CASE # F081362

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE FIFTH APPELLATE DISTRICT

IN RE CHELSEA BECKER,
Petitioner,

On Habeas Corpus.

Hon. Robert S. Burns
Superior Court Case No. 19CM-5304

[PROPOSED] AMICUS BRIEF OF ACLU OF NORTHERN CALIFORNIA IN SUPPORT OF PETITIONER CHELSEA BECKER

*JENNIFER CHOU, SBN 304838
jchou@aclunc.org
ELIZABETH GILL, SBN 218311
egill@aclunc.org
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493
Facsimile: (415) 255-8437

Attorneys for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

INTRODUCTION

Petitioner Chelsea Becker is currently being held under an unlawful charge of fetal murder under California Penal Code section 187 ("Section 187"). The claim against Ms. Becker is based on the allegation—unsupported by any scientific evidence—that her use of drugs during pregnancy caused a stillbirth. Even if Ms. Becker's conduct were to have resulted in the loss of her pregnancy, the statute's plain language excludes any act that was "solicited, aided, abetted, or consented to by the mother of the fetus." Since Section 187 was first amended in 1970 to include the unlawful killing of a fetus, the ACLU has successfully represented three clients in cases nearly identical to the one now before this court.[1] In each one, the court found that Section 187 could not be construed to criminalize a woman for being pregnant and allegedly taking some action that resulted in the termination of her own pregnancy. This case is no different.

Within the last three years, Kings County has prosecuted two women for murder under Section 187 for the outcomes of their pregnancies. Before Ms. Becker, Adora Perez was charged in 2018 under the same law and virtually identical facts. [2] She pleaded guilty to a lesser crime, and is currently serving eleven

---

[1] *People v. Jaurigue* (Super. Ct. San Benito County, 1992, No. 18988); *People v. Jones* (Justice Ct., Yreka Judicial Dist., Siskiyou County, 1993, No. 93-5); *People v. Johnson* (Mun. Ct., Contra Costa County, 1995, No. 096001-3).

[2] Alex Wigglesworth, *Addicts with stillborn babies are being charged with murder in California*, Los Angeles Times (Nov. 26, 2019), https://www.latimes.com/california/story/2019-11-26/chelsea-becker-adora-perez-murder-charge-stillbirth.

years at the Central California Women's Facility. Prior to this, the last court to have considered an argument to expand the reach of Section 187 did so nearly thirty years ago. The revival in Kings County of this disturbing trend provides even more compelling reason to give full consideration now to the constitutional implications of this case.

This brief argues that judicially expanding Section 187 to reach Ms. Becker would violate her fundamental rights to due process and privacy as guaranteed by both the state and federal constitutions. First, permitting such an expansion would enable the retroactive application of a judicially created criminal statute. By criminally linking a pregnant woman's conduct with the outcome of her pregnancy, this expansion would also create a liability so extensive, undefined, and unforeseeable as to make the statute void for vagueness. Second, such an interpretation would also run afoul of California's guarantee of privacy by requiring unwarranted and extraordinary intrusion into the lives of pregnant women. Because the prosecution has failed to charge her with a legally recognized and constitutional public offense, Ms. Becker must be released.

Moreover, the trial court has set Ms. Becker's bail at $2 million (reduced from $5 million). It has refused to even consider a reasonable means of release despite ample evidence presented that she cannot afford to pay this astronomical amount, that less onerous means of securing her future appearance at court are available, and—most urgently—that the current COVID-19 pandemic places people in jails and other detention settings at heightened risk of serious and potentially grave harm.

Accordingly, the ACLU respectfully urges this Court to grant Petitioner's requested relief.

ARGUMENT

I. PETITIONER SHOULD BE RELEASED BECAUSE CALIFORNIA HAS FAILED TO STATE A CONSTITUTIONAL PUBLIC OFFENSE UNDER PENAL CODE SECTION 187.

