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16
17 **SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN DIEGO**

18 **NORTH COUNTY DIVISION**

19
20 *THE PEOPLE OF THE STATE OF*
CALIFORNIA,

21 Plaintiff,

22 v.

23 *KELSEY SHANDE CARPENTER*

24 Defendant.
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27
28

CT No. SCN422556
DA No. OCQ790

**[PROPOSED] AMICUS CURIAE BRIEF ON
BEHALF OF MEDICAL AND PUBLIC
HEALTH ORGANIZATIONS AND
PHYSICIANS AND MIDWIVES IN SUPPORT
OF DEFENDANT KELSEY SHANDE
CARPENTER**

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28	2006-NMCA-068, 139 N.M. 741, 137 P.3d 1195	16
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Statutes

California Health and Safety Code § 12346720

California Penal Code § 187 *passim*

California Penal Code § 27015

California Penal Code § 273a(a).....1, 10, 14, 18

1 Kelsey Shande Carpenter’s indictment under California Penal Code §§ 187 and 273a(a)
2 should have never occurred. Ms. Carpenter’s charges have no basis in science and pose grave
3 risks for all Californians who become pregnant. This court can remedy this error and affirm that
4 the plain language and intent of Penal Code §§ 187 and 273a(a) do not permit prosecuting people
5 who for acts and omission during pregnancy, nor should the state as this will lead to negative
6 health impacts for pregnant people statewide. Here, assuming Ms. Carpenter did, as the
7 prosecution contends, avoid prenatal care during her pregnancy, that simply underscores the
8 recommendation of the nation’s leading medical and public health association about why adverse
9 pregnancy outcomes should not be criminalized: it can tragically lead to adverse health outcomes
10 for the pregnant person and child.

11 Moreover, the prosecution’s effort to criminalize *legal* use of pharmaceuticals to treat
12 substance use disorder during pregnancy is similarly misguided. The prosecution targets Ms.
13 Carpenter’s use of buprenorphine – a state of the art therapy that researchers at Stanford and
14 Harvard University have pronounced the safest of its kind during pregnancy.¹ Ms. Carpenter’s
15 prosecution is thus is contrary to the medical science and, as has been experienced in other states
16 that have criminalized adverse pregnancy outcomes, negatively impacts public health. Amici, as
17 associations of medical and public health professionals and individual healthcare providers, urge
18 the Court to dismiss the information against Ms. Carpenter.

19 **I. Medical and Public Health Authorities Oppose Punitive Responses to**
20 **Perinatal Drug Use.**

21 Medical and public health associations overwhelmingly oppose weaponizing criminal
22 law to punish pregnant people for drug use. The American Medical Association,² American
23

24 ¹ Helen Santoro, *Use of buprenorphine during pregnancy better for infants than methadone,*
25 *study finds*, [https://med.stanford.edu/news/all-news/2022/11/buprenorphine-pregnancy-](https://med.stanford.edu/news/all-news/2022/11/buprenorphine-pregnancy-opioid.html)
[opioid.html](https://med.stanford.edu/news/all-news/2022/11/buprenorphine-pregnancy-opioid.html).

26 ² Am. Med. Ass’n, Policy Statement H-420.962, *Perinatal Addiction - Issues in Care and*
27 *Prevention* (last modified 2019) (“Transplacental drug transfer should not be subject to criminal
(continued...)”) 28

1 Nurses Association,³ American Psychological Association,⁴ American Psychiatric Association,⁵
2 American Academy of Pediatrics,⁶ and every other major public health and medical group have
3 publicly decried such measures.⁷ These medical associations have consistently found that
4 punitive responses harm pregnant peoples’ and children’s health, and diminish families’
5 healthcare access.

6 Medical associations and public health groups recognize that criminal punishment erodes
7 pregnant peoples’ trust in the medical system. Such punishment disincentivizes pregnant people
8 with drug dependency from having an open and honest relationship with their prenatal healthcare
9 providers out of fear that disclosure will lead to criminal prosecutions.⁸ As the American College
10

11 sanctions or civil liability....”); Am. Med. Ass’n, Policy Statement H-420.969, *Legal*
12 *Interventions During Pregnancy* (last modified 2018) (“Criminal sanctions or civil liability for
13 harmful behavior by the pregnant woman toward her fetus are inappropriate. Pregnant substance
14 abusers should be provided with rehabilitative treatment appropriate to their specific
15 physiological and psychological needs.”).

16 ³ Am. Nurses Ass’n, Position Statement, *Non-punitive Treatment for Pregnant and Breast-*
17 *feeding Women with Substance Use Disorders* (2017) (“Contrary to claims that prosecution and
18 incarceration will deter pregnant women from substance use, the greater result is that fear of
19 detection and punishment poses a significant barrier to treatment.”).

20 ⁴ Am. Psych. Ass’n, *Pregnant and Postpartum Adolescent Girls and Women with Substance-*
21 *Related Disorders* (updated: 2020) (“Punitive approaches result in women being significantly
22 less likely to seek substance use treatment and prenatal care due to fear of prosecution and fear
23 of the removal of children from their custody. This places both the mother and her children at
24 greater risk of harm.”) (internal citation omitted).

25 ⁵ Am. Psychiatric Ass’n, Position Statement, *Assuring the Appropriate Care of Pregnant and*
26 *Newly-Delivered Women with Substance Use Disorders* (2019) (“A public health response,
27 rather than a punitive legal approach to substance use during pregnancy is critical.”).

28 ⁶ Am. Acad. of Pediatrics, Comm. on Substance Use and Prevention, Policy Statement, *A Public*
Health Response to Opioid Use in Pregnancy (2017) (“The existing literature supports the
position that punitive approaches to substance use in pregnancy are ineffective and may have
detrimental effects on both maternal and child health.”).

⁷ *Medical and Public Health Group Statements Opposing Prosecution and Punishment of*
Pregnant Women, National Advocates for Pregnant Women (NAPW) (June 2021),
[bit.ly/medicalgroupsstatements](https://www.napw.org/bit.ly/medicalgroupsstatements).

⁸ *Id.*; see also Sarah E. Wakeman et al., *When Reimagining Systems of Safety, Take a Closer*
Look at the Child Welfare System, Health Affairs (Oct. 7, 2020),
<https://www.healthaffairs.org/doi/10.1377/forefront.20201002.72121/>.

(continued...)

1 of Obstetricians and Gynecologists (“ACOG”) explains, “a positive drug test should not be
2 construed as child abuse or neglect” because such interpretations “mak[e] people less likely to
3 seek help when they need it.”⁹

4 Tennessee’s “fetal assault” law is a persuasive example. After the law’s enactment, which
5 was championed as a way to force pregnant people into treatment, there was actually a 2%
6 *decrease* in pregnant women enrolling in substance use treatment.¹⁰ Fear of reprisal does not
7 fade once a new parent gives birth. Instead, new parents are also likely to avoid bringing their
8 children in for medical care, undermining family health.¹¹ Thus, the ACOG Committee on Health
9 Care for Underserved Women recommends that “In states that mandate [perinatal drug and
10 alcohol abuse] reporting, policy makers, legislators, and physicians should work together to
11 retract punitive legislation and identify and implement evidence-based strategies outside the
12 legal system to address the needs of women with addictions.”¹²

13 Punitive laws also drive a wedge between patients and their doctors and negatively
14 impact fetal and neonatal health. For example, empirical research found that Tennessee’s “fetal
15 assault” law had the opposite of the effect intended, “result[ing] in twenty fetal deaths and sixty
16

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18 ⁹ *Opposition to Criminalization of Individuals During Pregnancy and Postpartum Period*, The
19 American College of Obstetricians and Gynecologists (ACOG) (Dec. 2020),
20 <https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period#..> For
21 similar reasons, ACOG has also specifically opposed criminal penalties for people who have
22 abortions outside of approved medical settings. *See Decriminalization of Self-Induced Abortion*,
ACOG (July 6, 2022), <https://www.acog.org/clinical-information/policy-and-position-statements/position-statements/2022/opposition-to-the-criminalization-of-self-managed-abortion>.

