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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff,

v.

KELSEY SHANDE CARPENTER,

Defendant.

Case No. SCN422556

[PROPOSED] AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANT KELSEY SHANDE CARPENTER'S MOTION TO DISMISS THE INFORMATION

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I. INTRODUCTION

A new California law which became effective thirteen days ago—January 1, 2023—prohibits the State from prosecuting *any* person "based on their actions or omissions with respect to their pregnancy or actual, potential, or alleged pregnancy outcome, including miscarriage, stillbirth, or abortion, or perinatal death due to causes that occurred in utero." (A.B. 2223 (codified at Health & Saf. Code § 123467).) A.B. 2223 powerfully repudiates the idea that pregnant individuals can be prosecuted for their decisions or actions taken in relation to their pregnancy. But that is exactly what the State's continued prosecution of Ms. Carpenter seeks to do: hold Ms. Carpenter criminally responsible for the tragic death of her newborn based on alleged decisions she made and actions she took during her pregnancy.

A.B. 2223 is not a sea change in California legislation. Rather, A.B. 2223 reinforces existing prohibitions against prosecutions like this one under California law. More than fifty years ago, in 1970, Penal Code section 187 was amended to make clear that section 187 prohibits prosecutions that result from harm to a fetus if the acts on which the prosecution is based were "consented to" by the mother of the fetus. (Pen. Code, § 187, subd. (b)(3).) A.B. 2223 is also consistent with decades of legislative activity addressing drug use during pregnancy, which has focused on enhanced access to treatment, education, and prevention rather than criminalization. This legislative history recognizes two important truths: (1) reliable scientific evidence has not demonstrated that methamphetamine use during pregnancy causes any serious negative pregnancy outcomes such as infant death, and (2) the objective to protect maternal, fetal, and family health is best served by legislation enhancing access to medical and rehabilitation services, not by criminalizing conduct by pregnant persons in relation to their pregnancy.

Amici submit this brief in support of Ms. Carpenter's Motion to Dismiss the Information. These *amici* include national and state drug policy and public health organizations with recognized expertise and experience in the areas of maternal, fetal, and neonatal health, as well as civil rights groups and organizations committed to supporting the rights and health of birthing parents, children, women generally, and families. *Amici* recognize a strong societal interest in protecting the health of pregnant individuals, children, and families. Those interests are

undermined, not advanced, by laws that permit the detention and arrest of pregnant people in relationship to their pregnancies. The State is prohibited from prosecuting Ms. Carpenter on the basis of any actions she took or decisions she made during her pregnancy. Specifically, in ruling on Ms. Carpenter's Motion to Dismiss the Information, the Court must reject any theory of liability that rests on alleged drug use during the pregnancy or Ms. Carpenter's choices about prenatal care or childbirth, including that she chose to have a home birth. *Amici* respectfully ask this Court to dismiss the information against Ms. Carpenter

II. ARGUMENT

The information should be dismissed for two main reasons. First, California law prohibits prosecution based on conduct during pregnancy, and such evidence is a focus of the prosecutor's case against Ms. Carpenter. The just-enacted A.B. 2223 confirms decades of legislative action: California does not authorize and has never authorized prosecutions based on pregnancy outcomes. The Legislature has consistently and correctly recognized that public health is best served by increasing access to treatment and healthcare for pregnant individuals and mothers, not by imposing criminal sanctions for pregnancy outcomes based on alleged substance use or any other pre-birth conduct.

Second, evidence-based research has not shown that methamphetamine use (or use of certain other drugs) causes serious adverse pregnancy outcomes that would lead to infant death. Substance use cannot be untangled from the myriad other factors that may contribute to adverse pregnancy outcomes, including socio-economic barriers and access to healthcare. Moreover, although pregnancy loss is sadly common, medical science often cannot identify the cause with any degree of certainty. The State should not be permitted to proceed on a theory of causation that is unsupported by the consensus view of the medical community.

A. The California Legislature Has Consistently Prohibited Prosecutions Based on Conduct During Pregnancy.

1. A.B. 2223 prohibits the continued prosecution of Ms. Carpenter.

A.B. 2223 became law on January 1, 2023. Its enactment reinforces the already unambiguous proposition that Ms. Carpenter may not be prosecuted for the unfortunate death of

her newborn child. Because A.B. 2223 went into effect while this case is pending, the charges must be dismissed. (*See People v. Rossi* (1976) 18 Cal.3d 295; *In re Estrada* (1965) 63 Cal.2d 740.)

"Statutory construction begins with the plain, commonsense meaning of the words in the statute." (*People v. Manzo* (2012) 53 Cal.4th 880, 885 (internal citations omitted).) Statutory interpretation must be construed in accordance with "its apparent purpose and the intent of the Legislature," gathered from the statute as a whole. (*People v. Lucero* (2019) 41 Cal.App.5th 370, 395.) When language in a criminal statute is susceptible to different interpretations, the rule of lenity requires a court to construe the language in the defendant's favor. (*Wooten v. Superior Court* (2001) 93 Cal.App.4th 422, 428.)

