

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WISCONSIN

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PLANNED PARENTHOOD OF WISCONSIN, INC.  
and FREDRIK BROEKHUIZEN, M.D.,

Plaintiffs,

OPINION and ORDER

12-cv-913-bbc

v.

J.B. VAN HOLLEN, Attorney General of Wisconsin,  
in his official capacity;  
ISMAEL OZANNE, District Attorney for Dane County,  
in his official capacity and as representative of a class of  
all district attorneys in the state of Wisconsin;  
CAROLYN H. BRONSTON, Medical Examining Board Member  
in her official capacity;  
MARY JO CAPODICE, Medical Examining Board Member,  
in her official capacity;  
RODNEY A. ERICKSON, Medical Examining Board Member,  
in his official capacity;  
JUDE GENEREAUX, Medical Examining Board Member,  
in his official capacity;  
SURESH K. MISRA, Medical Examining Board Member,  
in his official capacity;  
GENE MUSSER, Medical Examining Board Member,  
in his official capacity;  
SANDRA L. OSBORN, Medical Examining Board Member,  
in her official capacity;  
KENNETH B. SIMONS, Medical Examining Board Member,  
in his official capacity;  
TIMOTHY SWAN, Medical Examining Board Member,  
in his official capacity;  
SRIDHAR VASUDEVAN, Medical Examining Board Member,

in his official capacity;  
SHELDON A. WASSERMAN, Medical Examining Board Member,  
in his official capacity;  
TIMOTHY W. WESTLAKE, Medical Examining Board Member,  
in his official capacity;  
GREG COLLINS, Medical Examining Board Member,  
in his official capacity; and  
JAMES BARR, Medical Examining Board Member,  
in his official capacity;

Defendants.

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Plaintiffs Plaintiff Planned Parenthood of Wisconsin and Fredrik Broekhuizen filed this lawsuit to challenge the constitutionality of parts of 2011 Wis. Act 217 that impose new requirements on what they refer to as “medication abortions.” In their amended complaint, plaintiffs contend that two provisions are unconstitutionally vague: (1) the requirement that the physician who prescribed, or otherwise provided, the abortion-inducing drug be “physically present in the room when the drug is given to the woman,” Wis. Stat. § 253.105(2)(b); and (2) the requirement that the physician “shall determine whether the woman’s consent is, in fact, voluntary.” Wis. Stat. § 253.10(3)(b).

After plaintiffs filed a motion for a preliminary injunction (but before defendants’ deadline for responding), the parties filed a proposed stipulation in which they ask the court to enter a declaratory judgment that adopts particular interpretations of the challenged provisions. Although the parties are free to enter into a stipulation regarding their own understanding of the laws, they have failed to show that it would be appropriate for the court to issue a statutory construction outside the context of a live dispute. Accordingly, I

am declining to enter the proposed judgment and will set a new briefing schedule for plaintiffs' motion for a preliminary injunction.

#### ALLEGATIONS OF AMENDED COMPLAINT

Plaintiff Planned Parenthood of Wisconsin is a non-profit corporation that operates health care clinics in Milwaukee, Madison and Appleton, Wisconsin. Its services include performing abortions. Plaintiff Fredrik Broekhuizen is the medical director for plaintiff Planned Parenthood; he "performs and induces abortions." Am. Cpt. ¶ 11, dkt. #17.

In the past, plaintiff Planned Parenthood has provided "medication abortions" at its clinics. A medication abortion is a nonsurgical method of termination using medications alone. The protocol Planned Parenthood used requires two separate medications, Mifeprex, which blocks the production of progesterone, and misoprostol, which causes the uterus to contract and evacuate its contents. The patients swallowed the Mifeprex at the clinic and were instructed to take the misoprostol 24 hours later at home. This is the same protocol followed by most providers of medication abortions.

In April 2012, 2011 Wis. Act. 217 became effective. The act included the following new requirements on medication abortions:

The physician who is to perform or induce the abortion shall determine whether the woman's consent is, in fact, voluntary.

Wis. Stat. § 253.10(3)(b).

(2) No person may give an abortion-inducing drug to a woman unless the physician who prescribed, or otherwise provided, the abortion-inducing drug for the woman:

(a) Performs a physical exam of the woman before the information is provided under s. 253.10(3)(c)1.

(b) Is physically present in the room when the drug is given to the woman.

Wis. Stat. § 253.105(2).

After 2011 Wis. Act 217 became effective, plaintiffs stopped performing medication abortions.

