COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

Chelsea Becker, Petitioner,	)	No. F_____
v.	)	Trial Court No. 19CM-5304
Superior Court of Kings County, Respondent	)	(Kings County)

PETITION FOR WRIT OF PROHIBITION, APPLICATION FOR IMMEDIATE STAY OF PROCEEDINGS AND MEMORANDUM OF POINTS AND AUTHORITIES

Following order denying demurrer/nonstatutory motion to dismiss for charges not statutorily cognizable or constitutional under Penal Code § 187
From the Superior Court for Kings County,
Hon. Robert S. Burns, Tel: (559) 582-1010

STAY REQUESTED

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL FIFTH APPELLATE DISTRICT, DIVISION	COURT OF APPEAL CASE NUMBER:
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 42500 NAME: ROGER T. NUTTALL FIRM NAME: LAW OFFICES OF NUTTALL & COLEMAN STREET ADDRESS: 2333 MERCED STREET CITY: FRESNO STATE: CA ZIP CODE: 93721 TELEPHONE NO.: (559) 233-2900 FAX NO.: (559) 485-3852 E-MAIL ADDRESS: bryan@nuttallcoleman.com ATTORNEY FOR (*name*): PETITIONER	SUPERIOR COURT CASE NUMBER: 19CM-5304
APPELLANT/ CHELSEA BECKER PETITIONER: RESPONDENT/ KINGS COUNTY SUPERIOR COURT REAL PARTY IN INTEREST: PEOPLE OF THE STATE OF CALIFORNIA	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.

1. This form is being submitted on behalf of the following party (*name*): PETITIONER, CHELSEA BECKER

2. a. [ ] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [X] Interested entities or persons required to be listed under rule 8.208 are as follows:

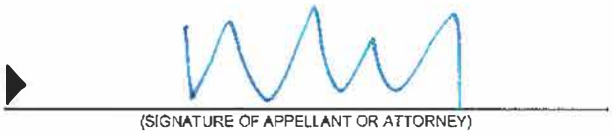
Full name of interested entity or person	Nature of interest (*Explain*):
(1) JACQUELINE GOODMAN	ATTORNEY FOR PETITIONER/DEFENDANT
(2) ROGER T. NUTTALL	ATTORNEY FOR PETITIONER/DEFENDANT
(3)	
(4)	
(5)	

[ ] Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: July 1, 2020

ROGER T. NUTTALL
(TYPE OR PRINT NAME)


(SIGNATURE OF APPELLANT OR ATTORNEY)

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INTRODUCTION

The District Attorney for Kings County has charged Petitioner Chelsea Becker with the murder of her own fetus under California Penal Code Section 187. Petitioner experienced a stillbirth that the prosecutor claims, without scientific basis, was caused by her methamphetamine use during pregnancy. Becker, a mother of three, is one of millions of Americans who have drug dependency problems and one of thousands of women in California who, every year, lose their pregnancies to miscarriage or stillbirth. The statute at issue - Pen. Code § 187 – was amended in 1970 to provide for the prosecution of *third parties* who assault pregnant women and kill their fetuses. The plain language of the statute does not contemplate, just as its drafters did not intend, the prosecution of a woman for experiencing her own pregnancy loss, regardless of the presumed cause. The charge against Petitioner, therefore, alleges conduct that does not constitute a public offense in California and over which the Superior Court of Kings County has no jurisdiction.

The Superior Court, however, has denied Petitioner's demurrer/nonstatutory motion to dismiss and has done so by judicially re-writing Section § 187(b). The Respondent's judicial re-construction of the statute is erroneous as a matter of law and violates both the canons of statutory construction and Petitioner's constitutional rights to due process, privacy, and equal protection under the law. The judicial expansion of Section 187 to permit prosecution of Petitioner will similarly render the statute unconstitutionally void for vagueness.

Petitioner seeks the only remedy she has available to her and asks this Court to issue a Writ of Prohibition to prohibit the continuation of the prosecution against her and to immediately stay all criminal proceedings.

PETITION FOR WRIT OF PROHIBITION AND APPLICATION FOR IMMEDIATE STAY OF PROCEEDINGS

Petitioner, Chelsea Becker, by and through her attorneys of record, Roger T. Nuttall, Jacqueline Goodman and Daniel N. Arshack, hereby petitions this Court for a Writ of Prohibition against an order issued by the Respondent Kings County Superior Court in Trial Court No. 19CM-5304 denying demurrer of charges that are not cognizable under the plain language of Pen. Code, § 187. Petitioner requests that this Court order the Respondent to grant demurrer of the charges filed because the conduct alleged in the Complaint does not constitute a crime in California. Petitioner additionally requests an immediate stay of all further criminal proceedings in the lower court pending the resolution of this Petition.

This verified Petition sets forth the following facts and causes of action for issuance of said writ:

Parties to Petition and Real Parties in Interest

1. Petitioner is a resident of Kings County, California and the defendant in the underlying action, *People v. Becker*, Kings County Trial Court No. 19CM-5304. She is currently incarcerated on a $2,000,000 bail at the Kings County Jail, 1570 Kings County Drive, Hanford, CA 93230.[1]
2. Respondent, the Superior Court of Kings County, Judge Robert S. Burns, has invoked trial court jurisdiction over the charges lodged against Petitioner under Cal. Pen. Code § 187(a) and has denied Petitioner's demurrer to those charges.
3. The Office of the Kings County District Attorney (DA) is a real party in interest in the present matter, having brought the charge of murder against Petitioner and in contesting its demurrer.

[1] Petitioner's bail is excessive as a matter of law and is the subject of a separate but related Petition for Writ of Habeas Corpus filed shortly after this Petition.

4. The parties have been served with a copy of this petition pursuant to Code of Civil Procedure section 1107.

Jurisdiction and Timeliness

5. All proceedings with which this Petition is concerned have occurred within the territorial jurisdiction of Respondent, the Superior Court of the State of California in and for Kings County, California.
6. The writ is taken without substantial delay, the Superior Court having issued its Order on June 4, 2020, and is therefore timely filed. *See, Volkswagen of Am. v. Superior Court* (2001) 94 Cal.App.4th 695, 701 [114 Cal.Rptr.2d 541] ("As a general rule, a writ petition should be filed within the 60-day period that is applicable to appeals.")

Factual Background

7. Petitioner is one of nearly a million Americans who each year experience pregnancy loss, and one of thousands who experience stillbirth (pregnancy loss after 20 weeks) each year in California. She is also one of millions of people who struggle with drug dependency and economic indigence. Becker has suffered from a substance use disorder and, as a result, has tried - unsuccessfully - to achieve abstinence from her methamphetamine use over a period of years. She is also a mother of three healthy children. She struggled with drug dependency through each of those earlier pregnancies. These facts are not in dispute.
8. Although she had three previous live and healthy births, on September 10, 2019, Petitioner's pregnancy ended, like thousands of other women in California and across the country, in stillbirth at a hospital. After she left the hospital, on the same date as her stillbirth, Petitioner's medical information, including test results and those of her stillborn fetus was provided to law enforcement. Those members of law enforcement called Petitioner and asked her to come speak with them, which she did. At the

end of the conversation she was free to go. These facts are also not in dispute.

Charge and Arrest

9. On October 31, 2019, the Kings County DA charged Petitioner with one count of Murder of a Human Fetus, a felony, in violation of Pen. Code, § 187(a), alleging that Petitioner committed murder of a human fetus "with malice aforethought." Criminal Complaint (Ex. 1) In addition, disregarding its lack of any scientific basis, *see e.g.*, Terplan Wright letter (Ex. 2)[2] the District Attorney lodged the charge despite the statute's explicit provision that the law cannot be used to prosecute "any person who commits an act that results in the death of the fetus if … [t]he act was solicited, aided, abetted, or consented to *by the mother of the fetus*." Pen. Code § 187(b) (emphasis added).
10. On the same date the complaint was issued, October 31, 2019, the Respondent signed an arrest warrant for Petitioner and issued a bail amount of $5,000,000. Hanford Police Department, Supplement 8 Report (November 6, 2019) (Ex. 3) Petitioner was arrested on November 5, 2019 and booked into the Kings County Jail on November 6, 2019. *Id.* Unable to afford any bail, Petitioner has remained in custody since that date.

[2] Also attached as Exhibit 1 to Petitioners First Motion for Reduction of Bail (Ex. 4)

Procedural History

Motions for Reduction of Bail, Spread of COVID-19, and Petition for Writ of Habeas Corpus

11. On December 19, 2019, current counsel substituted in place of the public defender and, on January 31, 2020, filed Petitioner's First Motion for Reduction of Bail (Ex. 4). The Superior Court, reduced Petitioner's bail from $5,000,000 to $2,000,000. Bail Hearing Transcript, February 20, 2020 at 5:26-27 (Ex. 5). This reduction in bail, based on factually inaccurate statements and without articulated reason or analysis, functioned as a distinction without a difference and did nothing to alter her circumstance.

12. During Petitioner's sustained detention, COVID-19 began its spread throughout the world. Cases ballooned in the United States and in California, with prisons and jails particularly vulnerable to spread. In response to the rapid and ongoing spread of the disease, Petitioner filed her Supplemental Notice and Motion for O.R. Release or Reduction of Bail in Light of Covid-19 Pandemic and Consequent State of Public Health Emergency on March 26, 2020. (Ex. 6). Originally set for hearing on April 10, 2020, on March 30, 2020 the trial court continued the bail hearing on the supplemental emergency motion for 50 days, until May 20, 2020. After the Superior Court refused to allow Petitioner to seek an earlier hearing of her motion, and in response to the mounting health crisis, Petitioner filed her initial Writ of Habeas Corpus on April 27, 2020 which was "denied without prejudice as premature" on May 7, 2020. *See*, Order (Ex. 7). Becker remained in custody awaiting the May 20 hearing.

