No. _____

In the Supreme Court of the United States

ELOISE ANDERSON, SECRETARY, WISCONSIN DEPARTMENT OF CHILDREN AND FAMILIES, AND BRAD D. SCHIMEL, WISCONSIN ATTORNEY GENERAL, APPLICANTS,

v.

TAMARA M. LOERTSCHER, RESPONDENT

EMERGENCY APPLICATION FOR STAY

To the Honorable Elena Kagan
Associate Justice of the Supreme Court of the United States and
Circuit Justice for the Seventh Circuit

BRAD D. SCHIMEL
Attorney General

State of Wisconsin
Department of Justice
17 West Main Street
Madison, Wisconsin 53703
tseytlinm@doj.state.wi.us
(608) 267-9323

MISHA TSEYTLIN
Solicitor General
Counsel of Record

KEVIN M. LEROY
LUKE N. BERG
Deputy Solicitors General

Attorneys for Applicants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

TO THE HONORABLE ELENA KAGAN, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SEVENTH CIRCUIT:

The "epidemic crisis" of prenatal substance abuse poses a substantial challenge for the States as they seek to carry out their sovereign responsibility of protecting children from either dying prematurely or being born with addictions, birth defects, or long-term health problems. Dkt. 137:8–9. Some States have dealt with this issue by subjecting 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). Through 1997 Wisconsin Act 292 ("Act 292" or "the Act"), Wisconsin has adopted a far more moderate approach, creating a statutory regime that "encourage[s] [pregnant women who habitually abuse controlled substances] to seek treatment . . . voluntarily," Wis. Stat. § 48.01(1)(bm), while also including judicially enforced, least-restrictive-means civil provisions as a backstop, *id.* §§ 48.347; 48.355; *cf.* Minn. Stat. § 253B.065(5); S.D. Laws § 34-20A-70. The district court in this case invalidated Wisconsin's carefully crafted statute, enacted 20 years ago, and then blocked its enforcement on a statewide basis under a vagueness theory that this Court explicitly rejected in *Minnesota ex rel. Pearson v. Probate Court of Ramsey County*, 309 U.S. 270 (1940). The Court of Appeals for the Seventh Circuit then refused to stay this statewide injunction pending appeal.

The reason that Defendants ask for emergency relief now—instead of waiting until a merits ruling from the Seventh Circuit—is simple and dire: absent a stay from

this Court, pregnant Wisconsin mothers and their unborn children are *likely* to suffer severe harms during the pendency of this appeal, with consequences ranging from needless death to being born with substance addiction and birth defects. Under the district court's injunction, the State would need to terminate the help that it is currently giving to many substance-addicted women under Act 292's voluntary programs, which includes assistance with "housing, transportation, clothing, food, and [help] obtaining diapers." App. 110–11; App. 135–36. These addicted women will thus lose the help they have grown accustomed to receiving, at their most vulnerable hour; Defendants will be left only to hope that those women seek out other resources instead of turning back to abusing substances to which they are addicted. The State would also need to suspend or dismiss immediately 19 cases currently under a final treatment order—where it has already been determined that the unborn child is at substantial risk absent Act 292 intervention—and six pending petitions for treatment orders. App. 216. And the State would be unable to address any new cases that may come up during the pendency of what is likely to be a lengthy appeals process.

These negative consequences would be extremely serious given that Wisconsin law has no other legal mechanism for protecting unborn children from substance abuse. *See Wis. ex rel. Angela M.W. v. Kruzicki*, 561 N.W.2d 729, 740 (Wis. 1997); *Wisconsin v. Deborah J.Z.*, 596 N.W.2d 490, 492, 496 (Wis. Ct. App. 1999). In one recent example, a Milwaukee-area woman, who was 23 weeks pregnant, "repeatedly le[ft] her hospital bed to use heroin in the hospital parking lot"; medical professionals concluded that her unborn child had a "3% chance of survival" if she continued her

habitual, severe drug abuse. App. 112–13. A Wisconsin trial court saved the unborn child's life only by resorting to Act 292's court-supervised provisions. *See* App. 112–13. In another case, a physician recounted a woman who was "5–6 months pregnant" "found unconscious on the floor" with a "blood alcohol level of .50%." Dkt. 171-1:2. The physician "advised the county that this mother and fetus were at risk of death." Dkt. 171-1:2. While other States have legal tools for helping unborn children in these unquestionably dangerous situations, the State of Wisconsin would have no such mechanism if Act 292—a 20-year-old statute—remains enjoined during this appeal.

Defendants are likely to obtain ultimate relief on the merits. The basis upon which Act 292 has now been enjoined—that Act 292's terms are impermissibly vague—is contrary to this Court's controlling caselaw and would call numerous federal and state statutes into immediate doubt. Most obviously, in *Pearson*, this Court unanimously held that terms virtually identical to those that Act 292 uses—"habitual," "uncontrollable desire," "likel[ihood]" of "inflict[ing] injury"—are not unconstitutionally vague in the civil-confinement context. 309 U.S. at 273. Indeed, the terms that Act 292 uses are so common that they appear, *verbatim*, in the Controlled Substances Act's definition of an "addict," 21 U.S.C. § 802(1), and in the model Uniform Alcoholism and Intoxication Treatment Act. Separately, the district court lacked jurisdiction to enter its injunction because the only plaintiff in this case no longer lives in Wisconsin. *See Camreta v. Greene*, 563 U.S. 692, 710–11 (2011).