On its face, the new law encompasses the alleged acts or omissions of Ms. Carpenter on which this prosecution is focused. A.B. 2223, codified at Health and Safety Code section 123467, provides that "a person shall not be subject to civil or criminal liability or penalty . . . based on their actions or omissions ***with respect to their pregnancy or actual, potential, or alleged pregnancy outcome***, including miscarriage, stillbirth, or abortion, ***or perinatal death due to causes that occurred in utero***" (italics & bold added). Elsewhere under California law, "perinatal" is defined as the period from establishment of pregnancy to one month after delivery. (*See* Welf. & Inst. Code, § 14134.5, subd. (b).) Consistent with this statutory definition, Merriam-Webster Dictionary defines "perinatal" as "the period around the time of birth."[1] (*See also People v. Gonsalves* (2021) 66 Cal.App.5th 1, 7 (citing Merriam-Webster Dictionary and other statutory law to define term).) Under either definition, the plain language of the statute encompasses actions taken during pregnancy alleged to have caused the death of a baby within hours of her birth. That prohibition includes all of the alleged conduct of Ms. Carpenter on which the prosecution bases its case: her alleged use of methamphetamine or buprenorphine (a drug used to treat substance use disorders) during pregnancy, her alleged decision not to receive prenatal care, and her alleged decision to have a home birth.[2] None of these alleged decisions and

[1] https://www.merriam-webster.com/dictionary/perinatal.

[2] Preliminary Hrg. Tr. 175-179.

actions can support a criminal prosecution for murder under Penal Code section 187.

To the extent the prosecution bases its case on events that flow from her prenatal decisionmaking, that theory too is foreclosed by A.B. 2223. For instance, if the prosecution relies on a contention that Ms. Carpenter failed to call 911 quickly enough to save her baby, e.g., Prelim Tr. 178:1-17, that theory is prohibited by A.B. 2223 under the facts of this case because Ms. Carpenter's alleged inaction flowed directly from her decision to have an unmedicated home birth. E.g., *id.* at 50:21-24, 92:10-18 (testimony indicating that Ms. Carpenter lost consciousness after giving birth and her baby died while she was unconscious).

Other amendments enacted by A.B. 2223 in the same section of the Health and Safety Code confirm that A.B. 2223 broadly covers decisions about childbirth and postpartum care. Legislative findings recognize that "every individual possesses a fundamental right of privacy with respect to personal reproductive decisions, which entails the right to make and effectuate decisions about all matters relating to pregnancy, including ***prenatal care, childbirth, postpartum care***, contraception, sterilization, abortion care, miscarriage management, and infertility care."[3] The legislative findings note the important rationales for immunizing such decisions from liability: they cite the fact that "[m]any pregnancy losses have no known explanation," and they recognize that "the threat of criminal prosecutions or civil penalties on pregnant people through child welfare, immigration, housing, or other legal systems has a harmful effect on individual and public health."[4] But this is exactly what the State seeks to do—hold Ms. Carpenter criminally responsible for decisions about prenatal care and childbirth.

The perinatal death of Ms. Carpenter's newborn is exactly the sort of adverse pregnancy outcome anticipated by A.B. 2223. When opposers of the bill expressed concern that the original "perinatal death" language could be read to encompass any death of a newborn after a live birth for any reason, the bill's author proposed amending that language to clarify that it would apply only to a pregnancy-related complication.[5] Accordingly, the enacted version of A.B. 2223 added

[3] Assem. Bill No. 2223 (2022 Legis. Reg. Sess.) (enacted) (italics added).

[4] *Id.*

[5] Assem. Judiciary Comm. No. 197 (2021-2022 Reg. Sess.).

the clause "due to causes that occurred in utero" to modify "perinatal death" for which criminal liability could not be imposed.[6] Ms. Carpenter's conduct falls squarely within this provision and the stated purpose of A.B. 2223 to protect the bodily autonomy of pregnant people. The State's theories of liability rely on alleged causes that occurred while the fetus was in utero: drug use during pregnancy, decisions about pre- and postnatal care, and the location and manner in which she gave birth.[7] Moreover, evidence at the preliminary hearing indicates her newborn died just hours after birth, further evidence that her tragic death was a pregnancy-related complication.[8]