A. The Plain Language and Legislative History of Section 187 Excludes the Conduct of the Mother of the Fetus from the Statute's Application.

Ms. Becker's prosecution rests on the theory that her conduct while pregnant resulted in the death of her fetus and that she accordingly committed murder under Section 187 of the California Penal Code. But this theory is refuted by the plain language of Section 187 itself. Section 187, which defines as murder "the unlawful killing of a human being, *or a fetus*, with malice aforethought" (Penal Code § 187, subd. (a) (emphasis added)), expressly excludes any act that "was solicited, aided, abetted, or consented to by the mother of the fetus" (Penal Code § 187, subd. (b)(3)). By its very nature, a pregnant person's own conduct is consented to by that person.

Moreover, the legislative history underlying Section 187, subdivision (b)(3), consistent with its plain language, is likewise irreconcilable with Ms. Becker's prosecution. In 1970, the legislature amended Section 187, broadening the scope of the statute to include the crime of fetal murder by adding "or a fetus" to the definition of murder. This amendment was in direct response to the California Supreme Court's decision in *Keeler v. Superior Court* (1970) 2 Cal.3d 619, in which the Court, holding that "the unlawful killing of a human being" did not encompass a

fetus, overturned the murder conviction of a man who had intentionally caused the death of his estranged partner's fetus. (*Id.* at p. 639.) The legislature acted to protect pregnant women by criminalizing the intentional conduct of third parties—such as Mr. Keeler—that result in fetal death. Critically for the case at hand, the legislature's addition of fetal murder to Section 187 expressly carves out conduct undertaken by the pregnant person herself: subdivisions (b)(1) and (2) of Section 187 narrowly excludes abortions, and subdivision (b)(3) broadly excludes the conduct of a pregnant woman that results in the death of the fetus.

Since 1970, the ACLU has successfully obtained the release of three women wrongfully charged under Section 187, in circumstances almost identical to those here.[3] In each case, the court found that Section 187 could not be construed to criminalize a woman for her own actions that may have resulted in the death of her fetus. In the wake of these decisions, the legislature could have chosen to amend Section 187 to reach women like Ms. Becker, but it did not do so. Instead, subsequent actions by the legislature demonstrate that California has unequivocally

[3] *People v. Jaurigue*, *supra*; *People v. Jones*, *supra*; *People v. Johnson*, *supra*.

rejected a punitive response to the problem of drug-dependent pregnant women[4] in favor of a treatment model.[5]

B. Penal Code Section 187 Cannot Constitutionally be Expanded to Keep Petitioner in Custody.

Even accepting as true the state's unscientific premise that Ms. Becker's drug use during pregnancy led to the loss of her pregnancy, judicially expanding Section 187 to reach this case not only redrafts the law but creates a statute that violates fundamental rights. This Court, of course, has an obligation to interpret Section 187 to preserve its constitutionality. As the California Supreme Court has stated: "We must, however, presume that the Legislature intended to enact a valid statute; we must, in applying the provision, adopt an interpretation that, consistent with the statutory language and purpose, eliminates doubts as to the provision's constitutionality." (*In re Kay* (1970) 1

---

[4] See, e.g., Sen. Bill No. 1070 (1987-1988 Reg. Sess.) (proposing to expand the scope of Penal Code section 273a, the state's felony child abuse statute, to make it applicable to certain conduct that resulted in harm to a fetus); Sen. Bill No. 1465 (1989-90 Reg. Sess.) (proposing to permit manslaughter prosecution of a mother if her child were born alive but subsequently died as a result of prenatal drug exposure); Assem. Bill 650 (1991-92) (creating a misdemeanor for a woman to give birth to a baby that was found to be under the influence of illegal drugs). All failed to obtain legislative approval.

[5] Health & Saf. Code § 11757.51 ("The Legislature finds and declares [that]. . .[t]he appropriate response to [drug and alcohol 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.").