### PROCEDURAL HISTORY

On December 11, 2012, plaintiffs filed this lawsuit in which they claimed that Wis. Stat. §§ 253.10(3)(b) and 253.105(2) are unconstitutionally vague. A few days later, they filed a motion for a preliminary injunction. Dkt. #3. In their motion, plaintiffs said that they have stopped performing medication abortions because they cannot determine the scope of the new laws and violating the laws could subject them to civil and criminal penalties, Wis. Stat. §§ 253.105(3) and 253.10(5), as well as professional discipline. Wis. Stat. § 448.02(3); Wis. Admin. Code § MED 10.02(2)(z).

With respect to Wis. Stat. § 253.105(2)(b), plaintiffs argued that the words “give” and “given” are unconstitutionally vague because they could mean “dispense” or “administer.” In other words, plaintiffs argued, they could not determine whether the physician who dispenses the drug must be present when the patient ingests the drug. This matters because, under plaintiffs’ protocol, patients self-administer one of the two drugs at home.

With respect to Wis. Stat. § 253.10(3)(b), plaintiffs argued that the requirement to

“determine whether the woman’s consent is, in fact, voluntary” is unconstitutionally vague because it does not include a scienter requirement. Without a scienter requirement, plaintiffs argued that they had no way of determining what they are required to do to determine whether consent is voluntary. (Plaintiffs’ motion also includes arguments about Wis. Stat. § 253.105(2)(a), but neither their amended complaint nor their stipulation includes that claim, so it is unnecessary to include those arguments.)

Plaintiffs asked the court to enjoin (1) “the enforcement of Wis. Stat. § 253.105(2) to the extent that it requires the same physician to be physically present when the patient ingests each of the two drugs”; and (2) “Wis. Stat. § 253.10(3)(c) to the extent that it subjects a physician to civil forfeitures under a strict liability standard, i.e., to enjoin its enforcement against physicians who have made a good-faith effort to ensure that the woman’s consent is voluntary in fact by speaking to her in private.” Dkt. #4 and 35-36.

Before defendants’ opposition brief was due, the parties filed a document they called “Stipulation to class certification and for the entry of a declaratory judgment.” Dkt. #22. In that document, the parties ask the court to certify a defendant class under Fed. R. Civ. P. 23(b)(1)(a) of each of the district attorneys in Wisconsin and to appoint defendant J.B. Van Hollen as class counsel under Fed. R. Civ. P. 23(g). In addition, the parties ask the court to enter a declaratory judgment regarding the interpretation of the Wis. Stat. §§ 253.105(b) and 253.10(3)(b). In particular, the parties ask the court to issue the following declarations:

- Wis. Stat. § 253.105(2) does not require the physician who prescribed or otherwise provided an abortion-inducing drug to be physically

present in the room when the woman takes or ingests the drug.

- A person who gives, i.e., dispenses, an abortion-inducing drug to a woman while the physician who prescribed or provided an abortion-inducing drug is physically present in the room is in compliance with Wis. Stat. § 253.105(2), and does not violate Wis. Stat. § 253.105(2) if the physician who prescribes or otherwise provides an abortion-inducing drug is not physically present in the room when the woman subsequently takes or ingests the drug.
- A physician's determination of voluntary consent under Wis. Stat. § 253.105(2) is governed by a "good faith" standard.
- A physician who makes a "good-faith" determination that a woman's consent to an abortion is "voluntary" in accordance with the requirements of Wis. Stat. § 253.10(3)(b) may not be criminally charged pursuant to Wis. Stat. § 253.10(5).
- A physician who makes a "good-faith" determination that a woman's consent to an abortion is "voluntary" in accordance with the requirements of Wis. Stat. § 253.10(3)(b) is not liable for civil damages pursuant to Wis. Stat. § 253.10(6)(a), (b) or (d).

In an order dated January 28, 2013, dkt. #23, I questioned whether this court had authority to enter the proposed judgment. First, the proposed judgment was limited to issues of statutory interpretation of a state law, so it was not clear whether a federal court would have subject matter jurisdiction to issue the judgment. Second, the parties were not seeking a declaration of rights or liabilities, so it was not clear whether the declarations could be issued under the Declaratory Judgment Act. 28 U.S.C. § 2201. Accordingly, I scheduled a hearing and a briefing schedule to allow the parties to demonstrate that the court had authority to enter the judgment.

At the hearing on February 5, 2013, the parties submitted a new stipulation in which they added the following paragraphs:

- The Plaintiffs allege that Wis. Stat. §§ 253.105(2) and .10(3)(b) are so ambiguous that they fail to give Plaintiffs fair notice of the conduct required of them and are therefore unconstitutionally void for vagueness.
- Wis. Stat. §§ 253.10(3)(b) & .105(2) are reasonably susceptible to the above constructions.
- The above constructions avoid, and therefore resolve, the Plaintiffs' federal constitutional challenges to the statutes on grounds of vagueness.

Dkt. #26.

