconsin Legislature enacted Act 292. The Legislature designed Act 292 to "protect[ ]" "unborn children" from severe substance abuse by "encourag[ing] [addicted mothers]" "to seek treat-

ment . . . voluntarily," Wis. Stat. § 48.01(1)(a), (bm), while allowing for judicially supervised, least-restrictive-means civil provisions as a backstop, *id.* §§ 48.347; 48.355. Act 292 empowers Wisconsin counties to implement its provisions. Wis. Stat. § 48.981(3)(c).

Most critically for this appeal, Act 292 applies only in very serious cases: when a pregnant woman "habitually lacks 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 standards, SA 36–108 ("Child Protective Services" or "CPS" Standards), that the counties that implement Act 292 must follow, *see* SA 40; Wis. Stat. § 48.981(3)(c)(1).

Act 292's text and the binding CPS standards explain how this regime operates. A matter begins when a county CPS Agency receives a report, usually from a doctor or relative, that a pregnant woman is abusing drugs or alcohol. Wis. Stat. § 48.981(2)(d); SA 136–37. A CPS "[a]ccess worker" reviews the report to decide whether to "screen[ ] [it] in," depending on whether there is "reasonable suspicion" that the woman is pregnant, is "currently severely abusing alcohol, controlled substances, or controlled substance analogs," and there is "credible information that the abuse of the [ ] substance(s) could cause serious physical harm to the unborn." SA 50–51, 58, 60, 137. For cases that are "screened in," a separate CPS "[a]ssessment

[w]orker" begins gathering information as part of a "diligent investigation to determine" whether the jurisdictional threshold is met. SA 137–38; Wis. Stat. § 48.981(3)(c)(1)(a). The assessment worker will also contact the mother, and if the report appears to be accurate, "offer to provide appropriate services." Wis. Stat. § 48.981(3)(c)(3); SA 137–38. Pregnant women often choose to receive treatment voluntarily under Act 292. SA 143–44. When that happens, Act 292's process otherwise ends, except that the CPS agency continues to work with the mother to provide additional help and assistance. SA 144.

If a pregnant woman "refuses to accept [voluntary] services," the assessment worker must decide whether to pursue a formal "UCHIPS" petition (Unborn Child in Need of Protective Services). Wis. Stat. § 48.981(3)(c)(3); SA 51, 138–39. If there is sufficient evidence to meet the statutory criteria, including from "medical [or alcohol or other drug abuse] professional[s]," the county may refer the case to the "district attorney, corporation counsel, or other official" (hereafter collectively, "district attorney") authorized to file a petition. Wis. Stat. § 48.24(3); SA 139–40.

If the case proceeds, and the mother is being temporarily held (described further below, *infra* pp. 13–14), a court "intake worker"[3] also reviews the case to decide whether to dismiss it, resolve it informally, or recommend a formal UCHIPS petition. *See* Wis. Stat. §§ 48.067(6); 48.24(1), (4); 48.981(3)(b)(2m), (3)(c)(2m)(a). To make this

[3] The "intake worker" can be one of the county workers or a separate court employee. SA 53–54.

determination, the intake worker conducts an "intake inquiry," which includes "conferring with" and "[i]nterview[ing]" the mother, Wis. Stat. §§ 48.067(2); 48.243(1), informing her of the "nature and possible consequences of the proceedings," *id.* § 48.243(1)(b), and her "basic rights," *id.* § 48.243(3), and providing "counseling," *id.* § 48.067(5). The intake worker must close the case if "the available facts [do not] establish prima facie jurisdiction." *Id.* § 48.24(1), (4); *see* SA 60. If the intake worker concludes that jurisdiction exists, the worker can resolve the case informally through an agreement with the mother to participate in "counseling," an "alcohol [or] other drug abuse assessment," or an "outpatient treatment program." Wis. Stat. § 48.245(1)(b), (1)(c), (2)(a). Informal disposition "may not include any form of out-of-home placement." *Id.* § 48.245(2)(b). If a UCHIPS petition is necessary, the intake worker must refer the case to the district attorney. *Id.* § 48.24(3).

The district attorney must then make another, separate determination about the proper disposition: "fil[ing] the petition, clos[ing] the case, or refer[ing] the case back to intake" for "further investigation" or "informal disposition." *Id.* § 48.25(2).

The filing of a petition initiates a carefully crafted and judicially supervised process. This process involves a plea hearing, Wis. Stat. § 48.30, a fact-finding hearing before a judge or jury, *id.* §§ 48.30(7); 48.31, and a final dispositional hearing, *id.* §§ 48.31(7); 48.335. Throughout this process, the pregnant mother is entitled to a full menu of procedural protections. She has rights to "legal counsel regardless of ability to pay," *id.* §§ 48.27(4)(b)(2); 48.243(e); *see also id.* § 48.213(2)(e), to a jury trial, *id.* § 48.31(2), to present and subpoena witnesses, *id.* § 48.243(1)(f); *see also id.*

§ 48.213(2)(d), to confront and cross-examine witnesses, *id.* § 48.243(1)(d); *see also id.* § 48.213(2)(d), to have a substitute judge, *id.* § 48.29, and to exclude the public from all proceedings, *id.* § 48.299(1)(a). The court must inform her of her rights and "the nature, location, date, and time" of all proceedings. Wis. Stat. §§ 48.27(4)(b)(1); 48.243; *see also id.* § 48.213(2)(d). If she fails to appear at a hearing, the court must grant a continuance and serve notice personally or by certified mail. *Id.* § 48.273(ar). The mother has discovery rights, including to all police reports and records related to her and her unborn child, unless disclosure "would be harmful to the interests of . . . the unborn child." *Id.* § 48.293(1)–(2). At any time, the mother may end this process by reaching a voluntary agreement regarding her treatment. *Id.* § 48.32(1)(a).

If, after following the above-described procedures, the court finds the unborn child to be "in need of protection or services," it must order the "least restrictive" "care and treatment plan" sufficient to "protect the well-being of the child." Wis. Stat. §§ 48.347; 48.355. The options are limited to "counseling," "alcohol or drug treatment or education," "supervision," "placement" at the "home of an adult relative or friend" or "community-based residential facility," or, at most, "inpatient alcohol or drug treatment." *Id.* § 48.347. The court can order treatment only if "an assessment for alcohol and other drug abuse . . . has been conducted by an approved treatment facility." *Id.* § 48.31(4). If "the expectant mother objects to a particular physician, psychiatrist, licensed psychologist or other expert" performing the assessment, "the court shall appoint a different physician, psychiatrist, psychologist or other expert." *Id.* § 48.295(3). Finally, the court may only place a woman "outside [her] home" if she "refuse[s] to

accept any alcohol or drug abuse services offered to her or is not making . . . a good faith effort to participate." *Id.* § 48.347.

In situations involving immediate danger to the unborn child, Act 292 allows for temporary custody, the process for which occurs simultaneously with the formal UCHIPS process outlined above. "Custody" is confined to the following locations: "[t]he home of an adult relative or friend," Wis. Stat. § 48.207(1m)(a), a "licensed community-based residential facility," *id.* § 48.207(1m)(b), a "hospital" or "physician's office," *id.* § 48.207(1m)(c), or, in limited situations, at an "emergency treatment" facility, *id.* §§ 48.207(1m)(d), (e); 48.203(4), (5); 51.15(2); 51.45(11). If the initial report of a pregnant woman abusing drugs or alcohol suggests that the unborn child is "in immediate danger," and if there are "reasonable grounds" to believe that there is a "substantial risk [to] the physical health of the unborn child . . . unless the adult expectant mother is taken into custody," a law enforcement officer or CPS worker may "take the adult expectant mother into custody and deliver [her] to the intake worker." *Id.* §§ 48.981(3)(b)(2m); 48.193(1)(d)(2). To maintain custody, the intake worker must find: (1) "probable cause" that the jurisdictional threshold applies, (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." Wis. Stat. § 48.205(1m). Even if continued custody is authorized, the intake worker must "immediately attempt to notify an adult relative or friend," *id.* § 48.193(2), and "make every effort to release the adult expectant mother to an adult relative or friend," *id.* § 48.203(1). If

the pregnant mother is not released to a friend or relative, she is entitled to a hearing before a judge or court commissioner "within 48 hours" to decide whether continued custody is necessary. *Id.* § 48.213(1)(a). The same criteria apply for the court to continue custody, *id.* §§ 48.213(1)(a); 48.205(1m)–(2)—including the requirement that the mother may be held only if she "refuse[s]" the "abuse services offered to her"—and "custody" is still limited to the locations listed above, *id.* §§ 48.205(1m); 48.207(1m); 48.213(3). If the court maintains custody, the mother can demand that the plea and fact-finding hearings (on the formal UCHIPS petition) be conducted within 30 days. *Id.* § 48.305.

