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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF KINGS

In re Application of
ADORA PEREZ

Petitioner,
For Writ of Habeas Corpus.

Case No. 21W-0033A

Related Kings County Superior Court
Case: 18CM-0021

**APPLICATION TO FILE
[PROPOSED] AMICUS CURIAE
BRIEF IN SUPPORT OF
PETITIONER ADORA PEREZ**

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD HEREIN:

Proposed *Amici Curiae* National Advocates for Pregnant Women, National Perinatal Association, FASD United, Dr. Tricia E. Wright, MD MS FACOG DFASAM, and Dr. Hytham Imseis, MD, respectfully submit this application for leave to file the attached proposed *Amicus Curiae* brief in support of Petitioner Adora Perez in her petition for a writ of *habeas corpus*. This application is made pursuant to Cal. Rule of Court 8.200(c)(2), which governs *amicus* briefs submitted to appellate courts, but may also be applicable at the trial court level. In this proposed brief, *amici* respond directly to Judge Valerie R. Chrissakis' request for supplemental

briefing by the Petitioner, Respondent, and amicus curiae counsel to assist with a determination regarding Ms. Perez's petition. *See* Order Re: Pet. for Writ of Habeas Corpus, 1, 3-5.

Amici respectfully request leave to file the attached brief as it provides important legal and medical context relevant to the issues of pregnancy, drug use, and the harms of punitive responses through the criminal legal system raised in Ms. Perez's case and Judge Chrissakis' related questions. *See* Order Re: Pet. for Writ of Habeas Corpus, 3-5. This brief would draw on *amici's* legal and medical expertise to assist the Court in considering Ms. Perez's petition and identifying why it would be dangerous to deny her petition, which would effectively authorize the prosecutions of pregnant people in relation to their pregnancies.

INTEREST OF *AMICI CURIAE*

Amici are non-profit advocacy organizations, individual physicians, and medical associations concerned with the health and rights of pregnant people and all people who have the capacity to become pregnant, as well as their children and families. Some *amici* focus on the health and welfare of Californians, while others work with pregnant people across the United States. Together, *amici* bring significant expertise regarding substance use during pregnancy and effective interventions to promote maternal and child health.

Amicus Curiae National Advocates for Pregnant Women ("NAPW") is a nonprofit organization that advocates for the rights, health, and dignity of all people, focusing particularly on pregnant and parenting women, and those who are most likely to be targeted for state control and punishment. Through litigation, representation of leading medical and public health organizations and experts as *amicus*, and through organizing and public education, NAPW works to ensure that people do not lose their constitutional, civil, and human rights as a result of pregnancy. The organization also conducts research and has published a peer-reviewed study on prosecutions of and forced medical interventions on pregnant women. NAPW believes that health and welfare problems, including substance use disorders, should be addressed as health issues not as crimes, and promotes policies that actually protect maternal and child health as well as families.

Amicus Curiae National Perinatal Association (“NPA”) is a non-profit organization that works to give voice to the needs of pregnant people, infants, their families, and their healthcare providers so that collectively they can have the greatest positive impact on perinatal care in the United States. Additionally, NPA brings together people who are interested in perinatal care to share to listen and learn from each other. Its diverse membership is comprised of healthcare providers, parents and caregivers, educators, and service providers—all driven by a shared desire to support and advocate for babies and families at risk across the country.

Amicus Curiae FASD United, formerly National Organization on Fetal Alcohol Syndrome, is a public health non-profit organization that advocates for women affected by substance use disorder and individuals and families living with fetal alcohol spectrum disorders (FASD). In support of women who have consumed alcohol and other substances during pregnancy, FASD United strives to educate health, education, and justice professionals about prenatal substance exposure and promote policies and practices that increase access for women in need of therapeutic rehabilitation. FASD United forcibly rejects punitive approaches to medical and behavioral health conditions that perpetuate discrimination and mistreatment of women and their families.

Amicus Curiae Tricia E. Wright, MD MS FACOG DFASAM is a board-certified OB/GYN and Addiction Medicine physician who has been caring for pregnant people who use drugs for over 15 years. She has written several papers on the effects of methamphetamines during pregnancy, and has seen first-hand the harmful effects of draconian drug laws, stigma, and discrimination on pregnant people who use drugs. These policies are much more harmful than the drugs themselves. She has lectured extensively on the effects of these policies, and is recognized as a national expert on the care of pregnant people who use drugs.

Amicus Curiae Hytham M. Imseis, MD is a Maternal-Fetal Medicine Specialist practicing in Charlotte, North Carolina. His career has been dedicated to caring for and advocating for pregnant women. He is very involved in the medical education of Obstetrician/Gynecologists across the United States for which he has won many teaching awards. He has served on the

Women's Executive Board and the Ethics Committee at his hospital and has served as the Medical Director of the Mountain Area Perinatal Substance Abuse Program and the Mountain Area Health Education Teen Pregnancy Clinic. Dr. Imseis has published research articles in the American Journal of Obstetrics and Gynecology and in Obstetrics and Gynecology and currently reviews manuscripts for publication predominantly in the American Journal of Obstetrics and Gynecology and in Ultrasound in Obstetrics and Gynecology. Dr. Imseis also currently serves on the Board of Directors of National Advocates for Pregnant Women.