A.B. 2223 must be applied to the present case. (See *Estrada*, 63 Cal.2d at 751 [statute reducing punishment applied retroactively to pending prosecution].) "*Estrada*'s presumption of retroactivity has been a fixture of our criminal law for more than 50 years." (*People v. Esquivel* (2021) 11 Cal.5th 671, 675; *see also Rossi*, *supra*, 18 Cal.3d at pp. 301-302 [holding that when a legislative amendment eliminates a criminal sanction for a defendant's acts before a conviction has become final, and that amendment contains no savings clause, the criminal prosecution is barred].) Under the plain language of A.B. 2223, there is no criminal liability for Ms. Carpenter's alleged pre-birth acts, and A.B. 2223 contains no savings clause.[9] To the contrary, as discussed *supra*, the legislative findings in A.B. 2223 indicate that the Legislature viewed the law already to prohibit such prosecutions. It would be nonsensical to conclude that the Legislature intended A.B. 2223 to bar prosecutions like this one from January 1, 2023 on, but to allow such prosecutions to proceed if they were initiated prior to January 1, 2023. Because A.B. 2223 operates retroactively, it "requires the dismissal of a pending criminal proceeding charging such conduct." (*Rossi*, *supra*, 18 Cal.3d at p. 304 (quoting *Bell v. Maryland* (1964) 378 U.S. 226, 230).) Ms. Carpenter's case must be dismissed.

2. PC Section 187 does not criminalize the charged pre-birth conduct.

Even before the enactment of A.B. 2223, Penal Code section 187 expressly immunized

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[6] Assem. Bill No. 2223 (2022 Legis. Reg. Sess.) (enacted).

[7] Prelim Tr. at 175:23-179:20.

[8] *Id*. at 44:2-45:3, 92:10-25.

[9] *See* Assem. Bill No. 2223 (2022 Legis. Reg. Sess.).

from liability any actions taken by a pregnant person in relation to their own pregnancy resulting in the death of a fetus. Both the plain statutory language and the apparent legislative intent demonstrate that section 187 is not intended to permit prosecution based on the pregnant person's conduct during pregnancy.

As amended in 1970, section 187 defines murder to include "the unlawful killing of a human being, or a fetus," but with an important exception. (Pen. Code, § 187, subd. (a).) Section (b)(3) excludes from liability any action that "was solicited, aided, abetted, ***or consented to by the mother of the fetus***." (*Id.* § 187, subd. (b)(3) (italics & bold added).) In other words, any volitional acts by a pregnant person during the pregnancy that result in the death of a fetus are expressly excluded from prosecution under section 187, subdivision (b)(3).[10] There is no logical reason to *prohibit* prosecution based on a pregnant person's alleged conduct leading to in utero death, but *permit* a prosecution based on the ***same conduct*** that allegedly leads to infant death immediately post-birth. Here, Ms. Carpenter's decisions about prenatal and postnatal care, her alleged drug use during the pregnancy, and her decision to have a home birth are excluded from liability under section 187.

The circumstances of the 1970 amendment to section 187 confirm this interpretation. The Legislature amended section 187 in response to the California Supreme Court's decision in *Keeler v. Superior Court* (1970) 2 Cal.3d 619. In *Keeler*, the defendant attacked a pregnant woman, causing the woman to deliver a fetus stillborn. The California Supreme Court held that section 187 did not encompass acts to a fetus, and therefore could not be used to prosecute the defendant for homicide. In response, the Legislature amended section 187 to permit the prosecution of attackers for acts that result in the death of a fetus. (*People v. Davis* (1994) 7 Cal.4th 797, 829.) As the primary author of the amendment to section 187, State Assemblyman W. Craig Biddle, explained: "[T]he purpose of my legislation [was] to make punishable as murder a third party's willful assault on a pregnant woman resulting in the death of her fetus.

[10] *See* Att'y General's Amicus Curiae Br. in Supp. of Issuance of an Order to Show Cause at 6, *In re Application of Adora Perez*, Case No. 21W-0033A ("A woman necessarily consents to an act that she herself voluntarily undertakes, free of fraud, duress, or mistake," including "alleged drug use during [] pregnancy.").

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." (Biddle Decl. ¶ 4, *People v. Jaurequi* (San Benito County, 1992, No. 23611).)[11]

The legislative findings accompanying A.B. 2223 confirm that even before its enactment, existing California law banned prosecutions based on pregnancy outcomes. The Legislature recognized that reproductive justice, "the human right to control our bodies, . . . and reproduction" can only be realized by "***clarifying*** that there shall be no civil and criminal penalties for people's actual, potential, or alleged pregnancy outcomes."[12] The findings noted instances of criminal prosecutions for pregnancy losses, "***[d]espite clear law*** that ending or losing a pregnancy is not a crime."[13] As an example, the findings cite the Kings County prosecution of "two women for murder after they suffered stillbirths." *Id.* In other words, prosecutions of pregnant individuals based on acts allegedly leading to perinatal deaths were never allowed—the Legislature enacted A.B. 2223 only because some prosecutors were ignoring the "clear law" and filing such charges anyway.

3. The Legislature has consistently declined to criminalize drug use during pregnancy.

The policy judgment underlying A.B. 2223—that criminalization of a mother's conduct during pregnancy does not promote maternal and fetal health—is not new. In the time between the 1970 amendment to Penal Code section 187 and the enactment of A.B. 2223 in 2022, the California Legislature has ***repeatedly*** rejected invitations to criminalize substance use during pregnancy. Consistent with the recommendations of medical professionals and experts on public health, California has instead addressed substance use in pregnant people by improving public health access and education.[14]

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[11] See also Att'y General's Amicus Curiae Br. in Supp. of Issuance of an Order to Show Cause at 10-12, *In re Application of Adora Perez*, Case No. 21W-0033A.

