Case No. F077851

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIFTH APPELLATE DISTRICT

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

ADORA PEREZ,
Defendant and Petitioner

Hon. Robert Shane Burns
Superior Court Case No. 18CM-0021 (Kings County)

[PROPOSED] BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER ADORA PEREZ'S APPLICATION TO RECALL REMITTITUR ON APPEAL, BY *AMICI* AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, ASSOCIATION FOR MULTIDISCIPLINARY EDUCATION AND RESEARCH IN SUBSTANCE USE AND ADDICTION, CALIFORNIA NATIONAL ORGANIZATION FOR WOMEN, *ET AL.*

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INTRODUCTION

California law does not permit the prosecution of a pregnant woman for murder based on the loss of her pregnancy, including a loss resulting from alleged substance use during the pregnancy. Prosecutions under Penal Code §187, as in the instant case against the Petitioner, Adora Perez, have been rejected by California's trial courts. *See People v. Jaurigue* (Super. Ct. San Benito County, 1992, No. 18988); *People v. Jones*, No. 93-5 (Siskiyou County, July 28, 1993). Penal Code §187 does not authorize, nor has it ever been interpreted to authorize prosecution of a woman in relationship to her own pregnancy or any outcome of a woman's pregnancy. Despite this, Ms. Perez's trial counsel did not inform her that a homicide conviction based on allegations that Ms. Perez's stillbirth resulted from her drug use during pregnancy could not be sustained by law. Fearing a murder conviction, Ms. Perez pled no contest and was convicted of manslaughter. Ms. Perez's appellate counsel failed to raise on appeal that Ms. Perez's plea was not knowing or voluntary because it was based on the incorrect advice that she could be convicted of murder. Appellate counsel also failed to argue Ms. Perez had received ineffective assistance of counsel by failing to seek dismissal of the complaint and failing to advise Ms. Perez that she could not be convicted of murder.

The California legislature has never expanded Penal Code §187 in the manner suggested by the prosecution, in keeping with the recommendations of medical societies and medical and public

health experts who have counseled policy makers nationwide against the establishment of criminal sanctions related to pregnancy and substance use.[1] Broadly accepted medical, public health, and scientific evidence supports the Legislature's drafting of the statute to avoid criminalizing women with respect to their pregnancies. The unequivocal consensus among *amici* and every medical or public health organization to address the issue in the United States is that pregnancy and use of controlled substances is a medical and public health issue, not an issue that should be subject to criminal intervention and control.

These *amici* include national and state medical and public health organizations with recognized expertise and longstanding concern in the areas of maternal, fetal, and neonatal health, and in the effects of alcohol and controlled substances on families and society, as well as organizations committed to supporting the rights and health of mothers, children, women generally, and families. Together, *amici* represent thousands of healthcare providers in California and tens of thousands across the country. *Amici* recognize a strong societal interest in protecting the health of women, children, and families. Those interests are undermined, not advanced, by laws that permit the detention and arrest of women in relationship to their pregnancies.

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[1] Sue Holtby et al., *Gender issues in California's perinatal substance abuse policy*, 27 CONTEMPORARY DRUG PROBLEMS 77, 89 (2000) (Since the late 1980s, California's Legislature has debated the need for criminal penalties for pregnancy and substance use and has not amended the law to include criminal sanctions against "substance-using mothers").

Amici agree with Petitioner that the plain language of the California murder statute explicitly does not permit prosecution of a person for being pregnant and allegedly using a criminalized drug(s). California's statute, Penal Code §187, is clear and unambiguous in excluding prosecutions against the "mother of the fetus." §187(b)(3). The prosecution's misapplication of existing law would vastly expand the fetal homicide statute in a manner that would expose a wide range of pregnant individuals to criminal prosecution. Based on their professional expertise and knowledge of relevant medical and scientific research and practices, *amici curiae* write to correct several false assumptions underlying the premise of the prosecution and to elucidate the expected medical and public health ramifications of criminally prosecuting women who are pregnant, have used drugs, or who have experienced pregnancy losses under any circumstances.