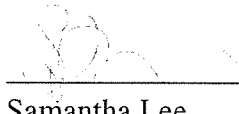
No party or counsel for a party in this matter authored this proposed *amicus* brief in whole or in part, or provided monetary contributions for its preparation or submission. Cal. Rule of Court 8.200(c)(3)(A). Furthermore, no person or entity other than *amici curiae* contributed monetarily towards this brief's production. Cal. Rule of Court 8.200(c)(3)(B).

**THE PROPOSED AMICUS CURIAE BRIEF WOULD ASSIST THE COURT IN
DECIDING THIS MATTER**

This proposed brief offers critical legal and medical context that would prove useful to the Court as it considers Adora Perez's petition and the questions it requested parties and *amici* to brief. Judge Chrissakis' Order, dated September 20, 2021, invited briefing on several questions, including whether a reasonable jury could convict Petitioner of a violation of Cal. Penal Code § 187(a). Order Re: Pet. for Writ of Habeas Corpus, 3-5. First, this proposed brief would support the Court in answering these questions by clarifying that all major medical associations to address drug use and pregnancy have found punitive responses to be harmful. Second, it will explain that allowing pregnant women to be prosecuted under Cal. Penal Code § 187 would result in disastrous consequences for all Californians with the capacity for pregnancy. Third, it describes how the California legislature has consistently rejected multiple efforts to criminalize women for pregnancy and drug use. Finally, it will summarize scientific research relevant to this prosecution, particularly regarding methamphetamine use and pregnancy loss. These insights into key issues regarding Ms. Perez's conviction would prove useful to the Court as it considers granting this petition.

Dated: October 19, 2021

Respectfully submitted,



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The prosecution and conviction of Adora Perez under California Penal Code section 187 should never have occurred. It is an error of law, unfounded in science, and poses grave risks for all Californians with the capacity for pregnancy. This court has an opportunity not only to remedy this error but also to affirm that Penal Code section 187—consistent with its plain language and clear intent—does not authorize the criminal prosecution of people who experience pregnancy losses, and thereby discourage subsequent unjust and inhumane prosecutions.

I. Medical and Public Health Authorities Oppose Punitive Responses to Pregnancy and Drug Use and Agree That Such Approaches Undermine the Health of Children and Families

The American Medical Association,¹ American Nurses Association,² American Psychological Association,³ American Psychiatric Association,⁴ American Academy of

¹ Am. Med. Ass’n, Policy Statement H-420.962, *Perinatal Addiction - Issues in Care and Prevention* (last modified 2019) (“Transplacental drug transfer should not be subject to criminal sanctions or civil liability....”); Am. Med. Ass’n, Policy Statement H-420.969, *Legal Interventions During Pregnancy* (last modified 2018) (“Criminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate. Pregnant substance abusers should be provided with rehabilitative treatment appropriate to their specific physiological and psychological needs.”).

² Am. Nurses Ass’n, Position Statement, *Non-punitive Treatment for Pregnant and Breast-feeding Women with Substance Use Disorders* (2017) (“Contrary to claims that prosecution and incarceration will deter pregnant women from substance use, the greater result is that fear of detection and punishment poses a significant barrier to treatment.”).

³ Am. Psych. Ass’n, *Pregnant and Postpartum Adolescent Girls and Women with Substance-Related Disorders* (updated: 2020) (“Punitive approaches result in women being significantly less likely to seek substance use treatment and prenatal care due to fear of prosecution and fear of the removal of children from their custody. This places both the mother and her children at greater risk of harm.”) (internal citation omitted).

⁴ Am. Psychiatric Ass’n, Position Statement, *Assuring the Appropriate Care of Pregnant and Newly-Delivered Women with Substance Use Disorders* (2019) (“A public health response, rather than a punitive legal approach to substance use during pregnancy is critical.”).

Pediatrics,⁵ and every other major public health and medical group unanimously oppose punitive responses to pregnancy and drug use, finding that such responses are harmful to the health of women and children, and diminish families' healthcare access.⁶

As the American College of Obstetricians and Gynecologists ("ACOG") explains, "a positive drug test should not be construed as child abuse or neglect" and 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."⁷ For this reason, the ACOG Committee on Health Care for Underserved Women has concluded:

The use of the legal system to address perinatal alcohol and substance abuse is inappropriate. Obstetrician-gynecologists should be aware of the reporting requirements related to alcohol and drug abuse within their states. In states that mandate reporting, policy makers, legislators, and physicians should work together to retract punitive legislation and identify and implement evidence-based strategies outside the legal system to address the needs of women with addictions.⁸

⁵ 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.").

⁶ NAPW, *Medical and Public Health Group Statements Opposing Prosecution and Punishment of Pregnant Women* (June 1, 2021), bit.ly/medicalgroupsstatements.

⁷ ACOG, *Opposition to Criminalization of Individuals During Pregnancy and Postpartum Period* (2020), <https://www.acog.org/clinical-information/policy-and-position-statements/statements-of-policy/2020/opposition-criminalization-of-individuals-pregnancy-and-postpartum-period>. For similar reasons, ACOG has also specifically opposed criminal penalties for people who have abortions outside of approved medical settings. See ACOG, *Decriminalization of Self-Induced Abortion* (2017), <https://www.acog.org/clinical-information/policy-and-position-statements/position-statements/2017/decriminalization-of-self-induced-abortion>.