23 ¹⁰ Caroline K. Darlington, et al., *Revisiting the Fetal Assault Law in Tennessee: Implications and*
24 *the Way Forward*, 22:2 Policy, Politics, & Nursing Practice 97 (2021).

25 ¹¹ *See id.*

26 ¹² *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist*,
ACOG (Jan. 2011, reaffirmed 2022), <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2011/01/substance-abuse-reporting-and-pregnancy-the-role-of-the-obstetrician-gynecologist>.

27 (continued...)

1 infant deaths” in 2015 alone.¹³ At least one Tennessee children’s hospital “also documented a
2 substantial rise in newborns treated for [neonatal abstinence syndrome (“NAS”)] whose mothers
3 lacked prenatal care.”¹⁴ Another empirical study found a higher prevalence of [NAS] in states
4 with punitive policies in effect.¹⁵

5 It is thus unsurprising that universal medical consensus opposes punitive responses to
6 pregnancy and drug use because they harm maternal, fetal, and children's health.¹⁶ Medical and
7 public health authorities agree that the provision of care for pregnant and postpartum people,
8 including those who have experienced pregnancy loss, should never result in an arrest, regardless
9 of suspected drug and alcohol abuse.¹⁷

11 ¹³ Meghan Boone & Benjamin J. McMichael, *State-Created Fetal Harm*, 109 Georgetown L. J.
12 475, *supra* note 9, at 501, 514 (2021);, *see also* Wendy A. Bach, *Prosecuting Poverty*,
13 *Criminalizing Care*, 60 WILLIAM & MARY L. REV. 3 (2019); SisterReach et. al., *Tennessee’s*
14 *Fetal Assault Law: Understanding its impact on marginalized women*, Pregnancy Justice (Dec.
15 14, 2020), [https://www.pregnancyjusticeus.org/wp-](https://www.pregnancyjusticeus.org/wp-content/uploads/2020/12/SisterReachFinalFetalAssaultReport_SR-FINAL-1-1.pdf)
16 [content/uploads/2020/12/SisterReachFinalFetalAssaultReport_SR-FINAL-1-1.pdf](https://www.pregnancyjusticeus.org/wp-content/uploads/2020/12/SisterReachFinalFetalAssaultReport_SR-FINAL-1-1.pdf).

17 ¹⁴ Darlington *supra* note 9.

18 - ¹⁵ Laura J. Faherty et. al., *Association of Punitive and Reporting State Policies Related to*
19 *Substance Use in Pregnancy With Rates of Neonatal Abstinence Syndrome*, JAMA Open
20 Network (2019),,; *see also*
21 - Rebecca L. Haffajee et al., *Pregnant Women with Substance Use Disorders—The Harm*
22 *Associated with Punitive Approaches*, 384 N. Engl. J. Med. 2364 (2021)
23 ; Sarah C.M. Roberts & Cheri Pies, *Complex Calculations: How Drug Use During Pregnancy*
24 *Becomes a Barrier to Prenatal Care*, 15 MATERNAL FETAL HEALTH J. 33 (2011).

25 ¹⁶ *See* Am. Med. Ass’n, *Policy Statement H-420.962, Perinatal Addiction - Issues in Care and*
26 *Prevention* (Updated 2019), <https://www.ama-assn.org/system/files/2019-05/a19-520.pdf>; Am.
27 Psych. Ass’n, *Pregnant and Postpartum Adolescent Girls and Women with Substance-Related*
28 *Disorders* (updated: 2020), [https://www.apa.org/pi/women/resources/pregnancy-substance-](https://www.apa.org/pi/women/resources/pregnancy-substance-disorders.pdf)
[disorders.pdf](https://www.apa.org/pi/women/resources/pregnancy-substance-disorders.pdf).

29 ¹⁷ Am. Psych. Ass’n, *Pregnant and Postpartum Adolescent Girls and Women with Substance-*
30 *Related Disorders* (updated: 2020), [https://www.apa.org/pi/women/resources/pregnancy-](https://www.apa.org/pi/women/resources/pregnancy-substance-disorders.pdf)
31 [substance-disorders.pdf](https://www.apa.org/pi/women/resources/pregnancy-substance-disorders.pdf) (“Legislatures should decriminalize substance use during pregnancy and
32 support more funding and programs that offer specialized substance use treatment to pregnant
33 (continued...)”) (continued...)

I. Medical Research Does Not Support the Claim that Methamphetamine Causes Neonatal Death or Poses Risks of Harm Different in Kind or Magnitude Compared to Other Activities and Exposures During Pregnancy

While the prosecution of Ms. Carpenter is based, in part, on the belief that methamphetamine use during pregnancy can cause fetal demise, this is not, in fact, supported by rigorous, peer-reviewed, evidence-based research.¹⁸

Relationships between a condition and an outcome can be established in various ways, and it is often true that two variables co-occur without one causing the other.¹⁹ In other words, correlation and causation are not the same, and understanding the difference between these concepts is crucial in correctly interpreting biomedical science – especially when it is being used as forensic evidence.

For instance, even if fetal morbidity and mortality are correlated, other factors, such as poverty, domestic abuse, poor nutrition and lack of healthcare, rather than the drug use itself,

women and girls.”); Am. Med. Ass’n, Policy Statement H-420.969, *supra* note 1; Am. Med. Ass’n, Policy Statement H-420.962, *supra* note 1.

¹⁸ Tricia E. Wright et al., *Methamphetamines and Pregnancy Outcomes*, 9 J. ADDICTION MED. 111 (2d ed. 2015); Mishka Terplan & Tricia Wright, *The Effects of Cocaine and Amphetamine Use during Pregnancy on the Newborn: Myth versus Reality*, 30 J. ADDICTIVE DISEASES 1 (2011); Ctr. for the Evaluation of Risks to Hum. Reprod., *Report of the NTP-DEHR Expert Panel on the Reproductive and Developmental Toxicity of Amphetamine and Methamphetamine* 163, 174 (2005); Silver et al., *Workup of Stillbirth: A Review of the Evidence*, 196 AM. J. OBSTETRICS & GYNECOLOGY 433, 438 (May 2007); Am. Coll. of Obstetrics & Gynecology, Comm. on Health Care for Underserved Women, *Committee Opinion 473, Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist* (2011, reaffirmed 2014), <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2011/01/substance-abuse-reporting-and-pregnancy-the-role-of-the-obstetrician-gynecologist> (“Drug enforcement policies that deter women from seeking prenatal care are contrary to the welfare of the mother and fetus. Incarceration and the threat of incarceration have proven to be ineffective in reducing the incidence of alcohol or drug abuse . . . The use of the legal system to address perinatal alcohol and substance abuse is inappropriate.”)

¹⁹ Naomi Altman, Martin Krzywinski, *Association, Correlation and Causation*, *Nature Methods*, 12: 899-900 (2015).

(continued...)

