STATE OF WISCONSIN
SUPREME COURT
Appeal No. 2014AP2812

ASCARIS MAYO and ANTONIO MAYO,

PLAINTIFFS-RESPONDENTS-CROSS-APPELLANTS,

UNITED HEALTHCARE INSURANCE COMPANY and WISCONSIN STATE DEPARTMENT OF HEALTH SERVICES,

INVOLUNTARY PLAINTIFFS,

v.

WISCONSIN INJURED PATIENTS AND FAMILIES COMPENSATION FUND,

DEFENDANT-APPELLANT-CROSS-RESPONDENT-PETITIONER,

PROASSURANCE WISCONSIN INSURANCE COMPANY, WYATT JAFFE, M.D., DONALD C. GIBSON, INFINITY HEALTHCARE, INC., and MEDICAL COLLEGE OF WISCONSIN AFFILIATED HOSPITALS, INC.,

DEFENDANTS.

APPEAL FROM THE FINAL ORDER OF THE CIRCUIT COURT FOR MILWAUKEE COUNTY, THE HON. JEFFREY A. CONEN, PRESIDING CIRCUIT COURT CASE NO. 12-CV-6272

NON-PARTY BRIEF OF THE AMERICAN TORT REFORM ASSOCIATION, THE WISCONSIN CIVIL JUSTICE COUNCIL, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS, THE CHAMBER OF COMMERCE OF THE UNITED STATES, AND THE WISCONSIN INSURANCE ALLIANCE

Wis. Stat. § (Rule) 809.19(7)

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INTRODUCTION

The Mayos claim that the statutory damage cap in Wis. Stat. § 893.55 violates their constitutional rights to equal protection and due process, both on its face and as applied to them. Amici, the American Tort Reform Association, the Wisconsin Civil Justice Council, the National Federation of Independent Business, the Chamber of Commerce of the United States, and the Wisconsin Insurance Alliance, (collectively, "Amici") disagree, and they ask this Court to reverse the decision of the Court of Appeals, clarify that as-applied challenges are not appropriate with respect to statutory damage caps, and apply the traditional, deferential rational basis test to reject the Mayos' facial challenge.

ARGUMENT

I. THE MAYOS' FACIAL CONSTITUTIONAL CHALLENGE TO WIS. STAT. § 893.55 FAILS.

The Court of Appeals incorrectly held that section 893.55's statutory damage cap is facially unconstitutional because it "denies equal protection to that class of malpractice victims whose adequate non-economic

damages a factfinder has determined are in excess of the cap." *Mayo v. Wis. Injured Patients and Families Compensation Fund*, 2017 WI App 52, ¶ 1, 377 Wis. 2d 566, 901 N.W.2d 782; *see id.* ¶ 12 n.3 (noting that the analysis for the due process and equal protection challenges are "substantially similar"). This Court should reverse that decision.

"To succeed on a claim that a law is unconstitutional on its face, the challenger must demonstrate that the State cannot enforce the law under any circumstances." *Blake v. Jossart*, 2016 WI 57, ¶ 26, 370 Wis. 2d 1, 884 N.W.2d 484. The challenger must overcome the "strong presumption" that a statute is Constitutional. *Id.* When attempting to do so, "[i]t is not sufficient for the challenging party merely to establish doubt about a statute's constitutionality, and it is not enough to establish that a statute is probably unconstitutional." *State ex rel. Hammermill Paper Co. v. La Plante,* 58 Wis. 2d 32, 46-72, 205 N.W.2d 784 (1973).

The challenging party's burden is particularly heavy in cases like this one that do not involve a "suspect class" or

"fundamental right." Blake, 370 Wis. 2d 1, ¶ 31; *see Mayo*, 377 Wis. 2d 566, ¶ 12 n.2 (correctly noting "[t]he Mayos have not shown that they are members of a traditional suspect class or that they have been denied a fundamental right."). "'In cases where a statutory classification does not involve a suspect class or a fundamental interest, the classification will be upheld if there is any rational basis to support it.'" *Blake*, 370 Wis. 2d 1, ¶ 31 (quoting *State v. Burgess*, 2003 WI 71, ¶ 10, 262 Wis. 2d 354, 665 N.W.2d 124); *see Ferdon v. Wis. Patients Compensation Fund*, 2005 WI 125, ¶ 17, 284 Wis. 2d 573, 701 N.W.2d 440. "'The right to equal protection does not require that such similarly situated classes be treated identically, but rather requires that the distinction made in treatment have some relevance to the purpose for which classification of the classes is made.'" *Blake*, 370 Wis. 2d 1, ¶ 30 (quoting *State v. West*, 2011 WI 83, ¶ 90, 336 Wis. 2d 578, 800 N.W.2d 929).

Courts applying the rational basis analysis uphold a statute "unless it is patently arbitrary and bears no rational

relationship to a legitimate government interest." *Id.* ¶ 32 (citations omitted). This Court should apply the rational basis test here and it accord great deference to the Legislature in setting public policy.

Applying the traditional rational basis test, the cap on non-economic damages in medical liability actions easily survives the Mayos' constitutional challenge. The limitation on damages is rationally related to ensuring affordable and accessible healthcare for Wisconsin's citizens, as the Legislature determined, while simultaneously providing adequate compensation to worthy claimants. Wis. Stat. § 893.55(1d)(a).

> Establishing a limitation on noneconomic damage awards accomplishes the objective by doing all of the following:
>
> 1. Protecting access to health care services across the state and across medical specialties by limiting the disincentives for physicians to practice medicine in Wisconsin ....
>
> 2. Helping contain health care costs by limiting the incentive to practice defensive medicine ....
>
> 3. Helping contain health care costs by providing more predictability in noneconomic damage awards, allowing insurers to set insurance premiums that better reflect such insurers' financial risk ....