⁸ ACOG, Comm. on Health Care for Underserved Women, *Comm. Opinion No. 473: Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist* (Jan. 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>.

Imposing criminal penalties on pregnant people and new parents causes real and devastating health consequences by deterring women from seeking prenatal care altogether.⁹ This fear of penalties also deters parents from bringing their children in for medical care, further undermining family health.¹⁰ It creates a disincentive for pregnant women with actual drug dependency problems from having an open and honest relationship with their prenatal healthcare providers out of fear that disclosure will lead to criminal prosecutions.¹¹

Punitive laws that drive a wedge between patients and their doctors have demonstrable negative impacts on fetal and neonatal health. For example, empirical research found that Tennessee’s “fetal assault” law “resulted in twenty fetal deaths and sixty infant deaths” in 2015 alone.¹² Another empirical study found a higher prevalence of neonatal abstinence syndrome (NAS) in states with punitive policies in effect.¹³

⁹ See, e.g., Am. Med. Ass’n, *supra* note 1; Am. Nurses Ass’n, *supra* note 2; Am. Psych. Ass’n, *supra* note 3; Am. Psychiatric Ass’n, *supra* note 4; Am. Acad. of Pediatrics, *supra* note 5; Laura J. Faherty et. al., *Association of Punitive and Reporting State Policies Related to Substance Use in Pregnancy With Rates of Neonatal Abstinence Syndrome*, JAMA OPEN NETWORK (2019), <https://jamanetwork.com/journals/jamanetworkopen/fullarticle/2755304>; Rebecca L. Haffajee et al., *Pregnant Women with Substance Use Disorders—The Harm Associated with Punitive Approaches*, 384 N. ENGL. J. MED. 2364 (2021); Meghan Boone & Benjamin J. McMichael, *State-Created Fetal Harm*, 109 GEORGETOWN L. J. 475 (2021).

¹⁰ See *id.*

¹¹ *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/hblog20201002.72121/full/>.

¹² Boone & McMichael, *supra* note 9, at 501, 514; see also Wendy A. Bach, *Prosecuting Poverty, Criminalizing Care*, 60 WILLIAM & MARY L. REV. 3 (2019); SisterReach et. al., *Tennessee’s Fetal Assault Law: Understanding its impact on marginalized women* (Dec. 14, 2020), <https://www.nationaladvocatesforpregnantwomen.org/tennessees-fetal-assault-law-understanding-its-impact-on-marginalized-women/>.

¹³ Faherty et al., *supra* note 9; see also Haffajee et al., *supra* note 9; Sarah C.M. Roberts & Cheri Pies, *Complex Calculations: How Drug Use During Pregnancy Becomes a Barrier to Prenatal Care*, 15 MATERNAL FETAL HEALTH J. 33 (2011).

There is universal medical consensus opposing punitive responses to pregnancy and drug use because they are inhumane, discriminatory, and cause real harm to maternal, fetal, and child health. This country's medical and public health authorities agree that the provision of care for pregnant and postpartum people, including those who have experienced pregnancy loss, should never result in an arrest.

II. As Recognized by Other Jurisdictions, Judicially Expanding a State Law to Permit Murder Charges Against Women Who Experience Pregnancy Loss Will Undermine, Not Advance, Maternal and Child Health.

In a renunciation of a punitive response to pregnancy loss, California lawmakers crafted Penal Code § 187 to ensure that pregnant women would not be criminalized for the loss of a pregnancy. *See Att'y General's Amicus Curiae Br. in Supp. of Issuance of an Order to Show Cause*, at 10-12. Pregnancy losses are extremely common: miscarriages, defined as pregnancy losses before 20 weeks of gestation, occur in an estimated 10% to 15% of all clinically confirmed pregnancies, with a much higher rate of 26% for all pregnancies; and stillbirths, defined as pregnancy losses after 20 weeks, occur in 0.6% of pregnancies.¹⁴

As demonstrated in other states in which pregnant people are prosecuted under the theory that something they did or did not do resulted in a pregnancy loss, interpreting Penal Code section 187 will have far-reaching and deeply harmful consequences for pregnant people, all of whom face significant risk of pregnancy loss and who engage in all types of activities, including lawful ones, that are believed to pose some risk of harm to their fetuses.¹⁵

¹⁴ NAPW, *Pregnancies and Pregnancy Outcomes in the United States* (Sept. 2021), bit.ly/pregnancyoutcomes2.

¹⁵ Paltrow & Flavin, *Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 J. HEALTH POLITICS, POL. & L. 299, 316-18, 331-33.

A. Where states have authorized the use of criminal laws to penalize people for being pregnant and using drugs, there is a deleterious effect on maternal and fetal health and well-being.