13. On May 20, the Superior Court denied her Second Motion for Reduction of Bail, and Becker remains in custody, as she has since her November arrest. *See,* May 20 Bail Hearing Transcript (Ex. 8)

14. Petitioner has filed a separate Writ for Habeas Corpus based on the Superior Court's May 20, 2020 order denying a reduction of bail.

Demurrer Motion

15. Like her continued detention, the underlying charge against Ms. Becker is, itself, unlawful. Section 187 neither contemplates nor authorizes the prosecution of a woman for the outcome of her own pregnancy under any circumstance, including when it is alleged that it was her own volitional and thereby consensual conduct that led to stillbirth. It is for this reason that Petitioner submitted her Notice of Demurrer, Demurrer of Complaint and Nonstatutory Motion to Dismiss on April 2, 2020 and thereby moved the trial court to dismiss the charge against her for its facial insufficiency. Notice of Demurrer and Demurrer of Complaint; Nonstatutory Motion to Dismiss (Apr. 2, 2020) (Ex. 9) (hereinafter "Motion for Demurrer"). On May 26, 2020, the government lodged its Points and Authorities in Support of Opposition to Demurrer and Motion to Dismiss. (Ex. 10) (hereinafter "State's Opposition to Demurrer"). Petitioner filed her Reply in Support of Notice of Demurrer and Demurrer to Complaint and Nonstatutory Motion to Dismiss on June 1, 2020. (Ex. 11).
16. On June 4, the Superior Court heard and denied the demurrer and dismissal in an order issued in open court. Reporter's Transcript of Demurrer, 19:17-24-26 (Ex. 12) (hereinafter "Transcript of Demurrer").
17. Because the Superior Court has now denied a reduction in bail on May 20, 2020, and also denied Petitioner's demurrer to the unlawful charges against her on June 4, 2020, both issues are ripe for writ review. This Petition seeks immediate review of only the demurrer.
18. It is respectfully submitted that because resolution of the demurrer issue will have a significant effect on the resolution of the pending Writ of Habeas Corpus, which incorporates by reference the legal arguments,

and references contained in this Petition, it may be useful for the Court to first address this Petition before moving to the bail issue.[3]

Respondent Court Erred in Denying Demurrer

19. Neither the plain language of California's murder statute nor its legislative intent permits the use of Pen. Code § 187 to prosecute a woman for the loss of her own pregnancy. The Superior Court's order denying demurrer is contrary to the statute's plain language and legislative intent. Instead of interpreting and applying the statute according to the canons of statutory construction, the Superior Court erroneously held as follows:

    A. First, relying solely on its own inventiveness, untethered from any evidence regarding the legislative history and contrary to the canons of statutory construction, the court concluded that this prosecution was consistent with the California's legislative intent in enacting Section 187. In reaching this conclusion, the court ignored appellate court decisions clarifying that this law was passed to respond to the issue of violence *against* pregnant women resulting in the death of the fetus. The court also specifically discounted a 1990 affidavit executed by the primary author of Pen. Code § 187, Speaker of the Assembly W. Craig Biddle, (Ex. 13) explaining that addressing such violence was the "sole intent" of the 1970 amendment. The trial court took the position, without foundation, he did "not know that it truly speaks for the entire legislative body[,]" and is therefore "not the ending point for that particular analysis." Transcript of Demurrer at 19:6-8 (Ex. 12). The court did not

[3] To be clear, as set forth in the accompanying Petition for Writ of Habeas Corpus, Petitioner contends that a significant bail reduction is appropriate regardless of the resolution of this Petition.

indicate that it had been presented with, reviewed, or relied upon *any* other evidence indicating a legislative intent different from that expressed by the amendment's author, Speaker Biddle.

B. The court went on to reason, again without any support, and contrary to the language of the statute, that "it appears to me that the exception under the B section of Penal Code Section 187 is designed to protect [only] the therapeutic abortion that is sought." *Id.* at 20:22-25; *see also id.* at 21:24-25 ("It looks to me like it excludes the mother [only] if she sought and retained a therapeutic abortion."). There is, however, no language in the statute that makes that limitation. The court further determined that the statute does not explicitly state that its terms preclude prosecution of the mother of the fetus, *id*., despite the statute's instruction that Section 187(a) "shall not apply to "*any person who commits an act* that results in the death of a fetus if any of the following apply […] (b)(3)." The *act,* alleged by the prosecution, "was solicited, aided, abetted, or *consented to by the mother of the fetus*." (emphasis added) The Superior Court's statutory reading incorporates terms into the statute that do not exist, defies commonsense meaning of statutory terms that do exist, and leads to absurd, far reaching results which were unintended by the legislature.

C. Finally, the Superior Court determined that its unprecedented reading of the statute does not violate constitutional principles of equal protection, due process and privacy, but rather applies equally regardless of sex and serves the state's legitimate interest in protecting potential life of a "viable" fetus. *See id.* at 22:28-24:26. As will be discussed below, "viable" is not a term

found in Section 187, and the California Supreme Court specifically rejected that exact limitation on the reach of the law in *People v. Davis* (1994) 7 Cal.4th 797, 810 [30 Cal.Rptr.2d 50, 872 P.2d 591].

20. The court's statutory construction is contrary to the statute's plain meaning and clear legislative intent. The court's constitutional analysis is similarly erroneous. There is simply no manner of proceeding with the present prosecution in accordance with recognized statutory and constitutional principles.

No Adequate Remedy at Law Exists

21. Petitioner has no speedy or adequate remedy at law. A writ of prohibition is the only remedy available to cure an unlawful denial of demurrer, which is not subject to direct appeal. Where "the trial court has heard and determined that it has jurisdiction, prohibition will lie to prevent the exercise thereof when that jurisdiction is challenged in that court by demurrer, motion, plea or other objection." *River Farms, Inc. v. Superior Court of San Bernardino County* (1967) 252 Cal.App.2d 604, 609 [60 Cal.Rptr. 665]. "Prohibition will issue to restrain any court action other than dismissal where it is mandatory that the court dismiss." *Id.* Dismissal is mandatory where, as here, the charge does not constitute a crime in the State of California and therefore does not invoke the jurisdiction of the Superior Court. *See*, *e.g.*, *Young v. Municipal Court* (1971) 16 Cal.App.3d 766, 773 [94 Cal.Rptr. 331] (writ of prohibition was an appropriate remedy where trial court had overruled demurrer of charges that violated freedoms guaranteed by the First and Fourteenth Amendments).

22. To require Petitioner to stand trial in a criminal case "by a court which acts without or in excess of its jurisdiction is an imposition of personal hardship upon the defendant and a futile expense to the public."

Patterson v. Municipal Court (1965) 232 Cal.App.2d 289, 294. Denial of the present Petition will result in such hardship stemming foremost from the progression of a prosecution that is unconstitutional at its inception and continues only in excess of the Respondent's jurisdiction. *See de Jesus Ortega Melendres v. Arpaio* (9th Cir. 2012) 695 F.3d 990, 1002 ("[T]he deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'") (quoting *Elrod v. Burns* (1976) 427 U.S. 347, 373).

23. The question of whether the Respondent erred in overruling the demurrer, and thereby exceeded its jurisdiction, is one of law and is reviewed *de novo*. *See McCutchen v. City of Montclair* (1999) 73 Cal.App.4th 1138, 1144 [87 Cal.Rptr.2d 95].

Application for Stay

24. Petitioner requests an immediate stay of proceedings in the Superior Court during the pendency of this Petition. On June 15, 2020 the parties agreed to adjourn the matter in Superior Court until August 26 at which time further dates would be set. June 15, 2020 Docket Entry (Ex.14). Petitioner requests that this Court issue a separate order requiring the stay of all proceedings until resolution of the present writ proceeding. A stay in the underlying case is necessary to ensure that Petitioner does not suffer the irreparable harm that could arise from continuing with a prosecution that is not authorized by law. Absent a stay, Petitioner risks being indicted and tried for a crime that does not exist. A stay is in the interests of justice, does not prejudice the prosecution in the underlying matter, and is in the interest of judicial economy.

WHEREFORE, petitioner respectfully prays that this Court:

1. Issue a Writ of Prohibition and prohibit the Superior Court from exceeding its jurisdiction by ordering that court to grant demurrer of the underlying charge;
2. Issue a Stay of Proceedings pending resolution of the present proceedings; and
3. Grant Petitioner whatever further relief this Court deems appropriate and in the interest of justice.

Date: July 1, 2020

Respectfully Submitted,

s/Roger T. Nuttall

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VERIFICATION

I, ROGER T. NUTTALL, declare as follows:

I have read and reviewed the foregoing "Petition for Writ of Prohibition" of Petitioner Chelsea Becker and know its contents. I am an attorney for Petitioner in this action. The matters stated in the Petition are true of my own knowledge, except as to those matters stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct.

This declaration was executed on July 1, 2020 at Fresno, California.

s/Roger T. Nuttall
ROGER T. NUTTALL

MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

The Kings County District Attorney charged Petitioner with murder of her own fetus after her pregnancy ended in a stillbirth, an outcome alleged to have resulted from the *act* of methamphetamine use during pregnancy. The charge is facially deficient because California's murder statute, Pen. Code § 187, categorically precludes prosecution of a woman for the outcome of her own pregnancy. Demurrer lies where the accusatory pleading alleges facts that, even if true, "do not constitute a public offense," and/or "contains matter which, if true, would constitute a legal justification or excuse of the offense charged, or other legal bar to prosecution." Pen. Code §§ 1004(4) & (5). To allow the present prosecution to continue would be to permit the creation of a judicially written and constitutionally prohibited crime - one that was neither described by the plain terms of the statute nor contemplated by the legislative body which drafted it.