Given that the unlawful injunction is likely to impose devastating harms on pregnant women and unborn children in Wisconsin, this Court should enter an

immediate stay. Defendants respectfully request emergency relief because the Act is currently enjoined for any new cases that may arise (with the injunction against pending cases being stayed only until this Court adjudicates the present Application).

OPINIONS BELOW

The district court issued two orders related to mootness, which are unreported, but attached at App. 42–67 and App. 68–86. The district court's summary judgment opinion holding Act 292 void for vagueness is not reported, but attached at App. 1–40 and available online at 2017 WL 1613654. The district court's judgment is unreported, but attached at App. 41. The district court's order denying a stay pending appeal is unreported, but attached at App. 89–93. The district court's order granting a temporary, limited stay as to pending cases is unreported, but attached at App. 94–95. The Seventh Circuit's order denying a stay pending appeal is unreported, but attached at App. 96. The Seventh Circuit's order granting a temporary, limited stay as to pending cases is unreported, but attached at App. 97–98.

JURISDICTION

This Court has jurisdiction over this Application under 28 U.S.C. §§ 1254(1) and 1651(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the United States Constitution and Wisconsin Statute Section 48.133. Both are reproduced in the Appendix beginning at App. 290.

STATEMENT

I. Legal Background

Act 292 "protects" "unborn children" by "assisting" "expectant mothers of unborn children . . . [i]n fulfilling their responsibilities." Wis. Stat. § 48.01(1)(a). The law prioritizes "encourag[ing] [expectant mothers]" who are severely addicted to harmful substances "to seek treatment . . . voluntarily," Wis. Stat. § 48.01(bm), while never imposing any criminal penalties, *see* Wis. Stat. ch. 948; § 948.01(1).

The Act only applies in extremely serious cases: where 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 also provides standards, App. 217–89 ("Child Protective Services" or "CPS" Standards), that the counties are bound to follow, *see* App. 221; Wis. Stat. § 48.981(3)(c)(1).

The statutes and binding CPS standards set forth the process for cases under the Act. A case begins when someone (often a doctor or relative) voluntarily reports that a pregnant woman is abusing drugs or alcohol. Wis. Stat. § 48.981(2)(d); App. 100–01, 127. CPS "[a]ccess worker[s]" review the reports and decide whether to "screen [them] in." A case is "screened in" only if there is "reasonable suspicion" that: (1) the woman is pregnant; (2) she is "currently severely abusing alcohol, controlled

substances, or controlled substance analogs"; and (3) there is "credible information that the abuse of the [ ] substance(s) could cause serious physical harm to the unborn." App. 101, 128–29, 231–32, 239, 241. Once "screened in," another CPS "[a]ssessment [w]orker" begins "gather[ing] information" to determine whether the statutory criteria are met. Wis. Stat. § 48.981(3)(c)(1)(a); App. 101–02, 128–29, 232. As part of this "diligent investigation," the assessment worker contacts the mother to discuss the report and, if accurate, "offers to provide appropriate services." Wis. Stat. § 48.981(3)(c)(3); App. 101–02, 130–32.

In many cases where the statutory criteria are met, women decide that they want to receive voluntary treatment. Dkt. 193:4; 249:2. In such cases, Act 292's remaining role is that the CPS agency provides "case management" services to the pregnant woman, including, among other things, "assisting with housing, transportation, clothing, food, and obtaining diapers." App. 111–12, 135–36. CPS assessment workers provide many other types of "support[ ]" and "assist[ance]," often "form[ing] a really close relationship with these women." App. 135. Afterwards, women frequently contact CPS workers to "thank them for caring about them and getting them the services they needed." App. 148.

If the mother "refuses to accept [voluntary] services," the assessment worker must then determine whether there is sufficient evidence to file a formal "UCHIPS" petition (Unborn Child in Need of Protective Services). Wis. Stat. § 48.981(3)(c)(3); App. 102–04. If there is enough evidence from "medical or [alcohol and other drug abuse] professionals" to meet the statutory criteria, the county will 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); App. 103–04, 232. Most of the time, however, there is no "credible information" of a "substantial risk" to the unborn child, so the county simply closes the case. App. 140–41, 241.

If the case moves forward, and if the mother is being held temporarily (described further below, *infra* pp. 9–10), a court "intake worker" must also review the case. Wis. Stat. §§ 48.981(3)(b)(2m), (3)(c)(2m)(a). The intake worker conducts an "intake inquiry" to decide whether to dismiss the case, resolve it informally, or recommend a formal UCHIPS petition. *See* Wis. Stat. §§ 48.067(6); 48.24(1), (4). In addition to "conferring with" and "[i]nterview[ing]" the mother to determine how to proceed, Wis. Stat. §§ 48.067(2); 48.243(1), the intake worker must inform the mother of the "nature and possible consequences of the proceedings," *id.* § 48.243(1)(b), and her "basic rights," *id.* § 48.243(3), and provide "counseling," *id.* § 48.067(5). The intake worker can close the case if "the available facts [do not] establish prima facie jurisdiction." *Id.* § 48.24(1), (4); *see* App. 241.

The intake worker can also resolve the case informally if it appears that jurisdiction "would exist," and the mother agrees 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). Like the CPS workers, if the intake worker decides that a UCHIPS petition is necessary, the intake worker refers the case to the district attorney. *Id.* § 48.24(3).

