IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

CHELSEA BECKER, Petitioner, **v.** **SUPERIOR COURT OF KINGS COUNTY,** Respondent.	Case No. F081341

Kings County Superior Court, Case No. 19CM-5304
Hon. Robert S. Burns, Judge

[PROPOSED] BRIEF OF THE CALIFORNIA ATTORNEY GENERAL IN SUPPORT OF PETITIONER CHELSEA BECKER

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TABLE OF CONTENTS

Page

INTRODUCTION 5
BACKGROUND 5
ARGUMENT 8
CONCLUSION..... 12
CERTIFICATE OF COMPLIANCE..... 14
CERTIFICATE OF SERVICE..... 15

TABLE OF AUTHORITIES

Page

CASES

Delaney v. Superior Court
(1990) 50 Cal.3d 785 8

John v. Superior Court
(2016) 63 Cal.4th 91 11

Keeler v. Superior Court
(1970) 2 Cal.3d 619 ..... 10, 11

Kilmon v. State
(2006) 394 Md. 168 12

Kovacevic v. Avalon at Eagles' Crossing Homeowners Assn.
(2010) 189 Cal.App.4th 677 9

People v. Davis
(1994) 7 Cal.4th 797 11

People v. Engram
(2010) 50 Cal.4th 1131 11

Tuolumne Jobs & Small Business Alliance v. Superior Court
(2014) 59 Cal.4th 1029 8

STATUTES

Health & Safety Code
§ 123462 11

Penal Code
§ 187 ..... *passim*
§ 187, subd. (b)(1) 5, 6, 7, 8

TABLE OF AUTHORITIES
(continued)

Page

§ 187, subd. (b)(2) 5, 6, 7, 9
§ 187, subd. (b)(3) ..... *passim*
§ 261.6 9

OTHER AUTHORITIES

Assem. Bill No. 650 (1990-1991 Reg. Sess.) 11

Assem. Com. on Crim. Procedure's Dig., Assem. Bill No. 816 (1970 Reg. Sess.) (July 15, 1970) 10

https://www.dictionary.com/browse/consent 9

https://www.merriam-webster.com/dictionary/consent 9

Review of Selected 1970 California Legislation, Crimes (1971) 2 Pacific L. J. 275 10

Schwing, 2 Cal. Affirmative Defense (2d ed. 2017) § 32:1 9

Sen. Floor Analysis, Sen. Bill No. 370 (1999-2000 Reg. Sess.) (Aug. 30, 2000), http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml 10

Sen. Bill No. 1465 (1989-1990 Reg. Sess.) 11

Webb, *Unborn Child Homicide—California's Law* (1971) 2 Pacific L.J. 170 10

INTRODUCTION

Half a century ago, the Legislature amended the State's murder statute, Penal Code section 187, to include the "unlawful killing" of a "fetus." The text, purpose, and legislative history of that amendment demonstrate that the Legislature intended only to ensure that a third party who unlawfully kills a fetus does not escape punishment. The amendment was the Legislature's targeted response to a 1970 California Supreme Court decision that refused to extend the statute beyond its text, which then addressed only the killing of a "human being." In amending section 187, the Legislature was careful to exclude several categories of actions, including those related to legal abortions (Pen. Code, § 187, subds. (b)(1)-(2)) and, in addition, any "act" that was "aided, abetted, or consented to by the mother of the fetus" (Pen. Code, § 187, subd. (b)(3)). A woman necessarily consents to an act that she herself voluntarily undertakes, free of fraud, duress, or mistake. The acts in question in this case—the defendant's drug use during her pregnancy—fall squarely within the subdivision (b)(3) exclusion. This Court should grant the writ.

BACKGROUND

The Attorney General will not repeat in detail the background of this case, which is fully described in the petition, but will highlight certain matters for the Court's reference.

The district attorney has alleged petitioner Chelsea Becker, through her drug use during her pregnancy, unlawfully "killed"

her own fetus. (Respondent's Opposition to Demurrer (May 26, 2020) (Pet., Ex. 10 at p. 110).)

Ms. Becker filed a demurrer, contending that Penal Code section 187 does not apply to a woman's actions or omissions that may result in the death of her fetus, and, in addition, its application to her would be unconstitutional. (Petitioner's Demurrer (Apr. 2, 2020) (Pet., Ex. 9 at p. 92).)[1] Among other things, Ms. Becker's counsel argued that "Penal Code 187(b)(3) by its own plain terms precludes the prosecution of a woman for the consensual acts in which she may engage while pregnant." (Transcript of Demurrer (June 4, 2020) (Pet., Ex. 12 at p. 140 (5:3-6)).) Under this reading of the statute, "a third party can commit this crime, but a birth mother who necessarily would consent to her own volitional actions cannot." (*Id*. at p. 143 (8:3-6).) The deputy district attorney in response acknowledged that "the plain reading of [the exceptions] is a mother who attempts to commit an abortion herself cannot be held liable." (*Id*. at p. 149 (14:7-9).) But, she argued, [section 187] "does not simply state that a mother cannot be prosecuted ever." (*Id.* at p. 149 (14:12-14).)