III. Factual And Procedural Background

A. A Mayo Clinic social worker reported to the Department of Health Services of Taylor County, Wisconsin, that Plaintiff had tested positive for methamphetamines, amphetamines, and THC at three months into her pregnancy. R. 169-4:6. Plaintiff had told her physicians that she was "using [methamphetamine] two to three times a week," using marijuana "throughout" her pregnancy, SA 15–16; 169-4:14, and had consumed alcohol "to the point of blacking out," R. 169-4:6. At least one physician offered voluntary treatment options, but Plaintiff refused. SA 19–20. The physician then reported the situation to a social worker, who then reported to Taylor County, that Plaintiff's "behavior [was] putting [her baby] in serious danger of harm." R. 169-4:6.

After a Taylor County access worker "screened in" the case, R. 169-4:5–8, a Taylor County assessment worker, Julie Clarkson, began investigating. She contacted Plaintiff to "get her perspective on things." R. 169-4:13. When Clarkson raised the positive drug screen, Plaintiff denied that she had "any drug issues," claiming that she "stopped using meth approximately one week ago," "ha[d] not used alcohol for one year," and "[could not] even remember the last time she used marijuana." R. 169-4:12. Clarkson noted that Plaintiff's drug test "indicate[d] she most likely used [methamphetamine] within one to two days" and marijuana "within the past 30 days." R. 169-4:12. Plaintiff "did not respond to this," but said simply that "she [did not] want to work with Taylor County." Clarkson emphasized to Plaintiff that the county "just want[ed] to make sure that she and [her] baby [were] safe." R. 169-4:12. She suggested a possible voluntary treatment option, but Plaintiff refused. R. 169-4:13. Given "how recently [m]eth was used," Taylor County concluded that treatment was needed, R. 169-4:11, decided to pursue a formal UCHIPS petition, and temporarily held Plaintiff at the Mayo Clinic to allow for a temporary custody hearing the following day, R. 159:7–8.

A Mayo Clinic physician testified at the temporary custody hearing that Plaintiff had admitted to "using [methamphetamine] two to three times a week," SA 15–16, and that her methamphetamine use could cause "cognitive" "complications in [her] child," SA 13–23. The doctor also testified that Plaintiff's methamphetamine use was "directly affect[ing] her ability to perhaps make good decisions, such as proper prenatal care and . . . adequate care for herself." SA 17–18. In particular, Plaintiff

had "not been taking her medications" for her "hypothyroidism," and, as a result, her numbers were "off the charts." SA 21. The doctor commented that she was "amaz[ed] [Plaintiff] made it this far without a miscarriage." SA 21. Finally, the doctor testified that she was "certain" that Plaintiff would not "avail herself" of voluntary, outpatient treatment options, given that she had refused the doctor's offers for treatment options. SA 19.

At the end of the hearing, the court found probable cause that the statutory standards had been met, SA 26, as required to maintain temporary custody while the UCHIPS petition was pending, *see* Wis. Stat. § 48.205(d). The court was particularly "impressed" with the doctor's testimony that Plaintiff's drug use, "couple[d] . . . with" her hypothyroidism, "magnifie[d] the effect on the child," such that the doctor "was surprised . . . that [Plaintiff] had not miscarri[ed] yet." SA 26–28. The court ordered Plaintiff to report to an alcohol and drug abuse treatment center for an assessment and possible treatment, depending on the results of the assessment. R. 1-3.

On August 19, 2014, Clarkson sent Plaintiff a letter requesting to "meet with [her] to discuss [her] opinions as to what [she] fe[lt] would be most workable for [her] to receive treatment." R. 169-4:16. The letter explained that Taylor County "pursue[d] court action because of [her] resistance to cooperate," but that the "status . . . could change based on [her] cooperation." R. 169-4:16. Taylor County viewed "her input [as] important" and "want[ed] [her] to be successful in . . . bringing a safe and healthy child into this world." R. 169-4:16. Clarkson further attempted to communicate with Plaintiff, but she "refused to speak with [Clarkson]." R. 169-4:17.

On September 4, at the plea hearing on Taylor County's UCHIPS petition, *see* R. 1-7:4, Plaintiff had yet to comply with the initial treatment order, so the court held her in contempt of court, R. 1-8:23–37; R. 1-9. It ordered her to serve 30 days in jail—*not through any provision of Act 292, but through the general contempt provisions*, *see* Wis. Stat. § 785.04—unless she complied with the order, R. 1-9. After the hearing, Clarkson met with Plaintiff, but Plaintiff "was defiant" and "stated that she would not go to [the treatment center]." R. 169-4:18. After Clarkson reminded her that if she continued to remain in contempt of the court's order, she would have to stay in jail, Plaintiff changed her mind and agreed to go into treatment. R. 169-4:18. Plaintiff then submitted to a preliminary urine analysis, which tested positive for "THC and Benzoids." R. 169-4:18. Plaintiff continued to deny that she had "used anything." R. 169-4:18. Later that evening, Plaintiff changed her mind again, choosing to stay in jail for contempt of court. R. 169-4:18–19. She eventually agreed to participate in a drug assessment, and when she did, she was released. SA 31–33; RSA 1. After the assessment, her "treatment plan" involved nothing more than "attend[ing] all prenatal appointments" at the "medical provider of her choice" and submitting to "random drug tests" one to three times per week. SA 33, 108, 113.

Plaintiff gave birth to a healthy boy on January 23, 2015. RSA 48. She has since moved out of Wisconsin and is no longer subject to Act 292. SA 35; RSA 69.

B. On December 15, 2014, Plaintiff sued multiple state and county officials, challenging Act 292 on a variety of constitutional grounds. R. 1. When Plaintiff filed an amended complaint on November 6, 2015, Defendants learned for the first time

that Plaintiff had moved out of Wisconsin. SA 35. Defendants argued that her move out of Wisconsin mooted her case, R. 69, but the district court allowed her lawsuit to proceed under the capable of repetition, yet evading review exception, RSA 55–60, 69–71. The court acknowledged that Plaintiff's "own re-injury [was] too speculative to overcome a mootness challenge," RSA 60, but applied a "relaxed inquiry" because the case "concern[ed] pregnancy," RSA 58–59. According to the court, the case was not moot because "the public at large has a reasonable expectation of being subjected to the challenged conduct." RSA 60, 69–71.

On April 28, 2017, the district court granted summary judgment to Plaintiff, concluding that Act 292 was void for vagueness and enjoined the law statewide. RSA 1–40; 41. The court applied a strict vagueness standard by finding the Act "nearly equivalent to [a] criminal" statute. RSA 20. The court then held that the Act "suffers from several critical ambiguities," RSA 24, focusing first on the words "severe" and "habitually," RSA 25–26. The court recognized that "these terms are intended to prevent enforcement . . . against minimal users," but 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." RSA 25–26.

The court then found vagueness in the phrase "lack of self-control" based on two hypotheticals. According to the court, this phrase "introduces the possibility that . . . [a woman's] history of substance abuse could be invoked to demonstrate the requisite lack of self-control, regardless of whether she actually used controlled substances while pregnant." RSA 26. The court also reasoned that it was unclear how

the phrase would apply to a woman who "consciously" or "defiant[ly]" "chooses to drink or use drugs during her pregnancy" based on the "belie[f] that alcohol—or some other drug—is [not] really dangerous to the unborn child." RSA 26–27.

The court held that the phrase "substantial risk" was "doubly indeterminate" because both "substantial" and "risk" are "matter[s] of degree." RSA 27–28. The court analogized to *Johnson*, 135 S. Ct. 2551, and suggested that the Act should have "quantif[ied] the risk," RSA 27–28. Relatedly, the court held that the phrase "seriously affected or endangered" was vague 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." RSA 28–29.