Because the evidence of harm from punitive responses to pregnancy and pregnancy loss is so clear,¹⁶ only four states—Oklahoma, Alabama, and South Carolina by way of judicial fiat, and Tennessee, for a short period of time (now expired) by legislative action—have expanded the reach of existing criminal laws to authorize prosecutions of women in relation to their own pregnancies.¹⁷ The precedent set by, and logical conclusion of, criminalizing women because of pregnancy and drug use—or because they experienced a miscarriage or stillbirth—is ever-expanding state intervention into the lives and activities of pregnant people. It opens the door for any pregnant person who engaged in any activity believed to pose a risk to fetal health or who experiences pregnancy loss to be subjected to a criminal investigation, arrest, and prosecution.¹⁸

The South Carolina Supreme Court’s decision to authorize criminal charges against pregnant people in relation to their pregnancies has enabled hundreds of arrests. While the South Carolina Supreme Court in *Whitner v. State*, 92 S.E. 2d 777 (S.C. 1997), claimed that in judicially expanding the state’s child abuse law to reach a woman who gave birth to a healthy

¹⁶ See *supra* Part I; see also *Ferguson v. City of Charleston*, 532 U.S. 67, 84 n.23 (2001) (holding that a hospital’s policy of secretly searching pregnant women for evidence of drug use and using that information to facilitate their arrest violated pregnant patients’ Fourth Amendment Rights and noting, “It is especially difficult to argue that the program here was designed simply to save lives. Amici claim a near consensus in the medical community that programs of the sort at issue, by discouraging women who use drugs from seeking prenatal care, harm, rather than advance, the cause of prenatal health.”).

¹⁷ See *State v. Green*, 474 P.3d 886 (Okla. Crim. App. 2020); *Ex Parte Ankrom*, 152 So. 3d 397 (Ala. 2013); *Whitner v. State*, 492 S.E. 2d 777 (S.C. 1997); Bach, *supra* note 12, at 812-14 (describing Tennessee’s short-lived experiment with a fetal assault law from 2014-2016).

¹⁸ Paltrow & Flavin, *supra* note 15, at 322-23.

baby who tested positive for cocaine, it was only addressing pregnancy and cocaine use,¹⁹ that decision established a precedent that allowed arrests and prosecutions of women who used marijuana,²⁰ drank alcohol,²¹ experienced pregnancy losses,²² or who were in the midst of a mental health crisis. For example, when a young pregnant woman tried to commit suicide by jumping out of a window and lost the pregnancy, she was arrested and jailed for what news reports described as “homicide-by-pregnancy-risk.”²³

In Oklahoma, the Court of Criminal Appeals, the highest state appellate court for criminal matters, recently judicially expanded its criminal child neglect law to permit the prosecution of people who are pregnant with a viable fetus and use a controlled substance. *State v. Green*, 474 P.3d 886, 890-891, 893 (2020). Oklahoma is now prosecuting women for experiencing miscarriages as early as 17 weeks’ gestation, before viability (sustained survival outside of the womb) is even possible and even where the medical examiner did not conclude that drug use caused the pregnancy loss.²⁴

¹⁹ *Whitner*, 492 S.E. 2d at 781-82.

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

²¹ *State v. Reid*, No. F-674-754 (S.C. Ct. Gen. Sess. Lancaster County Dec. 23, 2009).

²² *McKnight v. State*, 661 S.E.2d 354, 358 n. 2 (S.C. 2008) (granting post-conviction relief for conviction of homicide by child abuse for experiencing a stillbirth blamed, without 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.”).

²³ Jason Foster, *Woman faces charge of killing unborn child during August suicide attempt*, THE HERALD (Feb. 21, 2009), <https://www.heraldonline.com/news/local/article12250463.html>.

²⁴ NAPW, *Oklahoma Prosecution and Conviction of a Woman for Experiencing a Miscarriage is Shameful and Dangerous* (Oct. 13, 2021), <https://www.nationaladvocatesforpregnantwomen.org/oklahoma-prosecution-and-conviction-of-a-woman-for-experiencing-a-miscarriage-is-shameful-and-dangerous/>.

The Alabama Supreme Court, in 2013, held that the state's chemical endangerment law, enacted to penalize adults who took children to dangerous environments such as methamphetamine labs, could be used to prosecute pregnant women who used any controlled substance during pregnancy. *See Ex Parte Ankrom*, 152 So. 3d 397, 407, 411-12, 421 (Ala. 2013). This included even those controlled substances that had been *prescribed* to pregnant women.²⁵ Since 2006, Alabama prosecutors have charged over 500 pregnant people with crimes in relation to their pregnancies, including under the chemical endangerment law.²⁶ Under Alabama's framework, the state has arrested a woman who used marijuana to treat epilepsy during pregnancy instead of a prescribed medication that was known to cause fetal harm, and another woman who took a small amount of valium when panicked after receiving threats from an ex-partner.²⁷ Even after the legislature clarified that women could not be charged under the chemical endangerment law if they were taking controlled substances prescribed to them, a prosecutor is now prosecuting a woman for prescription fraud by making the unprecedented and factually-unsupportable claim that her appropriate use of a prescribed painkiller during pregnancy was illegal under that law.²⁸ Having created precedent for penalizing women who are pregnant, Alabama police and prosecutors have gone even further. In 2019, police arrested Marshaé Jones for manslaughter. Ms. Jones had been shot by another person in the abdomen and

²⁵ Nina Martin, *Take a Valium, Lose Your Kid, Go to Jail*, PROPUBLICA (Sept. 23, 2015), <https://www.propublica.org/article/when-the-womb-is-a-crime-scene>.

²⁶ *See id.*; Nina Martin, *Alabama Mom's Charges are Dropped, But Only After an Arduous Battle*, PROPUBLICA (June 2, 2016), <https://www.propublica.org/article/alabama-moms-charges-are-dropped-but-only-after-an-arduous-battle>.