[12] Assem. Bill No. 2223 (2022 Legis. Reg. Sess.) (enacted) (italics & bold added).

[13] *Id.*

[14] *See* Miranda et al., *How States Handle Drug Use During Pregnancy* (Sept. 30, 2015) ProPublica, at https://projects.propublica.org/graphics/maternity-drug-policies-by-state.

Several bills have been proposed over the years that would have imposed criminal penalties for drug use during pregnancy. None was enacted:

- In 1987, Senator Ed Royce sponsored a bill that would have expanded the definition of child endangerment to cover substance use during pregnancy. (S.B. 1070 (1987-1988 Reg. Sess.) (Cal. 1987).) That bill was not enacted.
- In 1989, then Senator John Seymour sponsored a bill that would have made controlled substance use during pregnancy, where the pregnancy resulted in fetal demise, a basis for manslaughter. (S.B. 1465 (1989-1990 Reg. Sess.) (Cal. 1989).) The Legislature did not enact this bill either.
- In 1991, the Legislature considered enacting a statute that would have made substance use during pregnancy a misdemeanor if there was a subsequent effect on a child after birth. (A.B. 650 (1990-1991 Reg. Sess.) (Cal. 1991).) This bill too was not enacted.
- In 1996, Assemblyman Phil Hawkins introduced A.B. 2614 (1995-1996 Reg. Sess.) (Cal. 1996), which would have created a crime of "fetal child neglect," which would have criminalized substance abuse during pregnancy. This bill was also not enacted.

This history is instructive of the Legislature's intent. (See, e.g., *Kilmon v. State* (Md. 2006) 905 A.2d 306, 312-314 [considering state legislature's failure to criminalize drug use during pregnancy as evidence legislature did not intend to impose criminal penalties on such conduct]; *see also* Eskridge Jr., *Interpreting Legislative Inaction*, (1988) 87 Mich. L.Rev. 67, 84-89 [surveying "rejected proposal" cases in which U.S. Supreme Court supported its interpretation of a statute based on Congress's failure to pass proposed legislation containing opposite interpretations].) Here, the Legislature ***repeatedly*** rejected proposals to criminalize pregnant people's acts during pregnancy. This constitutes evidence of the Legislature's intent to prohibit prosecutions of women like Ms. Carpenter for alleged drug use during pregnancy. (*See Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees* (1987) 481 U.S. 429, 439; *see also Blue Chip Stamps v. Manor Drug Stores* (1974) 421 U.S. 723, 732-733 [Congress's failure to enact proposed amendment that would codify interpretation of statute was evidence that Congress rejected that interpretation].)

Instead of punitive approaches, the Legislature passed bills that funded social services and public education for pregnant people and children at risk of prenatal drug exposure.[15] For example, in 1990 the Legislature enacted the Alcohol and Drug Affected Mothers and Infants Act. (See Health & Saf. Code, § 11757.51 et seq.) Recognizing the crisis of substance use disorders in people of childbearing age, the Legislature found that "[t]he appropriate response to this crisis 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." (*Id.* § 11757.51, subds. (a)-(c).) The Act created an Office of Perinatal Substance Abuse to research, conduct trainings, and support efforts at combatting perinatal drug use; it also required funding for treatment and support services for pregnant and postpartum individuals. (*Id.* §§ 11757.53, 11757.59.) At the local level, counties established treatment and recovery-focused programs for parents with substance use disorders.[16]

In short, the California Legislature has unwaveringly declined to criminalize the acts of a pregnant person, including drug use, during pregnancy. The Legislature has correctly concluded that treatment, education, and preventive measures—not criminalization—promote the best outcomes for mothers and babies. These conclusions are well founded in scientific evidence and public health research, as further discussed below.

B. Scientific Studies Have Failed to Establish That Drug Use Causes Adverse Pregnancy Outcomes.

Major medical and public health organizations agree with the California Legislature that punitive approaches to substance use during pregnancy are inappropriate.[17] First, scientific

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[15] Gomez, Misconceiving Mothers: Legislators, Prosecutors, and Politics of Prenatal Drug Exposure (1997) p. 41.

[16] U.S. Dept. of Health & Human Servs., Substance-Abused Infants: State Responses to the Problem, at extension://efaidnbmnnnibpcajpcglclefindmkaj/https://ncsacw.acf.hhs.gov/files/Substance-Exposed-Infants.pdf.