SUMMARY OF ARGUMENT

I. This case is moot because Plaintiff has moved out of Wisconsin and is thus unlikely to be subject to Act 292 again. The Supreme Court, this Court, and federal courts of appeals across the country have regularly held that a plaintiff lacks standing to ask a federal court to block a law that governs a jurisdiction where that plaintiff no longer resides. *See Camreta*, 563 U.S. at 710–11; *Ortiz*, 561 F.3d at 668; *Higgason v. Farley*, 83 F.3d 807, 811 (7th Cir. 1996); *Cooley v. Granholm*, 291 F.3d 880, 881–82 (6th Cir. 2002); *Lucero v. Trosch*, 121 F.3d 591, 596 (11th Cir. 1997). Here, Plaintiff has moved out of Wisconsin, meaning that this case is moot and the federal courts lack jurisdiction.

The district court erroneously concluded that the "capable of repetition, yet evading review" exception to mootness saved Plaintiff's case. This narrow exception

applies only when "there is a reasonable expectation that the *same complaining party* will be subject to the same action again," *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (citations omitted, emphasis added). Plaintiff makes no plausible argument that, having moved out of Wisconsin, she will be subject to Act 292 in the future. And the fact that the present dispute involves a pregnancy-related law does not dictate a different result—this case is moot not because of the short duration of pregnancy, but because Plaintiff has moved out of Wisconsin.

II. Under the Due Process Clause, laws cannot be so vague as to be "standardless." *United States v. Williams*, 553 U.S. 285, 304 (2008). To meet this threshold, laws do not need to "specif[y]" the precise "quantum" of prohibited activity, *Grayned v. City of Rockford*, 408 U.S. 104, 110–12 (1972); instead, legislatures are "general[ly]" free to use "qualitative standard[s] such as 'substantial risk,'" *Johnson*, 135 S. Ct. at 2561. Act 292 has two prongs: a use prong, which denotes severely addicted substance abusers, and an effect prong, which identifies serious risk to the unborn child. Neither prong is unconstitutionally vague.

Act 292's use prong—which applies only when a woman "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—is not unconstitutionally vague under controlling caselaw. The words "habitual," "lacks self-control," and "severe" are "words of common understanding." *Grayned*, 408 U.S. at 110–12. Both the Supreme Court and this Court have already held that these precise terms are *not* unconstitutionally vague. *See Pearson*, 309 U.S. at 273–74; *Sheehan*, 520 F.2d at 828–

30. Indeed, Act 292 employs the best terms to isolate very addicted substance abusers, *see United States v. Petrillo*, 332 U.S. 1, 5–8 (1947), as evidenced by the many federal and state laws that use nearly identical phrases, including the federal Controlled Substances Act, federal immigration law, and the model Uniform Alcoholism and Intoxication Treatment Act. Further, Act 292's robust procedural protections, *see Schall v. Martin*, 467 U.S. 253, 277–80 (1984), Act 292's noncriminal character, *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982), and the fact that much of the law's coverage applies only to already unlawful substance abuse, *Sheehan*, 520 F.2d at 830; *Parvati Corp. v. City of Oak Forest*, 709 F.3d 678, 684–85 (7th Cir. 2013), all refute any argument of the law's facial invalidity.

Act 292's effect prong—which applies when the mother's substance abuse creates "a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered," Wis. Stat. § 48.133—is similarly constitutional. The terms "substantial," "risk," and "serious," are "words of common understanding," *Grayned*, 408 U.S. at 110–12, which apply an approach similar to that used by numerous federal and state statutes. As the Supreme Court has recently made clear, "laws that [apply] . . . [a] 'substantial risk' [standard] to real-world conduct" are "general[ly]" constitutional. *Johnson*, 135 S. Ct. at 2561; *accord Pearson*, 309 U.S. at 273–74. Indeed, a qualitative standard like "substantial risk" is necessary in this particular context and therefore not unconstitutionally vague, *see Petrillo*, 332 U.S. at 5–8, because every human body and situation is different. By requiring testimony from "medical or [alcohol and other drug abuse] professionals" addressed to the

unique facts of each case, SA 51, 60, Act 292 permissibly allows for "flexibility and reasonable breadth," *Grayned*, 408 U.S. at 110, and accounts for "a variety of human conduct," *Colten v. Kentucky*, 407 U.S. 104, 110 (1972), while at the same time preventing arbitrary enforcement.

III. If this Court concludes that this case is not moot, and that Act 292 is vague in some respect, it should identify Act 292's problematic portions and then certify the meaning of Act 292 to the Wisconsin Supreme Court. In *Pearson*, the Supreme Court held that a civil confinement statute was not unconstitutionally vague after taking into account the Minnesota Supreme Court's narrowing construction. The interests of judicial economy and "cooperative judicial federalism," *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974), militate in favor of permitting the Wisconsin Supreme Court to have an opportunity to similarly interpret Act 292 in the first instance, if this Court concludes that the Act contains some constitutional infirmity.

STANDARD OF REVIEW

This Court reviews "de novo a district court's grant of summary judgment, construing all facts and drawing all reasonable inferences in favor of the non-moving party." *See Collins v. Al-Shami*, 851 F.3d 727, 730–31 (7th Cir. 2017). Most relevant here, this Court reviews jurisdictional and constitutional vagueness issues de novo. *See Musunuru v. Lynch*, 831 F.3d 880, 887 (7th Cir. 2016); *United States v. Khan*, 771 F.3d 367, 375 (7th Cir. 2014).

ARGUMENT

I. This Case Is Moot Because Plaintiff Has Moved Out Of Wisconsin

A. For a plaintiff to invoke the jurisdiction of the federal courts, she must have standing, *Davis v. FEC*, 554 U.S. 724, 732–33 (2008), including on appeal, *Hollingsworth*, 133 S. Ct. at 2661. Standing comprises three essential elements: "a claimant must present an injury that is [1] concrete, particularized, and actual or imminent; [2] fairly traceable to the defendant's challenged behavior; and [3] likely to be redressed by a favorable ruling." *Davis*, 554 U.S. at 733. If, at any stage of the litigation, any of these essential requirements is lost, the case becomes moot and "must be dismissed for lack of jurisdiction." *Fed'n of Adver. Indus. Representatives, Inc. v. City of Chicago*, 326 F.3d 924, 929 (7th Cir. 2003); *Alvarez v. Smith*, 558 U.S. 87, 92 (2009).

Most relevant here, a challenge to a state law in federal court seeking prospective relief becomes moot when the plaintiff moves out of the relevant jurisdiction and has not made a strong showing that she intends to move back.[4] For example, in *Camreta v. Greene*, 563 U.S. 692, the Supreme Court considered an Oregon student's claim that a school's in-school interview policy violated the Fourth Amendment. *Id.* at 699. By the time the Court reviewed the case, the student had "moved to Florida,"

[4] While moving from the State's jurisdiction will moot claims for prospective relief, it does not moot claims for compensatory damages or other retrospective relief. *See Parker v. Franklin Cnty. Cmty. Sch. Corp.,* 667 F.3d 910, 915 (7th Cir. 2012). Here, Plaintiff has only sought prospective relief against the State. *See* Amended Compl., R. 66:25. Although she pursued damages claims against Taylor County and various Taylor County officials, the district court dismissed these claims, RSA 2–3, and she has not appealed that dismissal.

"ha[d] no intention of relocating back to Oregon," and was close to graduation. *Id.* at 711 (citations omitted). Since the student could not "be affected by [the lower court's] ruling," the case was moot. *Id.*

Federal courts of appeals have reached the same conclusion in cases where the plaintiff moved out of the State. For example, in *Cooley v. Granholm*, 291 F.3d 880, the Sixth Circuit held that a doctor's challenge to Michigan's euthanasia ban was moot because he "moved to California" and thus did not "practice[ ] medicine in Michigan any longer." *Id.* at 882–83. Similarly, in *Lucero v. Trosch*, 121 F.3d 591, the Eleventh Circuit held that a doctor's move from Alabama "moot[ed]" "any claims for injunctive relief" he had against abortion protesters in that State. *Id.* at 596; *see also Ruiz v. City of Santa Maria*, 160 F.3d 543, 549 (9th Cir. 1998) ("This lawsuit would be moot if, for example, Plaintiffs had moved out of Santa Maria.").