The district attorney must then decide whether to "file the petition, close the case, or refer the case back to intake" for "further investigation" or "informal disposition." *Id.* § 48.25(2). If the district attorney does file a petition, the case proceeds through a carefully crafted and judicially supervised process, which includes 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. The mother is entitled to a full slate of procedural protections throughout. She has the "right to legal counsel regardless of ability to pay." *Id.* §§ 48.27(4)(b)2; 48.243(e); *see also id.* § 48.213(2)(e). The court must notify her of all proceedings, including "the nature, location, date, and time," and inform her of her rights to counsel, to a jury trial, to confront and cross-examine witnesses, to present witnesses, and to have a substitute judge. Wis. Stat. §§ 48.27(3)(a)1; 48.29; 48.243; *see also id.* § 48.213(2)(d). At all proceedings, the mother may exclude the public. *Id.* § 48.299(1)(a). If the mother fails to appear at a hearing, a continuance is granted and she is served notice personally or by certified mail. *Id.* § 48.273. The mother also has rights to discovery, including to copies of all police reports and all records relating to her or her unborn child, unless disclosure "would be harmful to the interests of . . . the unborn child." *Id.* § 48.293. At any time during this process, the mother may reach a voluntary agreement with the unborn child's guardian ad litem and the district attorney regarding her treatment in lieu of proceeding with the hearing process. *Id.* § 48.32.

If the unborn child is ultimately found to be "in need of protection or services," the court must order the "least restrictive" "care and treatment plan" that is 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 cannot order treatment "unless 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.

Women subject to the Act may be temporarily held while the process outlined above is ongoing. Women may be temporarily held only at "[t]he home of an adult relative or friend," Wis. Stat. § 48.207(1m)(a), at a "licensed community-based residential facility," *id.* § 48.207(1m)(b), at 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). The temporary custody process occurs simultaneously with the UCHIPS process described above. Initially, if an unborn child is reported to be "in immediate danger," and there are "reasonable grounds" to believe that there is a "substantial risk to the physical health of the unborn child," 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), (3)(c)(2m)(a); 48.193(1)(d). For the intake worker to maintain custody, three requirements must be met: (1) "probable cause" that the jurisdictional threshold, *id.* § 48.133, 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(d). Even if the Act allows continued custody, the intake worker must "immediately attempt to notify an adult friend or relative," *id.* § 48.193(2), and "make every effort to release the adult expectant mother to an adult friend or relative," *id.* § 48.203(1). In situations where the mother cannot be released to a friend or relative, she is entitled to a hearing "within 48 hours" before a judge or court commissioner to determine whether continued custody is required. *Id.* § 48.213(1)(a). The court may continue custody only if the mother "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 decides to continue custody, the mother is entitled to have the plea and fact-finding hearings (on the formal UCHIPS petition) conducted within 30 days. *Id.* § 48.305.

II. Factual And Procedural Background

A Mayo Clinic social worker reported to the Taylor County Department of Health Services that Respondent Tamara Loertscher ("Plaintiff") was three months pregnant and had tested positive for methamphetamines, amphetamines, and marijuana. Dkt. 169-4:6. Plaintiff told a physician that she was "using

[methamphetamine] two to three times a week," using marijuana "throughout," Dkt. 1-2:15–16, 169-4:14, and had consumed alcohol during her pregnancy "to the point of blacking out," Dkt. 169-4:6. The physician recommended voluntary treatment options, but Plaintiff refused. Dkt. 1-2:20–21. The physician reported to a social worker, who reported to Taylor County, that Plaintiff's "behavior [was] putting [her baby] in serious danger of harm." Dkt. 169-4:6. Taylor County investigated and concluded that, given "how recently [m]eth was used," Dkt. 169-4:11, treatment was needed. The CPS worker contacted Plaintiff and suggested a voluntary treatment option, but Plaintiff refused. Dkts. 169-4:12. Taylor County temporarily held Plaintiff at the Mayo Clinic for a hearing the following day. Dkt. 159:7–8.

At the hearing, a Mayo Clinic physician testified about Plaintiff's pregnancy, the frequency of her drug use, and the effect it could have on her child. Dkt. 1-2:13–23. At the end of the hearing, the court ordered Plaintiff to report to a treatment center for an alcohol and drug abuse assessment and possible treatment (depending on the results of the assessment). Dkt. 1-3. Plaintiff ignored the order, so 30 days later, at a plea hearing on Taylor County's UCHIPS petition, the court held Plaintiff in contempt. Dkt. 1-8:23–29; Dkt. 1-9. It ordered her to serve 30 days in jail—not under the Act, but under the general contempt of court provision, Wis. Stat. § 785.04—unless she complied with the order by the end of the day. Dkt. 1-9. She initially agreed, but then changed her mind and spent 18 days in jail. App. 1. When she eventually agreed to comply with the order and participate in a drug assessment, she was released. Dkt. 1-13; App. 1. She gave birth to her baby on January 23, 2015.

App. 47. She has since moved out of Wisconsin and is not subject to any requirements or consequences from Act 292. Dkt. 66:20; App. 69.

Plaintiff has sued multiple state and county officials, challenging Act 292. Dkts. 1; 66. The district court allowed her lawsuit to proceed even after her move out of Wisconsin mooted her case. App. 69–71. Ultimately, the district court found the Act void for vagueness and enjoined it statewide. App. 1–40, 41–42. The court held that nearly every qualitative term in the Act was vague, including "severe," App. 25, "habitual," App. 25–26, "lack of self-control," App. 26–27, "substantial risk," App. 27–28, and "seriously affected or endangered," App. 28–29. The court acknowledged that "these terms are intended to prevent enforcement . . . against minimal use[ ]," but still found vagueness because the Act uses "terms of degree" rather than specifying the precise "quantum" of prohibited activity or exactly "where to draw the line." App. 25–26. The court also held that the "substantial risk" standard was vague because it did not "*quantify* the risk." App. 27–28.