1 may be the true *cause* of the poor pregnancy outcome.²⁰ In fact, many studies recognize the
2 impact of such confounding variables and establish that “it is likely that drug [and] alcohol use is
3 a surrogate for a constellation of many factors which may influence mortality, for example,
4 decreased utilization of prenatal and pediatric care, poor or unstable housing, poor nutrition and
5 exposure to violence.”²¹ Consistent with this, much of the research does not demonstrate even a
6 *correlation* between methamphetamine use and serious obstetric outcomes, such as preterm
7 birth, maternal hypertensive disorders, pre-eclampsia, placental abruption, stillbirth, or neonatal
8 death.²² This is also and especially true for the study by Gorman et al. (2014) cited by the
9 prosecution’s main medical expert, which did not find a correlation between neonatal mortality
10 and substance use after adjusting for gestational age at delivery.²³ And although some studies do
11 reveal a correlation between methamphetamine and low birth weight,²⁴ this is not an indicator of
12
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14
15 ²⁰ Wolfe EL et al. *Mortality Risk Associated with Perinatal Drug and Alcohol Use in California*,
16 *Journal of Perinatology*, 25(2): (2005),
17 <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3349286/pdf/nihms374014.pdf> (conceding that
any correlation that has been found between neonatal mortality and substance use can be in large
part explained by confounding factors.).

18 ²¹ Wolfe EL, *supra* 18.

19 ²² Rizwan Shah et al., *Prenatal methamphetamine exposure and short-term maternal and infant*
20 *medical outcomes*, 29 AM. J. PERINATOLOGY 391, no. 5, 2012, at 391; Tiffany Pham et al.,
21 *Obstetrical and perinatal outcomes of patients with methamphetamine-positive drug screen on*
22 *labor and delivery*, 2 AM. J. OBSTETRICS & GYNECOLOGY MATERNAL-FETAL MED., no. 4, 2020,
23 at 2589; Dimitrios-Rafail Kalaitzopoulos et al., *Effect of Methamphetamine Hydrochloride on*
24 *Pregnancy Outcome: A Systematic Review and Meta-analysis*, 12 J. ADDICTION MED., no. 3,
25 2018, at 220.

26 ²³ Gorman M et al. (2014) *Outcomes in pregnancies complicated by methamphetamine use*,
27 *American Journal of Obstetrics and Gynecology*, [Volume 211, Issue 4](#), p. 429, E1-E7, also
28 conceding that the slight correlation between perinatal substance use and neonatal mortality that
does exist when not adjusted for birth weight could in reality be caused by confounding bio-
psycho-social markers which “are unlikely to be known by providers in these situations,
particularly among those who are late to or inconsistent in prenatal care.”

²⁴ Diana Nguyen et al., *Intrauterine growth of infants exposed to prenatal methamphetamine:*
results from the infant development, environment, and lifestyle study, 157 J. PEDIATRICS, no. 2,
2010, at 337.

(continued...)

1 shortened life expectancy or serious health outcomes later in life.²⁵ In fact, many well-designed
2 studies, such as the Infant Development, Environment, and Lifestyle (IDEAL) study, show that
3 any early effects of substance use during pregnancy (such as infant stress and arousal) disappear
4 with increased infant age.²⁶ Similarly, systematic review data (which relies on a rigorous analytic
5 method to capture and describe published studies) was unable to confirm a *causal relationship*
6 between stillbirth and substance use in pregnancy; all that could be identified was a *correlation*
7 between substance use and reduced fetal growth.²⁷

8 Methamphetamine is part of a class of medications known as psychostimulants.²⁸ In
9 clinical medicine, certain types of psychostimulants are used in the treatment of attention-
10 deficit/hyperactivity disorder (ADHD) in youth and adults. Interestingly, the psychostimulant
11 medications prescribed for ADHD are almost identical to methamphetamines in terms of their
12 chemical structure and, therefore, have very similar pharmacological effects on the body during
13 pregnancy.²⁹ The effects of psychostimulant medications during pregnancy have been
14 extensively studied in population health research and are well documented in the medical
15 literature. For instance, a study comparing mothers with prescription psychostimulant use during
16 pregnancy to mothers without such use demonstrated only a small increased risk of preeclampsia
17
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20 ²⁵ Lazaros Belbasis et al., *Birth weight in relation to health and disease in later life: an umbrella*
21 *review of systematic reviews and meta-analyses*, BMC Medicine, 14: 147 (2016),
<https://bmcmmedicine.biomedcentral.com/articles/10.1186/s12916-016-0692-5>.

22 ²⁶ Zeina N. Kiblawi et al., *Prenatal methamphetamine exposure and neonatal and infant*
23 *neurobehavioral outcome: results from the IDEAL study*, 35 SUBSTANCE ABUSE, no. 1, 2014, at
24 68, <https://doi.org/10.1080/08897077.2013.814614>.

25 ²⁷ Corrie B. Miller & Tricia E. Wright, *Investigating Mechanisms of Stillbirth in the Setting of*
26 *Prenatal Substance Use*, 8 ACAD. FORENSIC PATHOLOGY, no. 4, 2018, at 865; Robert M. Silver et
27 al., *Workup of Stillbirth: A Review of the Evidence*, 196 AM. J. OBSTETRICS & GYNECOLOGY 433,
28 438 (2007).

²⁸ Jacqueline M. Cohen et al., *Placental Complications Associated with Psychostimulant Use in*
Pregnancy, 130 OBSTETRICS & GYNECOLOGY, no. 6, 2017, at 1192.

²⁹ *Id.*

(continued...)

1 and preterm birth and no increased risk at all of placental abruption or stillbirth.³⁰ As a matter of
2 fact, the vast majority of women who use substances during pregnancy (whether prescribed or
3 illicit) simply do not have a miscarriage or any other seriously adverse pregnancy outcomes.

4 Although the commonly held misbelief that substance use during pregnancy necessarily
5 leads to adverse health outcomes for neonates is without scientific support, there has been a
6 recurring pattern of media frenzy on this issue. Applying labels like “meth babies” and “crack
7 babies,”³¹ the popular media have fed on the hardships of pregnant women with substance use
8 disorders, many of whom also suffer from various comorbidities and face serious socioeconomic
9 disadvantages including homelessness and domestic abuse. The stigma and shame associated
10 with criminalizing these women – who are themselves victims rather than offenders – results in
11 an avoidance of the medical system for fear of prosecution, and thereby keeps alive the vicious
12 circle of illness, oppression and social injustice.³² This, in turn, has motivated a series of studies
13 conducted by a national expert panel *disaffirming* any relationship between drug use and
14 pregnancy loss.³³ And leading healthcare professional, including medical doctors, scientists,
15 psychological researchers, and treatment specialists, have written an open letter requesting that
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18 ³⁰ *Id.* This was a large study comparing a cohort of approximately 5,000 pregnancies with
19 confirmed psychostimulant prescriptions to a control group of approximately 1.5 million
20 pregnancies without any (known) psychostimulant use.

21 ³¹ David C. Lewis et al., *Physicians, Scientists to Media: Stop Using the Term ‘Crack Baby’*,
22 Partnership to End Addiction (Feb. 27, 2004), https://www.brown.edu/Administration/News_Bureau/2003-04/03-099.html. ; see also
23 Sarah Weiser, et al., *From Crack Babies to Oxytots: Lessons Not Learned*, RetroReport (July 22,
24 2015), <https://www.retroreport.org/video/from-crack-babies-to-oxytots-lessons-not-learned/>;
25 N.Y. TIMES EDITORIAL BOARD, *A Woman’s Rights: Part 4, Slandering the Unborn*, N.Y. Times
26 (Dec. 28, 2018), [https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-](https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html)
27 [racism.html](https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html).