> 4. Helping contain health care costs by providing more predictability in noneconomic damage awards in order to protect the financial integrity of the fund ....

Id. Under a traditional rational basis review, the Legislature's express bases for the statutory distinction in Wis. Stat. § 893.55 passes constitutional muster, with no further analysis necessary. That should end this Court's review of the facial challenge.

The Court should expressly reject *Ferdon*'s "rational basis with teeth" test, which the Court had never applied before *Ferdon* and has not applied since. That test's increased level of scrutiny is entirely inconsistent with rational basis test jurisprudence. *See, e.g.*, *Heller v. Doe*, 509 U.S. 312, 320 (1993). By recognizing the rational bases outlined by the legislature, but overturning the statute because of disagreements with the legislature's rationale or data, the Court of Appeals improperly substituted its own policy choices for those of the Legislature.

II. THE MAYOS' AS-APPLIED CONSTITUTIONAL CHALLENGE TO WIS. STAT. § 893.55 FAILS.

The trial court correctly held that section 893.55 is constitutional on its face, but the court erroneously found the statute unconstitutional as applied to the Mayos. The Court of Appeals did "not disturb the circuit court's findings as to [the Mayos' as-applied challenge]," while expressly holding the statute facially unconstitutional. *Mayo*, 377 Wis. 2d 566, ¶ 1. Accordingly, to fully resolve this appeal, this Court should address and reject the as-applied challenge to the cap on non-economic damages.

In the context of statutory damage caps, the difference between a facial challenge and an as-applied challenge explains why an as-applied challenge is not cognizable. In a facial challenge, a party contends that a statute "always operates unconstitutionally.'" *State v. Smith*, 2010 WI 16, ¶ 10 n.9, 323 Wis. 2d 377, 780 N.W.2d 90 (citation omitted). By contrast, an as-applied challenge does not attack "the constitutionality of the statute itself ...." *Tammy W-G. v. Jacob T. (In re Gwenevere T.)*, 2011 WI 30, ¶¶ 47-48, 333

Wis. 2d 273, 797 N.W.2d 854. "[A]n as-applied challenge ... is a 'claim that a statute is unconstitutional on the facts of a particular case or to a particular party.'" *Smith*, 323 Wis. 2d 377, ¶ 10 n.9 (citation omitted). "The 'as applied' method ... invalidates the challenged statute only to the extent of the impermissible application." *Turchick v. United States*, 561 F.2d 719, 721 n.3 (8th Cir. 1977).

This Court recently made clear that disparate treatment is a fundamental prerequisite to an as-applied constitutional challenge. *See Blake*, 370 Wis. 2d 1, ¶ 46. One concrete, hypothetical illustration of an appropriate as-applied challenge based on disparate treatment would arise from a loitering ordinance, which on its face appears to treat everyone equally without infringing any constitutional rights. If that ordinance were applied only to a racial minority, however, that disparate treatment could properly form the basis of an as-applied challenge. Similarly, if the ordinance were applied to prevent an otherwise lawful demonstration, the demonstrators could have a valid as-applied challenge to

the ordinance as infringing on their First Amendment rights to speech and assembly.

> A law may be facially unconstitutional if it facially abridges speech or discriminates against a protected class of persons, or the law may be unconstitutional "as applied" if it does not facially target speech or establish an illegal classification, but in its application unfairly burdens speech or imposes different burdens on different classes of people.

Ameritech Corp. v. United States, No. 93-CV-6642, 1994 WL 142864, *3 n.3 (N.D. Ill. Apr. 18, 1994) (attached).

That simply is not the case here. The cap on non-economic damages in healthcare liability actions creates a single, legislative distinction that is clear on its face: plaintiffs whose non-economic damages are less than or equal to $750,000 (who receive full compensation), and plaintiffs whose damages exceed $750,000 (whose non-economic damages are reduced to the cap). Plaintiffs in each category are treated exactly the same as all other plaintiffs in that category. Thus, it is simply not possible for there to be disparate treatment. The Supreme Court of Ohio recognized as much in rejecting an as-applied challenge to its general

statutory cap on non-economic damages. *Simpkins v. Grace Brethren Church of Delaware, Ohio*, 2016-Ohio-8118, ¶ 31, 75 N.E.3d 122 ("[A]ppellants do not demonstrate that R.C. 2315.18 affects Simpkins differently than it does any other tort plaintiff.").

In his concurrence to the Court of Appeals opinion in this case, Judge Brash concluded that Wis. Stat. § 893.55 is constitutional on its face, but unconstitutional as applied to the Mayos, based primarily on the severity of the reduction of non-economic damages.

> This [reduction of non-economic damages] highlights the disparity in applying the cap to a severely injured patient such as Ascaris, as compared to applying the cap in cases where a patient is less severely injured and receives a lower award, but is able to collect the entire amount of the award because it falls under the cap's limits.

Mayo, 377 Wis. 2d 566, ¶ 43. But that is not the reasoning of an as-applied challenge; it is a classic facial challenge analysis. In fact, Judge Brash's analysis mirrors the majority's in *Ferdon*, finding that the previous non-economic damage cap was facially unconstitutional.

> Indeed, the burden of the cap falls entirely on the most seriously injured victims of medical malpractice. Those

> who suffer the most severe injuries will not be fully compensated for their non-economic damages, while those who suffer relatively minor injuries with lower non-economic damages will be fully compensated. The greater the injury, the smaller the fraction of non-economic damages the victim will receive.

Ferdon, 284 Wis. 2d 573, ¶ 98 (footnote omitted).

By couching their conclusions as as-applied analyses, Judge Brash and the trial court sought to have it both ways—they want the benefits of the statutory cap (identified by the legislature in Wis. Stat. § 893.55(1d)), *and* the ability to strike down the cap when it chafes the individual jurist's notion of fairness. Such a standard-less test of the constitutionality of the non-economic damages cap invites litigation and creates uncertainty, eliminating the public policy benefits that underpin the legislature's decision-making.