Defendants immediately appealed to the Seventh Circuit and, at the same time, asked the district court for a stay pending appeal. Dkts. 241; 242. The district court declined to stay the law pending appeal, App. 89–93, but granted a stay of then-pending cases until the Seventh Circuit had the opportunity to adjudicate Defendants' upcoming stay motion, App. 94–95.

The Seventh Circuit denied Defendants' request for a stay pending appeal. Dkt. 11; App. 96. Defendants then sought, Dkt. 22, and the Seventh Circuit granted, App. 97–98, the continuation of the district court's temporary stay *only* for pending

cases and *only* while the Defendants sought relief from this Court. Thus, while the injunction is stayed for currently pending cases, the Act is blocked statewide for any new cases. And unless this Court grants this Application, the injunction will block Act 292 statewide throughout the appeal, including as to now-pending cases.

REASONS FOR GRANTING THE APPLICATION

This Court has authority to grant a stay of a district court's order, including in a case still pending before a lower court, if there is "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010) (per curiam); *San Diegans for the Mt. Soledad Nat'l War Mem'l v. Paulson*, 548 U.S. 1301, 1302 (2006) (Kennedy, J., in chambers); *see also Nken v. Holder*, 556 U.S. 418, 427–29 (2009); *West Virginia v. EPA*, 136 S. Ct. 1000 (2016). "In close cases . . . the Court will balance the equities and weigh the relative harms to the applicant and to the respondent." *Hollingsworth*, 558 U.S. at 190. Defendants' Stay Application satisfies all of these considerations.[1]

[1] Alternatively, Defendants request relief through a writ of mandamus under 28 U.S.C. § 1651(a). *See Hollingsworth*, 558 U.S. at 190. "Before a writ of mandamus may issue, a party must establish that (1) no other adequate means exist to attain the relief he desires, (2) the party's right to issuance of the writ is clear and indisputable, and (3) the writ is appropriate under the circumstances." *Id.* (citations omitted); *accord Atiyeh v. Capps*, 449 U.S. 1312, 1313–14 (1981) (Rehnquist, J., in chambers). Defendants meet these standards for the same reasons discussed below. *See infra.*

I. There Is A Reasonable Probability That Four Justices Would Vote To Grant Review And A Fair Prospect That This Court Would Reverse A Decision Invalidating Act 292

The district court invalidated Act 292 on a statewide basis, on the theory that the qualitative terms at the heart of the Act—"habitual," "lack of self-control" and "substantial risk"—are unconstitutionally vague, in a case where the only plaintiff has moved out of Wisconsin. Given the clear conflict between these merits and jurisdictional rulings and this Court's caselaw, as well as the practical importance of the issues involved, there is at least "a reasonable probability that four Justices will consider the issue[s] sufficiently meritorious to grant certiorari [and] a fair prospect that a majority of the Court will vote to reverse." *Hollingsworth*, 558 U.S. at 190.

A. Invalidating Act 292 On Vagueness Grounds Would Be Contrary To This Court's Controlling Caselaw And Would Call Into Immediate Doubt Numerous Federal And State Statutes

1. The Due Process Clauses of the Fifth and Fourteenth Amendments forbid "standardless" laws, *see United States v. Williams*, 553 U.S. 285, 304 (2008), which fail to "provid[e] notice and [lead to] arbitrary enforcement," *Beckles v. United States*, 137 S. Ct. 886, 894 (2017). "As a general matter," "laws that call for the application of a *qualitative standard such as 'substantial risk' to real-world conduct*" satisfy this due-process requirement. *Johnson v. United States*, 135 S. Ct. 2551, 2561 (2015) (emphasis added); *see Grayned v. City of Rockford*, 408 U.S. 104, 110, 112 (1972); *United States v. Powell*, 423 U.S. 87, 93 (1975). This principle applies with special force where the nature of the inquiry in the statute justifies some "imprecision." *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498–99 (1982);

United States v. Petrillo, 332 U.S. 1, 5–8 (1947). That is because a legislature must be able to craft a statute "general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning." *Colten v. Kentucky*, 407 U.S. 104, 110 (1972).

This Court's decision in *Pearson*, 309 U.S. 270, shows the proper application of these principles. In that case, the Minnesota Supreme Court had interpreted a state statute calling for civil confinement of those with a "psychopathic personality" 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). This Court unanimously held that these "conditions" rendered the statute *not* unconstitutionally vague 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. Or, as this Court later put it in *Johnson*, these inquiries called for "the application of a qualitative standard" to "real-world conduct" and thus survived a vagueness analysis. 135 S. Ct. at 2561.

2. As relevant, Act 292 provides jurisdiction to protect an unborn child where the pregnant 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 [to] the physical health of the unborn child*."

Wis. Stat. § 48.133 (emphases added). This statute is not vague under this Court's caselaw, especially *Pearson*'s controlling vagueness holding.