²⁷ *See id.*

²⁸ Meryl Kornfield, *A pregnant woman took a prescribed opioid for her chronic pain. Now she's facing a felony charge*, WASHINGTON POST (June 24, 2021), <https://www.washingtonpost.com/nation/2021/06/24/pregnant-woman-charged-prescription/>; Amy Yurkanin, *Alabama mom faces felony for filling doctor's prescription while pregnant*, AL.COM (Jun. 21, 2021), <https://www.al.com/news/2021/06/alabama-mom-faces-jail-for-filling-doctors-prescription-while-pregnant.html>.

experienced a pregnancy loss.²⁹ While the person who shot her was not charged, Alabama prosecutors obtained an indictment against Ms. Jones for putting herself, while pregnant, in a dangerous situation.³⁰ Although the chief prosecutor eventually dropped the charge after local and national outrage, this case is a profound example of how decisions permitting prosecutions of women in relation to their own pregnancies in one context will not stay limited to that context.

Alabama, South Carolina, and Oklahoma illustrate the tragic consequences that unfold when reviewing courts judicially expand criminal laws intended for other purposes—in this case to reach and deter violent attacks on pregnant women by other people—to prosecute women for experiencing pregnancy losses. If California’s reviewing courts were to judicially expand section 187 to permit the prosecution of women in relation to their own pregnancies, it would provide precedent for prosecutors to investigate, arrest, and incarcerate any person who experienced a pregnancy loss at any stage of pregnancy.³¹ It would also likely encourage prosecutors to try to use numerous other California criminal laws intended for other purposes to penalize pregnancy, drug use, and other perceived risks of harm. *See, e.g.,* Decision, *People v. Stewart*, No. M508197 (Cal. Mun. Ct. San Diego County Feb. 26, 1987) (rejecting attempt to use California Penal Code Section 270, failure to provide medical care for a child, as a basis for prosecuting a woman who experienced a neonatal loss allegedly as a result of her failing to get to the hospital on time on the morning of delivery, having intercourse with her husband, and testing positive for an amphetamine); *Reyes v. Superior Court*, 141 Cal. Rptr. 912 (Cal. Ct. App. 1977) (rejecting

²⁹ 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), <https://www.npr.org/2019/06/28/737005113/woman-indicted-for-manslaughter-after-death-of-her-fetus-may-avoid-prosecution>.

³⁰ *Id.*

³¹ *See, e.g., People v. Davis*, 872 P.2d 591, 602 (Cal. 1994) (finding “viability is not an element of fetal homicide under section 187, subdivision (a). The third party killing of a fetus with malice aforethought is murder under section 187, subdivision (a), as long as the state can show that the fetus has progressed beyond the embryonic stage of seven to eight weeks.”).

attempt to use California's felony child endangerment law as a basis for prosecuting a woman who failed to obtain prenatal care and gave birth to twins who had been exposed prenatally to heroin). As discussed above, experiences from other states show that this will increase rates of negative health outcomes, including tragic increases in fetal and infant deaths and reluctance from pregnant people to access needed healthcare.³²

B. In the vast majority of states, reviewing courts reject prosecutorial misuse of state law to penalize women in relationship to their own pregnancies.

In many states, law enforcement officials have misinterpreted existing laws to authorize arrest and prosecution of people for being pregnant and experiencing pregnancy losses or posing some imagined risk to a fetus. State actors continue to try to bring cases against pregnant women based on the perceived risk of harm to the fetus and/or based on pregnancy outcomes even when it is beyond the scope of the statutory language and clear legislative intent of state criminal and civil laws. When these prosecutions are challenged on appeal, whether in a pre-trial posture or post-conviction, the vast majority of the attempts at criminalization have been struck down by appellate courts.³³ Such decisions recognize that these laws were not intended to prosecute pregnant women and that judicially expanding

³² See, e.g., *McKnight v. State*, 661 S.E.2d 354 (S.C. 2008); Boone & McMichael, *supra* 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.

³³ See, e.g., *Arms v. State*, 471 S.W.3d 637 (Ark. 2015); *Cochran v. Commonwealth*, 315 S.W.3d 325 (Ky. 2010); *State v. Geiser*, 763 N.W.2d 469 (N.D. 2009); *Kilmon v. State*, 905 A.2d 306 (Md. 2006); *State ex rel. Angela M.W. v. Kruzicki*, 561 N.W.2d 729 (Wis. 1997); *Johnson v. State*, 602 So. 2d 1288 (Fla. 1992); *State v. Gray*, 584 N.E.2d 710 (Ohio 1992); *Patel v. State*, 60 N.E.3d 1041 (Ind. Ct. App. 2016); *People v. Jorgensen*, 41 N.E.3d 778 (N.Y. 2015); *State v. Armstard*, 991 So. 2d 116 (La. 2008); *State v. Wade*, 232 S.W.3d 663 (Mo. App. 2007); *State v. Martinez*, 137 P.3d 1195 (N.M. App. 2006); *Herron v. State*, 729 N.E.2d 1008 (Ind. App. 2000); *State v. Deborah J.Z.*, 596 N.W.2d 490 (Wis. App. 1999); *Reyes v. Superior Court*, 141 Cal. Rptr. 912 (Cal. App. 1997); *State v. Dunn*, 916 P.2d 952 (Wash. App. 1996); *Reinesto v. Superior Court*, 894 P.2d 733 (Ariz. App. 1995); *Collins v. State*, 890 S.W.2d 893 (Tex. App. 1994); *State v. Luster*, 419 S.E.2d 32 (Ga. App. 1992); *State v. Gethers*, 585 So. 2d 1140 (Fla. App. 1991); *People v. Hardy*, 469 N.W.2d 50 (Mich. App. 1991).

such laws would raise serious constitutional questions with significant public health implications beyond the issue of pregnancy and drug use.