Moreover, applying this reasoning to an as-applied challenge will lead to unjust and absurd results. If the cap on non-economic damages is facially constitutional, the obvious question is, at what point will the reduction in damages be so great that the otherwise constitutional cap becomes unconstitutional on an as-applied basis? According to the

circuit court and the Court of Appeals concurrence, a reduction of $15,750,000 is too much. What about a reduction of $10,000,000? Or $5,000,000? Or $250,000? Or $1.00? That question, which was left unanswered by the courts below, is a question of public policy more appropriately left to the Wisconsin Legislature. In this case, the Legislature has spoken with Wis. Stat. § 893.55.

In fact, focusing on the harshness or severity of the reduction in non-economic damages in analyzing an as-applied challenge to the statute necessarily results in the very disparate treatment of persons in the legislatively-created category of those with non-economic damages over $750,000 that equal protection is intended to prevent. That approach also is fundamentally inconsistent with the appropriate analysis of an as-applied constitutional challenge. "However, no change in the law is justified simply by a 'case with more egregious facts.'" *Schultz v. Natwick*, 2002 WI 125, ¶ 38, 257 Wis. 2d 19, 653 N.W.2d 266 (citation omitted).

In *Smith*, this Court cautioned lower courts to be wary of challengers who "blur the lines" between facial and as-applied challenges. 323 Wis. 2d 377, ¶ 37; *see Ameritech*, 1994 WL 142864, *3 n.3 ("It is not clear to us that plaintiffs' 'as-applied' challenge involves any different facts or legal issues than their facial challenge.").

> But there is a difference: Where the "claim and the relief that would follow ... reach beyond the particular circumstances of the [] plaintiffs," "[t]hey must ... satisfy [the] standards for a facial challenge to the extent of that reach.

Center for Individual Freedom v. Madigan, 697 F.3d 464, 475 (7th Cir. 2012). Here, the Mayos cannot satisfy the standard for either an as-applied challenge or a facial challenge to Wis. Stat. § 893.55.

III. THE VAST MAJORITY OF OTHER COURTS HAVE UPHELD DAMAGE CAPS AGAINST SIMILAR CHALLENGES.

Affirming the constitutionality of the damage cap in Wis. Stat. § 893.55 would bring this Court in line with the decisions of courts throughout the country. Approximately half of the states have statutory caps on non-economic damages. Some of those states place limits on non-economic

damages in all personal injury actions. *See, e.g.*, Colo. Rev. Stat. § 13-21-102.5; Idaho Code § 6-1603; Kan. Stat. Ann. § 60-19a02(b); Ohio Rev. Code § 2315.18. Over 20 states specifically limit non-economic damages in healthcare liability actions.[1] *See, e.g.*, Cal. Civ. Code § 3333.2; Nev. Rev. Stat. § 41A.035; Tex. Civ. Prac. & Rem. Code § 74.301; W. Va. Code § 55-7B-8; Wis. Stat. § 893.55.

Most courts have respected the state legislatures' policy decision to place reasonable limits on the highly subjective and inherently unpredictable non-economic damages for pain and suffering and related injuries. State appellate courts have upheld non-economic damage caps that apply to all personal injury actions. *See, e.g.*, *Scharrel v. Wal-Mart Stores, Inc.*, 949 P.2d 89 (Colo. App. 1997); *Samsel v. Wheeler Transp. Servs., Inc.*, 789 P.2d 541 (Kan. 1990); *Arbino v. Johnson & Johnson*, 2007-Ohio-6948, 880

[1] Those states are Alaska, California, Colorado, Indiana, Louisiana, Maryland, Massachusetts, Michigan, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Carolina, North Dakota, Ohio, South Carolina, South Dakota, Texas, Utah, Virginia, West Virginia and, of course, Wisconsin.

N.E.2d 420. Many other state courts have held damage caps specific to medical liability actions are constitutional. *See, e.g.*, *Fein v. Permanente Med. Group*, 695 P.2d 665 (Cal. 1985); *Rose v. Doctors Hosp.*, 801 S.W.2d 841 (Tex. 1990). In addition, federal courts consistently have rejected constitutional challenges to state law caps on non-economic damages.. *See, e.g.*, *Learmonth v. Sears, Roebuck & Co.*, 710 F.3d 249 (5th Cir. 2013); *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513 (6th Cir. 2005); *Hoffman v. United States*, 767 F.2d 1431 (9th Cir. 1985).

In cases in which plaintiffs have raised equal protection challenges, many courts have held that statutory damage caps easily survive constitutional challenge because the legislation is rationally related to legitimate governmental interests. *See Tam v. Eighth Judicial Dist. Court*, 358 P.3d 234, 239 (Nev. 2015) (rejecting an equal protection challenge to Nevada's $350,000 medical malpractice non-economic damage cap, and finding the cap "rationally related to the legitimate governmental interests of ensuring that adequate

and affordable health care is available to Nevada's citizens"); *see also Arbino*, 880 N.E.2d 420, ¶ 58 (holding Ohio's generally applicable limit on non-economic damages in tort actions "bears a real and substantial relation to the general welfare of the public").

Plaintiffs have challenged non-economic damage caps, without success, on numerous other grounds. Courts have held that limits on non-economic damages:

- Do not infringe the right to a jury trial. *See, e.g.*, *Arbino*, 880 N.E.2d 420, ¶ 40 (Damage caps "do not alter the findings of facts themselves, thus avoiding constitutional conflicts.").
- Do not violate separation of powers. *See, e.g.*, *Kirkland v. Blaine Cty. Med. Ctr.*, 4 P.3d 1115, 1122 (Idaho 2000) (The legislature "has the power to limit remedies available to plaintiffs without violating the separation of powers.").
- Do not deny the right to a remedy. *See, e.g.*, *Arbino*, 880 N.E.2d 420, ¶ 47 (The damage cap "does not violate the right to a remedy or the right to an open court ....").
- Do not constitute prohibited special legislation. *See, e.g.*, *Kirkland*, 4 P.3d at 1121.

