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November 5, 2020

Chief Justice Tani Gorre Cantil-Sakauye
and Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

RE: *Becker v. Superior Court of Kings County*, Case No. S265209
Court of Appeal of the State of California, Fifth Appellate District, Case No. F081341
Letter Supporting Petition for Review (Cal. Rules of Court 8.500, subdivision (g))

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The Attorney General respectfully submits this letter in support of the petition filed by appellant Chelsea Becker on October 26, 2020.¹ Petitioner Becker seeks this Court's review of the decision of the court of appeal to deny her request to review the trial court's ruling overruling her demurrer. (*Becker v. Super. Ct. of Kings County* (Oct. 15, 2020, F081341), Order Denying Petn. for Writ of Prohibition ("Order").)

This Court should intervene because Becker's petition raises an important question of law: specifically, whether a woman can be held to answer for the crime of murder, Penal Code section 187, on allegations that her drug use during pregnancy caused the death of the fetus she was carrying.

In the Attorney General's view, as set out in full in the amicus brief filed in the court of appeal, when the Legislature amended Penal Code section 187 in 1970 to include the death of a fetus, it did not intend to sweep in a woman's own actions that might result in a miscarriage or stillbirth. This reading follows from the language of section 187. The statute expressly excludes abortion and any act that "was solicited, aided, abetted, or consented to by the mother of the fetus." (Pen. Code, § 187, subd. (b)(3).) As dissenting Justice Rosendo Peña, Jr. noted, "[t]he California Attorney General . . . contend[s] that '[a] woman necessarily consents to an act that she herself voluntarily undertakes, free of fraud, duress, or mistake.' Although perhaps not conclusive, this interpretation of the language appears to me to have some persuasive force."

¹ This Court recently ordered an answer to Becker's related petition for review seeking relief from bail set in the amount of \$2 million. (See *In re Becker on Habeas Corpus*, petn. for review pending, answer due Nov. 16, 2020, S265210.) The Attorney General's Office has confirmed that the District Attorney will file the answer in that matter.

(Order at p. 4 (dis. opn. of Peña, J.)) This reading is also consistent with the legislative history. Among other things, the amendment was a direct response to the California Supreme Court’s decision in *Keeler v. Superior Court* (1970) 2 Cal.3d 619 in which the Court held that the unlawful “killing of a ‘human being’” did not encompass a fetus, restraining the prosecution of a man who intentionally caused the death of his estranged partner’s fetus. (*Id.* at pp. 623, 628, 639.) The specific impetus for the amendment is further evidence that the Legislature meant to criminalize only third-party violence against women that results in fetal death. (See Order at pp. 3, 5 (dis. opn. of Peña, J.))

The practical consequences of an overbroad reading of section 187 are of particular concern for some of the State’s most vulnerable residents. Fear of serious criminal liability and imprisonment has the potential to deter pregnant women with addiction issues from seeking out necessary, and sometimes lifesaving, healthcare. And it may cause local law enforcement to place additional and unnecessary scrutiny on every miscarriage and stillbirth—which are relatively common occurrences. Such scrutiny could have disproportionate criminal justice impacts, as the rates of miscarriage and stillbirth vary dramatically by race and ethnicity.²

As outlined in Becker’s petition, California courts need this Court’s guidance. The question presented in this case has now arisen twice in Kings County and has previously been presented to other courts, resulting in opposite conclusions. In 2018, the Kings County Superior Court permitted the prosecution of a woman charged with murder for her own pregnancy loss. (See Petn. at p. 19, fn. 9, citing *People v. Perez* (Mar. 26, 2019, F077851) [nonpub. opn.].) Like Becker, the prosecution alleged that the defendant’s drug use during her pregnancy caused the pregnancy loss. (*Ibid.*) In contrast to Kings County, a superior court for the County of Siskiyou concluded that Penal Code section 187 could not be used to prosecute a woman for the death of her child for alleged drug use during pregnancy. (Petn. at p. 18, citing *People v. Jones* (Super Ct. Siskiyou County, 1993, No. 93-5), Transcript of Record, [https:// tinyurl.com/wc4xb3x](https://tinyurl.com/wc4xb3x).) Similarly, a superior court for the County of San Benito dismissed fetal homicide charges against a woman who experienced a stillbirth, alleged to have been a result of drug use. (Petn. at p. 18, citing *People v. Jaurigue* (Super. Ct. San Benito County, 1992, No. 18988), order filed Aug. 21, 1992, <https://tinyurl.com/rsnyrvl>.) More recently, in an unpublished decision, the Court of Appeal, Third District, held that because section 187(b)(3) excepts from section 187 an act that “was solicited, aided, abetted, or consented to by the mother of the fetus,” the woman carrying the fetus “who necessarily would consent to her own volitional actions, cannot” commit this crime. (*People v. Olsen* (July 20, 2004, C043059) [nonpub. opn.] 2004 Cal. App. Unpub. LEXIS 6774, at 1, 2004 WL 1616294, at *5).

² See Sudeshna Mukherjee, et al., *Risk of Miscarriage Among Black Women and White Women in a US Prospective Cohort Study* (2013) 177 Am. J. of Epidemiology 11, <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3664339/pdf/kws393.pdf>> [as of Nov. 3, 2020]; Data & Statistics, Centers for Disease Control and Prevention, <<https://www.cdc.gov/ncbddd/stillbirth/data.html>> [as of Nov. 3, 2020].

The court of appeal held that the issue presented in this case must wait, and Becker must try again “once the facts of her case become part of the record” because she “fail[ed] to make a prima facie showing the accusatory pleading is defective on its face.” (Order at p. 1.) This was error. As the court recounted, the accusatory pleading provides: “The ‘crime of Murder Of Human Fetus in violation of PC187(a), a Felony, was committed in that the said defendant, ..., did unlawfully, and with malice aforethought murder a human fetus.’” (*Ibid.*) The People should not be able to take advantage of any ambiguity created by their own pleading to hold Becker in custody and subject her to a criminal trial simply because they referred to “*a fetus*” rather than “*her fetus.*” (*Ibid.*, italic added.) No further factual development is needed to resolve the proper interpretation of section 187, which presents a pure question of law.

The Attorney General respectfully urges this Court to grant the petition and either transfer the matter to the court of appeal for consideration of Becker’s motion on its merits, or, alternatively, grant plenary review and consider the question of the proper interpretation of Penal Code section 187 itself in the first instance.

Sincerely,

RENU GEORGE
Senior Assistant Attorney General
DARCIE TILLY
Deputy Attorney General

/s/ Karli Eisenberg

KARLI EISENBERG
Supervising Deputy Attorney General

For XAVIER BECERRA
Attorney General

**DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S.
MAIL**

Case Name: **Chelsea Becker v. Superior Court of Kings County**
Case No.: **S265209**

I declare:

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

On November 5, 2020, I electronically served the attached **Amicus Curiae Letter** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on November 5, 2020, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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Clerk of the Court,

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on November 5, 2020, at Sacramento, California.

B. Barton
Declarant

/s/ B. Barton
Signature