28 ³² Rebecca Stone, *Pregnant women and substance use: fear, stigma, and barriers to care*, Health
& Justice, 3:2 (2015).

³³ Ctr. for the Evaluation of Risks to Hum. Reprod., *Report of the NTP-CERHR Expert Panel on
the Reproductive and Developmental Toxicity of Amphetamine and Methamphetamine*, 74 BIRTH
DEFECTS RES. B. DEV. REPROD. TOXICOL. 471 (2005).

(continued...)

1 “policies addressing prenatal exposure to methamphetamines and media coverage of this issue be
2 based on science, not presumption or prejudice.”³⁴ This Court should follow their advice—and
3 the science behind it.

4 **II. Medical Research Does Not Show That The Use Of Buprenorphine Leads To**
5 **Neonatal Mortality.**

6 In addition to the methamphetamine allegations addressed above, the prosecution of Ms.
7 Carpenter is also based on the contention that the use of buprenorphine, a legal medication
8 prescribed to treat opioid addiction, can cause fetal demise or is otherwise punishable as child
9 abuse. This is directly contrary to the research, and the endorsed approach of medical groups
10 such as the American College of Obstetricians and Gynecologists (ACOG), which recommend
11 that pregnant people addicted to opioids seek treatment that includes prescription medication
12 such as buprenorphine.³⁵ Notably, ACOG notes that pharmacotherapy is “preferable to
13 medically supervised withdrawal because withdrawal is associated with high relapse rates, which
14 lead to worse outcomes.”³⁶

15 Indeed, there is growing evidence that buprenorphine specifically is the preferred
16 treatment for opioid addiction. As ACOG has written, “[r]ecent evidence supports the use of
17

18
19 ³⁴ See *Leading Doctors, Scientists, and Researchers Request that Media and Policymakers Stop*
20 *Perpetuating “Meth Baby” Myths*, 14 CESAR FAX, Center for Substance Abuse Research,
21 University of Maryland, College Park (Aug. 15, 2005),
22 <http://db.cesar.umd.edu/cesar/cesarfax/vol14/14-33.pdf>; David C. Lewis et al., *Open Letter*
23 *From Doctors, Scientists, & Specialists Urging Major Media Outlets Not to Create “Meth*
24 *Baby” Myth* (July 27, 2005), [https://www.nationaladvocatesforpregnantwomen.org/wp-](https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2020/07/22Meth22-Open-Letter-2005.pdf)
25 [content/uploads/2020/07/22Meth22-Open-Letter-2005.pdf](https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2020/07/22Meth22-Open-Letter-2005.pdf).

23 ³⁵ *Opioid Use Disorder and Pregnancy*, ACOG (April 2020), [https://www.acog.org/womens-](https://www.acog.org/womens-health/infographics/opioid-use-disorder-and-pregnancy)
24 [health/infographics/opioid-use-disorder-and-pregnancy](https://www.acog.org/womens-health/infographics/opioid-use-disorder-and-pregnancy) (“The recommended treatment for opioid
25 addiction involves the following: Taking medication that reduces your cravings (methadone or
26 buprenorphine....”).

26 ³⁶ *Opioid Use and Opioid Use Disorder in Pregnancy*, ACOG (Aug. 2017),
27 [https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2017/08/opioid-use-](https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2017/08/opioid-use-and-opioid-use-disorder-in-pregnancy)
28 [and-opioid-use-disorder-in-pregnancy](https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2017/08/opioid-use-and-opioid-use-disorder-in-pregnancy)

(continued...)

1 buprenorphine for opioid use disorder treatment during pregnancy.”³⁷ ACOG notes multiple
2 potential benefits in the use of buprenorphine, including reducing the likelihood of an overdose
3 and that “several trials demonstrate evidence of less-severe neonatal abstinence syndrome.” *Id.*
4 For example, a recent study conducted at Harvard University and Stanford Medicine found that
5 the use of buprenorphine was associated with better health outcomes for the fetus, including
6 higher birth weights than methadone (the other opioid agonist prescribed for opioid addiction).³⁸

7 Medical science does *not* support the criminalization of a pregnant person’s decision to
8 seek pharmacotherapy during pregnancy—as ACOG specifically notes, “a coordinated
9 multidisciplinary approach **without criminal sanctions** has the best chance of helping infants
10 and families.”³⁹

11 **III. Judicially Expanding State Laws to Criminalize Pregnancy Loss Will**
12 **Undermine, Not Advance, Maternal and Child Health.**

13 Interpreting Penal Code §§ 187 and 273a(a) to permit prosecution of pregnant people for
14 allegedly harming their fetuses will have far-reaching consequences. Pregnant people all face
15 statistically significant risks of pregnancy loss, regardless of their behavior. Redefining criminal
16 law to include alleged misdeeds while pregnant will unnecessarily subject pregnant people to
17 suspicion and harassment for lawful behavior and unintended pregnancy losses.⁴⁰

22 ³⁷ *Id.*

23 ³⁸ *See Use of buprenorphine during pregnancy better for infants than methadone, study finds,*
supra note 1.

24 ³⁹ *Opioid Use and Opioid Use Disorder in Pregnancy*, ACOG (Aug. 2017),
25 <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2017/08/opioid-use-and-opioid-use-disorder-in-pregnancy> (emphasis added)

26 ⁴⁰ Paltrow & Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United*
27 *States, 1973–2005: Implications for Women’s Legal Status and Public Health*, 38 J. HEALTH
POLITICS, POL. & L. 299, 316–18, 331–33.

(continued...)

1 A. Applying criminal laws to pregnant people with respect to their own
2 pregnancies improperly encourages prosecutions of legal behavior
3 and pregnancy loss.

4 Criminalizing women because of pregnancy and drug use—or because they experienced
5 a miscarriage, stillbirth or neonatal death—is a gross expansion of state power. It potentially
6 subjects any pregnant person who engages in any activity believed to pose a risk to fetal health
7 or who experiences pregnancy loss to criminal investigation, arrest, and prosecution.⁴¹ States that
8 have expanded existing criminal laws to prosecute pregnant people have arrested and convicted
9 many, often without clear scientific evidence that the person’s behavior caused a negative
10 pregnancy outcome.⁴²

11 South Carolina’s overreach is just one example. In *Whitner*, the South Carolina Supreme
12 Court expanded the state’s child abuse law to apply to a woman who gave birth to a healthy baby
13 who tested positive for cocaine, claiming it was only addressing pregnancy and cocaine use.⁴³
14 The Court’s limitation of its precedent proved ineffective. The decision enabled hundreds of
15 arrests and prosecutions of women who used marijuana,⁴⁴ drank alcohol,⁴⁵ experienced
16 pregnancy losses,⁴⁶ or who were in the midst of a mental health crisis. For example, when a
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18 ⁴¹ Paltrow & Flavin, *supra* note 15, at 322-23.

19 ⁴² See, e.g., *State v. Green*, 474 P.3d 886, 891 (Okla. Crim. App. 2020); *Ex Parte Ankrom*, 152
20 So. 3d 397 (Ala. 2013); *Whitner v. State*, 492 S.E. 2d 777, 781-82 (S.C. 1997); Bach, *supra* note
21 12, at 812-14 (describing Tennessee’s short-lived experiment with a fetal assault law from 2014-
2016).

22 ⁴³ *Whitner*, 492 S.E. 2d at 781-82.

23 ⁴⁴ *State v. Mashburn*, No. 2000-GS-44-184 (S.C. Ct. Gen. Sess. Union County Mar. 20, 2000)
(Hayes, J.).