The same principle applies when a plaintiff challenging regulations of a state institution leaves that institution. In *Ortiz v. Downey*, 561 F.3d 664, this Court considered a federal prisoner's claims against the policies of a state jail where he was temporarily held. *Id*. at 665, 668. Before this Court heard the appeal, the government transferred the prisoner to federal prison. *Id.* at 668. This Court held that, since "he [was] no longer under the jurisdiction and control of the [state] defendants," and "[t]here [was] no realistic possibility that [the prisoner] w[ould] again be incarcerated in the same state facility and therefore be subject to the actions of which he complain[ed]," the prisoner's "prayers for prospective relief [were] moot." *Id.* Similarly, in *Higgason v. Farley*, 83 F.3d 807, this Court held that a prisoner's declaratory-relief

claims became moot when he was transferred to another facility because he had not shown that it was "likely" that he would transfer back into the prison. *Id.* at 811.

The rationale for the rule that a plaintiff who leaves a jurisdiction lacks standing to prospectively challenge that jurisdiction's laws is grounded in the logic of the standing doctrine itself. A plaintiff who leaves a State no longer has the concrete, particularized injury sufficient to yield standing. Her dispute with her former State's laws is only a "generalized grievance." *Hollingsworth*, 133 S. Ct. at 2662. The plaintiff who leaves the State becomes a "concerned bystander[ ]" who could use the case only "as a vehicle for the vindication of value interests." *Id.* (citations omitted); *see* Pl. Resp. to Stay 11, Dkt. 17 ("[T]he Defendants have made it clear that they wish to continue enforcing the Act against pregnant women. This has serious consequences for Wisconsin women[.]").

B. Plaintiff's case here is moot because, before the district court entered its judgment awarding prospective relief, she moved out of Wisconsin and, as a result, is no longer subject to any consequences from the Act. SA 35; RSA 89; *see Camreta*, 563 U.S. at 710–11; *Ortiz*, 561 F.3d at 668; *Higgason*, 83 F.3d at 811. Since she no longer lives in Wisconsin, Plaintiff cannot be subject to Act 292. *See Wisconsin v. Mueller*, 171 N.W.2d 414, 416 (Wis. 1969) ("[L]aws of a state have no extraterritorial effect."). And Plaintiff has not claimed that she will move back to the State if she prevails in this case or otherwise; only that "[i]t is [ ] entirely *possible* that [she] could become pregnant again and return to Wisconsin." Pl. Resp. to Stay 11, Dkt. 17 (emphasis added). As such, Plaintiff no longer has any "direct stake in the outcome of th[is] case,"

Hollingsworth, 133 S. Ct. at 2662 (citations omitted), just like the plaintiffs in the Supreme Court's decision in *Camreta*, this Court's decision in *Ortiz*, and in the other court of appeals cases discussed above, *see supra* pp. 23–24.

C. The district court reached a contrary result by holding that the capable of repetition, yet evading review exception to mootness applied in this case. RSA 55–60, 69–71. This holding is incorrect as a matter of law.

This exception is "narrow," *Milwaukee Police Ass'n v. Bd. of Fire & Police Comm'rs*, 708 F.3d 921, 932 (7th Cir. 2013), and reserved for "exceptional situations," *Spencer*, 523 U.S. at 17 (citations omitted). It has two elements, the second of which is relevant here: "(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." *Id.* (citations omitted, emphasis added). This Court has held that a plaintiff who has left the relevant jurisdiction does not satisfy this exception unless it is "likely" that she will move back to the jurisdiction. *Higgason*, 83 F.3d at 811.

In the present case, Plaintiff cannot meet the second element of this exception because there is no "reasonable expectation that the *same complaining party* will be subject to" Act 292 again. *Spencer*, 523 U.S. at 17 (citations omitted, emphasis added). She has moved out of Wisconsin; therefore, she is no longer subject to Act 292. *See supra* p. 25. And she has not shown (or even alleged facts suggesting) that she is "likely" to move back to Wisconsin, *Higgason*, 83 F.3d at 811, let alone that she would do so while "habitually lack[ing] 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 [to] the physical health of [her] unborn child," Wis. Stat. § 48.133.

In nevertheless concluding that this exception applied to this case, the district court applied the exception's same-party requirement in the relaxed form that the Supreme Court has permitted in some abortion and elections cases. RSA 69–70, 58–60 (citing *Roe v. Wade*, 410 U.S. 113 (1973) and *Rosario v. Rockefeller*, 410 U.S. 752 (1973)). As this Court has explained, "while canonical statements of th[is] exception . . . require that the dispute giving rise to the case be capable of repetition *by the same plaintiff*," "the courts . . . do not interpret the requirement literally, at least in abortion and election cases." *Majors v. Abell*, 317 F.3d 719, 723 (7th Cir. 2003). "If a suit attacking an abortion statute has dragged on for several years after the plaintiff's pregnancy terminated, the court does not conduct a hearing on whether she may have fertility problems or may have decided that she doesn't want to become pregnant again." *Id.* In making these observations, this Court cited to Justice Scalia's dissenting opinion in *Honig v. Doe*, 484 U.S. 305 (1988), which explained that some of the Supreme Court's abortion and election cases have not applied the "same-party requirement" because, absent that approach, "the issue will recur between the defendant and the other members of the public at large *without ever reaching us*." *Id.* at 335–36 (Scalia, J., dissenting) (emphasis altered). Or, as the Ninth Circuit put it, the capable of repetition, yet evading review exception should be interpreted to avoid a

situation where a dispute, "absent an exception, would *always* evade judicial review." *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 836 (9th Cir. 2014).

The district court erred in lifting the same-complaining-party requirement in this case because the justifications for dispensing with that requirement in some abortion and election cases have no application to a case—like the present one—that is moot because the plaintiff has chosen to sever ties with the relevant jurisdiction. *See, e.g.*, *Stotts v. Cmty. Unit Sch. Dist. No. 1*, 230 F.3d 989, 991 (7th Cir. 2000) (holding that a case challenging a school regulation "will not necessarily evade review" because "[a] freshman" could challenge the regulation). This case well illustrates the point. If this Court holds that Plaintiff's lawsuit is moot because she has left Wisconsin, it is simply not the case that a dispute about Act 292's constitutionality "will recur between the defendant and the other members of the public at large without ever reaching" this Court, *Honig*, 484 U.S. at 335–36 (Scalia, J., dissenting), or "*always* evade judicial review," *Protectmarriage.com-Yes on 8*, 752 F.3d at 836. Nor will courts need to "conduct a hearing on whether [any plaintiff] may have fertility problems or may have decided that she doesn't want to become pregnant again." *Majors*, 317 F.3d at 723. Rather, the *only* upshot would be that Plaintiff, who no longer lives in Wisconsin, would not be able to challenge *any* of Wisconsin's laws, be they abortion laws, election laws, Act 292, or any others. *See Camreta*, 563 U.S. at 710–11; *Ortiz*, 561 F.3d at 668; *Higgason*, 83 F.3d at 811. If another plaintiff, who does live in Wisconsin, were to challenge Act 292 in a future case, 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.

II. Act 292 Is Not Unconstitutionally Vague

Act 292 applies when an expectant mother "habitually lacks 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 for that habitual lack of self-control." Wis. Stat. § 48.133. This standard "consists essentially of a two-part test"—a use prong and an effect prong. RSA 24.

The district court held that "[b]oth prongs of the Act's two-part test are fundamentally ambiguous," RSA 29, finding nearly every material term to be facially vague, including "severe," RSA 25, "habitual," RSA 25–26, "lack of self-control," RSA 26–27, "substantial risk," RSA 27–28, and "seriously affected or endangered," RSA 28–29. The court's holding contradicts binding caselaw from the Supreme Court and this Court affirming statutes that use nearly identical language, calls into question numerous garden-variety statutes that use similar language, including the federal Controlled Substances Act, and violates multiple principles of the vagueness doctrine.