[17] See generally [Proposed] Amicus Curiae Br. on Behalf of Medical and Public Health Organizations and Physicians and Midwives in Support of Defendant Kelsey Shande Carpenter (hereinafter Medical Associations Amicus Brief).

evidence does not support the claim that substance use—including use of cocaine, methamphetamine, or opiates—during pregnancy causes serious prenatal harm, such as would lead to perinatal death.[18] To the extent the State bases its prosecution on Ms. Carpenter's alleged buprenorphine use—a drug physicians actually *recommend* for pregnant people—this theory is equally unfounded in science.[19] Second, while adverse pregnancy outcomes are common, their causes are often unknown—making them a particularly inappropriate vehicle for criminal liability.

1. Scientific studies have not shown that in utero methamphetamine exposure causes serious harm to fetuses.

Scientific studies have demonstrated no causal link between a pregnant person's use of drugs, including methamphetamine, and serious harm to the fetus that would lead to infant death.[20] In other words, from a scientific perspective, the prosecution cannot establish that Ms.

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[18] See, e.g., Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure* (2001) 285 J. Am. Med. Ass'n 1613 at 1 (finding "no convincing evidence" among children 6 and under "that prenatal cocaine exposure is associated with developmental toxic effects that are different in severity, scope, or kind from the sequelae of multiple other risk factors"); Helmbrecht & Thiagarajah, *Management of Addiction Disorders in Pregnancy* (2008) 2 J. Addiction Med. 1, 12 (reviewing literature regarding methamphetamine use during pregnancy and finding little or no effect on organogenesis and no increase in spontaneous abortion, major, or minor malformations); Schempf, *Illicit Drug Use and Neonatal Outcomes: A Critical Review* (2007) 62 Obstetrical & Gynecological Survey 749 (noting some studies associated opiate use during pregnancy with lower birth weight and transitory withdrawal symptoms in infant, but not with serious outcomes).

[19] Helmbrecht & Thiagarajah, *supra*, at 11; *see also* Medical Associations Amicus Brief at 8-9.

[20] Terplan & Wright, *The Effects of Cocaine & Amphetamine Use During Pregnancy on the Newborn: Myth versus Reality* (2010) 30 J. of Addiction Diseases 1, 2-5;Golub et al., *NTP-CERHR Expert Panel on the Reproductive & Developmental Toxicity of Amphetamine and Methamphetamine* (2005) 74 Birth Defects Research Part B Developmental & Reproductive Toxicology 471, 500-572 (expert panel extensively reviewed existing literature and found evidence only that methamphetamine use in animals manifested in behavioral alterations and decreased birth weight, but no such evidence in humans nor any evidence of serious outcomes such as infant death); *see also* Am. Coll. Obstetricians & Gynecologists, Committee Opinion No. 479: *Methamphetamine Abuse in Women of Reproductive Age* (2011) 117 Obstet. Gynecol. 751, 752-53 (reaffirmed in 2017) (noting association between methamphetamine use by pregnant mother and low infant birth weight and potential developmental abnormalities, but not more serious outcomes); Editorial Board, *Slandering the Unborn* (Dec. 28, 2018) N.Y. Times, https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html.

Decades of research makes clear that exposure to opioids is not associated with birth defects. Helmbrecht & Thiagarajah, *supra*, at 9. Some newborns who are exposed to opioids in utero experience a transitory and treatable set of symptoms at birth known as neonatal abstinence

Carpenter's alleged drug use caused any serious harm to the fetus, let alone perinatal death.

Experts have repeatedly concluded that available scientific evidence does not show that methamphetamine use during pregnancy causes serious adverse outcomes. One expert panel convened by the federal government determined that "the data regarding illicit methamphetamine are insufficient to draw conclusions concerning developmental toxicity in humans"; and the studies reviewed by the authors involving animals failed to associate methamphetamine with any serious outcomes such as infant death.[21] A peer-reviewed journal article on stillbirths confirmed that evidence linking methamphetamine use during pregnancy with an increased risk of stillbirth "remains lacking."[22] Well-designed studies have found no association—let alone causal link—between methamphetamine and serious obstetric outcomes such as preterm birth, maternal hypertensive disorders, pre-eclampsia, placental abruption, or stillbirth. For example, one study testing prenatal methamphetamine exposure at birth and one month after birth reported no serious adverse effects associated with the methamphetamine use.[23] Indeed, most amphetamine use during pregnancy (whether illicit or prescribed) results in no adverse pregnancy outcomes.[24] Studies of drugs that work similarly to methamphetamine confirm these findings.[25]

The assertion that substance use during pregnancy leads to serious adverse outcomes often relies on flawed research and assumptions. While certain studies have found an association between methamphetamine and low birth weight,[26] this outcome is not associated with infant

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syndrome (NAS) that can be safely and effectively treated in the nursery setting. Substance Abuse & Mental Health Servs. Admin., Methadone Treatment for Pregnant Woman (2006).

[21] Report of the NTP-CERHR Expert Panel at 500-572, (2005) 74 Birth Defects Research Part B Developmental & Reproductive Toxicology 471.

[22] Silver et al., *Workup of Stillbirth*: A Review of the Evidence (2007) 196 Am. J. Obstetrics & Gynecology 433, 438.