24 ⁴⁵ *State v. Reid*, No. F-674-754 (S.C. Ct. Gen. Sess. Lancaster County Dec. 23, 2009).

25 ⁴⁶ *McKnight v. South Carolina*, 661 S.E.2d 354, 358 n.2 (S.C. 2008) (granting post-conviction
26 relief for conviction of homicide by child abuse for experiencing a stillbirth blamed, without
27 scientific basis, on a pregnant woman’s use of cocaine and where her defense attorney failed to
call an expert who would have testified 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.”).

(continued...)

1 young pregnant woman attempted suicide by jumping out of a window and lost the pregnancy,
2 she was arrested and jailed for homicide.”⁴⁷

3 Oklahoma’s experiment has fared no better. There, the state’s highest criminal court
4 recently expanded Oklahoma’s child neglect law to permit the prosecution of people pregnant
5 with a viable fetus who use a controlled substance. *Green*, 474 P.3d at 892-93. Under that
6 precedent, Oklahoma successfully convicted a woman of manslaughter for a miscarriage she had
7 at 17 weeks’ gestation, before fetal viability and when the medical examiner did not conclude
8 that drug use caused the pregnancy loss.⁴⁸ She was ultimately sentenced to four years in state
9 prison.⁴⁹

10 Likewise, Alabama has arrested and prosecuted numerous pregnant people under its
11 expanded laws. Since 2006, Alabama prosecutors have charged over 500 pregnant people with
12 crimes in relation to their pregnancies, including under the chemical endangerment law.⁵⁰ And in
13 2013, the Alabama Supreme Court held that the state’s chemical endangerment law, enacted to
14 penalize adults who expose children to methamphetamine labs and the like, applies to pregnant
15 people who use any controlled substance, even prescribed substances. *See Ex Parte Ankrom*, 152

19 ⁴⁷ Jason Foster, *Woman faces charge of killing unborn child during August suicide attempt*, THE
20 HERALD (Feb. 21, 2009, 1:03 AM),
<https://www.heraldonline.com/news/local/article12250463.html>.

21 ⁴⁸ *Oklahoma Prosecution and Conviction of a Woman for Experiencing a Miscarriage is*
22 *Shameful and Dangerous*, Pregnancy Justice (Oct. 13, 2021),
[https://www.nationaladvocatesforpregnantwomen.org/oklahoma-prosecution-and-conviction-of-](https://www.nationaladvocatesforpregnantwomen.org/oklahoma-prosecution-and-conviction-of-a-woman-for-experiencing-a-miscarriage-is-shameful-and-dangerous/)
[a-woman-for-experiencing-a-miscarriage-is-shameful-and-dangerous/](https://www.nationaladvocatesforpregnantwomen.org/oklahoma-prosecution-and-conviction-of-a-woman-for-experiencing-a-miscarriage-is-shameful-and-dangerous/).

23 ⁴⁹ Li Cohen, *Manslaughter conviction of 21-year-old Oklahoma woman who suffered*
24 *miscarriage sparks outcry*, CBS News (Oct. 20, 2021, 7:37 AM),
<https://www.cbsnews.com/news/brittany-poolaw-manslaughter-miscarriage-pregnancy/>.

25 ⁵⁰ *See id.*; Nina Martin, *Alabama Mom’s Charges are Dropped, But Only After an Arduous*
26 *Battle*, PROPUBLICA (June 2, 2016, 10:29 AM EDT),
[https://www.propublica.org/article/alabama-moms-charges-are-dropped-but-only-after-an-](https://www.propublica.org/article/alabama-moms-charges-are-dropped-but-only-after-an-arduous-battle)
[arduous-battle](https://www.propublica.org/article/alabama-moms-charges-are-dropped-but-only-after-an-arduous-battle).

27 (continued...)

1 So. 3d 397, 407, 411-12, 421 (Ala. 2013).⁵¹ Even after the Alabama legislature clarified that the
2 chemical endangerment law does not apply to pregnant people taking prescribed substances, a
3 prosecutor charged a woman for unlawful possession of a controlled substance, arguing that her
4 use of a prescribed painkiller during pregnancy was illegal.⁵² The prosecutor did so even though
5 ACOG advises that discouraging pregnant women from opioid use when needed stifles access to
6 “appropriate care by overstating the risk of rare complications associated with opioid use during
7 pregnancy and by understating the potential risk associated with opioid discontinuation.”⁵³

8 Alabama has also prosecuted pregnant people for taking drugs less harmful to fetuses
9 than the available alternatives. The state arrested a woman who used marijuana to treat epilepsy
10 during pregnancy instead of a prescribed medication that was known to cause fetal harm, and
11 another who took a small amount of valium when panicked after receiving threats from an ex-
12 partner.⁵⁴ But Alabama prosecutors have not stopped there.

13 In 2019, police arrested Marshae Jones for manslaughter. Ms. Jones had been shot by
14 another person in the abdomen and experienced a pregnancy loss.⁵⁵ While the person who shot
15 her was not charged, Alabama prosecutors indicted Ms. Jones for putting herself in a dangerous
16

17 ⁵¹ Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*, PROPUBLICA (Sept. 23, 2015),
18 <https://www.propublica.org/article/when-the-womb-is-a-crime-scene>.

19 ⁵² Meryl Kornfield, *A pregnant woman took a prescribed opioid for her chronic pain. Now she’s*
20 *facing a felony charge*, WASHINGTON POST (June 24, 2021, 7:00 AM EDT),
21 <https://www.washingtonpost.com/nation/2021/06/24/pregnant-woman-charged-prescription/>;
22 Amy Yurkanin, *Alabama mom faces felony for filling doctor’s prescription while pregnant*,
23 AL.COM (Jun. 21, 2021, 10:15 AM), [https://www.al.com/news/2021/06/alabama-mom-faces-jail-](https://www.al.com/news/2021/06/alabama-mom-faces-jail-for-filling-doctors-prescription-while-pregnant.html)
24 [for-filling-doctors-prescription-while-pregnant.html](https://www.al.com/news/2021/06/alabama-mom-faces-jail-for-filling-doctors-prescription-while-pregnant.html).

25 ⁵³ Mark S. DeFrancesco, *Statement on Opioid Use During Pregnancy*, ACOG (Mar. 16. 2016),
26 [https://www.acog.org/news/news-releases/2016/03/acog-statement-on-opioid-use-during-](https://www.acog.org/news/news-releases/2016/03/acog-statement-on-opioid-use-during-pregnancy)
27 [pregnancy](https://www.acog.org/news/news-releases/2016/03/acog-statement-on-opioid-use-during-pregnancy).

28 ⁵⁴ *See id.*

⁵⁵ Mary Crossley, *Reproducing Dignity: Race, Disability, and Reproductive Controls*, 54 U.C.
DAVIS L. REV. 195, 198-99 (2020); Vanessa Romo, *Woman Indicted For Manslaughter After*
Death Of Her Fetus, May Avoid Prosecution, NPR (June 28, 2019, 4:49 PM ET),
[https://www.npr.org/2019/06/28/737005113/woman-indicted-for-manslaughter-after-death-of-](https://www.npr.org/2019/06/28/737005113/woman-indicted-for-manslaughter-after-death-of-her-fetus-may-avoid-prosecution)
[her-fetus-may-avoid-prosecution](https://www.npr.org/2019/06/28/737005113/woman-indicted-for-manslaughter-after-death-of-her-fetus-may-avoid-prosecution).

(continued...)

1 situation while pregnant.⁵⁶ Although the chief prosecutor eventually dropped the charge against
2 Ms. Jones after local and national outrage, her case shows how prosecuting people in relation to
3 their own pregnancies in one context spills over to many others.