A. Relevant Vagueness Principles

The Due Process Clauses of the Fifth and Fourteenth Amendments forbid laws so vague that they are "standardless." *See Williams*, 553 U.S. at 304. There are "tw[o]

concerns underlying [the] vagueness doctrine—providing notice and preventing arbitrary enforcement." *Beckles v. United States*, 137 S. Ct. 886, 894 (2017). To provide adequate notice, a law must inform "a person of ordinary intelligence . . . of what is prohibited." *Williams*, 553 U.S. at 304. The fear is that ambiguous laws will "operate as traps for the unwary and . . . induce careful people to steer far clear of the prohibitions, forgoing lawful activity because they can't be sure what . . . [is] lawful and what [is] unlawful." *Parvati*, 709 F.3d at 684–85. With respect to enforcement, a law must not be "so standardless that it authorizes or encourages seriously discriminatory enforcement." *Williams*, 553 U.S. at 304.

"[L]aws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct" are, "[a]s a general matter," not constitutionally suspect. *Johnson*, 135 S. Ct. at 2561. As long as "it is clear what the [law] as a whole prohibits," it does not need to "specif[y]" the precise "quantum" of prohibited activity. *Grayned*, 408 U.S. at 110, 112. So, for example, in *Pearson*, the Supreme Court upheld a Minnesota law after the Minnesota Supreme Court held that the law allowed civil commitment only where a person exhibited "a habitual course of misconduct in sexual matters," a "lack of power to control [ ] sexual impulses," and a "like[lihood]" of "inflict[ing] injury, loss, pain or other evil" on others. 309 U.S. at 273. Similarly, in *Grayned*, the Supreme Court found "no unconstitutional vagueness" in an ordinance prohibiting "the making of any noise or diversion which . . . tends to disturb" a nearby school, 408 U.S. at 108, 110 (citation omitted), because legislatures are "[c]ondemned to the use of words" and cannot be "expect[ed] [to provide] mathematical certainty,"

id. at 110. And in *Sheehan v. Scott*, this Court upheld a law that prohibited "habitual truan[cy]" because statutes "often use the word 'habitual' and the courts have construed it, without apparent difficulty, as sufficiently definite to pass constitutional muster." 520 F.2d at 829.

The tolerable degree of vagueness depends on what level of clarity is possible (or desirable) for the particular subject matter. *See Petrillo*, 332 U.S. at 5–8. In *Petrillo*, for example, the Supreme Court rejected a vagueness challenge to a statute criminalizing any attempt to compel a radio broadcaster to hire people it did not need. *See id*. at 3. Because there are "many factors . . . in determining how many employees are needed on a job," the Court could not imagine any "[c]learer and more precise language" that could "effectively [ ] carry out . . . the [Legislature's] purpose." *Id*. at 6–7. If the vagueness argument prevailed, the Court explained, "no statutory language could meet the problem Congress had in mind." *Id*. at 7. Similarly, in *Colten v. Kentucky*, the Supreme Court rejected a vagueness challenge to a law that prohibited "refusing to disperse [from an area] with the intent of causing inconvenience, annoyance, or alarm" because the vagueness doctrine does not "convert into a constitutional dilemma the practical difficulties in drawing [ ] statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning." 407 U.S. at 110.

The fact that the State has offered robust procedural protections cuts against any finding of impermissible vagueness. Thus, in *Schall v. Martin*, the Supreme Court explained, in response to a vagueness challenge, that there was "no reason" for

the statute to be more "specific," "[g]iven the right to a hearing, to counsel, and to a statement of reasons." 467 U.S. at 277–80. Similarly, this Court in *Bono v. Saxbe* rejected a vagueness challenge to a prison's standards for solitary confinement, primarily because "judicial review . . . [was] available," such that courts could "construe the [statutory] requirements . . . as narrowly as is necessary." 620 F.2d 609, 618 (7th Cir. 1980).

The "degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Hoffman Estates*, 455 U.S. at 498. The Supreme Court has "expressed a greater tolerance of" ambiguity for "enactments with civil rather than criminal penalties." *Id.* at 498–99. And an even "more stringent vagueness test" applies in the First Amendment context, *id.*, because of the threat of "chill[ing] protected speech," *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 254 (2012).

Finally, facial rulings are strongly "disfavored," *see Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008), especially for vagueness challenges outside the First Amendment context, *see*, *e.g.*, *United States v. Nagelvoort*, 856 F.3d 1117, 1130 (7th Cir. 2017); *Vrljicak v. Holder*, 700 F.3d 1060, 1062 (7th Cir. 2012); *United States v. Calimlim*, 538 F.3d 706, 710 (7th Cir. 2008). Facial invalidation "risk[s] [ ] premature interpretation of statutes on the basis of factually barebones records," "run[s] contrary to the fundamental principle of judicial restraint," and "threaten[s] to short circuit the democratic process by preventing laws

embodying the will of the people from being implemented in a manner consistent with the Constitution." *Wash. State Grange*, 552 U.S. at 450–51 (citations omitted).

B. Neither Of Act 292's Prongs Is Unconstitutionally Vague

1. Act 292's Use Prong Is Not Vague

To meet Act 292's use prong, 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." Wis. Stat. § 48.133. The district court held that the words "severe," "habitually," and "lack[ ] [of] self-control" are all unconstitutionally vague as "terms of degree" that do not specify the precise "quantum" of prohibited activity or exactly "where to draw the line." RSA 25–26. The district court's conclusion was wrong as a matter of law.

a. The terms that Act 292's use prong employs—"severe," "habitually," and "lacks self-control"—are precisely the types of qualitative terms that regularly survive vagueness analysis. As this Court has explained, "habitual" is not vague, but rather "means constant, customary, accustomed, usual, common, ordinary or done so often and repeatedly as to form a habit." *Sheehan*, 520 F.2d at 829 (citations omitted). "Lack[ ] [of] self-control," in turn, while "not [ ] demonstrable with mathematical precision," requires "proof of serious difficulty in controlling behavior." *Kansas v. Crane*, 534 U.S. 407, 413 (2002). And "severe" means "[v]ery dangerous or harmful; grave or grievous." *American Heritage Dictionary* 1605 (5th ed. 2011). These are "words of common understanding" that make "clear what [Act 292] as a whole prohibits." *Grayned*, 408 U.S. at 110–12 (citations omitted).

b. Controlling caselaw dictates that Act 292's use prong is not unconstitutionally vague. For example, in *Pearson*, 309 U.S. 274, the Supreme Court held that nearly identical phrases were so obviously *not* vague that they "destroy[ed]" any vagueness challenge. The Minnesota Supreme Court had interpreted that State's civil-confinement law to require three showings: (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 (emphases added). The three "conditions"—a "habitual course of misconduct," an "utter lack of power to control" the conduct, and a "likelihood of inflicting injury"—were not unconstitutionally vague, the Supreme Court held, because they "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*. at 274. Similarly, in *Sheehan*, this Court considered a vagueness challenge to a law that prohibited "habitual truancy." This Court held that the vagueness challenge "lack[ed] substance" because statutes "often use the word 'habitual' and the courts have construed it, without apparent difficulty, as sufficiently definite to pass constitutional muster." 520 F.2d at 829.

The exact same terms in Act 292—"habitual," "severe," and "lack[ ] [of] self-control," Wis. Stat. § 48.133—can likewise be construed "without [ ] difficulty." *Sheehan*, 520 F.2d at 829. These terms "call for evidence of [drug use]" and "probable consequences" to the unborn child. *Pearson*, 309 U.S. at 273. They make clear that Act 292 does not cover occasional or sporadic drug or alcohol use; it reaches only the

most serious cases. Even the district court acknowledged as much, without properly comprehending the legal consequences of its conclusion: "Presumably these terms are intended to prevent enforcement of the Act against minimal users of alcohol or controlled substances." RSA 25.

c. Act 292's use prong is also not vague because it employs the terms that *best* achieve the State's legitimate goals of separating sporadic users from those who are severely addicted, such that they cannot control their conduct. *See Petrillo*, 332 U.S. at 5–8. As the Supreme Court has explained, for example, in cases where lack of control is at issue, "'inability to control behavior' will not be demonstrable with mathematical precision." *Crane*, 534 U.S. at 413.