By comparison, the Wisconsin Supreme Court is one of only a few state high courts that have invalidated statutory

limits on non-economic damages. "Over the years, the scales in state courts have increasingly tipped toward upholding noneconomic damages caps." Carly N. Kelly & Michelle M. Mello, *Are Medical Malpractice Damages Caps Constitutional? An Overview of State Litigation*, 33 J.L. Med. & Ethics 515, 527 (2005); *see also MacDonald v. City Hosp., Inc.*, 715 S.E.2d 405, 421 (W. Va. 2011) (finding decision upholding $500,000 limit on non-economic damages in medical malpractice cases to be "consistent with the majority of jurisdictions that have considered the constitutionality of caps on noneconomic damages in medical malpractice actions or in any personal injury action"). Simply put, the decision in *Ferdon* and the Court of Appeals decision in this case directly conflict with the well-reasoned jurisprudence from the vast majority of state and federal courts around the country.

CONCLUSION

For the reasons stated above, the American Tort Reform Association, the Wisconsin Civil Justice Council, the

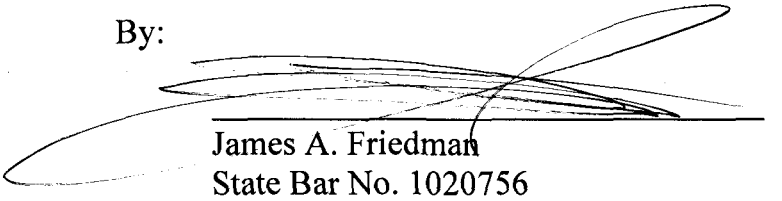
National Federation of Independent Business, the Chamber of Commerce of the United States, and the Wisconsin Insurance Alliance respectfully request that this Court reverse the decision of the Court of Appeals and hold that Wis. Stat. § 893.55 is constitutional on its face and as applied in this case.

Dated this 5th day of February, 2018.

Respectfully submitted,

GODFREY & KAHN, S.C.

By:



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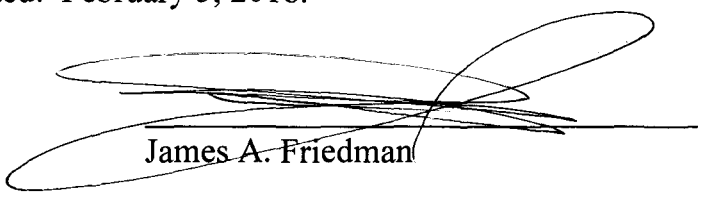
FORM AND LENGTH CERTIFICATION

I hereby certify that this brief conforms to the requirements of Wis. Stat. §§ 809.19(8)(b) and (c), for a brief produced with a proportional font. The length of this brief is 2,849 words.

Dated: February 5, 2018.



James A. Friedman

CERTIFICATION OF COMPLIANCE WITH RULE 809.19(12)

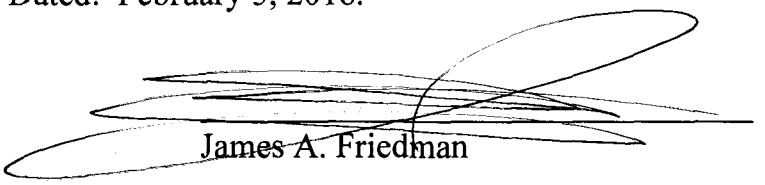
I hereby certify that:

I have submitted an electronic copy of this brief, which complies with the requirements of Wis. Stat. § 809.19(12). I further certify that:

This electronic brief is identical in content and format to the printed form of the brief filed as of this date.

A copy of this certificate has been served with the paper copies of this brief filed with the Court and served on all opposing parties.

Dated: February 5, 2018.



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1994 WL 142864
Only the Westlaw citation is currently available.
United States District Court,
N.D. Illinois, Eastern Division.

AMERITECH CORPORATION, et al., Plaintiffs,
v.
UNITED STATES of America, et al., Defendants.

No. 93 C 6642.
|
April 18, 1994.

MEMORANDUM OPINION

GRADY, District Judge.

***1** This case comes before the court on defendants' motion to transfer venue to the Eastern District of Michigan, where a related case is pending. For the reasons discussed below, we are inclined to grant this motion if transfer to Michigan is the only way to avoid duplicative litigation. However, we recognize that this court might be an equally suitable forum for consolidation of the two cases. We delay a final decision on this motion at this time, and set this case for a status conference to discuss the possibility of conferring with Judge Duggan, the Eastern District of Michigan judge to whom the Michigan case is assigned.

BACKGROUND

Plaintiff Ameritech Corporation ("Ameritech") provides communication services and products to the general public, primarily in Illinois, Indiana, Ohio, Michigan, and Wisconsin through its subsidiaries, plaintiff Illinois Bell Telephone Company ("Illinois Bell"), Indiana Bell Telephone Company, Ohio Bell Telephone Company, Michigan Bell Telephone Company, and Wisconsin Bell Telephone Company. Ameritech wishes to offer video programming services to subscribers in the service area of its telephone companies, including that of plaintiff Illinois Bell, through an affiliate that is separate from the Ameritech local telephone companies, but using the telephone companies' network facilities. Complaint at 2–4, 10. However, under 47 U.S.C. § 533(b) of the Cable Communications Policy Act of 1984 ("the Cable Act"), telephone companies currently are prohibited from entering the video market in their telephone service areas. The Cable Act states, in relevant part:

> (1) It shall be unlawful for any common carrier ... to provide video programming directly to subscribers in its telephone service area, either directly or indirectly through an affiliate owned by, operated by, controlled by, or under common control with the common carrier.
>
> (2) It shall be unlawful for any common carrier ... to provide channels of communications or pole line conduit space, or other rental arrangements, to any entity which is directly or indirectly owned by, operated by, controlled by, or under common control with such common carrier, if such facilities or arrangements are to be used for, or in connection with, the provision of video programming directly to subscribers in the telephone service area of the common carrier.