First, as discussed in Part I below, research demonstrates that such prosecutions serve to endanger, rather than protect, pregnancies. Coercive responses to a woman based on pregnancy and drug use can place not only the pregnant woman but also her pregnancy, her future children, and her family at greater risk of harm. Prosecution and the threat of prosecution pose direct and indirect health risks. The direct risks arise from the profound stresses associated with threatened arrest, incarceration, and family separation. The indirect risks arise when people who anticipate prosecution avoid accessing prenatal and other medical care or, in some cases, terminate their pregnancies. Both

types of risk present serious obstacles to the provision of the best medical and most ethical care.

Second, as discussed in Part II below, the medical and scientific communities recognize that Ms. Perez's drug use, characterized in court records as consistent with a substance use disorder, is not accurately viewed as a matter of individual misconduct. Substance use disorders are chronic conditions with biological, psychological, and socio-environmental components that are best addressed through the non-punitive, non-coercive medical and public health approaches used to address all chronic health conditions, which protect and respect patient decision making. Continued drug use is an expected part of substance use disorder treatment and recovery. A person who is diligently working to stop drug use could still be convicted of murder under the prosecution's inaccurate and outrageous interpretation of California law. Moreover, pregnancy is complex, and medical science has great difficulty discerning any one single factor responsible for a pregnancy outcome. Research shows that the wellbeing of pregnant women, their pregnancies, and their children are most successfully promoted when women who have used or use drugs during pregnancy are treated like any other person experiencing any one of a wide variety of pregnancy risks—including health, environmental, personal and professional factors that range from maternal age, body weight, income, and exercise habits, to carrying twins or living in a home contaminated with lead.

Amici therefore ask the Court to consider the instant petition in view of the widespread opposition within the medical and scientific community to the criminalization of pregnant people for being pregnant and using drugs. The California legislature has consistently acted in accordance with this legal, scientific, and medical consensus and avoided measures that would criminalize women for their health and circumstances while pregnant. Courts in California and throughout the United States have overwhelmingly held that actions taken and health conditions experienced by a pregnant person that may affect the health of an embryo or fetus do not constitute murder.[2]

A survey of state statutes designating embryos or fetuses as potential crime victims found that two-thirds of such statutes explicitly state that women shall not be prosecuted for their pregnancy outcome, like California's §187(b)(3).[3] More specifically, despite the number of states that criminalize conduct

[2] *See e.g. State v. Aiwohi*, 123 P.3d 1210 (Haw. 2005), as corrected (Dec. 12, 2005) (holding that a prosecution for manslaughter for a woman's actions taken while pregnant contravened the plain language of the statute); Andrew S. Murphy, *A Survey of State Fetal Homicide Laws and Their Potential Applicability to Pregnant Women Who Harm Their Own Fetuses*, 89 INDIANA L. J. 847, 865 (2014) (Twenty-four of the thirty-six states that have passed statutes recognizing embryos and fetuses as potential victims of violent crimes have included similar language to their statutes expressly exempting pregnant women from being prosecuted for causing injury to their own fetuses.")

[3] See Rebecca Stone, *Pregnant Women and Substance Use: Fear, Stigma, and Barriers to Care*, 3 HEALTH AND JUSTICE 1, 2 (2015) (citing Murphy, *supra* note 2).

that threatens harm to embryos and fetuses, the survey found that just one state's law is interpreted to make prenatal substance use a crime.[4]

The legal issues presented by this petition cannot properly be decided in isolation from the scientific, medical, and public health contexts in which the relevant legislative decisions have been made. *Amici* seek to assist this Court by making known the explicit and historical opposition by scientific, medical, and public health experts to legislation and statutory interpretations such as the one put forward by the State in the instant case. A criminal legal response to substance use and substance use disorders during pregnancy would increase the physical and mental health risks for pregnant women and the children they give birth to, and would undermine public health in California. It would reinforce a scientifically unfounded stigma against people who use substances and are pregnant, and expose them to unnecessary and serious hazards, leaving them to choose among dangerous options to the detriment of their own health and the health of their future children.

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[4] *Id.*

ARGUMENT

I. MEDICAL AND PUBLIC HEALTH EXPERTS UNEQUIVOCALLY OPPOSE PUNITIVE RESPONSES TO PREGNANCY AND SUBSTANCE USE BECAUSE THEY THREATEN WOMEN'S AND CHILDREN'S HEALTH

Major medical and public health organizations in California and throughout the country oppose criminally prosecuting pregnant women who use controlled substances. Among them are the American College of Obstetricians and Gynecologists (ACOG)[5]; Association of Women's Health, Obstetrics and Neonatal Nurses (AWHONN)[6]; American Academy of Addiction

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[5] Am. Coll. Obstetricians & Gynecologists ("ACOG"), Comm. on Health Care for Underserved Women, Comm. Opinion 473: *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist*, 117 OBSTET. GYNECOL. 200, 2 (2011) (reaffirmed 2014) ("The use of the legal system to address perinatal alcohol and substance abuse is inappropriate. 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.").