That the Wisconsin Legislature chose the best terms to achieve its goals is strongly supported by the common usage of those terms in laws dealing with addicts. The federal Controlled Substances Act uses nearly identical language to Act 292's disputed terms, defining an "addict" as "any individual who *habitually uses any narcotic drug* so as to endanger the public morals, health, safety, or welfare, or who is so far addicted to the use of narcotic drugs as to have *lost the power of self-control with reference to his addiction*." 21 U.S.C. § 802(1) (emphases added). Among other things, federal law makes it unlawful for "addict[s]" to possess firearms. *See* 18 U.S.C. § 922(g)(3). The Fifth Circuit had no trouble concluding that "[t]he term 'addict' is adequately defined in the Controlled Substances Act so as to give clear guidance as to the meaning of that term." *United States v. Herrera*, 289 F.3d 311, 322 (5th Cir. 2002), *rev'd on other grounds by* 313 F.3d 882 (en banc). Similarly, immigration law imposes

severe consequences for "habitual drunkard[s]." 8 U.S.C. § 1101(f)(1). The Ninth Circuit, sitting *en banc*, recently found that this statute was not unconstitutionally vague because "the term 'habitual drunkard' readily lends itself to an objective factual inquiry." *Ledezma-Cosino v. Sessions*, No. 12-73289, 2017 WL 2324717, at *1 n.1, *4 (9th Cir. May 30, 2017) (en banc).

State laws in the substance-abuse context similarly use the same terms as Act 292. The "Uniform Alcoholism and Intoxication Treatment Act," *available at* http://goo.gl/cQV7ZS, which allows for the involuntary commitment of alcoholics, *id.* § 14, defines an alcoholic as "a person who habitually lacks self-control as to the use of alcoholic beverages," *id.* § 2. Ten States, including Wisconsin, have enacted their own version of this model act. *See Legislative Fact Sheet—Alcoholism and Intoxication Treatment*, Uniform Law Commission, http://goo.gl/dBWu3u; *e.g.* Mont. Code § 53-24-302(1); R.I. Gen. Laws § 23-1.10-12(a); S.D. Codified Laws § 34-20A-70; *see also* V.I. Code 19, § 723(a). A number of other States also define "alcoholism" or addiction by reference to a "habitual[ ] lack[ ] [of] self-control." *See* S.D. Codified Laws § 34-20A-70; Ga. Code § 37-7-1; Ariz. Rev. Stat. § 36-2021(2); La. Stat. § 40:961(1); N.C. Gen. Stat. § 14-443(1); *see also* Minn. Stat. § 626.5561(1)(a). And multiple licensing-related statutes allow for discipline or licensing consequences for "severe dependency" on alcohol or drugs. *See* Alaska Stat. § 08.38.040(6)(B); Ind. Code § 36-12-11-23(4)(D); Miss. Code § 73-24-24(1)(g); N.C. Gen. Stat. § 90-154(b)(3); S.D. Codified Laws § 36-34-21(5).

d. The robust procedural protections described above, *supra* pp. 9–14, significantly mitigate any claimed ambiguity, *see Schall*, 467 U.S. at 277–280; *Bono*, 620 F.2d at 618. Under Act 292's procedures, multiple actors can filter out any unjustified cases, including the CPS "access worker," the CPS "assessment worker," the court "intake worker," the district attorney, and, most importantly, a Wisconsin court. *See* SA 50–51, 58, 60, 137–39; Wis. Stat. §§ 48.24(1), (4); 48.25; 48.347; 48.981(3)(c). Doctors too can often filter out unjustified uses of the Act, since reporting is voluntary, *see* Wis. Stat. § 48.981(2)(a), (d); 48.02(2), (19); SA 50, and counties need testimony from "medical or [alcohol and other drug abuse] professionals" to establish jurisdiction, SA 50–51, 58, 60, 137–40. In many cases, the "district attorney [ ] cho[oses] not to pursue [a] UCHIPS [petition]." SA 141. If the case proceeds to a formal UCHIPS petition, the mother is entitled to a variety of procedural protections, including the rights to counsel, a jury, notice, presenting and cross-examining witnesses, discovery, and substitution of a judge. *Supra* p. 11–12. And, at any point, the mother can avoid temporary custody and involuntary placement "outside of [her] home" simply by participating in the "alcohol and drug abuse services offered to her." *Id*. §§ 48.205(1m); 48.347.

e. The nature of Act 292's regime—voluntary treatment with a court-monitored, least-restrictive means civil backup—means that its terms are subject to less vagueness scrutiny than a criminal statute or a statute dealing with First Amendment-protected speech. *Hoffman Estates*, 455 U.S. at 498. Unlike many criminal laws, "[y]ears of prison [do not] hinge on the scope of [the law]." *See James v. United States*,

550 U.S. 192, 216 (2007) (Scalia, J., dissenting), *overruled by Johnson*, 135 S. Ct. 2551. Act 292 has no criminal component and prioritizes "encourag[ing]" women "to seek treatment . . . voluntarily," Wis. Stat. § 48.01(1)(a), (bm). At most and only in rare cases, Act 292 allows temporary custody and involuntary inpatient treatment, but only if the expectant mother "refuse[s] to accept any alcohol or drug abuse services offered to her," Wis. Stat. §§ 48.205(d); 48.347, and even then courts and intake workers must use the "least restrictive" option possible, *id.* §§ 48.347(6); 48.355. For example, Plaintiff in this case, after finally agreeing to an assessment, was required only to "attend all prenatal appointments" at the "medical provider of her choice" and submit to "random drug tests" one to three times per week. SA 33, 109–10, 113.

f. The district court's decision to facially invalidate Act 292 was particularly inappropriate. *See Nagelvoort*, 856 F.3d at 1130; *Vrljicak*, 700 F.3d at 1062; *Calimlim*, 538 F.3d at 710. To take just one example relating to the effect prong, *mere possession* of unlawful drugs is illegal to begin with, *see*, *e.g.*, Wis. Stat. § 961.41(3g)(g) (methamphetamine), so Act 292 will 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*, 709 F.3d at 684–85 (emphasis added). In *Sheehan*, for example, where the challenged law was "triggered by *habitual* truancy," this Court rejected the vagueness claim in part because a separate law prohibited even "[s]poradic or occasional absence." 520 F.2d at 830 (emphasis added). The plaintiff's argument in essence was that "he [was] uncertain how many times he

[could] violate the compulsory attendance [law] before effective action [under the habitual-truancy statute would] be initiated against him." *Id*. But "[t]he simple answer [was] to comply with the law which requires compulsory attendance at school by going to school." *Id*. Therefore, this Court "decline[d] to interfere with the reasonable judgmental discretion to be exercised by school authorities in defining exactly where the thin ice ends." *Id.* Similarly, Plaintiff cannot "complain[ ] that [s]he is uncertain how many times [s]he can violate [drug laws] before effective action [under the Act] will be initiated against h[er]." *Id.* "The simple answer is to comply with the [drug] law[s]." And while this particular argument does not apply to alcohol use covered by Act 292, that only shows that the district court was wrong to facially invalidate Act 292. *See Wash. State Grange*, 552 U.S. at 450.

g. The district court's rationales for reaching a contrary conclusion do not withstand scrutiny.

The court reasoned that Act 292 was vague because the Wisconsin Legislature could have chosen to prohibit "some quantum of . . . use of alcohol or controlled substances." RSA 26. But the Supreme Court has held that laws do not need to "specif[y]" the precise "quantum" of prohibited activity as long as "it is clear what the [law] as a whole prohibits." *Grayned*, 408 U.S. at 110, 112. Nor does it matter that the words "habitual" and "severe" are "terms of degree" that do not specify exactly "where to draw the line." RSA 25–26. As the Supreme Court has repeatedly noted, "the law is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree." *Nash v. United States*, 229 U.S. 373, 377 (1913); *see Johnson*, 135 S. Ct. at

2561 (quoting *Nash*); *United States v. Powell*, 423 U.S. 87, 93 (1975) (same). And the fact that two experts disagree about "whether [Plaintiff in this case] exhibited a habitual lack of self-control," RSA 30, is not particularly relevant because "the mere fact that [there are] close cases [does not] render[ ] a statute vague"—"[c]lose cases [exist] under virtually any statute," *Williams*, 553 U.S. at 305–06. Ultimately, the district court disregarded the Supreme Court's instruction that the Constitution permits laws "marked by 'flexibility and reasonable breadth, rather than meticulous specificity.'" *Grayned*, 408 U.S. at 110.