Act 292 uses the very same qualitative concepts for uncontrollable, habitual, harmful substance abuse that this Court unanimously found permissible in *Pearson* in the uncontrollable, habitual sexual-misconduct context. The course of conduct in Act 292, just as in *Pearson*, must be "habitual," meaning "constantly repeated or continued," "customary," "[c]ommonly or constantly used," or "usual." 6 *Oxford English Dictionary* 996 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989). Lack of "self-control"—a concept that both Act 292 and *Pearson* employ to identify the uncontrollability of the relevant conduct—while "not [ ] demonstrable with mathematical precision," requires "proof of serious difficulty in controlling behavior." *Kansas v. Crane*, 534 U.S. 407, 413 (2002) (interpreting "inability to control behavior"). And both *Pearson* and Act 292 require a showing of likelihood of harm to others, with Act 292 requiring "substantial risk," meaning the risk to the unborn child's physical health must be substantial, not merely speculative or minor.[2]

[2] The robust procedural protections described above, *supra* pp. 5–10, also significantly mitigate any ambiguity. *See Schall v. Martin*, 467 U.S. 253, 277–80 (1984); *Bono v. Saxbe*, 620 F.2d 609, 618 (7th Cir. 1980). 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 a Wisconsin court. *See* App. 232, 234, 239, 241; App. 101–03; App. 128–29, 156–57; Wis. Stat. §§ 48.24(1), (4); 48.25; 48.347; 48.981(3)(c). To establish jurisdiction, counties need testimony from "medical or [alcohol and other drug abuse] professionals." App. 231–32, 239, 241; App. 101–04. 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. 8. And at any point the mother can avoid temporary custody and

The reasoning that the district court articulated in reaching a contrary result demonstrates how clearly its approach violates this Court's caselaw. The district court held that Act 292's terms "severe," "habitually," "lack of self-control," "substantial risk," and "seriously endangered or affected" are unconstitutionally vague because they are "terms of degree" that do not specify the precise "quantum" of prohibited activity or exactly "where to draw the line." App. 25–26. That precise criticism could have been lodged against the terms at issue in *Pearson*, since *Pearson*'s three inquiries did not specify the "quantum" of prior sexual misconduct, and spoke in "terms of degree." As this Court has repeatedly explained, "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*); *Powell*, 423 U.S. at 93 (same). If the Wisconsin Legislature had used the precise "quantum" approach that the district court favored, it would not achieve the State's legitimate goals; after all, "where lack of control is at issue, 'inability to control behavior' will not be demonstrable with mathematical precision." *Crane*, 534 U.S. at 413. Indeed, "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." *Id.* It is well understood that substance addiction is merely a species of mental illness. *See* American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: DSM-5* 481 (2013).

---

involuntary placement "outside of [her] home" simply by participating in the "alcohol and drug abuse services offered to her." Wis. Stat. §§ 48.205(1m); 48.347.

3. A holding that Act 292's terms are unconstitutionally vague would call numerous statutes into immediate doubt, given how many statutes employ a qualitative inquiry relating to habitual and/or uncontrollable substance abuse.

Federal statutes in the substance-abuse context commonly use the very terms that the district court found unconstitutionally vague. The Controlled Substances Act, for example, uses phrases almost identical to Act 292, 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 applications of this statutory definition, federal law makes it unlawful for such an "addict" to possess a firearm. *See* 18 U.S.C. § 922(g)(3). Federal immigration law also imposes severe consequences for "habitual drunkard[s]," 8 U.S.C. § 1101(f)(1), which the Ninth Circuit, sitting *en banc*, recently found was not unconstitutionally vague. *See Ledezma-Cosino v. Sessions*, No. 12-73289, 2017 WL 2324717, at *4 (9th Cir. May 30, 2017) (en banc).

At the state level, the "Uniform Alcoholism and Intoxication Treatment Act," *available at* http://goo.gl/cQV7ZS, which provides model legislation for the "[i]nvoluntary [c]ommitment of [a]lcoholics," *id.* § 14, defines an alcoholic as "a person who *habitually lacks self-control* as to the use of alcoholic beverages," *id.* § 2 (emphasis added). States across the country have adopted this model law, using these very terms. *See* Uniform Law Commission, *Legislative Fact Sheet—Alcoholism and*

Intoxication Treatment, http://goo.gl/dBWu3u; *e.g.* Mont. Code § 53-24-302(1); 23 R.I. Gen. Laws § 23-1.10-12(a); S.D. Laws § 34-20A-70; V.I. Code 19, § 723(a).

In addition, a number of other States also define "alcoholism" or addiction by reference to a "habitual[ ] lack[ ] [of] self-control." *E.g.*, Ga. Code § 37-7-1; Ariz. Rev. Stat. § 36-2021(2); La. Stat. § 40:961(1); N.C. Gen. Stat. § 14-443(1). Many truancy statutes use the term "habitual" as well. *E.g.*, N.Y. Fam. Ct. Act § 732(a)(i); Mich. Comp. Laws § 380.1596(2)(a); N.J. Stat. § 9:10-2; Neb. Rev. Stat. § 43-247(3).

"Dozens" of state laws use the qualitative term "substantial risk," *Johnson*, 135 S. Ct. at 2561, another term that the district court found unconstitutionally vague. Many civil commitment statutes use "substantial risk" or a similar standard. *See, e.g.*, La. Stat. § 28:2(3); Mich. Comp. Laws § 330.1401(c); Tex. Health & Safety Code § 593.052(a)(2)(A). This same qualitative term (or a similar phrase) is common in the criminal-law context. Examples include reckless endangerment, *e.g.*, Ala. Code § 13A-6-24(a), resisting arrest, *e.g.*, Ark. Code § 5-54-103(a)(2), 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 recklessness and negligence, *e.g.*, Wis. Stat. §§ 939.24(1); 939.25(1).