For example, appellate courts in Kentucky ruled that interpreting its criminal child abuse and wanton endangerment laws to permit prosecution of women who were pregnant and consumed drugs would render those laws unconstitutionally vague. *See Cochran*, 315 S.W.3d at 328; *Com. v. Welch*, 864 S.W.2d 280, 283-84 (Ky. 1993). In *Welch*, the court refused to authorize such prosecutions for child abuse, noting the defendant:

could have been a pregnant alcoholic, causing fetal alcohol syndrome; or she could have been addicted to self-abuse by smoking, or by abusing prescription painkillers, or over-the-counter medicine; or for that matter she could have been addicted to downhill skiing or some other sport creating serious risk of prenatal injury, risk which the mother wantonly disregarded as a matter of self-indulgence. What if a pregnant woman drives over the speed limit, or as a matter of vanity doesn't wear the prescription lenses she knows she needs to see the dangers of the road?

864 S.W.2d at 283.

In Maryland, the Court of Appeals similarly overturned Regina Kilmon's conviction for reckless endangerment based on her pregnancy and alleged drug use. *Kilmon v. State*, 905 A.2d 306, 311-15 (Md. 2006). The *Kilmon* court noted that the prosecution's theory had the potential to render criminal "not just the ingestion of unlawful controlled substances but a whole host of intentional and conceivably reckless activity that could not possibly have been within the contemplation of the Legislature." *Id.* at 311. For instance, the court held, pregnant women could face prosecution for ingesting *legal* drugs, smoking, drinking, failing to maintain a proper diet, failing to seek available prenatal care, failing to wear a seatbelt while driving, exercising too much or too little, or even skiing or horseback riding. *Id.* The court thus concluded that the legislature could not have possibly intended for the reckless endangerment statute to authorize prosecution of women for pregnancy and drug use. *Id.* at 315.

In fact, prosecutors around the country have also sought to misuse existing state criminal laws to arrest and penalize women for falling down a flight of stairs; being HIV positive; drinking alcohol; and not getting to the hospital quickly enough on the day of delivery (Stewart California).³⁴ In New York, Jennifer Jorgensen was charged with and convicted of manslaughter when her newborn died days after an emergency cesarean section following a car accident, in part, because they alleged Jorgensen was not wearing a seatbelt. *People v. Jorgensen*, 41 N.E.3d 778, 779-80 (N.Y. 2015). New York’s highest court later overturned the conviction holding that crimes must be clearly defined by the legislature and “not be left to the whim of the prosecutor.” *See id.* at 781-82. The Court further explained, “conceivably, one could find it ‘reckless’ for a pregnant woman to disregard her obstetrician’s specific orders concerning bed rest; take prescription and/or illicit drugs; shovel a walkway; engage in a contact sport; carry groceries; or disregard dietary restrictions.” *Id.* at 781.

Purvi Patel suffered a pregnancy loss in Indiana and was convicted of feticide by the trial court; however, the Court of Appeals vacated her conviction because the state’s feticide statute was not meant to apply to women in relationship to their own pregnancies, including those women who sought to have abortions outside of legally-approved contexts. *See Patel v. State*, 60 N.E.3d 1041, 1061-62 (Ind. Ct. App. 2016); *see also Herron v. State*, 729 N.E.2d 1008 (Ind. Ct.

³⁴ *See, e.g.*, Media Conference Call Recording: Implications of the Bei Bei Shuai Case for Women and Roe, Rewire News Group (May 15, 2012), <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 Falling Down the Stairs While Pregnant*, The Stranger (Mar. 1, 2010, 4:06 PM), <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 DAILY NEWS (June 2, 2009), <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-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-against-mother-in-death-of-baby-are-thrown-out.html>.

App. 2000) (dismissing felony neglect of a child charge against a woman who was pregnant and allegedly used cocaine).

This court, like the vast majority of reviewing courts across the country, should refuse to judicially expand the law in a way that undermines public health and makes pregnant women uniquely vulnerable to police control and surveillance.

III. Consistent with Scientific Research and the Recommendations of Leading Medical Organizations and Experts, California Has Refused to Pass Any Criminal Law intended to Penalize Women for Pregnancy and Drug Use

The California Legislature has consistently refused to adopt any criminal law that would penalize a woman for being pregnant and using a criminalized drug.³⁵ California's legislature has repeatedly considered and robustly debated the need for criminal penalties in response to the issue of drug use during pregnancy and, each time, has rejected imposing criminal sanctions. For example, in 1987, the legislature considered and rejected criminalizing the precise behavior alleged by the prosecution in this case, by refusing to pass S.B. 1070, 1987-88 Leg., Reg. Sess. (Cal. 1987) (sponsored by Senator Ed Royce), which would have expanded the definition of child endangerment to cover pregnancy and substance use during pregnancy. In 1989, then Senator John Seymour sponsored S.B. 1465, 1989-90 Leg., Reg. Sess. (Cal. 1989), which also attempted to criminalize controlled substance use during pregnancy, where the pregnancy resulted in fetal demise, as manslaughter. The legislature rejected that, too. In 1991, in A.B. 650, 1990-91 Leg., Reg. Sess. (Cal. 1991), the legislature considered enacting a statute that would make substance abuse during pregnancy a misdemeanor if there was a subsequent effect on a child after their birth. This was also rejected. In 1996, Assemblyman Phil Hawkins introduced A.B. 2614, 1995-96 Leg., Reg. Sess. (Cal. 1996), which would have created a crime of "fetal