47 U.S.C. § 533(b).

Plaintiffs bring this action challenging the constitutionality of this prohibition under the free speech protections of the First Amendment (Counts I and II), and under the equal protection principles embodied in the Fifth Amendment (Count III). They seek both a declaration that § 533(b) is unconstitutional and an injunction to prevent defendants, the United States of America, the Federal Communications Commission, and Janet Reno, Attorney General of the United States, from enforcing it. Plaintiffs frame their complaint as both a challenge to the facial validity of the Cable Act and a challenge to the Cable Act as it applies to plaintiffs' intentions and efforts regarding the provision of video programming in Naperville, Illinois.

***2** At the same time as plaintiffs filed this lawsuit, plaintiff Ameritech and another of its subsidiaries, Michigan Bell, filed a virtually identical complaint against the same defendants in the United States District Court for the Eastern District of Michigan, Southern Division, *Ameritech Corporation, et. al. v. United States, et. al.*, 93 CV 74617 ("the Michigan action"). The only potentially significant difference between the Michigan action and the case before this court is that the Michigan plaintiffs' "as-applied" challenge concerns Ameritech's intention to provide video programming in Troy, Michigan.

The case is now before the court on defendants' motion pursuant to 28 U.S.C. § 1404(a) to transfer venue to the

Eastern District of Michigan so that the two cases might be handled together. Because the lawsuits involve virtually identical legal challenges and factual issues and because the Michigan action has progressed somewhat further, defendants maintain that a transfer of venue would serve the conveniences of the parties and witnesses and the interests of justice.

DISCUSSION

Pursuant to the venue transfer statute, the court has discretion to transfer a civil action "[f]or the convenience of the parties and witnesses, in the interests of justice ... to any other district or division where it might have been brought." 28 U.S.C. § 1404. A transfer is proper under this statute if (1) venue is proper in the transferor district, (2) venue is proper in the transferee district, and (3) the transfer serves the convenience of the parties and witnesses and the interests of justice. *See, e.g., Mullins v. Fast Motor Service, Inc.*, 735 F.Supp. 249, 250 (N.D.Ill.1989). The parties do not dispute that venue is proper in this district. Memorandum in Support of Defendants' Motion to Transfer Venue ("Defendants' Memorandum") at 3–4; Plaintiffs' Memorandum in Opposition to Defendants' Motion to Transfer ("Plaintiffs' Opposition") at 4. Thus, in deciding this motion to transfer, we proceed to examine first whether this action might have been brought in the Eastern District of Michigan, and then whether transfer would serve the interests of justice and the convenience of parties and witnesses.

I. Is Venue Proper in Michigan?

Venue in actions against the United States government, its agencies, and officials in their official capacities, is proper

> in any judicial district in which (1) a defendant in the action resides, (2) a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) the plaintiff resides if no real property is involved in the action.

28 U.S.C. § 1391(e) (1990). Plaintiffs argue and apparently defendants concede that no defendant or plaintiff "resides" in Michigan within the meaning of § 1391(e)(1) or (3). *See* Plaintiffs' Opposition at 6 n. 4. Thus, we focus our analysis of venue on the second prong of the statute: did a substantial part of the events giving rise to this suit occur in the Eastern District of Michigan?

***3** Resolution of this question will depend on how we define the "events giving rise to the claim" for the purposes of a constitutional challenge to the validity of a statute and its anticipated enforcement. In their efforts to defeat defendants' motion to transfer, plaintiffs emphasize the link between their constitutional challenge to the Cable Act and their plans to provide video programming specifically to customers in Naperville, Illinois. Plaintiffs imply that their desire to tap into the Naperville video market is the primary "event" giving rise to their legal challenge.

We believe, however, that plaintiffs' characterization of their suit for purposes of opposing the motion to transfer is too narrow. Plaintiffs maintain in their opposition that "all of the events alleged in the Illinois complaint—the provision of video programming and the enforcement of the statute—would occur in Naperville, Illinois." Plaintiffs' Opposition at 4. Additionally, plaintiffs note that plaintiff Illinois Bell has no intention of involvement in video programming outside of Illinois. *Id.* at 5. However, the interests at stake in plaintiffs' complaint are actually much broader than plaintiffs lead us to believe in their opposition. While plaintiff Illinois Bell's involvement may be limited to Illinois, plaintiffs state in their complaint that "Ameritech desires to offer video programming directly to subscribers in the service area of its telephone companies," and describe that service area as including Illinois, Indiana, Ohio, Michigan, and Wisconsin. Complaint at 2. Plaintiffs have correctly argued that "[v]enue, even for constitutional challenges, cannot be based on imaginary facts," Plaintiffs' Opposition at 5. However, no leaps of the imagination are required here: defendants' motion for transfer of venue to Michigan is founded on the very facts which plaintiffs, themselves, allege in their complaint.[1] Clearly, plaintiffs' ambitions, by their own admissions, extend well beyond Illinois, and thus, the effect of the challenged statute's prohibition against provision of video programming will not be limited to plaintiffs' interests in Illinois.