Cal.3d 930, 942; see also *People v. Garcia* (2017) 2 Cal.5th 792, 804.)

This basic rule of statutory construction compels an interpretation of Section 187 that preserves its broad exclusion of conduct by the pregnant woman herself. Conversely, to interpret the law as criminalizing Ms. Becker's own conduct based on its alleged effect on her fetus, would render it unconstitutional because it would infringe upon her fundamental rights of due process and privacy.

1. Expanding Section 187 to Include the Pregnant Woman Herself Violates Her Constitutional Due Process Rights.

If Section 187 were judicially expanded to permit prosecution of Ms. Becker, it would violate her constitutional due process rights in two ways. First, both the federal and state constitutions contain provisions prohibiting the enactment of *ex post facto* laws, i.e., laws that punish conduct that was not criminal at the time it occurred. (U.S. Const., art. I, §§ 9 & 10; Cal. Const., art. I, § 16.) These provisions are not limited to the retroactive application of a criminal statute by the legislature, but they also apply when "an act is made punishable under a preexisting statute by means of an unforeseeable *judicial* enlargement thereof." (*Keeler v. Superior Court*, *supra*, 2 Cal.3d at p. 634 (emphasis in original); see also *Marks v. United States*, (1977) 430 U.S. 188, 191-92.) Thus, when a judicial construction of a statute broadens its scope to include conduct previously understood to be beyond its reach, that new interpretation may not constitutionally be applied to conduct occurring before the

new construction of the statute was pronounced. (*Bouie v. City of Columbia* (1964) 378 U.S. 347, 353-54; accord *Keeler*, at pp. 634-35.) The due process clauses forbid application of the statute to Ms. Becker here.

Second, if Section 187 were interpreted to criminalize miscarriage or stillbirth allegedly caused by an act or omission of the pregnant woman, it would create a criminal liability so expansive, undefined, and unforeseeable as to make the statute void for vagueness. "A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." (*People v. Belous* (1969) 71 Cal.2d 954, 960 (citations omitted).) Moreover, "[t]he requirement of certainty in legislation is greater where the criminal statute is a limitation on constitutional rights." (*Ibid*.) Applying these principles, the California Supreme Court has ruled that laws exposing women to criminal liability for the outcomes of their pregnancies must satisfy strict standards of specificity. The Court struck down both of California's 1850 and 1967 abortion laws on grounds of vagueness for failing to provide fair guidance to women, physicians or law enforcement officials. (*People v. Belous*, *supra* (striking down the 1850 statute permitting abortion only where "necessary to preserve" the pregnant woman's life); *People v. Barksdale* (1972) 8 Cal.3d 320 (striking down the 1967 statute permitting abortion where pregnancy will "gravely impair" the pregnant woman's health).)

Even more so here, expanding Section 187 to allow prosecution of pregnant women for the outcomes of their pregnancies would create an unlimited number of unspecified new crimes because an enormous range of behavior—such as drinking alcohol, taking prescription or over-the-counter drugs, or exceeding the speed limit while driving—poses risk to the fetus. Nor can this inherent vagueness be cured by limiting its application to only conduct deemed illegal that allegedly causes miscarriage or stillbirth. The text of Section 187 is in no way limited to behavior that is proscribed by an independent criminal law. Moreover, the legal-illegal line is irrational in view of the statute's stated objective of promoting fetal welfare; many illegal activities pose less risk to the pregnancy than lawful ones. Recklessly driving a car above the speed limit, for example, is less hazardous to pregnancy than frequent alcohol or cigarette use.

An expanded construction of Section 187 would mean that each of California's thousands of women who suffered late-term miscarriages and stillbirths could be the subject of an invasive homicide investigation. Women, their physicians, and law enforcement could not predict what behavior or circumstances during pregnancy might trigger a homicide case. The law would not provide adequate notice and would invite arbitrary and selective enforcement, the precise evils sought to be prevented by the vagueness doctrine.