Respondent ruled in favor of its own jurisdiction and denied the demurrer. Respondent's flawed reasoning was that the plain language of Pen. Code § 187(b) does *not* under any circumstances preclude the prosecution of a woman who engages in any act which results in pregnancy loss. Instead, the court opined, despite the lack of supporting statutory language, and contrary to both the structure and history of the statute, that "[Section 187](b)(3) appears to me to be there to protect the medical personnel who assist the doctor during the course of that [therapeutic abortion] procedure" Transcript of Demurrer at 20:17- 28 (Ex. 12) Respondent then concluded by stating "Nowhere in the statute does it say that the statute does not apply to the mother of a fetus" Transcript of Demurrer at 20:27-28, thereby declaring that *any* voluntary act, without statutory definition or limit, of a pregnant woman which is alleged to have caused the demise of a viable fetus is subject to prosecution for murder.

Respondent found that the statute's plain language somehow, provides constitutionally clear and sufficient notice of a woman's liability for murder for engaging in *any* act herself while pregnant which allegedly results in pregnancy loss. *See id.* at 21:19-27.

Finally, Respondent determined that prosecution pursuant to its judicially rewritten version of Section 187 would not violate Petitioner's right to privacy under the Fourteenth Amendment because the state "has a legitimate and important interest in potential life" and an ability "to impose regulations to protect that life once the fetus has become viable." *Id.* at 22:4-15.[4]

Respondent's decision completely ignores the contrary holding in *People v. Davis*. (1994) 7 Cal.4th 797, 810 [30 Cal.Rptr.2d 50, 872 P.2d 591] that specifically recognized the constitutional privacy interests pregnant women have that third party attackers do not, and held that Section 187 has no viability requirement.

Respondent at once judicially expanded the statute by permitting - contrary to its plain terms - prosecution of the "mother of the fetus" while

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[4]Nothing in the law supports this interpretation. First, in *Roe v. Wade* (1973) 410 U.S. 113 and subsequent abortion cases recognized a state interest in fetal life sufficient to justify certain state limitations on just one thing: abortion. Those decisions did not consider, much less recognize, a state interest in potential life (before or after viability) that authorized state surveillance, control, arrest or prosecution of pregnant women themselves for abortion or any other action or omission that might affect pregnancy outcome. Roe balanced a mother's constitutional privacy rights against a state's interest in protecting potential life. It held that *in the context of a mother's abortion decision*, the state's interest in potential life became significant enough at the point of viability to allow states to outlaw abortion except when necessary for the mother's life or health. Roe, 410 U.S. 163; People v. Davis. (1994) 7 Cal.4th 797, 803 [30 Cal.Rptr.2d 50, 53, 872 P.2d 591,594] (emphasis added))

also limiting its scope by ignoring *Davis,* and applying the statute only to those fetuses which have obtained "viability."

This simultaneous expansion and contraction speaks to the tortured manner in which this prosecution and Respondent seek to rewrite the statute so as to enable the prosecution of a woman for any of her acts or omissions while pregnant that allegedly result in pregnancy loss - a result neither intended by the legislature nor permitted by State or Federal Constitutions. Unsurprisingly then, the Respondent's reasoning is fundamentally flawed and contrary to both the canons of statutory construction and legislative intent.

Respondent's order denying demurrer creates a new crime never enacted by the legislature (but rather, repeatedly rejected by it), and will, for the first time, without legislative imprimatur and contrary to the finding of every California court that has considered this issue, make pregnant women subject to criminal investigation, arrest and prosecution for an unlimited range of acts and omissions - from smoking cigarettes, having sex while pregnant, poor nutrition, drinking alcohol, not wearing a seat belt, to failing to seek prenatal care - which could and have been alleged to contribute to a stillbirth. Absent a legislative enactment establishing, which among these and countless other behaviors shall be subject to prosecution, the decision to choose which women who experience a pregnancy loss to prosecute and for what behavior will be left to the sole discretion of police and prosecutors. Introduction of this new offense renders the statute overly broad, void for vagueness, and in violation of Petitioner's fundamental rights.

ARGUMENT

I. A writ of prohibition must issue because Pen. Code §187 necessarily and categorically excludes prosecution of a woman for a pregnancy loss.

In construing Section 187(b), the Court must, "begin with the plain, commonsense meaning of the language used by the Legislature. If the language is unambiguous, the plain meaning controls." *Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 519 [128 Cal. Rptr. 3d 658, 257 P.3d 81] *see also*, *People v. Cook* (2015) 60 Cal.4th 922, 935 [183 Cal.Rptr.3d 502, 512 342 P.3d 404,412]. The court may, however, "reject a literal construction that is contrary to the legislative intent apparent in the statute or that would lead to absurd results." *Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 27 [109 Cal. Rptr. 3d 329, 230 P.3d 1117].

> At the outset, it bears noting that:
>
> > California is a "code" state, i.e., the Legislature has the exclusive province to define by statute what acts constitute a crime (§ 6), and statutory provisions must "be construed according to the fair import of their terms, with a view to effect [their] objects and to promote justice." (§ 4.)
>
> *Davis* (1994) 7 Cal.4th at 810.

Respondent, however, accepted the prosecution's invitation to engage in judicial expansion of the law and thereby invade the province of the legislature. This Court should reject the invitation, just as "the overwhelming majority of the jurisdictions confronted with the prosecution of a mother for prenatal conduct causing harm to the subsequently born

child, refuse to permit such prosecutions." *State v. Louk* (2016) 237 W.Va. 200, 207 [786 S.E.2d 219, 226-227].[5]

Section 187(b) instructs that an "act" - any act without limitation in the statue - is precluded from prosecution if any of the circumstances in the subsequent three sub-parts exist. The Respondent, however, chose to ignore critical language defining the enumerated preclusions from prosecution as disjunctive that is, standing alone and distinct from one another, and found instead that an "act" is excluded from the reach of the statute only when it is committed in the course of a "therapeutic" abortion. Transcript of Demurrer at 20:24; 21:26 (Ex. 12). Ignoring existing language, Respondent then rewrote the statute by *ipsi dixit* expanding its application to the pregnant woman herself and then limiting it to those "acts" which affect only "viable" fetuses. *Id.* at 22:8. The Superior Court's construction fails not only for its patent disregard of the statute's disjunctive terms but also because the California statute codifying the concept of a "therapeutic abortion," which predated *Roe v. Wade*, was rescinded and superseded in 2002.[6] This judicial rewriting is contrary to the plain language of the statute, contrary to California caselaw, and if upheld, will lead to absurd,

[5] The State below based the validity of its prosecution on the inapt and extreme outlier position adopted by South Carolina in *Whitner v. State* (1997) 328 S.C. 1 [492 S.E.2d 777] and *State v. McKnight* (2003) 352 S.C. 635 [576 S.E.2d 168]. *See* State's Response to Demurrer at 8-9 (Ex. 10)

[6] The Therapeutic Abortion Act was adopted in 1967 and was repealed and replaced in 2002 with the "Reproductive Privacy Act," Health & Safety Code § 123460 *et seq.*

unintended results and would render the statute unconstitutional on its face.[7]

A. The plain language of the statute precludes pregnant women from prosecution.

Section 187(b) explicitly precludes prosecution of a woman who terminates her own pregnancy - by any means. The section states, in full:

> **(b)** This section shall not apply to any person who commits an act that results in the death of a fetus *if any of the following apply*:
>
> **(1)** The act complied with the Therapeutic Abortion Act, Article 2 (commencing with Section 123400) of Chapter 2 of Part 2 of Division 106 of the Health and Safety Code.
>
> **(2)** The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code in a case where, to a medical certainty, the result of childbirth would be death of the mother of the fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.
>
> **(3)** The act was solicited, *aided, abetted, or consented to by the mother of the fetus.*

(emphasis added). The statute's terms exempt from prosecution any person who complied with the Therapeutic Abortion Act (§(b)(1)), held a physician or surgeon's certificate and acted to save the life of the pregnant woman (§(b)(2)), *or* any *person* without limitation, therefore, perforce including the mother of the fetus, who solicited, aided, abetted or consented

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[7] *See, e.g., Johnson v. State* (Fla. 1992) 602 So.2d 1288 (The court refused to judicially expand Florida's drug delivery law to permit prosecution of a woman who was pregnant and used a controlled substance, allegedly delivering it to her newborn through her umbilical cord in the 30-90 seconds after birth but before the cord was cut and "decline[d] the State's invitation to walk down a path that the law, public policy, reason and common sense forbid it to tread").

to an act of the mother of the fetus (§(b)(3)). Subsection (b)(2), when drafted, independently protected and exempted practitioners performing an abortion *outside* of the terms then permitted by the Therapeutic Abortion Act.[8] Subsection (b)(3), for its part, also stands on its own and necessarily includes the mother of the fetus herself, who, as a "person" may "act," and who can clearly aid, abet and consent to her own volitional conduct.

The preclusions from prosecution in Section 187(b)(3) make no mention of "medical" or "therapeutic" abortion, abortion, or "viable" and means that a woman who terminates her own pregnancy - or solicits another to terminate her pregnancy - by any means and at any point, will not be subject to prosecution for murder. This reading is consistent with the statute's plain language, the legislative history underlying the amendment of Section § 187 and its surrounding and subsequent legislative landscape. *See* Section 1. B, *infra*.

1. The State's statutory interpretation fails to consider statutory terms as written.

The State purports to prosecute Petitioner under the "plain meaning of the language" of Section 187(b), something which, it asserts, Petitioner "conveniently omits" from demurrer arguments. Opposition to Demurrer at

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[8] Adopted in 1967, six years before *Roe*, 410 U.S. 113, the Therapeutic Abortion Act, Health & Safety Code § 123400 *et seq.* (revised/repealed in 2002 by SB 1301, the Reproductive Privacy Act, Health & Safety Code § 123460 *et seq.*) permitted abortion *only* when it occurred in an accredited hospital, was approved in advance by hospital committee, *and* the committee determined substantial risk that continuance of pregnancy would gravely impair the physical or mental health of the mother; *or* the pregnancy had resulted from rape or incest.