The breadth of plaintiffs' challenges is further revealed by the very general nature of their prayer for relief. Plaintiffs ask the court (1) to declare § 533(b) unconstitutional

and (2) to permanently enjoin defendants from enforcing it—not solely with respect to the plaintiffs' planned activities in Naperville—but "in any criminal, civil or administrative proceedings." Complaint at 12–13. It is clear that the issues at stake in this lawsuit involve potential events in Michigan and the other states in Ameritech's region, as well as Illinois, and thus, a Michigan district court is a proper venue for this litigation. [2]

Plaintiffs' argument against venue in Michigan also emphasizes the fact that "[n]either the complaint, nor anything in the record, indicates that Illinois Bell wants to offer video programming in Michigan." Plaintiffs' Opposition at 5. However, Ameritech has described a large-scale plan to offer video programming throughout its region, and the inclusion of Illinois Bell as a plaintiff cannot be used to tie this case to this court. Moreover, the truth of the matter is that plaintiff Illinois Bell does not intend to offer video programming anywhere at all. Rather, as plaintiffs, explain in the complaint, the video programming is to be provided by an affiliate "that is separate from the Ameritech telephone companies," and plaintiff Illinois Bell is to have "no ownership interest in this entity." Complaint at 2–3. Plaintiff Illinois Bell's only connection to the intended provision of video programming—and thus its only connection to this suit—is that its "network facilities" are to be used in the video transport process in Illinois. *Id.* at 10. In view of Illinois Bell's rather limited role in the "events" giving rise to this suit, we will not allow its presence to defeat venue in Michigan. [3]

II. Would a Transfer to Michigan Serve the Interests of Justice and the Convenience of the Parties and Witnesses?

***4** Having concluded that venue in Michigan would be proper, we must next consider whether a transfer to Michigan would serve the interests of justice and the convenience of the parties and witnesses.

A. The Interests of Justice

When a case is transferred to a district in which a related case is pending, the expectation is that the two cases will be consolidated pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, if practicable. *Waller v. Burlington Northern R. Co.,* 650 F.Supp. 988, 991 (N.D.Ill.1987). Consolidation not only conserves scarce judicial resources, but also reduces the resources ultimately expended by the litigants. *Keppen v. Burlington Northern R. Co.,* 749 F.Supp. 181, 183 (N.D.Ill.1990). By preventing duplicative efforts on the part of both the courts and the parties, transfer and subsequent consolidation serve the interests of justice within the meaning of the venue transfer statute. As the Supreme Court stated in *Continental Grain Co. v. Barge FBL–585,* 364 U.S. 19 (1960), "[t]o permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent." *Id.* at 26. Transfer of venue also serves the further purpose of avoiding the possibility of inconsistent judgments. *Countryman v. Stein Roe & Farnham,* 681 F.Supp 479, 484 (N.D.Ill.1987). Thus, this district has "a strong policy in favor of transferring a case to the district where a related action is pending." *Keppen* 749 F.Supp. at 184.

Plaintiffs do not dispute the general policy in favor of avoiding duplicative litigation, but instead argue that the Illinois and Michigan suits are not necessarily duplicative. Once again, plaintiffs' opposition to the motion to transfer is based on the participation of Illinois Bell in this suit and the applicability of the challenged Cable Act to plaintiffs' plans to provide video programming in Naperville, Illinois. We find this argument to be wholly specious. Illinois Bell raises no claim not also raised by Ameritech, and as discussed at length in the preceding section, we see no real difference between plaintiffs' facial challenges to the Cable Act and plaintiffs' so-called "as-applied" challenges to the Cable Act's application to plaintiffs' plans with respect to Naperville. The Cable Act applies to plaintiffs' intended provision of video programming in Naperville exactly as it applies to plaintiffs' broader plans of providing video programming throughout Ameritech's five-state service area. The First Amendment and equal protection issues involved in the facial and as-applied challenges are intertwined, if not identical. Moreover, the case pending in Michigan includes a very similar "as-applied" challenge, relating to the provision of video programming in Troy. Because there is no difference between the application of the Cable Act to Ameritech and Michigan Bell's efforts to provide video services in Troy, Michigan, and the Act's application to Ameritech and Illinois Bell's efforts with respect to Naperville, Illinois, we conclude that the litigation would indeed be duplicative.

Ameritech's insistence on duplicative litigation in Illinois and Michigan, or anywhere else in its five-state region, cannot be justified merely by virtue of either the inclusion of its local telephone company subsidiaries as plaintiffs, or the inclusion of allegations regarding specific intended locations for video programming.

***5** Plaintiffs further argue that to the extent the litigation is duplicative, such duplication has occurred at the "insistence" of the defendants, who successfully opposed a post-judgment motion to intervene by Ameritech and other regional telephone companies in a similar suit brought by the Chesapeake and Potomac Telephone Company (C & P) and Bell Atlantic Video Services Company in the Eastern District of Virginia. Plaintiffs' Opposition at 7–8. In the Virginia case, the court held that the Cable Act violated the plaintiffs' First Amendment right to free expression. *Chesapeake and Potomac Telephone Co. v. U.S.*, 830 F.Supp. 909, 932 (E.D.Va.1993). It is not our place nor is it particularly useful at this point to comment on whether Ameritech should have been permitted to intervene in the *C & P* litigation. However, given the denial of intervention, Ameritech was not a party to the *C & P* case and cannot invoke the doctrine of res judicata to bar the government from relitigating the issue. *United States v. Mendoza,* 464 U.S. 154 (1984) (non-mutual, offensive and defensive collateral estoppel can be invoked only against private litigants, not against the United States government). Thus, Ameritech and its local telephone company subsidiaries cannot rest on the *C & P* victory, but must litigate for themselves their constitutional challenges to the Cable Act. However, the unavailability of non-mutual collateral estoppel against the government does not require the same parties—or their privies[4]—to relitigate the same cause of action over and over again: "The doctrine of res judicata, of course, prevents the Government from relitigating the same cause of action against parties to a prior decision." *Id.* at 163. Thus, Ameritech and its local subsidiaries have no need to bring multiple suits to challenge the Cable Act and its application to their activities throughout the Ameritech region. Such duplication is unnecessary and does not promote the interests of justice.