## OPINION

In arguing that the court has authority to enter their proposed declaratory judgment, the parties rely solely on Karlin v. Foust, 188 F.3d 446 (7th Cir. 1999). In that case, one of the plaintiffs' claims was that informed consent requirements in an abortion regulation were unconstitutionally vague because they failed to identify the information a physician needed to convey. Id. at 471. The court of appeals upheld this court's determination that the statute was not void for vagueness because the statute could be construed reasonably to mean that each doctor must use his or her own medical judgment in determining the appropriate information to convey. Id. at 472-77. The parties argue that their proposed declaratory judgment is no different from what the court did in Karlin: just as in Karlin, this case would be resolved by a statutory construction provided by the court.

Although the result of Karlin might share superficial similarities with what the parties are requesting in this case, the case is not instructive because its procedural posture was

different. Karlin proceeded in the way cases ordinarily do: the parties presented a disputed federal question (whether the statute was unconstitutionally vague) and the court resolved the dispute by concluding that the statute was not void for vagueness. The court did not interpret the statute simply because the parties asked it to but as a necessary part of its determination whether the statute was constitutional.

In this case, the parties are asking the court expressly to *avoid* the federal question and instead adopt a particular construction of a state statute. In their amended stipulation, the parties state that the proposed constructions “avoid, and therefore resolve, the Plaintiffs’ federal constitutional challenges.” Dkt. #26 at 7. This is an odd approach. As a general rule, one does not “resolve” an issue by avoiding it. Although issuing the proposed judgment might “resolve” this lawsuit, it does not resolve the actual dispute identified in the complaint, which is whether the statutes are unconstitutionally vague.

If plaintiffs had filed a complaint in this court in which their only claim for relief was an interpretation of a state statute, it would be clear that this court could not exercise jurisdiction over that claim under 28 U.S.C. § 1331, which provides federal jurisdiction over a claim that arises under federal law. The parties have not explained why their proposed declaratory judgment does not pose the same problem. Although jurisdiction generally is determined at the time of filing, Doctors Nursing & Rehabilitation Center v. Sebelius, 613 F.3d 672, 677 (7th Cir. 2010), it is also true that courts generally decline to exercise jurisdiction over state claims once the federal claims are eliminated from the case. Segal v. Geisha NYC LLC, 517 F.3d 501, 506 (7th Cir. 2008). By seeking to convert their federal

claim into an issue of state statutory construction, it appears that plaintiffs have eliminated their federal claim.

Even if I assume that the parties' proposed declaratory judgment does not pose a problem under § 1331, the parties have not responded in any helpful way to the question whether this court has authority under the Declaratory Judgment Act to issue a declaration that consists solely of a statutory interpretation. That statute gives courts authority to "declare the rights and other legal relations of any interested party seeking such declaration." 28 U.S.C. § 2201(a); see also DeBartolo v. Healthsouth Corp., 569 F.3d 736, 741 (7th Cir. 2009) ("The Declaratory Judgment Act, 28 U.S.C. § 2201, allows a party . . . to determine his rights and liabilities."). Again, in Karlin, the court's construction of the statute was part of the determination whether the plaintiffs' rights were violated, but in this case, the parties are asking the court to avoid declaring any rights, which makes it unlikely that the proposed judgment is authorized by § 2201.

Apart from concerns about jurisdiction and justiciability, prudential concerns counsel against entering the proposed judgment. Apple, Inc. v. Motorola, Inc., 869 F. Supp. 2d 901, 924 (N.D. Ill. 2012) ("The decision whether to grant declaratory relief is discretionary.") (Posner, J.) (citing 28 U.S.C. § 2201(a); MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 136 (2007); Wilton v. Seven Falls Co., 515 U.S. 277, 286–89 (1995)). In particular, the parties' proposed judgment raises the question whether it is ever appropriate for a court to issue a declaration that incorporates the parties' stipulated interpretation of a statute without determining for itself whether that interpretation is correct. (In fact, it seems that plaintiffs'

position is that the proposed interpretation is *not* correct, an issue I will discuss below.) Ordinarily, courts do not accept stipulations on legal matters from the parties. United States v. National Bank of Oregon, 508 U.S. 439, 448 (1993) (“[T]he Court of Appeals acted without any impropriety in refusing to accept what in effect was a stipulation on a question of law.”); Gardner v. Galetka, 568 F.3d 862, 879 (10th Cir. 2009) (“It is one thing to allow parties to forfeit claims, defenses, or lines of argument; it would be quite another to allow parties to stipulate or bind us to application of an incorrect legal standard, contrary to the congressional purpose.”); United States v. One 1978 Bell Jet Ranger Helicopter, 707 F.2d 461, 462 (11th Cir. 1983) (“[A] stipulation of the parties to an action may be ignored by the court if it is a stipulation as to what the law requires”). Particularly because the judgment in this case could have implications for nonparties, it would be irresponsible for a court to adopt a statutory interpretation simply because the parties requested it.