Section 187(b)(2) protected from prosecution any licensed physician or surgeon *outside* of the terms of the Therapeutic Abortion Act who performed an abortion where failure to do so would have, more likely than not, resulted in the death of the mother of the fetus.

2 (Ex. 10) Through a cherry picked, and erroneous reading of dictionary definitions, the prosecution purports to elucidate the "plain meaning" of § 187(b)(3)'s listed exceptions of "solicited," "aided," "abetted," and "consented to." The State's explanation is deeply flawed.

The prosecution asserts that "the statute's plain language connotes [sic] a female who solicits, aids or abets *a third person* to facilitate the death of her fetus." Opposition to Demurrer at 4 (emphasis in original) But there is no mention of a "third person" in §187(b)(3). Instead of the ordinary meaning of subsection (b)(3), the State is more interested in describing what it "connotes," that is, what it might convey "*in addition* to [its] exact explicit meaning." *See* Merriam-Webster (available at https://www.merriam-webster.com/dictionary/connote) (*emphasis added*). Statutory construction, however, requires us to hew to what the statute actually states, rather than by connotation.

Furthermore, the dictionary definitions that the People urge on the Court for three of the four verbs used in §187(b)(3) ("aid," "abet," and "consent to") are either incomplete or incorrectly applied. The words listed in §187(b)(3) are *verbs*. Of the four verbs in the statute, only "solicit" requires the intervention of or engagement with another person or entity. The remaining three apply directly to Petitioner and exempt her from prosecution.

The prosecution provides no insight into the meaning of the verb "aid." It relied instead on an incomplete definition of the *noun* "aid." Webster defines the *verb* "aid" as "to provide with what is useful or necessary in achieving an end." Miriam-Webster (available at https://www.merriam-webster.com/dictionary/aid) (accessed on June 25, 2020). The "act" complained of by the prosecution is Petitioner's alleged ingestion of a controlled substance allegedly causing the stillbirth. Obviously, one can aid oneself, whether by using controlled substances to

self-medicate, enhance athletic ability, or quell craving or withdrawal that results from a drug dependency problem. Consequently, the "aid" exception in subsection (b)(3) applies to what Petitioner allegedly did by and to herself.

Even when the prosecution invoked the noun definition of "aid," it omitted some significant information. Left out from its quotation of the dictionary entry is the first definition, that is, "the act of helping someone." *Id.* The definition does not say "someone else." Plainly, one can help oneself, or engage in an act of helping oneself.

Similar problems arise in the prosecution's treatment of the verb "abet." The prosecution, again, ignores the first definition given for the word – "to actively second and encourage (something, such as an activity or plan)." It asserts that "Webster does not define abetting oneself in any context," Opposition to Demurrer at 5, (Ex. 10) but the usage illustration given for Webster's first definition of the word is "abet the commission of a crime." Again, Webster describes actions being done, but with no requirement that they be done *with* or *for* anyone in particular or, necessarily, with or for a third person. In this case the prosecution accuses Petitioner, as Webster defines it, of *abetting* in the commission of a murder by taking drugs, and thus, according to the plain language of Section 187(b)(3), precludes her from prosecution.

The State's proffered definition of "consent" is similarly incomplete and misleading. As before, instead of giving the definition of the verb form of the word, the prosecution invokes the noun form of "consent." *Id*. at 5. The statute uses the term as a verb; however, the noun form would have required the statute's drafters to have used the term "to provide consent," which they did not. Section § 187(b)(3).

The Webster definition of the verb "consent" is "to give assent or approval" or to "agree." (https://www.merriam-webster.com/dictionary/consent). Webster offers an instructive illustration of the verb "consent": one can "consent to being tested." *Id.* One can consent to answering questions. In the same way, one can surely consent to taking medication or ingesting controlled substances. It merely means, that one does the act voluntarily and volitionally. The words "consent to" as used in subsection (b)(3), does not require consent *with* anyone, but merely consent to an act done, including the act of voluntarily and volitionally - consensually - ingesting drugs. The "consent to" exception of subsection (b)(3) also applies to preclude prosecution of Petitioner for the act with which she has been charged.

2. The Respondent erred in finding that the plain language of the statute excluded pregnant women from protection.

The Respondent disregarded a commonsense reading of the statute and ignored the disjunctive phrase "if *any* of the following apply" in section 187(b). The court instead held, without any support, that the enumerated exemptions were meant to be read as one and "in connection with each other." Transcript of Demurrer at 20:3-5 (Ex. 12). The fact is Section 187(b) identifies three discrete methods by which a person is precluded from prosecution for behavior that results in the death of a fetus. There is no connection between subparts (b)(1), (b)(2) and (b)(3). The statute does not say "and" following any subpart. The subparts are three independent, disjunctive methods of precluding prosecution.[9]

[9] It is likewise clear that the rescission of the Therapeutic Abortion Act did not result in the collapse of the remaining two subparts of Pen. Code § 187(b). That is precisely because the subparts do not rely upon each other as suggested by the Respondent.

Moreover, Respondent's reading fails because it renders both subparts (b)(2) and (b)(3) superfluous, and therefore is contrary to the canons of statutory construction. *United States v. Jicarilla Apache Nation* (2011) 564 U.S. 162, 185 ("As our cases have noted in the past, we are hesitant to adopt an interpretation of a congressional enactment which renders superfluous another portion of that same law.") (quoting *Mackey* v. *Lanier Collection Agency & Service*, *Inc.* (1988) 486 U.S. 825, 837.) Based on this flawed reading, the court judicially inserted language into the statute to hold that Section 187(b)(3) only "excludes the mother if she sought and retained a therapeutic abortion." Transcript of Demurrer at 21:25-27 (Ex. 12).

The Respondent's selective reading and re-drafting of the statute's exemptions runs counter to the plain language of the statute and defies both logic and legislative history. Nothing in the language of the statute nor in the legislative history suggests that the preclusion from prosecution be limited only to those pregnant women in pursuit of a therapeutic abortion.[10] Rather, the preclusion is without limitation and necessarily applies to a pregnant woman's volitional conduct. This is because a pregnant woman who has committed a volitional act, by definition, has consented to the

[10] When the legislature intends to describe limitations in the application of statues that relate to pregnancy, birth defects, abortion, fetuses, stillbirth, miscarriage and perinatal issues it uses specific language to do so. *See, e.g.*, Cal. Health & Safety Code § 104560 (perinatal); Cal. Health & Safety Code § 103825 (1995) (birth defects, stillbirths, and miscarriages); Cal. Health & Safety Code § 103830 (birth defects, stillbirths or miscarriages); Cal. Health & Safety Code § 103840 (birth defects, stillbirths or miscarriages); Cal.Health & Safety Code § 103040.1 (stillbirth); Cal. Health & Safety Code § 103850 (birth defects, stillbirth, or miscarriage); Cal. Educ. Code § 87766 (1990) (pregnancy, miscarriage, childbirth); Cal.Educ.Code § 44965 (pregnancy, miscarriage, childbirth); Cal. Food & Agric. Code § 13123 (abortions, birth defects, stillbirths and resorptions); Cal. Pen. Code § 1108 (abortion).

commission of that act. A contrary reading defies common sense: that is, that a woman will not be seen to have consented to an act in which she voluntarily and volitionally engages. The legislative history unequivocally comports with this commonsense interpretation.

B. The legislative history of Pen. Code § 187 makes clear that a pregnant woman cannot be prosecuted for experiencing a stillbirth.

The plain language of the statute is sufficient for the issuance of a Writ of Prohibition. However, even assuming *arguendo* that the terms of Section 187(b)(3) are not themselves clear, the legislative intent to *only* address *third party violence against* women and to preclude prosecution of women for the outcomes of their pregnancies, including unintentionally or intentionally ending or attempting to end their own pregnancies, is writ large.

In 1970, the statute was amended in response to the California Supreme Court's decision in *Keeler v. Superior Court* (1970) 2 Cal.3d 619 [87 Cal.Rptr. 481, 470 P.2d 617]. In *Keeler*, a man attacked a pregnant woman causing her to experience a stillbirth. *Keeler* held that the state's homicide law did not reach fetuses and therefore could not be used to prosecute the defendant. In response, the Legislature amended the murder statute to permit prosecution of a third person, other than the pregnant woman, for the killing of a fetus. But, critically, the Legislature clarified that a pregnant woman could not herself be charged with murdering her fetus for any of her own acts while pregnant. Pen. Code § 187(b)(3). The legislative history underpinning amended Section 187 is unequivocal in its protection of pregnant women. This is particularly apparent in light of a 1992 affidavit prepared by the author of the amendment, Speaker of the Assembly, Craig W. Biddle, *See,* Biddle Affidavit (Apr. 23, 1992) (Ex. 13). Speaker Biddle explained that the purpose of Section 187(b)(3) was

> to make punishable as murder a *third party's* willful assault on a pregnant woman resulting in the death of her fetus. That was the *sole intent* of AB 816. No legislator ever suggested that this legislation, as it was finally adopted, could be used to make punishable as murder conduct by a pregnant woman that resulted in the death of her fetus.

Id. at ¶ 4 (emphasis added). The Respondent court, however, chose to ignore this (or any) evidence of legislative intent, despite its consistency with California's overall statutory scheme, instead finding that it may not "speak[] for the entire legislative body" and, therefore, "is not the ending point of that particular analysis." Transcript of Demurrer at 19:7-11 (Ex. 12). The court did not, however, provide any further analysis or describe any evidence of contrary legislative intent.[11] This is because, Petitioner having searched, there is none.