The district court's suggestion that Act 292 "could have . . . prohibit[ed] some quantum of . . . use," RSA 26, violates the principle that the tolerable degree of vagueness depends on what level of clarity is possible or desirable for the particular subject matter, *see*, *e.g.*, *Petrillo*, 332 U.S. at 5–8; *Colten*, 407 U.S. at 110. The Supreme Court has "recognize[d] that in cases where lack of control is at issue, 'inability to control behavior' will not be demonstrable with mathematical precision." *Crane*, 534 U.S. at 413. Because "the Constitution's safeguards of human liberty in the area of mental illness and the law are not always best enforced through precise bright-line rules," the States "retain considerable leeway in defining the mental abnormalities and personality disorders that make an individual eligible for commitment." *Id*.

And the district court's reliance on implausible hypotheticals does not support its decision. RSA 26–27. As a threshold matter, a law does not become vague simply because some "fertile legal 'imagination can conjure up hypothetical cases in which the meaning of (disputed) terms will be in nice question.'" *Grayned*, 408 U.S. at 110

n.15. In any event, neither hypothetical would justify facial invalidation of Act 292. First, the court suggested that a pregnant woman's "history of substance abuse could be invoked to demonstrate the requisite lack of self-control, regardless of whether she actually used controlled substances while pregnant." RSA 26. That is quite clearly not what the statute covers, since *past* drug use would not create a "substantial risk" to an unborn child, as the statute requires. Wis. Stat. § 48.133. As the binding CPS standards explain, an expectant mother must be "*currently* severely abusing alcohol, controlled substances, or controlled substance analogs." SA 50 (emphasis added). Second, the court hypothesized that Act 292 might not apply to a woman who "consciously" or "defiant[ly]" "chooses to drink or use drugs during her pregnancy" based on the "belie[f] that alcohol—or some other drug—is [not] really dangerous to the unborn child," because, "in such a case," "[t]here would be no demonstrated lack of self-control." RSA 26–27. It is hard to imagine that there is any significant number of women (if any) who are not addicted but "consciously" choose to engage in "severe" and "habitual" drug or alcohol use while pregnant. And, of course, these same exact hypotheticals would be just as problematic, to the exact same degree, for cases arising under the Controlled Substance Act and the numerous state statutes in the substance-abuse area, discussed above. *See supra* pp. 35–36.

2. Act 292's Effect Prong Is Not Vague

For Act 292's effect prong to apply, the expectant mother's substance abuse must create "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 district court held that the phrase "substantial risk" was "doubly indeterminate" because both "substantial" and "risk" are "matter[s] of degree," and suggested that Act 292 should have "quantif[ied] the risk." RSA 27–28 (emphasis removed). As with its holding on the use prong, the district court's vagueness holding with regard to the effect prong is legally indefensible.

a. The terms that Act 292's effect prong employs—"substantial risk" and "seriously affected or endangered," Wis. Stat. § 48.133—are permissible, non-vague, qualitative terms. "Substantial" means "[o]f ample or considerable amount [or] quantity." 17 *Oxford English Dictionary* 67 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989). "Risk" means "[h]azard, danger; exposure to . . . peril." 13 *Oxford English Dictionary* 987. And "serious" means "[w]eighty, important, grave," of "considerable" "quantity or degree." 15 *Oxford English Dictionary* 15. As in the use prong, these are "words of common understanding" that do not require further definition. *Grayned*, 408 U.S. at 112.

b. The conclusion that Act 292's effect prong is not unconstitutionally vague follows from the Supreme Court's controlling caselaw. In *Johnson*, the Supreme Court made clear that "laws that call for the application of a qualitative standard such as 'substantial risk' to real-world conduct"—like Act 292—are not, "[a]s a general matter," constitutionally suspect. 135 S. Ct. at 2561. The Supreme Court's decision in *Pearson*, discussed more extensively above, *supra* p. 34, also held that a

similar risk-based standard was not vague. In particular, one of the three prerequisites for the Minnesota civil-commitment statute there was a showing that the person's behavior created a "like[lihood]" of "inflict[ing] injury" on others. 309 U.S. at 273. The Supreme Court held that this requirement was not vague because it was "as susceptible of proof as many of the criteria constantly applied in prosecutions for crime"—it simply "call[ed] for evidence of past conduct pointing to probable consequences." *Id.* at 274. Act 292's effect prong likewise calls for evidence of probable consequences to an unborn child.

c. Act 292's effect prong best achieves the Legislature's legitimate ends. *See Petrillo*, 332 U.S. at 5–8. Every human body is different, so the precise level of substance abuse that will create a "substantial risk" to an unborn child will vary. *See, e.g.*, SA 132 ("The potential effects of alcohol . . . can vary widely[.]"). A general risk standard, which requires substantial and severe harm, allows "medical professionals" to testify based on their knowledge of the unique individuals and weed out cases where the chances of harm are merely minor. SA 51. As the CPS Standards make clear, the "substantial risk" standard in any particular case must be supported by "credible" testimony from "medical or [alcohol and other drug abuse] professionals." SA 51, 60. That testimony is then considered by numerous actors, in an adversarial process, with Wisconsin courts being the ultimate arbiter. This is exactly the sort of qualitative inquiry that the Supreme Court in *Johnson* and *Pearson* approved as *not* impermissibly vague.

That a risk-based standard is appropriate is further supported by the use of similar standards in the area of substance abuse. The Controlled Substances Act, for example, applies to "addict[s]" whose habitual use "endanger[s] the public morals, health, safety, or welfare," 21 U.S.C. § 802(1), an effects test that is *unquestionably* less precise than Act 292's qualitative standard. And the "Uniform Alcoholism and Intoxication Treatment Act," and many of the States that enacted it, allow for civil commitment of alcoholics who are "likely to inflict physical harm on another." *See* http://goo.gl/cQV7ZS, at § 14(a); *e.g.*, Mont. Code § 53-24-302(1); R.I. Gen. Laws § 23-1.10-12(a); S.D. Codified Laws § 34-20A-70; *see also* V.I. Code Ann. 19, § 723(a).

Risk-based standards, which are not susceptible to any degree of scientific precision, are common outside of the substance abuse arena as well. As *Johnson* noted, "dozens of federal and state [ ] laws use terms like 'substantial risk.'" 135 S. Ct. at 2561. Many different state and federal crimes incorporate a risk-based standard into criminal law elements. *See* App. to United States' Suppl. Br. at 1a–99a, *Johnson v. United States*, 135 S. Ct. 2551 (No. 13-7120), 2015 WL 1284964 (listing 11 federal and 214 state criminal statutes that use "substantial risk" or a similar phrase). Examples include reckless endangerment, *e.g.*, Ala. Code § 13A-6-24(a), resisting arrest, *e.g.*, Ark. Code § 5-54-103(a), unlawful imprisonment, *e.g.*, Del. Code tit. 11, § 782, hazing, *e.g.*, Ind. Code § 35-42-2-2.5(a), sexual abuse, *e.g.*, Iowa Code § 709.3(1)(a), manslaughter, *e.g.*, N.Y. Penal Law § 125.20(4), and criminal negligence and recklessness, *e.g.* Wis. Stat. §§ 939.24(1); 939.25(1). Many civil commitment statutes also use "substantial risk" or a similar standard. *E.g.*, La. Stat. § 28:2; Mich. Comp. Laws

§ 330.1401; Tex. Health & Safety Code § 593.052. The phrase "seriously affected or endangered," or something similar, appears often in a variety of civil statutes, including child-custody laws, *e.g.*, Kan. Stat. § 23-3208(a); child welfare laws, *e.g.*, Ind. Code § 31-34-1-1, and healthcare-facility licensing laws, *e.g.*, Mich. Comp. Laws § 333.20168(1); Wis. Stat. § 50.55(3).

d. The district court's contrary reasoning is wrong.

The district court relied upon *Johnson v. United States*, 135 S. Ct. 2551, in support of its holding that Act 292's effect prong is unconstitutionally vague. But *Johnson* cuts strongly in favor of Act 292's constitutionality. The *Johnson* Court considered, for the fifth time in eight years, the "residual clause" of the Armed Career Criminal Act's definition of "violent felon[ies]." *See* 18 U.S.C. § 924(e)(2)(B)(ii) (defining "violent felony" to include "burglary, arson, or extortion, [and any crime that] involves use of explosives, or *otherwise involves conduct that presents a serious potential risk of physical injury to another*" (emphasis added)). The Court held that the residual clause was vague primarily because it "require[d] application of the 'serious potential risk' standard to an *idealized ordinary case of the crime*," rather than to a defendant's "conduct . . . *on a particular occasion*." 135 S. Ct. at 2561 (first emphasis added). 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. The Court cautioned, in no uncertain terms, that its holding did not "place . . . in constitutional doubt" the "dozens of federal and state [ ] laws" that "call for the application of a qualitative standard such as 'substantial risk' to real-world conduct."