[23] Kiblawi et al., *Prenatal methamphetamine exposure and neonatal and infant neurobehavioral outcome: results from the IDEAL study*, 35 Substance Abuse, no. 1 (2014), at 68, at https://doi.org/10.1080/08897077.2013.814614.

[24] *See* Wright et al., *Methamphetamines and Pregnancy Outcomes* (2015) 9 J. Addiction Med.111, 116 (2d ed.).

[25] *See* Medical Associations Amicus Brief at 7 (discussing study of use of prescribed psychostimulant with similar chemical structure to methamphetamine during pregnancy).

[26] Nguyen et al., *Intrauterine growth of infants exposed to prenatal methamphetamine: results from the infant development, environment, and lifestyle study* (2010) 157 J. Pediatrics at 337-339.

death. Thus, studies associating methamphetamine with low birth weight have nothing to do with this case, where the prosecution seeks to prove that Ms. Carpenter caused her newborn's death. Second, studies frequently fail to account for other factors that contribute to poorer pregnancy outcomes like low birth weight, including concurrent use of other drugs, poor nutrition, and other socioeconomic variables associated with methamphetamine users.[27] As the National Institute on Drug Abuse recently observed, "[S]tudies of [methamphetamine use during pregnancy] have used small samples and did not account for other possible drug use besides methamphetamine in research samples."[28]

Rather than having a foundation in science, media outlets and policymakers have perpetuated the myth of a "meth baby." In 2005, an open letter signed by ninety medical and psychological researchers denounced the terms "meth baby" or "crack baby," stating:

> Although research on the medical and developmental effects of prenatal methamphetamine exposure is still in its early stages, our experience with almost 20 years of research on the chemically related drug, cocaine, has not identified a recognizable condition, syndrome or disorder that should be termed "crack baby" nor found the degree of harm reported in the media and then used to justify numerous punitive legislative proposals.[29]

Courts around the country have rejected prosecutions based on alleged harm to fetuses due to in utero drug exposure because they are unsupported by science. For example, the Supreme Court of South Carolina unanimously overturned the conviction of a woman charged with causing a stillbirth based on evidence that she used cocaine during pregnancy. (*McKnight v. State* (S.C. 2008) 661 S.E.2d 354.) The court held that the woman's counsel provided ineffective assistance

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[27] See, e.g., Am. Pub. Health Ass'n, Transforming Public Health Works: Targeting Causes of Health Disparities (2016) 46 The Nation's Health 1 ("at least 50% of health outcomes are due to the social determinants . . ."). As the Gorman study relied on by the State's expert acknowledges, the slight positive association with neonatal mortality in neonates exposed to methamphetamine could be explained by "various bio-psycho-social reasons" and "it is unclear whether any one of these factors is a larger contributor to outcomes than methamphetamine itself." Gorman et al., *Outcomes in pregnancies complicated by methamphetamine use* (2014) 211 Am. J. Obstetrics & Gynecology 429. *See also* Medical Associations Amicus Brief at 6.

[28] National Institute on Drug Abuse, Methamphetamine Research Report 11 (Oct. 2019), at extension://efaidnbmnnnibpcajpcglclefindmkaj/https://nida.nih.gov/download/37620/methamphetamine-research-report.pdf?v=59d70e192be11090787a4dab7e8cd390.

[29] Open Letter by Medical and Psychological Researchers to David E. Lewis (July 27, 2005), at extension://efaidnbmnnnibpcajpcglclefindmkaj/http://www.csdp.org/news/news/MethLetter.pdf; see also Medical Associations Amicus Brief at 7-8.

of counsel when she failed to educate the jury about "recent studies showing that cocaine is no more harmful to a fetus than nicotine use, poor nutrition, lack of prenatal care, or other conditions commonly associated with the urban poor." (*Id.* at 358 n.2.) The conviction could not stand because of the "reasonable probability" that the jury relied on "apparently outdated scientific studies" suggesting that cocaine use caused the death of her fetus; defense counsel had failed to rebut this claim with available expert testimony that cocaine did not cause the stillbirth. (*Id.* at 360-61.)

2. Buprenorphine improves pregnancy outcomes.

To the extent the State seeks to prove that Ms. Carpenter's buprenorphine use contributed to the perinatal death of her newborn, that contention is contrary to science and common sense. "Methadone or buprenorphine treatment during pregnancy is the ***recommended standard of care*** for pregnant women with opioid use disorder and improves neonatal outcomes for opioid abuse" (italics & bold added).[30] Further, a study funded by a component of the National Institutes of Health found that treating pregnant individuals with buprenorphine resulted in outcomes superior to methadone in reducing withdrawal symptoms in the newborn babies.[31] Allowing the state to criminalize conduct that follows the recommended standard of care for treating addiction during pregnancy would turn existing law and policy on its head.[32]

C. Declining to Criminalize Conduct Like Ms. Carpenter's Will Lead to Better Outcomes for Babies and Families.

As the California Legislature recognized, criminalizing conduct like Ms. Carpenter's would disincentivize pregnant people from seeking medical care and treatment for drug abuse.[33]

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[30] Am. Psych. Ass'n, Pregnant and Postpartum Adolescent Girls and Women with Substance-Related Disorders (updated 2020), at extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.apa.org/pi/women/resources/pregnancy-substance-disorders.pdf.