Notably, neither Plaintiff nor the district court identified any case, from any court, holding that a statute that uses these qualitative terms, or terms like them, is impermissibly vague. *See*, *e.g.*, *Ledezma-Cosino*, No. 12-73289, 2017 WL 2324717, at *4 ("the term 'habitual drunkard' readily lends itself to an objective factual inquiry"); *Sheehan v. Scott*, 520 F.2d 825, 829 (7th Cir. 1975) ("[C]ourts have construed [the

word habitual] without apparent difficulty."); *In re E. B. v. C.B.*, 287 N.W.2d 462, 464 (N.D. 1980) (collecting cases holding that "habitual" truancy statutes are not vague); *A. v. City of New York*, 286 N.E.2d 432, 434 (N.Y. 1972) ("The term[ ] 'habitual truant' . . . [is] easily understood.").

B. Holding That A Plaintiff Who Has Moved Out Of A Jurisdiction Can Still Challenge That Jurisdiction's Laws Would Be Contrary To The Conclusions Of Both This Court And Numerous Federal Courts Of Appeals

1. In order to satisfy the case or controversy requirement of Article III, a plaintiff must have standing at all stages of litigation, including on appeal. *Davis v. FEC*, 554 U.S. 724, 732–33 (2008); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). The standing requirement has three elements: "a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant's challenged behavior; and likely to be redressed by a favorable ruling." *Davis*, 554 U.S. at 733 (citing *Lujan*, 504 U.S. at 560–61). Should the plaintiff lose any of these during the course of litigation in federal court, the court must dismiss the case as moot. *Alvarez v. Smith*, 558 U.S. 87, 92–94 (2009); *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 397 (1980). Dismissal under such circumstances will occur "[n]o matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013).

In a case challenging a state law or regulation seeking only prospective relief, mootness occurs when the plaintiff moves from the State's jurisdiction before the

conclusion of litigation. *See Camreta*, 563 U.S. at 710–11. In *Camreta*, this Court considered an Oregon student's claim that her school's interview policy violated the Fourth Amendment. *Id*. at 699. By the time the case made it to this Court, the student had "moved to Florida, and ha[d] no intention of relocating back to Oregon," and was close to graduation. *Id.* at 711 (citations omitted). Since the student could no longer "be affected by [the lower court's] ruling," this Court concluded there was "no live controversy to review," thus the case was moot. *Id.*; *accord Arizonans for Official English v. Arizona*, 520 U.S. 43, 67–68 (1997).

The conclusion that a claim for prospective relief against a state law is moot once a plaintiff leaves the relevant State, without a strong likelihood of moving back, flows from the standing doctrine. Once a plaintiff leaves a State, she is no longer subject to the challenged state law—thus she gets no benefit from prospective relief since she has no prospect of future harm. *See Camreta*, 563 U.S. at 711. In other words, moving from a State demotes the plaintiff's concrete, particularized, standing-conferring interest into "[a]n interest shared generally with the public at large in the proper application of the Constitution." *Arizonans*, 520 U.S. at 64; *Camreta*, 563 U.S. at 710 (moving plaintiff does not have the "usual stake" in the outcome). Leaving a State's jurisdiction makes the plaintiff a "concerned bystander[ ]" who could use the case only "as a vehicle for the vindication of value interests." *Arizonans*, 520 U.S. at 65 (citations omitted). Even if these value interests are "sincere," they are "insufficient to confer standing"; they "do[ ] not state an Article III case or controversy." *Hollingsworth*, 133 S. Ct. at 2662.

2. Here, Plaintiff moved out of Wisconsin and had her baby before the district court enjoined the enforcement of Act 292. Am. Compl., Dkts. 66 ¶ 79–80; 71:1. She has not claimed that she will move back to Wisconsin; only that "[it] is [ ] entirely *possible* that [she] could become pregnant again and return to Wisconsin." Pl. Opp. to Stay Mot. 11, App. Dkt. 17 (emphasis added). Due to this change in circumstances, Plaintiff is no longer subject to Act 292 and is unlikely to be subject to it in the future. She therefore has no concrete, particularized interest in Act 292's constitutionality; she is a "concerned bystander[ ]" who could use her case only to "vindicat[e] [ ] value interests." *Arizonans*, 520 U.S. at 64 (citations omitted). Indeed, Plaintiff is, in all relevant respects, indistinguishable from the student in *Camreta*, who had moved to another State during the litigation.

3. The district court wrongly believed it had jurisdiction to decide this case under the capable of repetition, yet evading review exception. App. 58–60, 70–71. This exception applies only when "(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." *Spencer v. Kemna*, 523 U.S. 1, 17 (1998) (brackets and citations omitted). This narrow exception is reserved for "exceptional situations," *id.* (citations omitted), such as when a case is moot *only because* a mother has given birth or the election has already taken place, *see Roe v. Wade*, 410 U.S. 113, 125 (1973); *Rosario v. Rockefeller*, 410 U.S. 752, 756 n.5 (1973). The application of the exception in these cases is justified by "the great likelihood that the [abortion or election] issue will recur between the defendant

and the other members of the public at large without ever reaching [this Court]." *Honig v. Doe*, 484 U.S. 305, 335 (1988) (Scalia, J., dissenting) (citations omitted).