1. The Respondent erred in disregarding legislative history.

A legislator's statement is entitled to consideration when it is a reiteration of legislative discussion and events leading to adoption of proposed amendments. *California Teachers Assn. v. San Diego Community College Dist*. (1981) 28 Cal.3d 692, 700 [170 Cal.Rptr. 817, 621 P.2d 856]; *see also Marriage of Bouquet* (1976) 16 Cal.3d 583, 590 [128 Cal.Rptr. 427, 546 P.2d 1371]; *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 284 [104 Cal.Rptr. 761, 502 P.2d 1049] (dis. opn. by Sullivan, J.); *Rich v. State Board of Optometry* (1965) 235 Cal.App.2d 591, 603; *Stanton v. Panish* (1980) 28 Cal.3d 107, 114 [167 Cal.Rptr. 584, 615 P.2d 1372]. Mr. Biddle's sworn affidavit reflects exactly this history and warrants consideration by the Court. The lower court's refusal to afford the

[11] Nor has the prosecution provided any evidence of legislative intent at all, and certainly none contrary to the Biddle affidavit. Rather, all available evidence demonstrates consistency with Mr. Biddle's sworn statement that the *sole* intent of the amendment Section 187(b)(3) was to prosecute *third party assault* on pregnant women and not the women themselves.

same, absent *any* evidence contradicting Speaker Biddle's statements, constitutes error and a willful disregard of the intent of the legislative body.

C. Legislative intent requires prohibition of the present prosecution

The California Legislature's refusal to criminalize a pregnant woman's behavior with regard to her own pregnancy has remained unwaveringly consistent for the past fifty years. Since 1970, California's legislature has repeatedly considered and robustly debated the need for criminal penalties in response to the issue of drug use during pregnancy and repeatedly and deliberately decided against enacting criminal sanctions against "substance-using mothers."

In 1987, the legislature considered and rejected criminalizing the precise behavior alleged by the prosecution in this case, by refusing to pass S.B. 1070, 1987-88 Leg.Reg.Sess. (Cal. 1987) (sponsored by Senator Ed Royce), which would have expanded the definition of child endangerment to cover pregnancy and substance use during pregnancy. In 1989, then Senator John Seymour sponsored S.B. 1465, 1989-90 Leg.Reg.Sess. (Cal. 1989), which also attempted to criminalize as manslaughter a woman's controlled substance use during pregnancy resulting in fetal demise. The Legislature rejected that too. In 1991, in A.B. 650, 1990-91 Leg.Reg.Sess. (Cal. 1991), the legislature considered an effort to enact a statute that would make substance abuse during pregnancy that had a subsequent effect on an after-born child a misdemeanor. This was also rejected by the legislature. In 1996, Assemblyman Phil Hawkins put forth A.B. 2614, 1995-96 Leg.Reg.Sess. (Cal. 1996), which would have criminalized "fetal child neglect." California's legislative body *again* rejected the attempt to

criminalize a woman's conduct with regard to her own fetus.[12] Indeed, the legislature knew and knows how to address the issues raised by the prosecution in this case and has done so repeatedly over many years.[13] It has, however, consistently rejected the punitive approach espoused by the State in this prosecution. *See* Sue Holtby et al., Gender issues in California's perinatal substance abuse policy (2000) 27 Contemporary Drug Problems 77, 89. It is not for any court to do so now.

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[12] "*None of the punitive bills [designed to criminalize drug use by pregnant women] won passage or even made it through a major policy committee.*" […] Of the 57 bills concerning pregnant women's drug use introduced between 1983 and 1996, the California Legislature passed close to half. However, almost 15 percent of them were vetoed by Republican governors who held office over the course of the study (George Deukmejian, 1983-1991, and Pete Wilson, 1991-1996), so that only about one-third of the [non-punitive] bills eventually became law" Laura L. Gomez, Misconceiving Mothers –Legislators, Prosecutors and the Politics of Prenatal Drug Exposure, (1997) Temple University Press p. 41 (emphasis added).

[13]The legislature consistently has treated pregnancy and drug use as a public health issue and explicitly rejected criminal approaches. See, e.g., Cal. Penal Code § 11165.13 (a positive toxicology at birth is insufficient to report child abuse or neglect, mandating risk assessment and mandating reports only to welfare and probation departments, not law enforcement); Cal. Health & Safety Code § 123600 (creating a needs assessment protocol for pregnant women who use substances including using hospitals, prevention and treatment programs, social services, public health agencies but no law enforcement agencies); Cal. Health & Safety Code § 11757.51, et seq., (creating prevention and treatment programs for pregnant women who use alcohol or drugs); Cal. Bus. & Prof. Code § 2191(f) (Medical Board of California should require training for early detection and treatment of pregnant women who use substances); Cal. Welf. & Inst. Code § 14132.21 (CA Dep't of Health Services should create services for to pregnant women who use substances and women who have given birth to an infant prenatally exposed to a substance).

D. Every court which has construed Pen. Code § 187 has determined that it does not apply to the mother of a fetus.

Like the legislative history outlined *supra*, prior to Respondent's holding, every court decision from various levels of California's justice system has construed Section 187 to apply only to third-party assaults on pregnant women and not to pregnant women themselves.

In proceedings below, the prosecution did not cite one case - trial level, appellate court, reported, unreported, published or unpublished - that construes Section 187 to permit prosecution of a woman for her acts while pregnant which result in a miscarriage or stillbirth. No such case exists. Every court called upon to judicially expand California criminal law to permit such prosecutions has rejected the invitation to exceed their authority and to ignore clear legislative language and intent. *See*, *e.g.* *Jaurigue*, San Benito County No. 23611, Transcript of Record https://tinyurl.com/rsnyrvl) (dismissed fetal homicide charges against a woman who experienced a stillbirth, alleged to have resulted from drug use, finding statute could not be used to prosecute woman for the loss of her own pregnancy, relying, in part, on Biddle Affidavit (Ex. 13)); *People v. Jones*, No. 93-5, Transcript of Record (Cal. J. Ct. Siskiyou County July 28, 1993) https://tinyurl.com/wc4xb3x (murder statute could not be used to prosecute defendant after newborn's death for alleged drug use and pregnancy); *People v. Tucker*, No. 147092 (Cal. Santa Barbara-Goteta Mun. Ct. June 1973) https://tinyurl.com/yax2uoux (Demurrer granted where pregnant defendant, in an act of desperation, shot herself in the

abdomen, causing her to lose the pregnancy);[14] *see also Reyes v. Court* (1977) 75 Cal.A.pp.3d 214 [141 Cal.Rptr. 912] (child endangerment statute cannot be used to prosecute woman for alleged actions while pregnant); *People v. Stewart*, No. M508197 (Cal. Mun. Ct. San Diego County Feb. 26, 1987) https://tinyurl.com/y9dsjjzm (failure to provide medical care for a child, Pen. Code § 270, cannot be used to prosecute a woman for alleged acts or omissions such as having intercourse and failing to get bed rest while pregnant).

In its Opposition to Demurrer at p. 3 (Ex. 10) the prosecution claimed:

> Defendant conveniently omits the fact that she failed to provide one California appellate case that supports her proposition that a female who carries a child full term while using toxic amounts of methamphetamine is immune from criminal prosecution for the murder of her stillborn

The truth is, there *is* an appellate decision which addresses this precise issue. However, because it is unpublished and therefore clearly without precedential value, Petitioner, not wanting to run afoul of California Rules of Court 8.1115(a) asked the Superior Court to take judicial notice of the decision pursuant to California Evidence Code Sections 451(a), 452(a), (d) and 453. (Reply in Support of Demurrer p. 3 (Ex. 11). Petitioner, likewise, respectfully asks this Court to take judicial notice of *People v. Olsen* (July 20, 2004, No. C043059) _Cal.App.4th__ [2004 Cal. App. Unpub. LEXIS 6774, at 1], [2004 WL 1616294].), which,

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[14] These unpublished trial level cases are identified here, obviously not as authority but as examples of courts recognizing the inapplicability of Section 187(a) to a woman's pregnancy loss and specifically in cases in which the loss was attributed to her alleged drug use. Providing the Court with access to these cases is consistent with California Rules of Court 8.1115(a) because these cases are not unpublished decisions of either the Court of Appeal or of the Superior Court Appellate Division.

contrary to the prosecution's statement, did *directly* consider the precise issues at bar. *Olsen* and the trial level cases noted above are provided to demonstrate the absolute uniformity that courts throughout this state, with the sole exception of the Respondent court, have reached in considering and rejecting the theories and arguments underlying the prosecution of Petitioner. [15]

Like every other California court, the *Olsen* court rejected the use of Section 187 to prosecute a woman for her pregnancy loss and explained that:

> "homicide of a fetus" is punishable as murder (1998) 17 Cal.4th 468, 506, unless the "act was solicited, aided, abetted, or consented to by the mother of the fetus." (§ 187, subds. (a), (b)(3).) Thus, a third party can commit this crime (*see People v. Dennis, supra*, at p. 506), but a birth mother, who necessarily would consent to her own volitional actions, cannot.

Id. at 16.

Olsen constitutes an example of an appellate court holding that the plain language of Section 187(b)(3) precludes the prosecution of a woman for her volitional acts during pregnancy. The fact cannot and should not be ignored that every single case which has construed Section 187 has found it inapplicable to a pregnant woman's volitional behavior and inapplicable specifically to her volitional and consensual drug use during pregnancy.

While the California Supreme Court has not yet considered the exact issues at bar, it has construed Section 187 in a manner consistent only with

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[15] It is essential to recognize the existence of these cases because each of them received some significant amount of public attention. To the degree that pregnant women were *ever* on notice of *any* potential liability under §187 for a pregnancy loss allegedly related to any behavior in which they may engage, these cases and the public rejection of every legislative effort to criminalize pregnancy loss or other outcomes served to put them on clear notice that *this state has never and does not criminalize the behavior of pregnant women with regard to their pregnancy.*

the prosecution of third-parties whose acts result in fetal death. In *Davis*, the court considered whether Section 187 applied where the defendant had shot a woman in the chest, leading to the stillbirth of her then approximately 23-week fetus. The court held that Section 187, which does not define the term "fetus," refers to a fetus of *any* gestational age, recognizing that a third party could be held accountable for causing pregnancy losses *at any stage of pregnancy* because, unlike the woman herself, third parties have no privacy interests at stake. The court explained,

> that when *the mother's privacy interests are not at stake*, the Legislature may determine whether, and at what point, it should protect life inside a mother's womb from homicide. Here, [in Section 187] the Legislature determined that the offense of murder includes the murder of a fetus with malice aforethought. […] a fetus is defined as the unborn offspring in the postembryonic period, after major structures have been outlined. This period occurs in humans seven or eight weeks after fertilization.