³⁵ See Leticia Miranda et al., *How States Handle Drug Use During Pregnancy*, PROPUBLICA (Sept. 30, 2015), <https://projects.propublica.org/graphics/maternity-drug-policies-by-state>.

child neglect.” California’s legislative body *again* rejected the attempt to criminalize a woman’s conduct with regard to her own fetus.³⁶

Instead of punitive approaches, the California legislature has thoughtfully and carefully chosen to adopt laws, regulations, and policies that address pregnant women, drug use, and drug dependency problems through education and public health approaches, consistent with the recommendations of every leading medical group, independent evaluators, and peer-reviewed research. For example,

[b]etween 1983 and 1996, there were 57 bills introduced concerning pregnant women’s drug use, about a third of which became law. None of the punitive bills even made it through a major policy committee. The bills that won passage addressed the social problem by providing funding for public education, health care (especially prenatal care), and a range of social services for mothers and children at risk for prenatal drug exposure. Of those, approximately 15 percent were vetoed by Republican governors for being too expensive to enact.³⁷

California has remained committed to a non-punitive approach to issues concerning pregnancy and pregnancy outcomes. California was even featured in a 2009 federal report because of the state’s clear legislation supporting public education and prevention efforts on behalf of substance exposed infants.³⁸

³⁶ See Sue Holtby et al., *Gender issues in California’s perinatal substance abuse policy*, 27 CONTEMPORARY DRUG PROBLEMS 77, 89 (2000).

³⁷ Laura E. Gomez, *Misconceiving Mothers: Legislators, Prosecutors, and Politics of Prenatal Drug Exposure* 41 (1997).

³⁸ See U.S. Dep’t of Health and Hum. Servs., Substance Abuse and Mental Health Services Administration and the Administration for Children and Families, *Substance-Exposed Infants: State Responses to the Problem* (2009), <https://ncsacw.samhsa.gov/files/Substance-Exposed-Infants.pdf>.

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

While the prosecution and conviction of Ms. Perez was based on the belief that methamphetamine use during pregnancy can cause fetal demise, it is not, in fact, supported by rigorous, peer-reviewed, evidence-based research.³⁹ Association and causation are related statistical terms, however they are not the same. Causation implies a cause-and-effect relationship, wherein one event is the result of the occurrence of another event. By contrast, association simply describes the magnitude of a relationship but does not necessarily mean one event changes as a result of the other changing.⁴⁰ Well-designed prospective studies, including the Infant Development, Environment, and Lifestyle (IDEAL) study,⁴¹ do not demonstrate even an association between methamphetamine use and serious obstetric outcomes, such as preterm

³⁹ 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-DERHR 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.”)

⁴⁰ Austl. Bureau of Statistics, *Statistical Language - Correlation and Causation*, <https://www.abs.gov.au/websitedbs/D3310114.nsf/home/statistical+language+-+correlation+and+causation>.

⁴¹ Zeina N. 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, <https://doi.org/10.1080/08897077.2013.814614>.

birth, maternal hypertensive disorders, pre-eclampsia, placental abruption, or stillbirth.⁴² These studies only reveal an *association* between methamphetamine and low birth weight,⁴³ which is not an indicator of long-term health. Systematic review data, which relies on a rigorous analytic method to capture and describe published studies, focused on the relationship between stillbirth and substance use in pregnancy and similarly identified an *association* between substance use and reduced fetal growth but no association between substance use (including methamphetamine use) and stillbirth, and no causation.⁴⁴

Methamphetamine is part of a class of medications known as psychostimulants.⁴⁵ Psychostimulants are used in the treatment of attention-deficit/hyperactivity disorder (ADHD) in youth and adults. Methamphetamines and medications for ADHD are almost identical in terms of chemical structure and, therefore, interact very similarly with a pregnancy.⁴⁶ A study comparing over 5,000 pregnancies with prescribed psychostimulant use to almost 1.5 million people without use demonstrated a small increased risk of preeclampsia and preterm birth but no increased risk

⁴² Rizwan Shah et al., *Prenatal methamphetamine exposure and short-term maternal and infant medical outcomes*, 29 AM. J. PERINATOLOGY 391, no. 5, 2012, at 391; Tiffany Pham et al., *Obstetrical and perinatal outcomes of patients with methamphetamine-positive drug screen on labor and delivery*, 2 AM. J. OBSTETRICS & GYNECOLOGY MATERNAL-FETAL MED., no. 4, 2020, at 2589; Dimitrios-Rafail Kalaitzopoulos et al., *Effect of Methamphetamine Hydrochloride on Pregnancy Outcome: A Systematic Review and Meta-analysis*, 12 J. ADDICTION MED., no. 3, 2018, at 220.