This exception has no relevance here because Plaintiff has left Wisconsin. The principle permitting application of this exception to cases that are moot because a mother has given birth, or an election has taken place, is that *every* plaintiff challenging an abortion or election law must contend with the relatively short length of pregnancies or election cycles. *Id.* at 335–36. Since both shortly-timed events are guaranteed to happen again to some "other members of the public at large"—although perhaps not to the plaintiff—there is a "great likelihood" that the same dispute over state law "will recur between the defendant and the[se] other members." *Id.* (emphasis removed). In sharp contrast, when the case is moot because the plaintiff has left the jurisdiction, no similar justification obtains for applying the exception.

4. A holding that a plaintiff that has moved out of the jurisdiction, without a strong likelihood of moving back, can still challenge the underlying law would create a conflict with the holdings of numerous courts of appeals, providing an additional basis for this Court's review. Sup. Ct. R. 10(a); *see, e.g.*, *Cooley v. Granholm*, 291 F.3d 880, 883 (6th Cir. 2002) (challenge moot after plaintiff left the State); *Bishop v. Comm. on Prof'l Ethics & Conduct of Iowa State Bar Ass'n*, 686 F.2d 1278, 1284 n.13 (8th Cir. 1982) (same); *Lucero v. Trosch*, 121 F.3d 591, 596 (11th Cir. 1997) (same); *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 or the City had already adopted a district election system.").

II. Defendants And The Public Interest Will Suffer Irreparable Harm Absent A Stay, While Plaintiff Would Not Be Harmed At All By A Stay

Through its injunction, the district court prohibited the State from enforcing the provisions of Act 292 on a statewide basis. This subjects Defendants to irreparable harm as a matter of law. *See Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) ("Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." (citations omitted)). The magnitude of this unquestionably irreparable harm strongly weighs in favor of granting this Stay Application.

Act 292 "protect[s] . . . unborn children" from "physical harm" due to "severe" alcohol and drug abuse. Wis. Stat. § 48.01(1)(a), (am). Act 292 is the *only* provision that permits the State of Wisconsin to protect unborn children from the devastating impacts of prenatal substance abuse. *See Kruzicki*, 561 N.W.2d at 740 (default definition of "child" in Wisconsin statutes does not include unborn children); *Deborah J.Z.*, 596 N.W.2d at 496 (Wisconsin homicide statute does not include protection for unborn children). The injunction thus removes from the State the only tool the Legislature has given to protect unborn children from prenatal substance abuse. The record contains overwhelming evidence of those devastating impacts.

Heroin and other opioids / opiates. Heroin and other opiates "readily pass[ ] from the placenta to the fetus" and "accumulat[e]" there. Dkt. 172-1:6. One commonly "documented" risk of prenatal opiate exposure is premature labor, which in turn can lead to "death, brain bleeding, and developmental delay." Dkt. 171-1:4.

Another well-known side effect of prenatal opiate exposure is "Neonatal Abstinence Syndrome" (NAS), the symptoms of which include a "high pitched cry," "tremors," "seizures," "vomiting," "diarrhea with skin breakdown . . . [that] may become infected," "excessive weight loss," "apnea" (suspension of breathing), and "hyperthermia." Dkts. 170-5:13; 171-1:4; 172-1:6–7. Babies born with NAS on average require a "3 week[ ]" hospital stay and often "require narcotics for treatment." Dkt. 172-1:7. Heroin-exposed babies have "low[er] birth weights" and "decreased head circumference," Dkt. 171-1:4, and are "three to four[ ]" times more susceptible to SIDS (Sudden Infant Death Syndrome), Dkt. 170-3:14. Long-term studies of children exposed to opiates in utero "show increased behavioral problems, including cognitive impairment." Dkt. 172-1:7.

Cocaine. Like heroin, cocaine "easily passes from mother to fetus." Dkt. 172-1:4. Cocaine is "toxic" and can "serious[ly] alter[ ]" "essential brain neurotransmitters." Dkt. 172-1:4. Cocaine can also "reduce blood flow" and "oxygen delivery" to the fetus, which can result in "severe developmental delay," including to "brain function and brain structure." Dkt. 172-1:4. Cocaine use during pregnancy is also associated with "low birth weight[s]" and "[s]maller head circumference." Dkts. 170-6:5; 172-1:4. Longer term, cocaine exposure has been statistically correlated with "slower [growth] rate[s]," Dkt. 170-6:5, "behavior[al]" "problems," "diminished memory," and "visual-motor deficits," Dkt. 172-1:4. A "growing body of research" also suggests that cocaine exposure affects "early language development, increasing the risk for language delays in early childhood." Dkt. 170-6:7.

Methamphetamine. "Similar to the action of cocaine," "methamphetamine block[s] the reuptake of neurotransmitters." Dkt. 170-5:15. It "has toxic effects on fetal neurotransmitters such as dopamine." Dkt. 172-1:6. Methamphetamine is also associated with "preterm birth, low gestational weight, smaller head circumference, and intrauterine growth restriction[s]," Dkt. 170-7:2, as well as "a high perinatal mortality rate" "and abnormal neurological signs, including drowsiness, poor feeding, and seizures," Dkt. 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." Dkt. 171-1:3. One study reported that exposed children "as early as age 3" exhibited "mood difficulties and acting out behaviors." Dkts. 171-1:3; 172-1:6.