Davis, 7 Cal.4th at 810 (internal quotation marks & citations omitted) (emphasis added).

If the legislature had intended, which it did not, for the prosecution of women for the loss of their pregnancies - at any fetal gestational stage - such a statute would necessarily implicate the privacy interests of women subject to its prosecution and would be unconstitutional. The *Davis* court's foundational reasoning that a woman's privacy interests are *not* implicated by Section 187 necessarily rests on their recognition that Section 187 [was not intended to and did not authorize prosecution of "the mother of the fetus" for her acts alleged to have affected her fetus. Respondent's judicial creation of a new crime clearly implicates Petitioner's Fourteenth Amendment privacy interests, and thus, must be prohibited by this court.

E. A construction of the statute that would permit the present prosecution will lead to absurd results.

Both the Respondent's tortured re-construction of the statute and the prosecution's alternative re-construction would lead to absurd results and therefore must be rejected. *See Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 27 [109 Cal. Rptr. 3d 329, 230 P.3d 1117].

The prosecution has argued below that the statutory terms "solicited, aided, abetted, or consented to by the mother of the fetus" operate to *exclude* the mother of the fetus from statutory protection. Similarly, the prosecution's strained construction of the statute (different in fact from the one adopted by the Respondent) to preclude prosecution of a woman for attempting to "commit an abortion herself" but not for terminating her pregnancy by other means will necessarily lead to the prosecution of women for any and all conduct during pregnancy that is deemed by prosecutors as unsavory, so long as that conduct is combined with a negative pregnancy outcome. *See* Transcript of Demurrer at 14:3-9 (June 4, 2020) (Ex. 12) (prosecutor arguing that it is only because subpart (b)(3) comes after (b)(2) that a woman would be precluded from prosecution for attempting "an abortion" on herself).

The Respondent's re-construction would *only* preclude prosecution of a woman for the loss of her own pregnancy if it occurred in the course of a "therapeutic" abortion of a viable fetus. Transcript of Demurrer at 21:25-27 (Ex. 12). This new and revised version of Section 187 is also nowhere in the statutory language nor in the legislative history.

If either of these re-constructions, were to be adopted or allowed to stand by this Court, they would lead to extreme and absurd instances in which women could be prosecuted for the loss of her own pregnancy. Bases for such prosecutions could include anything from,

> the continued use of legal drugs that are contraindicated during pregnancy, to consuming alcoholic beverages to excess, to smoking, to not maintaining a proper and sufficient diet, to avoiding proper and available prenatal medical care, to failing to wear a seat belt while driving, to violating other traffic laws in ways that create a substantial risk of producing or exacerbating personal injury to her child, to exercising too much or too little, indeed to engaging in virtually any injury-prone activity that, should an injury occur, might reasonably be expected to endanger the life or safety of the child. Such ordinary things as skiing or horseback riding could produce criminal liability. If the State's position were to prevail, there would seem to be no clear basis for categorically excluding any of those activities from the ambit of the statute; criminal liability would depend almost entirely on how aggressive, inventive, and persuasive any particular prosecutor might be.

Kilmon v. State (2006) 394 Md. 168, 177-178 [905 A.2d 306, 311-312] (loss of a fetus following use of cocaine is not a crime.); *see also*, *People v Jorgensen*, 2015 NY Slip Op 07699 [26 N.Y.3d 85, 19 N.Y.S.3d 814, 41 N.E.3d 778] (dismissing manslaughter charge since the statute was not intended to reach a woman's conduct against her own fetus where a pregnant woman gave birth to a baby that did not survive, allegedly as a result of a car accident the woman was claimed to have caused).

These examples are frighteningly endless under the State's invited and the Respondent's adopted interpretation of the statute. To leave statutory construction to an aggressive, inventive, or persuasive prosecutor "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis," thereby exposing any woman who experiences a negative pregnancy outcome to "arbitrary and discriminatory application" of the statute and potential criminal prosecution. *See People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1116 [60 Cal.Rptr.2d 277, 929 P.2d 596] (quoting *Grayned v. City of Rockford* (1972) 408 U.S. 104, 109). A writ of prohibition must issue to prevent this result.

F. The Rule of Lenity requires construction of the statute in favor of the accused.

The lower court's construction of the present statute is unreasonable as a matter of law and logic and is contrary to legislative intent. The prosecution's construction also fails as matter of constitutional law and rules of statutory construction. However, where there are competing reasonable interpretations of the statute, "the rule of lenity requires courts to resolve doubts as to the meaning of a statute in a criminal defendant's favor." *People v. Yearwood* (2013) 213 Cal.App.4th 161, 177 [151 Cal.Rptr.3d 901] (*quoting People v. Avery* (2002) 27 Cal.4th 49, 57 [115 Cal. Rptr. 2d 403, 38 P.3d 1].

> It is the policy of this state to construe a penal statute as favorably to the defendant as its language and the circumstances of its application may reasonably permit; . . . the defendant is entitled to the benefit of every reasonable doubt as to the true interpretation of words or the construction of language used in a statute.

Reyes v. Superior Court (1977) 75 Cal.App.3d 214, 218 [141 Cal.Rptr. 912] (citations omitted).

To the extent that this Court believes that there is merit in the Petitioner's position and in either the Respondent's or the prosecution's statutory construction, the rule of lenity is a "tie-breaking principle" that requires the tie be broken in favor of the accused. *People v. Manzo* (2012) 53 Cal.4th 880, 883 [138 Cal.Rptr.3d 16, 270 P.3d 711], *see also, Jaurigue, supra, at 51-54.*

II. Statutory Construction of Pen. Code § 187 to permit prosecution of Petitioner renders the statute unconstitutional.

The rule of statutory construction requiring that, "when faced with an ambiguous statute that raises serious constitutional questions, [the court] should endeavor to construe the statute in a manner which *avoids* any doubt

concerning its validity." *Young v. Haines* (1986) 41 Cal.3d 883, 898 [226 Cal. Rptr. 547, 718 P.2d 909]) (emphasis in original). Rather than avoiding such doubt, the Respondent has judicially enlarged the statute and has sown contradiction which violates the Constitution's due process, privacy and equal protection guarantees. To uphold the lower court's unauthorized expansion of Section 187 or to otherwise permit the continuation of the present prosecution would be to render the statute in violation of the constitutional due process principles of notice, vagueness, and result in the loss of pregnant women's privacy interests in all aspects of her life.

A. Respondent's Statutory Construction Violates Due Process Principles of Notice and Renders the Statute Void for Vagueness.

There is no California statute that declares or gives notice that a pregnant woman's actions while pregnant which result in the death of her own fetus will expose her to a murder prosecution. Rather, as explained *supra*, Pen. Code § 187(b)(3) specifically excludes from prosecution acts of the mother of the fetus which she solicits aid abets or consent to. Moreover, *for fifty years*, every California court that has considered the statute's applicability to pregnant women has found those women precluded from liability under Section 187 (b)(3). *See* Section I. D, *supra*.[16]

The Respondent's unprecedented reading of Section 187 constitutes an "unforeseeable judicial enlargement of [the] criminal statute," and, "applied retroactively, operates in the same manner as an ex post facto law." *People v. White* (2017) 2 Cal.5th 349, 360 [212 Cal.Rptr.3d 376, 386 P.3d 1172] (quoting *Davis* 7 Cal.4th at 811), Cal. Const., art 1, § 9; *Bouie*

[16] While the cases cited in Part I. D. have no precedential value, they are certainly relevant and necessary to the notice analysis as public interpretations of the statute at issue. Likewise, there is no case that has ever concluded that Section 187 could be used to prosecute women who allegedly cause their own pregnancy losses.

v. *Columbia* (1964) 378 U.S. 347, 353 ("an unforeseeable judicial enlargement of a criminal statute, applied retroactively, operates as an *ex post facto* law, such as Art. I, § 10, of the Constitution forbids"). Assuming that the Respondent's construction is allowed to stand, applying the same retroactively to Petitioner will function to punish her alleged conduct that was not criminal at the time it was committed, in violation of Cal. Const., art 1, § 9 and Const. art. I, § 10.

A criminal statute cannot be applied retroactively. Moreover, the terms of a criminal statute must be sufficiently explicit to inform those who are subject to it what conduct will make them liable to its penalties. *Connally v. General Construction Co.* (1926) 269 U.S. 385, 391. A statute violates this principle if it "fails to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits or if it may authorize and even encourage arbitrary and discriminatory enforcement." *In re Jorge G.* (2004) 117 Cal.App.4th 931, 938 [12 Cal.Rptr.3d 193] (quoting *People v. Castenada* (2000) 23 Cal.4th 743, 751 [97 Cal. Rptr. 2d 906, 3 P.3d 278]) (internal quotation marks & alterations omitted); *see also City of Chi. v. Morales* (1999) 527 U.S. 41, 56.

As explained by the Supreme Court, these laws "offend several important values:"

> First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide *explicit standards* for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned 408 U.S. at 108-09 (emphasis added, internal quotations & footnotes omitted).

At the very least, certainly under the Respondent court's construction, the provisions of Section 187 do not "provide explicit standards to those who apply them."

If this Court permits the continuation of the prosecution of Petitioner, police and prosecutors throughout California will become, as they have in Kings County, the sole determiners of which conduct during pregnancy is sufficiently dangerous or unsavory so as to warrant prosecution for murder in the event of a miscarriage or stillbirth. *See Smith v. Goguen* (1974) 415 U.S. 566, 574 ("Legislatures may not so abdicate their responsibilities for setting the standards of the criminal law" by delegating to "policemen, prosecutors and juries" the authority "to pursue their personal predilections").