The superior court overruled the demurrer. (Transcript of Demurrer (June 4, 2020) (Pet., Ex. 12).) It concluded that Penal Code section 187 did not appear "to exclude its application to the mother of [a] fetus." (*Id*. at p. 155 (20:2-3).) The court held that the exceptions related to a fetus (Pen. Code, § 187, subds. (b)(1)-

[1] Unless otherwise noted, all statutory references are to the California Penal Code.

(3)) are designed to except only conduct falling under a woman's constitutional right to terminate her pregnancy. (Pet., Ex. 12 at p. 155 (20:22-28).)

Penal Code Section 187 expressly does not apply where "[t]he act was solicited, aided, abetted, or consented to by the mother of the fetus." (Pen. Code, § 187, subd. (b)(3).) The superior court noted that the other two exceptions listed in section 187 involve medical personnel conducting an abortion. (Transcript of Demurrer (June 4, 2020) Pet., Ex. 12 at p. 155; see Pen. Code, § 187, subd. (b)(1) [excluding an act that "complied with the Therapeutic Abortion Act"]; subd. (b)(2) [excluding an act committed "by a holder of a physician's and surgeon's certificate" where the mother's life is in danger].) Interpreting the three exceptions in subdivision (b) "in connection with each other," the superior court held that the subdivision (b)(3) exception only "protect[s] the medical personnel who assist the doctor during the course of that procedure who themselves are not doctors, and do not hold surgeon certificates such as nurses and the such." (Pet., Ex. 12 at p. 155 (20:17-21); see also *id.* at p. 155 (20:22-25) ["the exception under the B section of Penal Code section 187 is designed to protect the therapeutic abortion that is sought"].)

The superior court observed that "[n]owhere in the statute does it say that the statute does not apply to the mother of a fetus" and reasoned that "if [excluding the mother of the fetus] was the intent of the legislature, they could have easily done so." (Pet., Ex. 12 at pp. 155-156 (20:28-21:2).)

On July 2, 2020, Ms. Becker filed her petition for writ of prohibition, application for immediate stay, and memorandum of points and authorities.

ARGUMENT

The Attorney General agrees with petitioner that the text, purpose, and legislative history of California Penal Code section 187 demonstrate that a woman cannot be prosecuted for murder as a result of her own omissions or actions that might result in pregnancy loss. The superior court erred in concluding otherwise.

Statutory construction is an exercise in discerning legislative intent, and courts start with the language of the statue as the "most reliable indicator." (*Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037.) Here, several aspects of the text show that a woman cannot be held liable in the circumstances of this case.

To start, the statute states that section 187 "shall not apply to *any* person" who engages in the behavior described within the three exceptions set out subdivision (b). (Italics added.) The term "any" is extremely broad. (See *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798 ["the word 'any' means without limit and no matter what kind"].) It should be read to include not only third parties whose actions result in the death of a fetus, but also the woman carrying the fetus.

Further, subdivision (b)(3) of section 187 is an independent, stand-alone exception that, by its terms, reaches beyond the medical abortion exceptions described in subdivisions (b)(1) and

(b)(2). Again, subdivision (b)(3) exempts from prosecution the "killing of . . . a fetus" when "[t]he act was . . . aided, abetted, or consented to by the mother of the fetus. . . ." The word "consent" in common use means "to permit, approve, or agree; comply or yield."[2] In this sense, one necessarily consents to one's own voluntary actions that are not undertaken through fraud, duress, or mistake. Because a person "consents" to her own voluntary actions and behaviors, when the mother of a fetus "consent[s]" to the "act" (i.e. the act that allegedly leads to the demise of the fetus), her conduct is necessarily exempted under subdivision (b)(3).

The superior court failed to address the independent meaning and function of subdivision (b)(3), and instead assumed that all three subparts address medical abortions. (Pet., Ex. 12 at p. 155.) But nothing within the statute supports this limited interpretation of subdivision (b)(3), and the superior court exceeded its authority in effectively rewriting the statute. (*Kovacevic v. Avalon at Eagles' Crossing Homeowners Assn.*

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[2] See https://www.dictionary.com/browse/consent [as of Aug. 6, 2020]; https://www.merriam-webster.com/dictionary/consent ["to give assent or approval"] (as of Aug. 6, 2020); see also Pen. Code, § 261.6 [defining consent as the "positive cooperation in act or attitude pursuant to an exercise of free will. The person must act freely and voluntarily and have knowledge of the nature of the act or transaction involved"]; Schwing, 2 Cal. Affirmative Def. (2d ed. 2017) § 32:1 ["Consent means a capable, deliberate and voluntary assent . . . in some act or purpose, reflecting mental and physical power and free action"].)

(2010) 189 Cal.App.4th 677, 685 [“‘We may not insert words into a statute under the guise of interpretation’”].)