4 Expanding Sections 187 and 273a(a) to permit the prosecution of pregnant people will
5 also embolden prosecutors to investigate, arrest, and indict any person who experiences a
6 pregnancy loss at any stage of pregnancy.⁵⁷ Many people lose wanted pregnancies. Miscarriages
7 (pregnancy losses before 20 weeks' gestation) occur in an estimated 26% of all pregnancies.⁵⁸
8 And stillbirths (pregnancy losses after 20 weeks' gestation) occur in 0.6% of pregnancies.⁵⁹ The
9 Cleveland Clinic additionally estimates that stillbirths occur in one of 160 births, which is about
10 24,000 babies per year in the United States.⁶⁰ Miscarriages and stillbirths occur for a variety of
11 reasons, including chromosomal and genetic abnormalities, infection, the age of the pregnant
12 person, uterine abnormalities, immune system disorders, hormonal imbalances—the list goes
13 on.⁶¹ Similarly, neonatal mortality occurs for a variety of reasons, such as genetic abnormalities,
14 biochemical imbalances and brain defects, unrelated to any type of prenatal or postnatal
15 substance abuse.⁶² Pinpointing the cause of pregnancy loss or neonatal death and disaggregating
16 it from a host of possible explanations is a task for the pregnant person's doctor, not the criminal
17 courts.

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20 ⁵⁶ *Id.*

21 ⁵⁷ *See, e.g., People v. Davis*, 872 P.2d 591, 602 (Cal. 1994) (finding “viability is not an element
22 of fetal homicide under section 187, subdivision (a). The third party killing of a fetus with malice
23 aforethought is murder under section 187, subdivision (a), as long as the state can show that the
24 fetus has progressed beyond the embryonic stage of seven to eight weeks.”).

25 ⁵⁸ *Pregnancies and Pregnancy Outcomes in the United States*, NAPW (Sept. 2021),
26 [bit.ly/pregnancy outcomes 2](https://www.napw.org/pregnancies-and-pregnancy-outcomes).

27 ⁵⁹ *Id.*

28 ⁶⁰ Stillbirth, Cleveland Clinic, <https://my.clevelandclinic.org/health/diseases/9685-stillbirth> (last
visited Aug. 27, 2020).

⁶¹ Miscarriage, Cleveland Clinic, [https://my.clevelandclinic.org/health/diseases/9688-](https://my.clevelandclinic.org/health/diseases/9688-miscarriage)
[miscarriage](https://my.clevelandclinic.org/health/diseases/9688-miscarriage) (last visited July 19, 2020); Stillbirth *supra* note 35.

⁶² Kinney HC, Thach BT (2009) The Sudden Infant Death Syndrome, *N Engl J Med*. 2009 Aug
20; 361(8): 795–805.

1 California courts regularly reject such an improper application of California’s criminal
2 laws. *See, e.g.*, Decision, *People v. Stewart*, No. M508197 (Cal. Mun. Ct. San Diego County
3 Feb. 26, 1987) (rejecting attempt to use California Penal Code Section 270, failure to provide
4 medical care for a child, as a basis for prosecuting a woman who experienced a neonatal loss
5 allegedly as a result of her failing to get to the hospital on time on the morning of delivery,
6 having intercourse with her husband, and testing positive for an amphetamine); *Reyes v.*
7 *California*, 141 Cal. Rptr. 912, 913 (1977) (rejecting attempt to use California’s felony child
8 endangerment law as a basis for prosecuting a woman who failed to obtain prenatal care and
9 gave birth to twins who had been exposed prenatally to heroin). And in two recent matters,
10 California courts have rebuffed one prosecutor’s interpretation of section 187 to apply to women
11 who experienced stillbirths when they had also consumed methamphetamine.⁶³ *In re Perez*, No.
12 21W-0033A (Cal. Sup. Ct. Kings County Mar. 16, 2022); *People v. Becker*, No. 19CM-5304
13 (Cal. Sup. Ct. Kings County).

14 Trends in other states, as well as in California, show that permitting Ms. Carpenter’s
15 prosecution will have several unintended consequences, including discouraging pregnant people
16 from taking necessary medications and encouraging prosecutors to distort California’s criminal
17 laws to convict pregnant people for lawful conduct or unintended pregnancy loss.⁶⁴

22 ⁶³ Azi Paybarah, *Judge Dismisses Murder Charge Against California Mother After Stillbirth*,
23 THE NEW YORK TIMES (May 20, 2021), [https://www.nytimes.com/2021/05/20/us/chelsea-becker-](https://www.nytimes.com/2021/05/20/us/chelsea-becker-stillbirth-murder-charges-california.html)
24 [stillbirth-murder-charges-california.html](https://www.nytimes.com/2021/05/20/us/chelsea-becker-stillbirth-murder-charges-california.html); Gregory Yee, *California judge overturns 11-year*
25 *prison term for woman whose baby was stillborn*, LOS ANGELES TIMES (Mar. 18, 2022, 4AM
PT), [https://www.latimes.com/california/story/2022-03-18/california-judge-overturns-](https://www.latimes.com/california/story/2022-03-18/california-judge-overturns-conviction-woman-whose-baby-was-stillborn)
conviction-woman-whose-baby-was-stillborn

26 ⁶⁴ *See, e.g.*, *McKnight v. South Carolina*, 661 S.E.2d 354 (S.C. 2008); Boone & McMichael, *supra*
27 note 9; SisterReach et. al., *supra* note 12; Haffajee et al., *supra* note 9; Paltrow & Flavin, *supra*
note 15, at 317-19; Foster, *supra* note 23.

(continued...)

1 **B. Most courts rightly reject prosecutors’ attempt to criminalize**
2 **pregnant people for drug use and other allegedly risky behavior**
3 **during pregnancy.**

4 In many states, state actors bring cases against pregnant people based on the perceived
5 risk of harm to the fetus or anticipated negative pregnancy outcomes even when it is beyond the
6 scope of the statutory language and clear legislative intent of their state’s criminal and civil laws.
7 When these prosecutions are challenged on appeal, however, whether pre-trial or post-
8 conviction, appellate courts overwhelmingly—and rightly—reject them.⁶⁵

9 For example, a Kentucky appellate court described the slippery slope that prosecuting
10 pregnant people under child abuse and wanton endangerment laws invited. The court explained
11 that Kentucky’s theory would sanction prosecuting the following: an alcoholic who risks fetal
12 alcohol syndrome; an addict who smokes, abuses prescription painkillers, or abuses over-the-
13 counter medicine; or a person prone to downhill skiing and thus risks prenatal injury. *See*
14 *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993). The court asked: what if a pregnant
15 woman drives over the speed limit, or as a matter of vanity, doesn’t wear the prescription lenses
16 she knows she needs to see the dangers of the road? *Id.* Such an interpretation of Kentucky’s
17 laws could not stand, the court concluded, because the breadth of potentially criminal conduct
18 rendered the statute unconstitutionally vague. *Id.*