Id. at 2561. Act 292 calls for exactly that—the application of a "substantial risk" standard "to real-world conduct."

The district court's suggestion that Act 292 should have "quantif[ied] the risk," RSA 27–28 (emphasis removed), or set forth the precise "quantum" of substance use that would cause a "substantial risk," RSA 26, violates the principle that the Constitution does not require more specificity than is possible for a given subject matter. *See Petrillo*, 332 U.S. at 5–8; *Colten*, 407 U.S. at 110; *supra* p. 31. By requiring "more precise language" than possible to "effectively [ ] carry out . . . the [Legislature's] purpose," the district court created an "insuperable obstacle to legislation," which the vagueness doctrine does not do. *Petrillo*, 332 U.S. at 7.

Relatedly, the district court reasoned that the "substantial risk" and "seriously affected or endangered" standards are vague because "current medical science cannot tell us what level of drug or alcohol use will pose a substantial risk of serious damage to an unborn child." RSA 29. Notably, the district court did not cite any cases holding, or even suggesting, that scientific uncertainty is relevant to the vagueness of qualitative statutes. And with good reason. There is, for example, no scientific certainty as to what constitutes a "like[lihood]" of "inflict[ing] injury" on others as a result of sexual addiction, *Pearson*, 309 U.S. at 273, or who is a "habitual" truant, *Sheehan*, 520 F.2d at 829, or what "tends to disturb" people near a school, *Grayned*, 408 U.S. at 107, or what uncontrolled drug addiction "endanger[s] the public morals, health, safety, or welfare," 21 U.S.C. § 802(1). Each of those examples simply calls for a qualitative judgment, from a continuum of risks, harms, or actions.

More generally, even though there is some scientific uncertainty about the effects of some substances on unborn children in general, Act 292 deals with *specific* cases, where there is more than sufficient certainty given that doctors can observe the particular mother and child. As the CPS Standards make clear, the "substantial risk" standard must be met by "credible" testimony from "medical or [alcohol and other drug abuse] professionals" with regard to the specific mother and unborn child involved, SA 51, 60, which evidence is thereafter weighed by neutral actors, including Wisconsin courts, as part of a robust adversarial process, *see supra* pp. 9–14; *see*, *e.g.* SA 10–21 (doctor's testimony in this case). To take just the most obvious example, if a doctor were to testify that a mother's continued substance abuse would likely lead to an overdose, that would provide powerful evidence for the Wisconsin court to consider in deciding whether the unborn child's health and/or life was at serious risk from continued habitual substance abuse. *See, e.g.*, SA 115 (physician recounting a woman who was "5–6 months pregnant" and "found unconscious on the floor" with a "blood alcohol level of .50%").

And even assuming (contrary to uniform caselaw) that scientific uncertainty is relevant to the vagueness inquiry, consideration of any uncertainty would be much more appropriate in an as-applied challenge to the law's application to a particular case or particular category of cases. *See Wash. State Grange*, 552 U.S. at 450–51 (facial invalidation "risk[s] [ ] premature interpretation of statutes on the basis of factually barebones records" (citations omitted)); *Nagelvoort*, 856 F.3d at 1130. Yet, the district court here facially enjoined the law with respect to all substances, without

seriously analyzing the science on any substance or particular category of cases. RSA 28–29.

III. In The Alternative, This Court Should Certify The Question Of The Meaning Of Act 292 To The Wisconsin Supreme Court

Defendants believe that this case is moot and that Act 292's terms easily satisfy the Due Process Clause's non-vagueness mandate. Accordingly, the proper disposition of this appeal is either to dismiss this case for lack of jurisdiction or to hold that Act 292 is not impermissibly vague. However, if this Court disagrees with Defendants' mootness and vagueness arguments, Defendants respectfully ask this Court to make clear which prong(s) this Court finds to be vague, as written, and then to certify the question of the prong(s)' "narrowing construction," *Virginia v. Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 397–98 (1988), to the Wisconsin Supreme Court, under Seventh Circuit Rule 52, *see* Cir. R. 52(a) (authorizing certification "sua sponte" or "on motion of a party"). This would forward the interests of "cooperative judicial federalism," *Lehman Bros.*, 416 U.S. at 391, by permitting Wisconsin's highest court to give Act 292 a narrowing construction, should this Court determine that such a construction is constitutionally necessary, *see*, *e.g.*, *Pearson*, 309 U.S. at 273 (state statute is not unconstitutionally vague given the Minnesota Supreme Court's construction).

This Court takes numerous factors into account in determining whether to certify a question to a State's highest court. Rule 52 sets out three requirements: (1) the question must "aris[e] under the laws of that state," (2) it must "control the outcome of a case pending in" this Court, and (3) the process must be "in accordance with the rules of th[e] [state supreme] court." Cir. R. 52(a). Additional factors cutting in favor

of certification include "when the case concerns a matter of vital public concern[;] where the issue will likely recur in other cases," *In re. Badger Lines, Inc.*, 140 F.3d 691, 698 (7th Cir. 1998); where the question "is an issue of first impression"; and "when the result of the decision will almost exclusively impact citizens of that state," *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001). More generally, the Supreme Court and this Court have regularly certified questions where a state statute is "readily susceptible" to a "narrowing construction" that "would make [the state statute in dispute] constitutional." *Am. Booksellers*, 484 U.S. at 397; *see, e.g.*, *Cline v. Okla. Coal. for Reprod. Justice*, 133 S. Ct. 2887 (2013); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 137 F.3d 503 (7th Cir. 1998).

Assuming that this Court finds that any of Act 292's terms are vague, as written, Rule 52 certification is appropriate because a "narrowing construction" could potentially solve any constitutional difficulties that this Court were to identify. *Am. Booksellers*, 484 U.S. at 397.[5] The meaning of Act 292's terms is a question of Wisconsin state law. *Brownsburg*, 137 F.3d at 504. The Wisconsin Supreme Court has established certification procedures. *See* Wis. Stat. ch. 821; *see generally Badger Lines*, 140 F.3d at 699, *certified question answered*, 590 N.W.2d 270 (Wis. 1999). The correct interpretation of Act 292 would be "an issue of first impression" for the Wisconsin

[5] The reason that Defendants only argue that a narrowing construction "could" solve a potential vagueness problem is that the statute already provides in the statutory text precisely what the Minnesota Supreme Court provided as a matter of judicial construction in *Pearson*. *Compare* 309 U.S. at 273, *with* Wis. Stat. § 48.133. If, contrary to *Pearson*, this Court finds that some aspect of Act 292's text is unconstitutionally vague, whether that vagueness was "fairly susceptible" to a saving construction would turn on what aspect of Act 292 this Court found wanting.

Supreme Court, having never been interpreted by that Court (or even by the Wisconsin Court of Appeals). *Pate*, 275 F.3d at 672. Since Act 292 protects mothers and their unborn children from the devastating effects of substance abuse, its meaning is "a matter of vital public concern." *Badger Lines*, 140 F.3d at 698. Finally, the meaning of Act 292 is relevant only to Wisconsin residents, *Pate*, 275 F.3d at 672, since the Act only operates within Wisconsin's borders, *Mueller*, 171 N.W.2d at 416.

CONCLUSION

The judgment of the district court should be reversed.

Dated, June 20, 2017

Respectfully Submitted,

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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 13,527 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: June 20, 2017

/s/ Misha Tseytlin

MISHA TSEYTLIN

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of June, 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: June 20, 2017

/s/ Misha Tseytlin

MISHA TSEYTLIN

CIRCUIT RULE 30(d) CERTIFICATE

Pursuant to Circuit Rule 30(d), I hereby certify that all materials required by Circuit Rules 30(a), (b) are included in the Required Short Appendix bound with the brief.

Dated: June 20, 2017

/s/ Misha Tseytlin

MISHA TSEYTLIN