Other state courts have held that allowing prosecutions of pregnant women under similar statutes would "offend due process notions of fundamental fairness and render the statute[s] impermissibly vague." *Reinesto v. Superior Court* (Ct.App. 1995) 182 Ariz. 190, 193 [894 P.2d 733, 736] (ordering a lower court to dismiss criminal charges against a woman who ingested heroin while pregnant). In *Commonwealth v. Welch*, (Ky. 1993) 864 S.W.2d 280, 283, the Supreme Court of Kentucky reviewed the decisions of several states and found:

> All of these cases address statutes similar in effect to the present one, and all conclude that, properly construed, the statutes involved do not intend to punish as criminal conduct . . . [actions of] an expectant mother . . . All of these cases point out in one way or another that to construe the statute involved otherwise makes it impermissibly vague[.]

Welch further explained:

> If the statutes at issue are applied to women's conduct during pregnancy, they could have an unlimited scope and create an indefinite number of new "crimes." ... In short, the District Attorney's interpretation of the statutes, if validated, might lead to a "slippery slope" whereby the law could be construed as covering the full range of a pregnant woman's behavior- a plainly unconstitutional result that would, among other things, render the statutes void for vagueness.

ld. at 282 (internal citations omitted).

Should the lower court's statutory construction be allowed to stand, it is not just Petitioner who will have lacked notice of a new statutory interpretation, but every pregnant woman in California.

This lack of notice is especially concerning because miscarriage and stillbirth are dishearteningly common, and advice on what might cause such an outcome is hardly set in stone.

There are approximately 8,061,479 women of reproductive age living in California.[17] On average, 10% (806,147) of California's women of reproductive age (18-45) get pregnant each year. Of those, approximately 15% (120,922) have miscarriages.[18] In the United States, about 1% of pregnancies result in stillbirth.[19] Approximately 8,000 pregnant women experience stillbirths in California each year.

The Center for Disease Control lists the following factors as the primary contributors to stillbirth: being of black race, being 35 years of age or older, being of low socioeconomic status, smoking cigarettes during

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[17] https://www.cdc.gov/reproductivehealth/data_stats/pdfs/california.pdf
[18] Special tabulations of data from Finer LB and Zolna MR, Declines in unintended pregnancy in the United States, 2008-2011, New England Journal of Medicine, 2016, 374(9):843-852.
[19] Hoyert DL, Gregory ECW, Cause of Fetal Death: Data from the Fetal Death Report, 2014 (Oct. 2016) Nat'l Vital Stat. Rep., vol 65 no 7

pregnancy, having certain medical conditions such as high blood pressure, diabetes and obesity, having multiple pregnancies such as triplets or quadruplets, and having had a previous pregnancy loss.[20] The prosecution and Superior Court's interpretations of Section 187 leaves open the opportunity for and incredible number of discretionary prosecutions.

As explained in Section I. E, *supra,* the conduct, therefore, that might constitute "murder" of a fetus could range from the ingestion of a controlled substance, as alleged here, to driving without a seatbelt, skiing, smoking cigarettes, or even attempting suicide. And while

> [i]t is the firmly held belief of some that a woman should subordinate her right to control her life when she decides to become pregnant or does become pregnant: anything which might possibly harm the developing fetus should be prohibited and all things which might positively affect the developing fetus should be mandated under penalty of law, be it criminal or civil. Since anything which a pregnant woman does or does not do may have an impact, either positive or negative, on her developing fetus, any act or omission on her part could render her liable to her subsequently born child. While such a view is consistent with the recognition of a fetus' having rights which are superior to those of its mother, such is not and cannot be the law of this State.

Stallman v. Youngquist (1988) 125 Ill.2d 267, 276 [126 Ill.Dec. 60, 64, 531 N.E.2d 355, 359] (declining to recognize a new tort of fetal neglect). Under the Respondent's construction, these determinations will be left up to policemen, prosecutors, and juries. How many of those thousands of women in California who suffer a stillbirth and miscarriage each year and who have engaged in some level of risky or unsavory conduct or merely become pregnant despite knowing the risk of stillbirth, will be subject to criminal prosecution? Judicially rewriting Section 187 to make it applicable

[20] https://www.cdc.gov/ncbddd/stillbirth/facts.html

to the circumstances of this case leaves that question dangerously and unconstitutionally unresolved.

B. Prosecution of Petitioner under Pen. Code § 187 Violates Petitioner's Constitutionally Protected Privacy Rights.

1. The present prosecution infringes upon Petitioner's privacy rights including the right to choose whether to carry a pregnancy to term.

The Fourteenth Amendment guarantees the right to be "free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." *Cleveland Bd. of Edu. v. LaFleur* (1974) 414 U.S. 632, 639; *Skinner v. Oklahoma* (1942) 316 U.S. 535, 536 ("the right to have offspring" is "a right which is basic to the perpetuation of a race"). It is this fundamental right that protects women from measures that penalize the decision to carry a pregnancy to term. *Planned Parenthood v. Casey* (1992) 505 U.S. 833, 859. This right applies regardless of Becker's alleged addiction.

The State hinges its prosecution on the theory that Petitioner *did not* intend an abortion and instead hoped for a live birth all while remaining unable to overcome her substance dependence. It is uncontroverted that Petitioner could have medically aborted at an earlier date in her pregnancy had she so chosen. See State's Opposition to Demurrer at 8:13-15 (Ex. 10). It is similarly uncontested that Becker's past drug use is not, on its own, a criminal act. See People v. Jones (1987) 189 Cal.App.3d 398, 405 (Health and Safety Code § 11550 only criminalizes current ongoing drug use and not past use).

The Respondent's and prosecution's approach seeks to walk a path fraught with evidentiary and constitutional quicksand. Assuming, as the prosecution argues, that Petitioner *intended* to have a live birth, that choice

was protected *regardless* of her continued addiction to substances. In opposing demurrer, the prosecution argued that

> [p]rosecuting the Defendant under Penal Code section 187 would not at all implicate her right to carry her child to term. The burden placed on a pregnant drug user potentially facing a fetal murder charge is *not* the burden to get an abortion; but rather, it is a burden to stop using illegal drugs after she has *already* exercised her constitutional decision not to have an abortion.

State's Opposition to Demurrer at 8:12-15 (Ex. 10).

This argument is inherently flawed, and not only because it fails to explain at what point during the gestation of her fetus Petitioner's alleged conduct became unlawful under Section 187. Would Petitioner's past use of substance *before* the point of viability be excluded from evidence at trial? Assuming the prosecution would be able to prove causation at all in the present case,[21] would it be limited to proving that it was only the alleged substance use *after* that point of viability that caused the pregnancy loss?

Even apart from these logical and practical pitfalls, the argument that Petitioner murdered her fetus because she used drugs during pregnancy while intending to have a live birth fails for the simple reason that the Constitution protects a woman's choice to carry her pregnancy to term, *even if* that woman suffers from substance use disorder and *even if* she, like every pregnant woman, cannot guarantee a live birth. *See Casey,* 505 U.S. at 859 (protecting women from government intrusion or punishment regarding the decision to carry a pregnancy to term); *see also Robinson v. California* (1962) 370 U.S. 66 7) (holding that to criminalize the *status* of being addicted to drugs constitutes cruel and unusual punishment); *see also*

[21] There is no scientific basis for the charge that Petitioner's alleged drug use caused the stillbirth of her fetus. See e.g., Terplan and Wright letter (Ex. 2).

Breaking the Law by Giving Birth: The War on Drugs, the War on Reproductive Rights, and the War on Women (*hereinafter* "*Breaking the Law by Giving Birth*"), Julie B. Ehrlich, 32 N.Y.U. Rev. L. & Soc. Change 381, 412 (2007) ("The prosecution of women for becoming mothers in spite of drug addiction [] violates the Equal Protection Clause" because those "prosecutions punish pregnancy and drug addiction, both of which are protected statuses that cannot be criminalized. Though there is no constitutionally protected right to use certain drugs, one does have a constitutionally protected right not to be punished simply for being addicted.").

But consider the alternative. While the prosecution has purportedly reached into Petitioner's mind to conclude that she "never wanted to abort her child,"[22] the prosecution, nonetheless, argues that Petitioner intentionally used drugs knowing of the possible deleterious affect doing so might have on her growing fetus. The prosecution contends that such intentional, volitional and consensual drug use while pregnant resulted in the termination of her pregnancy. What the prosecution describes – intentional termination of pregnancy is the same as abortion – an issue that unquestionably implicate privacy rights. By enacting Section 187(b)(3), the legislature intended to exclude from criminal liability the pregnant woman herself for her pregnancy outcome, with no stated limitations of when the pregnancy loss occurs.

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[22] The prosecution, in the proceedings below, repeatedly made the assertion that Petitioner "never wanted to abort her child[.]" State's Opposition to Demurrer at 6 (Ex. 10); *see also e.g., id.* at 8 (describing Petitioner's alleged obligations "[o]nce [she] made the choice to have the baby"). However, whether it was her desire or not, according to the prosecution Ms. Becker, by her own conduct, allegedly "terminat[ed] her pregnancy other than by live birth"

Bouvier Law Dictionary defines abortion as the "termination of a pregnancy other than by live birth of a child." *See also People v. Rankin* (1937) 10 Cal. (2d) 198) (An abortion is the termination of pregnancy before the time that a living child may possibly be anticipated.) Here, according to the State, instead of having another perform an abortion, Petitioner intentionally ingested a controlled substance which, says the prosecution, she knew or should have known could end her pregnancy. The prosecution stated clearly in its Opposition to the Demurrer at 6: 9-12 (Ex. 10) that:

> she alone caused Zachariah Joseph Campos' death by ingesting toxic quantities of methamphetamine during her pregnancy with notice and knowledge of the deleterious consequences to her newborn child, in light of two of her prior children that were born with methamphetamine in their systems.