In their surreply, plaintiffs argue that transfer would not promote judicial economy because of the recent intervention of Illinois Consolidated Telephone Company ("ICTC") and its parent company, Consolidated Communications Inc. ("CCI"):

> "[I]f plaintiffs' claims were transferred to Michigan, the ... intervenors, which are Illinois entities with no interest in or contacts with Michigan, would likely remain here. Transfer of this case ..., therefore, would not eliminate duplicative litigation. To the contrary, it may simply force the intervenors to pursue their own litigation here.

Plaintiffs' Surreply Memorandum in Opposition to the Government's Motion to Transfer Venue at 3. We find this argument wholly unconvincing. It is true that CCI, unlike Ameritech, desires to offer video programming to subscribers only within Illinois, and thus its complaint for declaratory judgment and injunctive relief has no direct factual link to Michigan. However, the legal issues raised and the relief sought by the intervenors are essentially the same as in the complaint brought by Ameritech and Illinois Bell. Based on the considerations of judicial economy raised by the intervenors in support of their motion to intervene, we granted CCI and ICTC permission to enter this suit, and there is no reason for them to withdraw should this case be transferred to Michigan. Withdrawing from this case in order to litigate a separate suit would defeat the very principles of judicial economy which the intervenors espoused in their motion to intervene. Regardless of the lack of factual ties to Michigan, the Michigan court is perfectly capable of deciding the constitutionality of the Cable Act as it pertains to the intervenors, and, provided that the intervenors remain parties to the litigation, any judgment entered by the Michigan court in plaintiffs' favor would be enforceable by CCI and ICTC in Illinois. Plaintiffs cannot use the recent entrance of the intervenors to justify proceeding with duplicative litigation.

***6** The interests of justice may be served not only by avoiding duplicative litigation and conserving resources, but also by "ensuring speedy trials," *Heller Financial v. Midwhey Powder,* 883 F.2d 1286 (7th Cir.1989); *see also, Coffey v. Van Dorn Iron Works,* 796 F.2d 217, 221 (7th Cir.1986). This factor favors transfer to a district with a less congested docket where a speedier resolution would be likely. However, the evidence regarding the relative workload of the Northern District of Illinois and the

Eastern District of Michigan is inconclusive, and thus, we do not base our decision on this factor. [5]

Nor is our decision influenced by defendants' arguments that the Michigan litigation has progressed further than this case. According to both plaintiffs and defendants, the only significant action taken by the court in the Eastern District of Michigan was the issuance of a scheduling order establishing deadlines for discovery and the filing of motions and pre-trial briefs and setting a tentative trial schedule. Defendants' Memorandum at 9; Plaintiffs' Opposition at 9. The Michigan court has not yet decided any dispositive motions or otherwise reviewed the merits of the case. Thus, there can be no argument that the Michigan court has greater familiarity with the case or that the Michigan action might be resolved much sooner because it has already reached an advanced stage of litigation.

In summary, we conclude that the interests of justice require that the same court handle these two virtually identical cases so as to avoid duplicative efforts. However, considerations of relative court congestion and relative familiarity and time previously invested in the case do not favor one district over the other. While the interests of justice weigh heavily in favor of transfer and consolidation in one court, it is not clear which court would best serve those interests.

B. The Convenience of the Parties and Witnesses

Up until this point we have focused on the "interests of justice" component of transfer analysis under § 1404(a), rather than the conveniences of the parties and witnesses. In part, we have concentrated on the interests of justice because the Seventh Circuit has held that this factor "may be determinative ..., even if the convenience of the parties and witnesses might call for a different result." *Coffey,* 796 F.2d at 220. The convenience of the parties and witnesses does not weigh heavily in our decision also because the relative conveniences in this case do not strongly favor one forum over the other. As an Illinois-based corporation, plaintiff Ameritech may find Illinois generally more convenient, but it can hardly object to transfer to Michigan on grounds of inconvenience since it has already chosen to litigate a nearly identical case there. Additionally, as mentioned above, consolidation in one district should save Ameritech time and money. Plaintiff Illinois Bell has a somewhat stronger case for inconvenience because it is not currently a party to the Michigan action. However, it is a wholly owned subsidiary of Ameritech and represented by the same attorneys as Ameritech. [6] Moreover, its intended role in Ameritech's video programming plans is limited to the use of its network facilities by a separate Ameritech affiliate. Its interests in participating in the provision of video programming in this limited capacity are not significantly different from the interests of Ameritech and involve the same constitutional challenges. Accordingly, litigating the interests of Illinois Bell should not require much, if any, additional effort. Thus, a transfer to Michigan would put Illinois Bell to little inconvenience. We emphasize again that we will not allow Ameritech to rely on the inclusion of its wholly owned subsidiary in this case as a device to justify duplicative litigation

***7** Plaintiffs have also raised the issue of the convenience of the *amicus curiae* participants, Citizens for a Sound Economy ("CSE"), a consumer group, and the Cable Television and Communications Associations of Illinois ("Cable Association"), an association of Illinois cable television companies, and the intervenors, ICTC and CCI, who recently entered this case. As a general matter, the amicus participants do not have party standing, and thus, their convenience is not recognized as a factor under the venue transfer statute. As regards the intervenors, two Illinois-based corporations doing business primarily in Illinois, it is clear that Michigan would be a less convenient forum for them.

However, we agree with defendants that the constitutional challenges brought by plaintiffs depend primarily on questions of law, making it highly unlikely that this case will go to trial, *see* Defendants' Memorandum at 10–11. This eliminates concerns about transporting documents or inconveniencing potential out-of-town witnesses. In all likelihood, this case will be litigated almost entirely on paper, thus requiring very little in-court time on the part of the original parties, the intervenors or amicus curiae participants.