2. Expanding Section 187 to Include the Pregnant Woman Herself Violates Her Constitutional Privacy Rights.

The right to privacy, explicitly guaranteed by Article I, Section 1 of the California Constitution, encompasses several aspects of personal autonomy and confidentiality. Constitutional privacy includes the freedom to make intimate decisions about childbearing[6] and access to health care.[7] The State may not intrude into any of these protected spheres without compelling justification. If Section 187 is applied to Ms. Becker, then it violates all of these rights of privacy.

If Section 187 is judicially expanded to reach Ms. Becker, it imposes a broad duty of care for every pregnant woman in California. As discussed above, criminal liability for miscarriage or stillbirth could result based simply on beliefs about the potential impact of a wide range of conduct. By casting the shadow of a potential prosecution over pregnant women as they make the daily decisions required to delicately balance their health and their obligations to employers, family members and others, Section 187 would significantly burden a core freedom secured by the right to privacy: the freedom to make childbearing decisions free of unwarranted governmental interference. Decisions about parenthood "are clearly among the most intimate and fundamental of all constitutional rights." (*Committee to*

---

[6] *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307; *Committee to Defend Reproductive Rights v. Myers* (1981) 29 Cal.3d 252.

[7] *Planned Parenthood v. Van de Kamp* (1986) 181 Cal.App.3d 245; *Aden v. Younger* (1976) 57 Cal.App.3d 662.

Defend Reproductive Rights v. Myers (1981) 29 Cal.3d 252, 275.) The state cannot extract as the price of the decision to become and stay pregnant such extensive control over a pregnant woman's life. Nor can it enact criminal laws so threatening to the pregnant women whose life circumstances present threats to fetal welfare such that they would feel coerced into abortion.

To intrude upon the fundamental right to privacy, the government must show that the statute furthers a public interest of compelling significance and that no less invasive means exist to achieve that objective. (*American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 340–41.) Even if the state's interest in maximizing fetal survival overrides all other competing interests of the pregnant woman—which it does not—prosecution and incarceration of women who make "improper" judgments during pregnancy would not actually further any interest in fetal welfare. Organizations with expertise in pediatrics and medicine are unified in their opposition to prosecution of pregnant women,[8] because experts understand

[8] See, e.g., Committee on Substance Use and Prevention, American Academy of Pediatrics, Policy Statement: A Public Health Response to Opioid Use in Pregnancy (2017), https://pediatrics.aappublications.org/content/139/3/e20164070; American College of Obstetricians and Gynecologists, Position Statement: Decriminalization of Self-Induced Abortion (2017), https://www.acog.org/clinical-information/policy-and-position-statements/position-statements/2017/decriminalization-of-self-induced-abortion; American Medical Association, Policy Statement: Perinatal Addiction - Issues in Care and Prevention H-420.962 (2019), https://policysearch.ama-assn.org/policyfinder/detail/alcohol%20treatment?uri=%2FAMADoc%2FHOD.xml-0-3705.xml.

that the threat of criminalization deters pregnant women from medical care, undermining their ability to give birth to healthy infants. Moreover, the state may more effectively further its interest in fetal welfare with measures that do not implicate privacy and without resorting to criminal prosecution: expanding education and medical care (including access to appropriate and voluntary treatment for addiction) for pregnant women.

If Section 187 is judicially expanded to permit the prosecution of Ms. Becker, it would transform California's fetal murder law from a limited, well-defined protection of pregnant women's reproductive rights, as well as maternal, fetal, and child health, into a coercive law justifying extraordinary intrusion into the lives of pregnant women. This interpretation of the law would render it unconstitutional as a violation of the state constitution's guarantee of privacy.

II. THE CLEAR FAILURE TO STATE A PUBLIC OFFENSE AS WELL AS THE CURRENT PUBLIC HEALTH CRISIS UNDERMINES THE GOVERNMENT'S INTEREST IN KEEPING PETITIONER IN CUSTODY.