While the state does not want to call this an abortion, because that undercuts their argument, it nonetheless argues that Petitioner intentionally, volitionally and consensually ingested a drug, knowing that it could have a "deleterious" effect on her fetus which resulted in the termination of her pregnancy.[23] This argument describes and defines a self-abortion. In a

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[23] The prosecution erroneously suggested in its Opposition to the Demurrer *id.* at 7:16-21 that,

> It is well documented within the realm of public knowledge that a mother's methamphetamine use can cause serious harm or death to a viable unborn child.

(citing to two research papers published in the Journal of Pediatrics for support of this statement).

remarkable bit of legerdemain, the State seeks to deprive Petitioner of statutory protection- by which she would be *precluded* from prosecution if she had affirmatively *sought* to terminate her pregnancy - by arguing that she is instead guilty of murder because she *did not* intend to terminate her pregnancy. This proffered theory is as legally unsound as it is illogical and unprincipled. The exclusionary provisions of Section 187(b)(3) cannot be constitutionally applied or construed so as to deprive Ms. Becker of its benefit because she *did not* intend to end her pregnancy.

The California Supreme court addressed this exact issue in the one case that the Respondent chose to ignore. In, *Davis* 7 Cal.4th 797, 810, the Court held:

> Abortion is specifically exempted from section 187 under subdivision (b)(3), which states that section 187 shall not apply if, "The act was solicited, aided, abetted, or consented to by the mother of the fetus."

The *Davis* court did not differentiate (as did the Respondent, below) between a legal or illegal abortion nor between an early or late term abortion. To sanction any attempt to deprive Petitioner of both statutory and constitutional protections - an attempt undoubtedly based upon conduct the prosecution and Respondent find repugnant - would render Section 187 unconstitutional.

But the lead authors of the research cited explain that their research does not in any way support the prosecution's claims and that there is no basis for anyone to presume that public notice of anything was accomplished by virtue of the publication of this research. Moreover, neither their research and no peer reviewed research supports the conclusion that occasional Methamphetamine use causes pregnancy loss. *See*, Affidavits of Dr. Barry Marshall Lester (Ex. 15) and Dr. Donald C. Derauf, (Ex. 16)

2. Limiting prosecution to pregnant women of "viable" fetuses does not resolve constitutional infirmities.

In construing Section 187 to apply to women who experience stillbirths, the Respondent, like the prosecution, pinned its constitutional reasoning on the concept that Petitioner is subject to prosecution only because her fetus was viable at the time of its demise. *See* Transcript of Demurrer at 22:2-8 (Ex. 12) (reasoning that Section 187, as construed, does not violate the Fourteenth Amendment because constitutional progeny "[a]llows the State to impose regulations to protect that life once the fetus has become viable."); *see also* State's Opposition to Demurrer at 1:6; 4:2; 6:5; 7:17; 8:8; 9:2 (Ex. 10) (referencing Petitioner's conduct as criminal because her fetus was "viable"). First, while courts have held that states may impose limitations *on abortion* to protect fetal life, they have *never* authorized regulation of pregnant women in general for that purpose. *See infra*, fn. 3 Moreover, the judicially imposed [non-statutory] limitation of prosecutions to post viability circumstances does little to remedy the statute's unconstitutionality as judicially re-written. Instead, it creates a new and separate issue as a result of the holding's direct conflict with the California Supreme Court's holding that Section 187 applies to *all* pregnancies "in the postembryonic period." *Davis* 7 Cal.4th at 810.

3. Prosecution of Petitioner Violates Principles of Equal Protection.

The Respondent court reasoned that its statutory construction does not offend principles of equal protection because both men and women can be prosecuted for murder of a fetus under Section 187. Transcript of Demurrer at 23:13-26 (Ex. 12). The operable distinction, however, is not between men and women, but rather between male and female *drug users*. As explained *supra*, California does not criminalize past drug use. *See Jones* 189 Cal.App.3d at 405 (construing Health and Safety Code § 11550). Even

if this prosecution is allowed to continue, a male drug user, who admits to a history of continued and sustained past drug use, is guilty of no crime in California. Expanding Pen. Code § 187 to criminalize still births experienced by women who used drugs while pregnant creates not only a new crime but also a new class of potential criminals - one that is exclusively formerly pregnant women.

A female drug user is rendered guilty of a crime for the same conduct as the male and is differentiated only by her status of having been pregnant. Such a distinction cannot withstand equal protection scrutiny. *See Breaking the Law by Giving Birth*, Julie B. Ehrlich, 32 N.Y.U. Rev. L. & Soc. Change at 409 ("Prosecutions that assume all women will meet the 'highly demanding set of [social] expectations' placed upon pregnant women, or that women will immediately be able to overcome addictions that have plagued them for years, place an unequal and unnecessary burden on women alone and should be considered unconstitutionally discriminatory.") (alteration in original). To permit the present prosecution would be to violate Petitioner's right to equal protection under the laws. U.S. Const., 14th Amend.; Cal. Const., art. 1, § 7.

III. Criminalizing Pregnancy Loss does not Protect Fetuses or Treat Substance Use Disorder.

Every state and national medical organization that has addressed controlled substance use by pregnant women agree that treatment, support and education, and not criminalization and incarceration, are the best way

to address the health issue of substance use by pregnant women.[24] To allow the continuation of the present prosecution ignores that Petitioner suffered from a substance use disorder throughout the entirety of her pregnancy and much of her adult life. Respondent's statutory construction, without any supporting statutory language or legislative history, would construe a pregnant woman's pregnancy loss allegedly caused by prenatal substance use as non-prosecutable under Section 187(b)(3) only during her first and second trimesters, but criminal and subject to a murder prosecution in her third trimester after the ill-defined moment of "viability." The statute's language imposes no such limitations. The Respondent's scenario would leave it to prosecutorial discretion and discrimination to determine the moment at which certain unspecified conduct converts itself from lawful to murderous during a woman's pregnancy. This is particularly fraught in the context of a disease - substance use disorder - over which

[24] The American Academy of Pediatrics, Committee on Substance Use and Prevention Policy Statement, A Public Health Response to Opioid Use in Pregnancy Academy of Pediatrics (AAP) first published recommendations on substance-exposed infants in 1990 ". . . and reaffirm[ed] [in 2017] its position that punitive measures taken toward pregnant women are not in the best interest of the health of the mother-infant dyad." *See also* American College of Obstetricians and Gynecologists, Position Statement, Decriminalization of Self-Induced Abortion (2017) (ACOG "opposes the prosecution of a pregnant woman for conduct alleged to have harmed her fetus"); American Medical Association, Policy Statement - H-420.962, Perinatal Addiction - Issues in Care and Prevention (last modified 2016) ("Transplacental drug transfer should not be subject to criminal sanctions or civil liability"); Report of American Medical Association Board of Trustees, Legal Interventions During Pregnancy, 264 JAMA 2663, 2667 (1990).

individuals do not exercise a choice. The California Legislature has likewise recognized and declared the value of this approach.[25]

The application of the statute, as re-drafted by Respondent and the prosecution, would invariably lead pregnant women suffering from addiction either into the shadows and away from treatment or toward an undesired abortion in order to avoid prosecution for murder in the event that a pregnancy ends in miscarriage or stillbirth. This is clearly not the course that the California legislature ever intended.

[25] *See* HEALTH AND SAFETY CODE Chapter 2 Alcohol and Drug Affected Mothers and Infants § 11757.51. (The Legislature finding and declaring: "The appropriate response to this crisis [of Alcohol and drug affected infants and mothers] is prevention, through expanded resources for recovery from alcohol and other drug dependency. *The only sure effective means of protecting the health of these infants is to provide the services needed by mothers to address a problem that is addictive, not chosen.*") (emphasis added).

CONCLUSION

Absent a writ of prohibition, Petitioner will endure prosecution for, and potentially conviction of, a crime that does not exist by statute in California and, as judicially re-written, will violate her constitutionally enshrined rights to privacy and equal protection under the laws. This judicially created crime will further render Pen. Code § 187 unconstitutionally void for vagueness and will open the door to prosecution of women for any number of as-yet undefined actions or omissions during pregnancy that are believed to create risks of negative pregnancy outcomes. It is for this Court to ensure that she is free from prosecution for conduct that does not constitute a public offense and issue a writ of prohibition.

Date: July 1, 2020

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I, Roger T. Nuttall, co-counsel for Chelsea Becker, petitioner and defendant, do hereby certify and verify, pursuant to the California Rules of Court, rule 8.204(c)(1), that the word processing program used to generate this brief indicates that the word count for this document (Petition for Writ of Prohibition and Application for Stay of Proceedings and Memorandum of Points and Authorities) is 13,879 words, excluding the tables, this certificate, and any attachment permitted under rule 8.486(b)(1).

I declare that the foregoing is true and correct to the best of my knowledge and belief at the time of making this verification.

EXECUTED on July 1, 2020, under penalty of perjury under the laws of the State of California, in Fresno, California.

/s/ Roger T. Nuttall
ROGER T. NUTTALL

PROOF OF SERVICE

STATE OF CALIFORNIA,)
COUNTY OF FRESNO.)

I am employed in the County of Fresno, State of California. I am over the age of eighteen (18) and not a party to the within action; my business address is: 2333 Merced Street, Fresno, California 93721.

On July 1, 2020, I served the foregoing document described as: PETITION FOR WRIT OF PROHIBITION, EXHIBITS TO PETITION FOR WRIT OF PROHIBTION, on the interested parties in this action by placing a copy thereof enclosed in a sealed envelope addressed as follows:

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[X] {State} I declare under penalty of perjury, under the laws of the State

of California the above is true and correct. EXECUTED on July 1, 2020, at Fresno, California.

/s/ Bryan Murray

BRYAN MURRAY