[31] Buprenorphine Treatment in Pregnancy: Less Distress to Babies (Dec. 9, 2010), at https://www.nih.gov/news-events/news-releases/buprenorphine-treatment-pregnancy-less-distress-babies.

[32] *See* Medical Associations Amicus Brief at 8-9.

[33] E.g., Assem. Bill No. 2223 (2022 Reg. Sess.) (Cal. 2022, enacted) ("Every Californian should have the right to feel secure that they can seek medical assistance during pregnancy without fear of civil or criminal liability.").

The overwhelming consensus of medical and public health organizations agree that punishing drug use during pregnancy harms pregnant people and children; improved access to treatment and healthcare is far more likely to promote positive outcomes.

The major medical and psychological associations are in accord that punitive measures lead to negative health outcomes for pregnant individuals and children.[34] Scientific literature suggests that pregnancy can motivate people with substance use disorders to seek treatment.[35] Studies also show that prenatal care substantially reduces risks of low birthweight and prematurity among infants born to individuals experiencing a substance use disorder.[36] But under a punitive approach, pregnant people using drugs may avoid prenatal care and treatment for fear of criminal penalties.[37] Criminalization also "harms the confidential patient–practitioner relationship by creating uncertainty as to whether law enforcement will become involved," and thus impedes information sharing that can help healthcare providers provide informed care to pregnant people.[38] The American College of Obstetricians and Gynecologists ("ACOG") explained that punitive responses pose "serious threats to people's health and the health system itself . . . [by] erod[ing] trust in the medical system, making people less likely to seek help when they need it."[39]

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[34] See Medical Associations Amicus Brief at 1-2.

[35] Am. Acad. of Pediatrics, Comm. on Substance Use and Prevention, Policy Statement, A Public Health Response to Opioid Use in Pregnancy (2017).

[36] El-Mohandes et al., *Prenatal Care Reduces the Impact of Illicit Drug Use on Perinatal Outcomes* (2003) 23 J. Perinatology 354; Gelshan, A Step Toward Recovery: Improving Access to Substance Abuse Treatment for Pregnant and Parenting Women, Southern Reg'l Project on Infant Mortality (1993); Roberts & Nuru-Jeter, *Women's Perspectives on Screening for Alcohol and Drug Use in Prenatal Care* (2010) 20 Women's Health Issues 193.

[37] Am. Psych. Ass'n, Pregnant and Postpartum Adolescent Girls and Women with Substance-Related Disorders (updated 2020), at extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.apa.org/pi/women/resources/pregnancy-substance-disorders.pdf.

[38] Statement of Policy, *Opposition to Criminalization of Individuals During Pregnancy and Postpartum Period* (2020) ACOG, at https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period; Wakeman et al., *When Reimagining Systems of Safety, Take a Closer Look at the Child Welfare System* (Oct. 7, 2020) Health Affairs Blog, at https://www.healthaffairs.org/do/10.1377/hblog20201002.72121/full/.

[39] Statement of Policy, *Opposition to Criminalization of Individuals During Pregnancy and Postpartum Period* (2020) ACOG, at https://www.acog.org/clinical-information/policy-and-

Employing punitive approaches to substance use by women during pregnancy has demonstrably negative effects on fetal and neonatal health. An empirical analysis of CDC-maintained data found that the enactment in Tennessee of a law making it a crime to use drugs while pregnant was associated with a reduction in pregnant individuals seeking prenatal care, a reduction in Apgar scores (associated with more serious medical conditions in infants), and an increase in both fetal and infant deaths.[40] An observational analysis of the same Tennessee law confirmed these findings, finding that the law motivated pregnant people who use drugs to avoid prenatal care, give birth at home rather than in hospitals, and seek unwanted abortions to avoid criminal liability.[41] That law has since expired. Another empirical study found a significantly higher prevalence of neonatal abstinence syndrome (NAS), a treatable condition that affects some newborns whose mother took drugs, in the first full year after states enacted laws criminalizing substance use during pregnancy.[42]

The threat of criminal sanctions in this context also disregards that addiction is a health condition, not a choice. The American Society of Addiction Medicine, the nation's largest organization representing medical professionals who specialize in addiction prevention and treatment, defines addiction as "a treatable, chronic disease involving complex interactions among brain circuits, genetics, the environment, and an individual's life experiences."[43] Even during treatment, relapses are a normal part of recovery.[44] Due to the nature of addiction, even individuals who seek out treatment for substance use disorders during pregnancy and achieve

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position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period.