Further, the Legislature’s purpose in adding the killing of a fetus to Penal Code section 187 was not to punish women who do not—or cannot, because of addiction or resources—follow best practices for prenatal health. Nor did it intend to punish women who might in desperation seek to end their pregnancies outside normal medical channels, as the district attorney acknowledged during the hearing. (See p. 6, *supra*.)[3] Rather, this addition was a focused response to *Keeler v. Superior Court* (1970) 2 Cal.3d 619. (See Assem. Com. on Crim. Procedure’s Dig., Assem. Bill No. 816 (1970 Reg. Sess.) (July 15, 1970); Review of Selected 1970 California Legislation, Crimes (1971) 2 Pacific L. J. 275, 362-363 [amendment to section 187 “was enacted in response to a June 1970 decision of the California Supreme Court (*Keeler v. Superior Court*, 2 Cal.3d 619)”].) In *Keeler*, a woman’s ex-husband beat her with the express intention of killing the fetus she was carrying. (2 Cal. 3d at p. 623 [“I’m going to stomp it out of you.”].)

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[3] Indeed, in 2000, the California Legislature repealed a statute that allowed for the “punishment of a pregnant woman who solicits an abortion outside the” confines of what is permitted by law. (Webb, *Is the Intentional Killing of an Unborn Child Homicide—California’s Law to Punish the Willful Killing of a Fetus* (1971) 2 Pacific L.J. 170, 182 [citing Pen. Code, § 276]; see also Sen. Floor Analysis, Sen. Bill No. 370 (1999-2000 Reg. Sess.) (Aug. 30, 2000), http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml [explaining that this provision is “outdated” and has largely been ruled unconstitutional].)

At the time, the text of Penal Code section 187 applied only to the killing of a "human being." The *Keeler* Court held that, consequently, section 187 could not be expanded to cover the killing of a fetus. (*Id*. at pp. 628, 631.) The California Legislature reacted by adding the "unlawful killing" of a "fetus" to the statute to ensure this type of action did not escape punishment. (See *People v. Davis* (1994) 7 Cal.4th 797, 802-803.) There is simply no indication that the Legislature in amending section 187 desired to do more than close the disturbing loophole noted in *Keeler*.[4]

The superior court's contrary interpretation would lead to absurd—and constitutionally questionable— results. (See *John v. Superior Court* (2016) 63 Cal.4th 91, 96 [court construes the statute's words in context "to avoid absurd results"]; *People v. Engram* (2010) 50 Cal.4th 1131, 1161 ["a statute must be construed, if reasonably possible, in a manner that avoids a serious constitutional question"].) It would subject all women who suffer a pregnancy loss to the threat of criminal

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[4] While not directly relevant to the interpretation of Penal Code section 187, the Attorney General notes that the Legislature has repeatedly declined to extend punishment to encompass a pregnant woman who experiences a pregnancy loss. (See Sen. Bill No. 1465 (1989-1990 Reg. Sess.) [proposed bill that would have expanded manslaughter to include substance abuse during pregnancy]; Assem. Bill No. 650 (1990-1991 Reg. Sess.) [proposed bill that would have made substance abuse during pregnancy a misdemeanor]; see also Health & Saf. Code, § 123462 [the "state shall not deny or interfere with a woman's fundamental right to choose to bear a child or to choose to obtain an abortion"].)

investigation and possible prosecution for murder. Whether a stillbirth or a miscarriage was due to drug use or some other reason, there is nothing in the statute that would constrain a district attorney's ability to investigate the most intimate aspects of the circumstances of a woman's pregnancy and to bring murder charges against that woman who suffered a pregnancy loss. (See *Kilmon v. State* (2006) 394 Md. 168, 177-178 [if "the statute is read to apply to the effect of a pregnant woman's conduct on the child she is carrying, it could well be construed to include not just the ingestion of unlawful controlled substances but a whole host of intentional and conceivably reckless activity. . . , [including but not limited] 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 exercising too much or too little, indeed to engaging in virtually any injury-prone activity. . . ."].)

The courts should not assume that the Legislature intended such a sweeping and invasive change to the criminal law affecting women's lives without clear evidence of that intent. And such evidence is absent here.

CONCLUSION

The writ should be granted.

Dated: August 7, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached [Proposed] Brief of the California Attorney General in Support of Petitioner Chelsea Becker uses a 13 point Century Schoolbook font and contains 2,041 words.

Dated: August 7, 2020

XAVIER BECERRA
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/s/ Karli Eisenberg
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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: *Becker v. Superior Court of Kings County*
Case No.: F081341

I declare:
I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On August 7, 2020, I electronically served the attached **[PROPOSED] BRIEF OF THE CALIFORNIA ATTORNEY GENERAL IN SUPPORT OF PETITIONER CHELSEA BECKER** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on August 7, 2020, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on August 7, 2020, at Sacramento, California.

B. Barton	***/s/ B. Barton***
Declarant	Signature