In light of the COVID-19 pandemic, Ms. Becker is now seeking release or, at minimum, a reduction of her extravagant $2 million bail. She is entitled to relief as a matter of law. The bail factors set forth in Penal Code section 1275 and the constitution require the court to consider the nature of the accused crime as well as the government's interest in protecting public safety. As discussed above, the crime of which Petitioner stands accused is not one supported by the plain language of Section 187 or by either the state or federal constitution. The

government's interest in enforcing such a straw man, therefore, is necessarily *de minimus*.

The current COVID-19 pandemic also urgently calls for a close consideration of how ordering someone to the close quarters of criminal detention impacts their vulnerability to a dangerous, communicable disease. Including prison population and staff, there are thousands of confirmed COVID-19 cases in California's prisons and jails to date.[9] This pandemic has caused immense harm across the country, particularly in carceral facilities. Nine of the top ten largest clusters of cases in the U.S. are in prisons or jails—three of which are in California.[10] Unprecedented and sweeping actions by California Governor Gavin Newsom,[11] the California Department of Corrections and Rehabilitation,[12] and

---

[9] California Department of Corrections and Rehabilitation ("CDCR"), *Population COVID-19 Tracking*, https://www.cdcr.ca.gov/covid19/population-status-tracking; CDCR, *CDCR/CCHCS COVID-19 Employee Status*, https://www.cdcr.ca.gov/covid19/cdcr-cchcs-covid-19-status.

[10] *Coronavirus in the U.S.: Latest Map and Case Count*, New York Times (updated daily, last accessed June 30, 2020), https://www.nytimes.com/interactive/2020/us/coronavirus-us-cases.html.

[11] Office of Governor Gavin Newsom*, Governor Newsom Issues Executive Order on State Prisons and Juvenile Facilities in Response to the Covid-19 Outbreak* (Mar. 24, 2020), https://www.gov.ca.gov/2020/03/24/governor-newsom-issues-executive-order-on-state-prisons-and-juvenile-facilities-in-response-to-the-covid-19-outbreak.

[12] CDCR, *CDCR Announces Plan to Further Protect Staff and Inmates from the Spread of Covid-19 in State Prisons* (Mar. 31, 2020), https://www.cdcr.ca.gov/news/2020/03/31/cdcr-announces-plan-to-further-protect-staff-and-inmates-from-the-spread-of-covid-19-in-state-prisons.

the California Judicial Council[13] to significantly reduce the prison population serve as clear confirmation that the current infrastructure of our detention system poses a substantial risk to life and public safety.

III. CONCLUSION

For the foregoing reasons, *amicus* respectfully urges the Court to grant Petitioner's request for relief.

DATED: July 8, 2020

Respectfully submitted,

/s/ Jennifer Chou

Jennifer Chou, SBN 304838
Elizabeth Gill, SBN 218311
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493
Facsimile: (415)255-8437

Attorneys for Amicus Curiae

[13] Judicial Council of California, *News Release: Judicial Council Adopts New Rules to Lower Jail Population, Suspend Evictions and Foreclosures* (Apr. 6, 2020), https://newsroom.courts.ca.gov/news/judicial-council-adopts-new-rules-to-lower-jail-population-suspend-evictions-and-foreclosures.

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court and in reliance on the word count of the computer program used to prepare this Amicus Brief, counsel certifies that the text was prepared in Microsoft Word, is proportionally spaced, and contains 3,452 words, including footnotes but excluding cover information, application, Certificate of Interested Entities or Persons, tables, signature blocks, and this certificate.

Dated: July 8, 2020

By: /s/ Jennifer Chou

Jennifer Chou, SBN 304838
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF NORTHERN CALIFORNIA
39 Drumm Street
San Francisco, CA 94111
Telephone: (415) 621-2493
Facsimile: (415)255-8437

Attorneys for Amicus Curiae