[40] Boone & McMichael, *State-Created Fetal Harm* (2021) 109 Geo. L.J. 475, 504-506.

[41] Bowers, et al., *Tennessee's Fetal Assault Law: Understanding its impact on marginalized women* (Dec. 14, 2020) Sister Reach, at extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.pregnancyjusticeus.org/wp-content/uploads/2020/12/SisterReachFinalFetalAssaultReport_SR-FINAL-1-1.pdf.

[42] Faherty et al., *Association of Punitive and Reporting State Policies Related to Substance Use in Pregnancy With Rates of Neonatal Abstinence Syndrome*, (2019) JAMA Open Network, at https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2755304.

[43] Am. Soc'y of Addiction Med., Definition of Addiction (Sept. 15, 2019), https://www.asam.org/resources/definition-of-addiction.

[44] Hendershot et al., *Relapse Prevention for Addictive Behaviors* (2011) 6 Substance Abuse Treatment, Prevention & Pol'y 2.

abstinence often cannot do so totally and immediately. In one study of women receiving treatment for substance use during pregnancy, the average amount of time needed to achieve abstinence from cocaine and marijuana was approximately five months.[45] The legislative decriminalization of drug use during pregnancy recognizes that a treatment-based approach, not a punitive one, is most likely to address the underlying condition and lead to abstinence or reduction in use.

Courts in multiple states have interpreted statutes *not* to criminalize individuals' conduct during pregnancy, reasoning that such interpretation would be contrary to common sense or their state legislature's reasoned policy choices. Employing the "unreasonable results" canon, the Oregon Court of Appeals interpreted an Oregon criminal statute to preclude charges based on the defendant pregnant mother's drug use during pregnancy "to avoid construing a statute to provide an incentive for a woman to terminate a pregnancy solely to avoid criminal liability." (*State v. Cervantes* (2009) 232 Or.App. 567, 589 (en banc).) Similarly, the Supreme Court of Kentucky held that it was unconstitutional to apply criminal abuse statutes to a pregnant person's drug use during pregnancy, because "it would be a 'slippery slope' whereby the law could be construed as covering the full range of a pregnant woman's behavior—a plainly unconstitutional result." (*See Cochran v. Commonwealth* (Ky. 2010) 315 S.W.3d 325, 328; *see also Commonwealth v. Welch* (Ky. Ct. App. 1993) 864 S.W.2d 280, 283-284 [holding same].) And in Maryland, the Court of Appeals overturned a conviction for reckless endangerment based on the defendant's alleged drug use during pregnancy. (*Kilmon*, *supra*, 905 A.2d at pp. 311-15.) The *Kilmon* court reasoned that the prosecution's theory had the potential to render criminal "a whole host of intentional and conceivably reckless activity that could not possibly have been within the contemplation of the Legislature"; the legislative history indicated the Legislature instead intended that pregnant women's drug use be addressed through treatment and termination of parental rights if necessary. (*Id.* at 311.) Courts in New York Indiana and Hawaii have rejected similar attempts to criminalize drug use during pregnancy. (*See People v. Jorgensen* (N.Y. 2015) 41 N.E.3d 778,

[45] Forray et al., *Perinatal Substance Use: A Prospective Evaluation of Abstinence and Relapse* (2015) 150 Drug & Alcohol Dependence 147.

781 [holding that legislature did not intend to hold pregnant people criminally liable for reckless acts committed while pregnant]; *Herron v. State* (Ind. Ct. App. 2000) 729 N.E.2d 1008 [dismissing felony neglect of a child charge against a woman who was pregnant and allegedly used cocaine]; *State v. Aiwohi* (Hawaii 2005) 123 P.3d 1210, 1224, as corrected Dec. 12, 2005 [dismissing manslaughter prosecution for death of baby born alive based on woman's alleged methamphetamine use during pregnancy].)

Here in California, the Legislature has correctly—and repeatedly—recognized that health outcomes for families and children are better served by declining to criminally prosecute pregnant people for the outcomes of their pregnancies. This Court should interpret Penal Code section 187 and A.B. 2223 consistent with the intent of the Legislature not to impose criminal sanctions for Ms. Carpenter's alleged conduct in relation to her pregnancy.

III. CONCLUSION

For the foregoing reasons, *Amici* respectfully request that this Court dismiss the Information because the prosecution's reliance on Ms. Carpenter's alleged conduct during pregnancy is prohibited by A.B. 2223 and Penal Code section 187 and unsupported by medical science or sound public health policy. At a minimum, the Court should expressly preclude reliance on Ms. Carpenter's pre-birth conduct to support the charged crimes.

Dated: January 13, 2023

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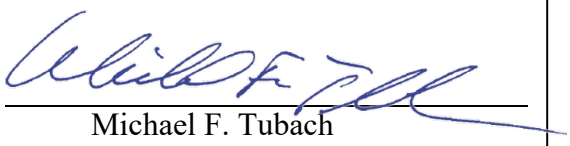
By: 
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