At the hearing, the parties’ position seemed to be that if the lawsuit went forward, the end result would be a determination by the court similar to the one in the stipulation and they wished to save themselves and the court from wasted time and effort. As laudable as effort by the parties to try to attain an expeditious resolution to the case is, I am not free to disregard limits on a federal court’s authority.

It may be worth pointing out that if it is true that the parties’ stipulation represents what both sides see as the inevitable result in this case, they can resolve their dispute without a declaration from the court. In fact, the parties’ statements in their brief, in the stipulation and at the hearing raise questions about the existence of a real controversy among the parties.

For example, in the amended stipulation, the parties state that “Wis. Stat. §§ 253.10(3)(b) & .105(2) are reasonably susceptible to [their] constructions.” Dkt. #26 at 7. This is an important stipulation because it is tied directly to plaintiffs’ claims. As plaintiffs acknowledge in their brief, a statutory provision is not unconstitutionally vague if it is “readily susceptible to a narrowing construction.” Karlin, 188 F.3d at 474 (internal quotations omitted). See also Center for Individual Freedom v. Madigan, 697 F.3d 464, 497 (7th Cir. 2012) (“Where an otherwise ambiguous provision is readily susceptible to a limiting construction that cures the vagueness concerns, we should adopt it.”). Thus, by stipulating that the proposed interpretations are reasonable, plaintiffs seem to be conceding that the statutes are constitutional and that they have no federal claim.

Plaintiffs stated at the hearing and in their brief that they are *not* conceding that the challenged provisions are constitutional. E.g., dkt. #24 at 6 (“The Plaintiffs, as stated in their complaint, contend that the statutes are unconstitutionally vague in violation of due process because their prohibitions are not clearly defined, due to the substantial ambiguity of the statutes. The Plaintiffs do not concede that the statutes are constitutional.”). However, plaintiffs have not explained how they can reconcile that position with their stipulation. Even if it were possible to reconcile the two views, if plaintiffs’ position continues to be that the statutes are unconstitutionally vague because they cannot be interpreted reasonably, this would create a different problem. In particular, it means that plaintiffs are asking the court to adopt a construction of the challenged statutes that they believe to be incorrect.

Perhaps a more precise summary of plaintiffs’ position is that they believe the

challenged provisions are unconstitutionally vague, but defendants' proposed interpretations address plaintiffs' vagueness concerns, so they are willing to stipulate to those interpretations, even if they are wrong, so long as defendants are legally bound by those interpretations. If that is accurate, then I agree with the parties that it makes little sense to continue litigating this case. However, the parties' shared assumption seems to be that a declaratory judgment is the only way to hold defendants to their word, but it is not clear whether that is correct. Defendants have committed themselves on the record to the proposed interpretations, both at the hearing and by signing the stipulation. Other, even more formal commitments are possible, such as an Attorney General Opinion. Because defendants have represented that the interpretations in the stipulation are their own, presumably they would not be opposed to working with plaintiffs to provide the type of commitment that would alleviate plaintiffs' concerns.

Even if the parties cannot reach that level of agreement, the stipulation raises a question whether plaintiffs' claims remain justiciable. A preenforcement challenge to a statute may be litigated only so long as there is a "credible threat of prosecution" or the plaintiff otherwise faces "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." Babbitt v. United Farm Workers National Union, 442 U.S. 289, 298 (1979). Further, "a threat of prosecution is credible when a plaintiff's intended conduct runs afoul of a criminal statute and the Government fails to indicate affirmatively that it will not enforce the statute." Commodity Trend Services, Inc. v. Commodity Futures Trading Commission, 149 F.3d 679, 687 (7th Cir. 1998). In light of the stipulation, a strong

argument can be made that defendants have “indicate[d] affirmatively” that they will not be enforcing the statutes in the manner that plaintiffs feared.

Because I am declining to enter the parties’ proposed judgment, I will issue a new briefing schedule on plaintiffs’ motion for a preliminary injunction. In addition to any arguments they wish to make on the merits, the parties should address the question whether the case remains justiciable in light of their stipulation and any other statements or actions. In the event that I conclude that defendants’ actions up to this point do not eliminate a credible threat of prosecution, defendants should identify any other actions they would be willing to take to eliminate or diminish the threat unilaterally.

ORDER

IT IS ORDERED that the parties’ stipulation, dkt. #22, and amended stipulation, dkt. #26, are REJECTED. Defendants may have until February 22, 2013, to file a response to plaintiffs’ motion for a preliminary injunction. Plaintiffs may have until March 4, 2013, to file a reply.

Entered this 7th day of February, 2013.

BY THE COURT:  
/s/  
BARBARA B. CRABB  
District Judge