Marijuana. Marijuana's psychoactive compound "readily crosses the placenta" and may cause "prolonged fetal exposure." Dkt. 172-1:5. Marijuana "frequently alter[s]" brain transmitter concentrations, thus substantially lowering "[b]rain synthesis of protein, nucleic acid and lipid." Dkt. 172-1:5. Prenatal marijuana exposure has been associated with "stunted growth outcomes," Dkt. 171-1:4, "academic underachievement," "memory impairment," and "learning difficulties," Dkt. 172-1:5. Marijuana exposed infants have "decrease[d] [ ] birth weight[s]" and are more frequently "place[d] in the NICU." Dkt. 154-7:7. Newer synthetic marijuana may "bind as much as 1,000 times more powerfully to brain receptors" than conventional marijuana. Dkt. 172-1:5–6.

Alcohol. Alcohol is "one of the leading preventable causes of intellectual disabilities, birth defects, and other developmental disorders in newborns." Dkt 171-1:2. Because alcohol "injur[es] [ ] the brain during its development," many of its effects are "lifelong." Dkt. 173-1:1. Alcohol-exposed infants "common[ly]" exhibit "irritability, inability to establish normal sleep and eating patterns, and altered patterns of alertness." Dkt. 173-1:2. Longer term, alcohol exposure causes "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," among other things. Dkt. 173-1:2; *see also* Dkt. 172-1:4. Alcohol can also "affect the development of other organs," causing "[h]eart defects, cleft palate, and [ ] other major and minor birth defects." Dkt. 173-1:2. As adults, individuals 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." Dkt. 173-1:2.

Absent an immediate stay of the injunction blocking Act 292, Wisconsin will be unable to prevent *all* of these extremely devastating harms, making it *likely* that unborn children will suffer death, will be born with disabilities or drug addictions or will suffer from long-term negative impacts. Under the district court's injunction, state courts will be forced to suspend or dismiss the 25 currently pending UCHIPS cases, Dkts. 249:2; 266, thereby permitting the imposition of "substantial risk" to

unborn children, Wis. Stat. § 48.01(1)(a), (am). The State would not be able to protect unborn children in new cases that arise, no matter how serious; indeed, even if there is little doubt that the heroin, cocaine, methamphetamine, or alcohol abuse is so severe that death, disability, or addiction for the unborn child is inevitable, the State would need to stand idly by. The heroin-addicted mother, reducing her unborn child's chances of survival to 3% by abusing heroin at 23 weeks of pregnancy, and the woman found unconscious with a .5% blood alcohol concentration at 5-6 months pregnant, *see supra* pp. 2–3, are just two examples of the many tragedies-in-waiting that are likely to result directly from the district court's injunction.

Importantly, the State will not even be able to provide Act 292's *voluntary* "case management" services to many women who want them and are benefiting from them today. App. 116–17. There are many addicted, pregnant women receiving those voluntary services in Wisconsin right now, including getting assistance with "housing, transportation, clothing, food, and obtaining diapers." App. 111–12, 135–36; *see* Wis. Stat. § 48.981(3)(c). Unless this Court issues a stay, CPS agencies will be required to stop providing these services immediately, thus leaving pregnant women who are already in a vulnerable state to try to find help elsewhere. CPS agencies' "experience and knowledge working with children and families," makes them "uniquely positioned to provide mothers with continuous care and services during pregnancy and after birth," App. 117; yanking these services away from women who are accustomed to this help could well lead to disastrous consequences. For these women and for any new addicted women who come to CPS agencies'

attention during the pendency of the appeal, those agencies will only be able to inform these women about other services elsewhere. The CPS agencies will then need to hope that these women will choose to seek out those alternatives, instead of simply turning back to the dangerous substances to which they are heavily addicted. App. 117, 138.

Plaintiff, on the other hand, would suffer absolutely no harm from a stay. Plaintiff has left Wisconsin and there is no reasonable likelihood that she will ever be subject to Act 292 again. *See supra* Part I.B.2. As to pregnant women that Act 292 will impact going forward, Plaintiff did not present any testimony from any other women who received services under this long extant regime and who claimed to have suffered negative experience as a result. There is no reason to force addicted, pregnant women in Wisconsin to suffer without Act 292's assistance during the pendency of this appeal, including losing services that they have already come to rely upon in this vulnerable time. And there is no reason to subject their unborn children to serious risk of death, or to being born with birth defects or drug addiction, because Act 292's services have been unexpectedly pulled away from their mothers.

CONCLUSION

This Court should issue a stay pending appeal of the district court's injunction.

Respectfully submitted,

BRAD D. SCHIMEL
Attorney General

MISHA TSEYTLIN
Solicitor General
Counsel of Record

KEVIN M. LEROY
LUKE N. BERG
Deputy Solicitors General

Attorneys for Applicants

Wisconsin Department of Justice
17 West Main Street
Madison, Wisconsin 53703
(608) 267-9323
tseytlinm@doj.state.wi.us

June 9, 2017

CERTIFICATE OF SERVICE

I, Misha Tseytlin, a member of the bar of this Court, certify that on June 9, 2017, I served a paper copy of the Emergency Application for Stay on the listed counsel of record by Federal Express Priority Overnight, and a courtesy PDF copy via email, and that all persons required to be served have been served.

Christopher G. Hanewicz
1 East Main Street, Suite 201
Madison, WI 53703
chanewicz@perkinscoie.com

Dated: June 9, 2017

_____
MISHA TSEYTLIN