⁴³ 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.

⁴⁴ Corrie B. Miller & Tricia E. Wright, *Investigating Mechanisms of Stillbirth in the Setting of Prenatal Substance Use*, 8 ACAD. FORENSIC PATHOLOGY, no. 4, 2018, at 865.

⁴⁵ Jacqueline M. Cohen et al., *Placental Complications Associated with Psychostimulant Use in Pregnancy*, 130 OBSTETRICS & GYNECOLOGY, no. 6, 2017, at 1192.

⁴⁶ *Id.*

of placental abruption or stillbirth.⁴⁷ Most people who use amphetamines during pregnancy (whether prescribed or illicit) do not have a miscarriage or other adverse pregnancy outcomes.⁴⁸

Many commonly-held beliefs that substance use during pregnancy will lead to adverse health outcomes are without scientific support. For example, in overturning the conviction of Regina McKnight for homicide by child abuse (for experiencing a stillbirth blamed on her cocaine use), the South Carolina Supreme Court acknowledged the existence of expert testimony 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.” *McKnight v. State*, 661 S.E.2d at 358, at n.2.⁴⁹

In response to the unscientific media frenzy surrounding “meth babies” in the early 2000’s, just like the now-debunked “crack baby epidemic” before it,⁵⁰ a 2005 national expert panel reviewed published studies concerning the developmental effects of methamphetamine and related drugs and did not even mention any significant association, let alone a causal relationship, between methamphetamine use and pregnancy loss in humans.⁵¹ That same year, more than 90 leading medical doctors, scientists, psychological researchers, and treatment

⁴⁷ *Id.*

⁴⁸ *Supra* note 39.

⁴⁹ By the time post-conviction relief was granted, Ms. 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.

⁵⁰ David C. Lewis et al., *Physicians, Scientists to Media: Stop Using the Term ‘Crack Baby’*, Partnership to End Addiction (Feb. 27, 2004), <http://www.jointogether.org/news/yourturn/announcements/2004/physicians-scientists-to-stop.html>; *see also* Sarah Weiser, *From Crack Babies to Oxytots: Lessons Not Learned*, RetroReport (July 22, 2015), <https://www.retroreport.org/video/from-crack-babies-to-oxytots-lessons-not-learned/>; N.Y. TIMES EDITORIAL BOARD, *A Woman’s Rights: Part 4, Slandering the Unborn*, N.Y. Times (Dec. 28, 2018), <https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html>.

⁵¹ 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).

specialists released an open letter requesting that “policies addressing prenatal exposure to methamphetamines and media coverage of this issue be based on science, not presumption or prejudice.”⁵² By definition, babies cannot be “addicted” to methamphetamines or anything else.⁵³ In 2006, the American College of Obstetrics and Gynecology created a special information sheet about methamphetamine use in pregnancy, noting that “the effects of maternal methamphetamine use cannot be separated from other factors” and that there “is no syndrome or disorder that can specifically be identified for babies who were exposed in utero to methamphetamine.”⁵⁴ Most recently, a peer-reviewed research article concerning stillbirths concluded that “despite widespread reports linking methamphetamine use during pregnancy with preterm birth and growth restriction, evidence confirming its association with an increased risk of stillbirth remains lacking.”⁵⁵

The scientific consensus renders the attempted criminalization of women because of pregnancy and drug use “an inappropriate use of criminal law because [that use] is predicated on a fundamental misunderstanding on the science of pregnancy, addiction, and withdrawal.”⁵⁶ Indeed, use of the criminal process as an attempted means to enhance maternal, fetal, or infant

⁵² See *Leading Doctors, Scientists, and Researchers Request that Media and Policymakers Stop Perpetuating “Meth Baby” Myths*, 14 CESAR Fax, A Weekly Fax from the Center for Substance Abuse Research, (Aug. 15, 2005), <http://db.cesar.umd.edu/cesar/cesarfax/vol14/14-33.pdf>; David C. Lewis et al., *Open Letter From Doctors, Scientists, & Specialists Urging Major Media Outlets Not to Create “Meth Baby” Myth* (2005), <https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2020/07/22Meth22-Open-Letter-2005.pdf>.

⁵³ *Id.*

⁵⁴ Am. Coll. of Obstetrics & Gynecology, *Committee Opinion No. 479: Methamphetamine Abuse in Women of Reproductive Age* (Mar. 2011), <https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2011/03/methamphetamine-abuse-in-women-of-reproductive-age>.

⁵⁵ Robert M. Silver et al., *Workup of Stillbirth: A Review of the Evidence*, 196 AM. J. OBSTETRICS & GYNECOLOGY 433, 438 (2007).

⁵⁶ Boone & McMichael, *supra* note 9, at 478, 487.

health has been empirically demonstrated to have the exact opposite effect, instead, sadly leading to diminished health outcomes and even death for fetuses and infants.⁵⁷

V. Conclusion

For the foregoing reasons, *amici* respectfully request that this Court grant petitioner's request for *habeas* relief.

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Respectfully submitted,



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⁵⁷ See generally *id.*; see also Faherty et. al., *supra* note 9 (finding that states with punitive policies addressing pregnancy and drug use were associated with greater odds of newborns experiencing Neonatal Abstinence Syndrome immediately and in the longer term based on a repeated cross-sectional analysis of 8 states).