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21 ⁶⁵ *See, e.g., Arms v. Arkansas*, 471 S.W.3d 637 (Ark. 2015); *Cochran v. Kentucky*, 315 S.W.3d
22 325 (Ky. 2010); *State v. Geiser*, 763 N.W.2d 469, 474 (N.D. 2009); *Kilmon v. Maryland*, 905
23 A.2d 306 (Md. 2006); *Wisconsin ex rel. Angela M.W. v. Kruzicki*, 561 N.W.2d 729, 733 (Wis.
24 1997); *Johnson v. Florida*, 602 So. 2d 1288 (Fla. 1992); *State v. Gray*, 584 N.E.2d 710 (Ohio
25 1992); *Patel v. Indiana*, 60 N.E.3d 1041 (Ind. Ct. App. 2016); *People v. Jorgensen*, 41 N.E.3d
26 778 (N.Y. 2015); *State v. Armstard*, 2008-43333, (La. Ct. App. 2 Cir. 8/13/08); 991 So. 2d 116;
27 *State v. Wade*, 232 S.W.3d 663 (Mo. Ct. App. 2007); *State v. Martinez*, 2006-NMCA-068, 139
28 N.M. 741, 137 P.3d 1195; *Herron v. Indiana*, 729 N.E.2d 1008 (Ind. Ct. App. 2000); *State v.*
Deborah J.Z., 596 N.W.2d 490 (Wis. Ct. App. 1999); *Reyes*, 141 Cal. Rptr. at 914-15; *State v.*
Dunn, 916 P.2d 952 (Wash. Ct. App. 1996); *Reinesto v. Arizona.*, 894 P.2d 733 (Ariz. Ct. App.
1995); *Collins v. Texas*, 890 S.W.2d 893 (Tex. App. 1994); *State v. Luster*, 419 S.E.2d 32 (Ga.
Ct. App. 1992); *State v. Gethers*, 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991); *People v. Hardy*,
469 N.W.2d 50 (Mich. Ct. App. 1991).

1 The Maryland Court of Appeals similarly overturned Regina Kilmon’s conviction for
2 reckless endangerment based on alleged drug use while pregnant. *Kilmon*, 905 A.2d at 311-15.
3 The *Kilmon* court noted that the prosecution’s theory rendered criminal “not just the ingestion of
4 unlawful controlled substances but a whole host of intentional and conceivably reckless
5 activity[.]” *Id.* at 311. For example, under such a broad interpretation, pregnant women could
6 face prosecution for ingesting *legal* drugs, smoking, drinking, failing to maintain a proper diet,
7 failing to seek available prenatal care, failing to wear a seatbelt while driving, exercising too
8 much or too little, or even skiing or horseback riding. *Id.* The court thus concluded that the
9 legislature could not have possibly intended for the reckless endangerment statute to authorize
10 prosecution of women for pregnancy and drug use. *Id.* at 315.

11 The Maryland and Kentucky courts’ concerns were not misplaced. Prosecutors around
12 the country have misused existing state criminal laws to arrest and penalize women for falling
13 down a flight of stairs; being HIV positive; drinking alcohol; and not getting to the hospital
14 quickly enough for delivery.⁶⁶

15 This court, like most across the country, should refuse to judicially expand California’s
16 criminal laws to subject pregnant people to potential criminal prosecution for legal behavior.

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19 ⁶⁶ See, e.g., Media Conference Call Recording: Implications of the Bei Bei Shuai Case for
20 Women and Roe, Rewire News Group and National Advocates for Pregnant Women (May 15,
21 2012, 2:18 PM), [https://rewirenewsgroup.com/audio/2012/05/15/media-conference-call-](https://rewirenewsgroup.com/audio/2012/05/15/media-conference-call-implications-bei-bei-shuai-case-women-and-roe/)
22 [implications-bei-bei-shuai-case-women-and-roe/](https://rewirenewsgroup.com/audio/2012/05/15/media-conference-call-implications-bei-bei-shuai-case-women-and-roe/); Dan Savage, *Woman In Iowa Arrested For*
23 *Falling Down the Stairs While Pregnant*, The Stranger (Mar. 1, 2010, 4:06 PM),
24 [https://www.thestranger.com/slog/archives/2010/03/01/woman-in-iowa-arrested-for-falling-](https://www.thestranger.com/slog/archives/2010/03/01/woman-in-iowa-arrested-for-falling-down-the-stairs-while-pregnant)
25 [down-the-stairs-while-pregnant](https://www.thestranger.com/slog/archives/2010/03/01/woman-in-iowa-arrested-for-falling-down-the-stairs-while-pregnant); Judy Harrison, *Judge jails woman until baby is born*, BANGOR
26 DAILY NEWS (June 2, 2009), [https://bangordailynews.com/2009/06/02/news/bangor/judge-jails-](https://bangordailynews.com/2009/06/02/news/bangor/judge-jails-woman-until-baby-is-born/)
27 [woman-until-baby-is-born/](https://bangordailynews.com/2009/06/02/news/bangor/judge-jails-woman-until-baby-is-born/); Ellen Goodman, *She ’s Pregnant and Arrested: The Bizarre Story of*
Diane Pfannenstiel, BUFFALO NEWS (Feb. 10, 1990), [https://buffalonews.com/news/shes-](https://buffalonews.com/news/shes-pregnant-and-arrested-the-bizarre-story-of-diane-pfannenstiel/article_1e91c003-d3d4-531c-9584-83f2951febe4.html)
[pregnant-and-arrested-the-bizarre-story-of-diane-pfannenstiel/article_1e91c003-d3d4-531c-](https://buffalonews.com/news/shes-pregnant-and-arrested-the-bizarre-story-of-diane-pfannenstiel/article_1e91c003-d3d4-531c-9584-83f2951febe4.html)
[9584-83f2951febe4.html](https://buffalonews.com/news/shes-pregnant-and-arrested-the-bizarre-story-of-diane-pfannenstiel/article_1e91c003-d3d4-531c-9584-83f2951febe4.html); Marcia Chambers, *Charges Against Mother in Death of Baby are*
Thrown Out, N.Y. TIMES (Feb. 7, 1987), [https://www.nytimes.com/1987/02/27/us/charges-](https://www.nytimes.com/1987/02/27/us/charges-against-mother-in-death-of-baby-are-thrown-out.html)
[against-mother-in-death-of-baby-are-thrown-out.html](https://www.nytimes.com/1987/02/27/us/charges-against-mother-in-death-of-baby-are-thrown-out.html).

(continued...)

1 **IV. Consistent with Scientific Research and the Recommendations of Leading**
2 **Medical Organizations and Experts, California Has Refused to Pass Any**
3 **Criminal Law Penalizing Women for Drug Use While Pregnant.**

4 The California Legislature has consistently refused to adopt any criminal law that would
5 penalize someone for being pregnant and using a criminalized drug.⁶⁷ This court should decline
6 to interpret California Penal Code §§ 187 and 273a(a) to do just that, in contravention of the
7 Legislature’s clear intent.

8 Instead of punitive approaches, the California legislature has thoughtfully and carefully
9 chosen to adopt laws, regulations, and policies that address pregnant women, drug use, and drug
10 dependency problems through education and public health approaches, consistent with the
11 recommendations of every leading medical group, independent evaluators, and peer-reviewed
12 research, and professional medical associations.⁶⁸ For example, recent medical literature has
13 emphasized the importance of a life course approach to addressing prenatal substance exposure,
14 which focusses on improving the accessibility of medical care and education “beginning well
15 before pregnancy and extending beyond childhood.”⁶⁹ This includes preventative care, such as
16 optimizing the access to contraception (which also reduces infectious comorbidities), providing
17 mental health care during pregnancy and post-partum, as well as the availability of early
18 intervention (social) services during the course of childhood. A similar approach was also
19 recently endorsed by the federal government, which reiterated the unanimous finding in the

21 ⁶⁷ See Leticia Miranda et al., *How States Handle Drug Use During Pregnancy*, PROPUBLICA
22 (Sept. 30, 2015), <https://projects.propublica.org/graphics/maternity-drug-policies-by-state>.