CONCLUSION

Our analysis of the conveniences of the litigants does not strongly favor or disfavor transfer. While venue can be transferred to Michigan without substantial inconvenience to the plaintiffs, amicus curiae, or intervenors, it is by no means clear that the Eastern

District of Michigan would be a more convenient—or speedier—forum than the Northern District of Illinois. While we believe that the interests of justice warrant a transfer of one of the two cases to the other district, there is no strong reason why the cases should be consolidated in Michigan as opposed to Illinois. However, no motion has been made before Judge Duggan to transfer the Michigan case to this district.

In the interests of judicial economy, we are inclined to grant the government's motion to transfer this case to the Eastern District of Michigan, and will do so if no other way to avoid duplicative litigation can be found. However, we are equally willing to consolidate the Michigan action with the case currently pending in this court should Judge Duggan of the Eastern District of Michigan desire to transfer that case here. A status hearing will be held on April 20, 1994, at 9:00 a.m. to discuss the possibility of this court conferring with Judge Duggan in order to determine his views on the matter of transfer.

All Citations

Not Reported in F.Supp., 1994 WL 142864

Footnotes

1 Further indications of Ameritech's goal of providing video programming across its entire five-state region appear in plaintiffs' responses to interrogatories and requests for admissions. Reply Memorandum in Support of Defendants' Motion to Transfer Venue ("Defendants' Reply Memorandum"), Exhibits 1 and 2. These discovery materials provide additional support for a broad reading of what constitutes the "events" that give rise to plaintiffs' claims for the purposes of determining venue in this case.

2 Under the "substantial events" prong of the venue statute, as amended in 1990, it is clear that venue may be proper in more than one district. *Sedio v. Bell,* No. 91 C 3691, 1992 WL 24069, *1 n. 1, 1992 U.S.Dist.Lexis 874, *3 n. 1 (N.D.Ill. Jan. 28, 1992). Plaintiffs express their fear that our approach to venue in constitutional litigation might "allow a party to launch a facial constitutional challenge in any court of its choosing, even if it had no factual connection with the forum." Plaintiffs' Opposition at 5 n. 2. However, in light of plaintiff Ameritech's stated intention of providing video programming throughout its five-state region, which includes Michigan, we are entirely satisfied that plaintiffs' suit has sufficient factual connection to Michigan (or any other state in its region) to justify venue there. Under these circumstances, plaintiffs' concerns regarding a lack of factual foundation for venue are misplaced.

3 In arguing against a transfer of venue, plaintiffs focus on the role of Illinois Bell and the connection of this case to Naperville, Illinois. As we have explained in the preceding discussion, the allegations regarding plaintiffs' desires to provide video programming in Naperville, and the involvement of Illinois Bell as a plaintiff, do not lead to the automatic conclusion that venue is proper only in Illinois. We believe that the emphasis on Naperville is misplaced for another reason as well. Plaintiffs' allegations regarding their intent to offer video services in Naperville pertain primarily to the so-called "as-applied" challenges to the Cable Act, raised in Counts II and III of the complaint. Although the validity of these challenges is not directly before the court and thus will not be fully discussed in this opinion, we wish to note our doubts as to whether plaintiffs actually have made out a separate "as-applied" challenge on either First Amendment or equal protection grounds. A law may be facially unconstitutional if it facially abridges speech or discriminates against a protected class of persons, or the law may be unconstitutional "as applied" if it does not facially target speech or establish an illegal classification, but in its application unfairly burdens speech or imposes different burdens on different classes of people. *See, e.g.,* John E. Nowak, Ronald D. Rotunda, J. Nelson Young, Constitutional Law § 14.4, at 543 (3d Ed.1986) (discussing facial and as-applied challenges with regard to equal protection). In this case, we see no real difference between the facial and as-applied challenges. In those counts involving an as-applied challenge, plaintiffs have added more detail regarding their plans to market video services in Naperville, the current market situation in Naperville, and the potential impact on Naperville consumers. However, a constitutional challenge is not an "as-applied" challenge merely because it includes fairly fact-specific allegations. It is not clear to us that plaintiffs' "as-applied" challenge involves any different facts or legal issues than their facial challenge. This leads us to wonder whether plaintiffs included the so-called "as-applied" challenges merely for the purpose of defeating a potential motion to transfer.

4 Two parties are said to be "in privity" for purposes of res judicata when there is a significant relationship between the two, such as that of a corporation and its wholly owned subsidiary, and their interests are so closely aligned that one party adequately represents the interests of the other. *See, e.g., Aetna Cas. and Sur. v. Kerr–McGee Chemical Corp.,* 875 F.2d 1252 (7th Cir.1989); *Albrech v. Opler,* No. 92 C 5158, 1993 U.S.Dist.Lexis 11633, *21–23 (N.D.Ill. Aug. 20, 1993); *Whitmer v. John Hancock Mut. Life Ins. Co.,* No. 91 C 3067, 1993 U.S.Dist.Lexis 7163 *16, 19–20 (N.D.Ill. May 26, 1993).

We believe that the Ameritech subsidiaries could be considered "in privity" with Ameritech and would be bound by the results achieved by Ameritech's constitutional challenges to the Cable Act, even if the subsidiaries, such as Illinois Bell, were not named parties to the litigation.

5 For example, as of 1993, there were fewer cases pending per judge in the Eastern District of Michigan (305 cases per judge as compared to 325 cases per judge), but the median time from filing to disposition in the Northern District of Illinois was shorter than in the Eastern District of Michigan (five months as compared to eight months). Defendants' Memorandum, Exhibit 5 (U.S. District Court—Judicial Workload Profile), p. 2–3.

6 The convenience of counsel is not itself a factor in considering a motion to transfer, but is relevant to the extent that it effects the parties' litigation costs. *Blumenthal v. Management Assistance, Inc.*, 480 F.Supp. 470, 474 (N.D.Ill.1979).

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