23 ⁶⁸ Such as The American College of Obstetrics and Gynecology (ACOG), Committee on Health
24 Care for Underserved Women, *Substance Abuse Reporting and Pregnancy: The Role of the*
25 *Obstetrician–Gynecologist*, Committee Opinion No. 473 (2011, reaffirmed in 2022); see also
26 The American College of Obstetrics and Gynecology (ACOG), Committee on Health Care for
27 Underserved Women, *Methamphetamine Abuse in Women of Reproductive Age*, Committee
Opinion No. 479 (2011, reaffirmed 2021).

⁶⁹ See Stephen W. Patrick, *Improving Public Health Systems for Substance-Affected*
Pregnancies, *American Journal for Public Health*, 109(1): 22-23 (2019).

(continued...)

1 medical literature that the criminalization of substance use disorders (SUDs) during pregnancy
2 has had harmful effects on the health of both mother and fetus.⁷⁰

3 In line with the medical community's consistent rejection of punitive approaches to
4 substance use during pregnancy, California has never enacted a law that allows pregnant women
5 to be criminally prosecuted for SUDs. Between 1983 and 1996, there were 57 bills introduced
6 concerning pregnant women's drug use, about a third of which became law. None of the punitive
7 bills even made it through a major policy committee. The bills that won passage addressed the
8 social problem by providing funding for public education, health care (especially prenatal care),
9 and a range of social services for mothers and children at risk for prenatal drug exposure.⁷¹

10 California has remained committed to a non-punitive approach to issues concerning
11 pregnancy and pregnancy outcomes, and was even featured in a 2009 federal report commending
12 the state's clear legislation supporting public education and prevention efforts on behalf of
13 substance exposed infants.⁷² In a very outspoken campaign, California Attorney General Rob
14 Bonta recently issued a legal alert to California law enforcement making it clear that "Section
15 187 of the California Penal Code was intended to hold accountable those who inflict harm on
16 pregnant individuals, resulting in miscarriage or stillbirth, *not to punish people who suffer the*
17 *loss of their pregnancy* [...] [which] at any stage is a physically and emotionally traumatic
18 experience that should not be exacerbated by the threat of being charged with murder."⁷³ Also
19

20 ⁷⁰ See The White House Office of National Drug Control Policy, *ONDCP Releases Report on*
21 *Substance Use Disorder Treatment During Pregnancy* (Oct 21, 2022),
22 [https://www.whitehouse.gov/ondcp/briefing-room/2022/10/21/ondcp-releases-report-on-](https://www.whitehouse.gov/ondcp/briefing-room/2022/10/21/ondcp-releases-report-on-substance-use-disorder-treatment-during-pregnancy/)
23 [substance-use-disorder-treatment-during-pregnancy/](https://www.whitehouse.gov/ondcp/briefing-room/2022/10/21/ondcp-releases-report-on-substance-use-disorder-treatment-during-pregnancy/).

24 ⁷¹ Laura E. Gomez, *Misconceiving Mothers: Legislators, Prosecutors, and Politics of Prenatal*
25 *Drug Exposure*, 41 (1997).

26 ⁷² See *Substance-Exposed Infants: State Responses to the Problem*, U.S. Dep't of Health & Hum.
27 Servs., Substance Abuse & Mental Health Servs. Admin. & the Admin. for Child.
28 & Fams. (2009), <https://ncsacw.samhsa.gov/files/Substance-Exposed-Infants.pdf>.

⁷³ *Attorney General Bonta, California Law Does Not Criminalize Pregnancy Loss*, State of Cal.
Dep't of Just., Press Release (Jan 6, 2022), [https://oag.ca.gov/news/press-releases/attorney-](https://oag.ca.gov/news/press-releases/attorney-general-bonta-california-law-does-not-criminalize-pregnancy-loss)
[general-bonta-california-law-does-not-criminalize-pregnancy-loss](https://oag.ca.gov/news/press-releases/attorney-general-bonta-california-law-does-not-criminalize-pregnancy-loss), emphasis added.

(continued...)

1 this year, Assembly Bill 2223 was proposed by Democrat Assemblywomen Buffy Wicks
2 (Oakland), and passed into law by Governor Gavin Newsom on September 27, 2022. Under the
3 newly added Section 123467 of the California Health and Safety Code, which will come into
4 effect on January 1, 2023,

5 [A] person shall not be subject to civil or criminal liability or penalty, or otherwise
6 deprived of their rights under this article, based on their actions or omissions with respect
7 to their pregnancy or actual, potential, or alleged pregnancy outcome, including
8 miscarriage, stillbirth or abortion, or perinatal death due to causes that occurred in
9 utero.⁷⁴

10 It is very clear from such developments that the California legislature continues to
11 support the policy it adopted in past decades against criminalization of those struggling with
12 substance use disorders during pregnancy. And by taking criminal penalties for neonatal
13 substance use off the table, California will follow the consistent recommendations of the medical
14 profession, and continue to safeguard access to adequate prenatal and neonatal care for mothers
15 and neonates alike.

16 **V. Conclusion**

17 The scientific consensus is clear: any attempt to criminalize women for SUDs during
18 pregnancy is “an inappropriate use of criminal law, because [it] is predicated on a fundamental
19 misunderstanding of the science on pregnancy, addiction, and withdrawal.”⁷⁵ There is a growing
20 body of case law acknowledging this, recognizing “recent studies showing that [substance use] is
21 no more harmful to a fetus than nicotine use, poor nutrition, lack of prenatal care, or other

25 ⁷⁴ Assembly Bill No. 2223, Chapter 629 (Sept. 27, 2022),
26 https://leginfo.ca.gov/faces/billNavClient.xhtml?bill_id=202120220AB2223.

27 ⁷⁵ Boone & McMichael, *supra* note 9, at 478, 487.

(continued...)

1 conditions commonly associated with the urban poor.”⁷⁶ Indeed, use of the criminal process as an
2 attempted means to enhance maternal, fetal, or neonatal health has been empirically
3 demonstrated to have the opposite effect, sadly leading to diminished health outcomes and even
4 fetal and neonatal death.⁷⁷

5 The scientific consensus—backed by hard data—is also clear that there is no causal link
6 between use of methamphetamine or buprenorphine during pregnancy and neonatal death. This
7 Court should decline to interpret California law to impose criminal sanctions on pregnant
8 persons who use those substances and suffer fetal loss—particularly since the data shows doing
9 so will only deter pregnant persons from obtaining the medical care they and their families need.

10 For the foregoing reasons, *amici* respectfully request that this Court dismiss the
11 prosecution’s case against Ms. Carpenter.

12
13 Dated: January 13, 2023

CROWELL & MORING LLP

14
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16
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24 ⁷⁶ See *McKnight*, 661 S.E.2d at 358, at n.2. By the time post-conviction relief was granted, Ms.
25 McKnight had already been incarcerated for eight years. See Lester and Veer, Editorial, *A*
Measure of Justice for Regina McKnight, STATE (July 1, 2008), bit.ly/ReginaMcKnight.

26 ⁷⁷ See generally *id.*; see also Faherty et. al., *supra* note 9 (finding that states with punitive
27 policies addressing pregnancy and drug use were associated with greater odds of newborns
28 experiencing Neonatal Abstinence Syndrome immediately and in the longer term based on a
repeated cross-sectional analysis of 8 states).

FACNM; Training in Early Abortion for Comprehensive
Healthcare (TEACH); Bixby Center for Global Reproductive
Health; Transitions Clinic Network; Anna Steiner, MSW,
MPH; Birth Equity Advocacy Project; Morgan White; Roots
of Labor Birth Collective; Ajira Darch