[6] Ass'n of Women's Health, Obstetric & Neonatal Nurses (AWHONN), *Optimizing Outcomes for Women with Substance Use Disorders in Pregnancy and the Postpartum Period*, 48 J. OF OBSTET., GYNECOL., & NEONATAL NURSING 583 (2019) ("AWHONN recommends treatment versus incarceration and that local and state policies reflect commitment to diverting pregnant women away from the criminal justice system.").

Psychiatry (AAAP)[7]; American Society of Addiction Medicine (ASAM)[8];) American Psychiatric Association (APA)[9]; American

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[7] Am. Acad. of Addiction Psychiatry, Use of Illegal and Harmful Substances by Pregnant Women (2018), available at https://www.aaap.org/wp-content/uploads/2018/07/AAAP-FINAL-Policy-Statement-Edits-Use-of-Illegal-Substances-by-Pregnant-Women-for-merge2.pdf ("AAAP is opposed to punitive actions against pregnant women who use substances solely based on child abuse laws. Pregnant women identified by law enforcement as using illicit substances should not receive incarceration or other punitive measures as a substitute for providing effective health services.").

[8] Am. Soc'y of Addiction Medicine ("ASAM"), *Substance Use, Misuse, and Use Disorders During and Following Pregnancy, with an Emphasis on Opioids* (2017), https://www.asam.org/advocacy/find-a-policy-statement/view-policy-statement/public-policy-statements/2017/01/19/substance-use-misuse-and-use-disorders-during-and-following-pregnancy-with-an-emphasis-on-opioids ("It is inappropriate to reflexively move from the possibility to an alleged certainty of defective parenting or danger to the child simply based on evidence of substance use. . . [I]t is unfortunate that in some states, . . . reporting requirements have led to punitive consequences . . . State and local governments should avoid any measures defining alcohol or other drug use during pregnancy as 'child abuse or maltreatment,' and should avoid prosecution, jail, or other punitive measures as a substitute for providing effective health care services for these women.").

[9] Am. Psychiatric Ass'n, *Position Statement: Assuring the Appropriate Care of Pregnant and Newly-Delivered Women with Substance Use Disorders* (Dec. 2016) ("The use of the legal system to address perinatal alcohol, tobacco, and other substance use disorders is inappropriate.").

Medical Association (AMA)[10]; American Academy of Pediatrics[11]; American Nurses Association (ANA)[12]; American Public Health

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[10] Am. Med. Ass'n, Policy, *H-420.969: Legal Interventions During Pregnancy* (1990) (reaffirmed 2016) ("Criminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate.").

[11] Am. Acad. of Pediatrics ("AAP"), Comm. on Substance Abuse, *A Public Health Response to Opioid Use in Pregnancy*, 139 PEDIATRICS (2017) available at https://pediatrics.aappublications.org/content/pediatrics/early/2017/02/16/peds.2016-4070.full.pdf ("A public health response, rather than a punitive approach to the opioid epidemic and substance use during pregnancy, is critical . . . . The AAP reaffirms its position that punitive measures taken toward pregnant women are not in the best interest of the health of the mother-infant dyad.").

[12] Am. Nurses Ass'n ("ANA"), *Position Statement: Non-Punitive Treatment for Pregnant and Breast-Feeding Women with Substance Use Disorders* (Mar. 15, 2017) ("ANA opposes laws that may result in punitive legal actions and result in incarceration of pregnant women because of substance use disorder.").

Association (APHA)[13]; March of Dimes[14]; and the National Perinatal Association (NPA)[15].

Based on the relevant scientific and medical research discussed below, authorities agree that criminal law approaches are inappropriate and can harm the health of women, fetuses, and newborns by detaining pregnant women, separating them from their homes and families, subjecting them to stress, incarcerating them, denying them prenatal and medical care and access to appropriate treatment, and eroding the doctor-patient relationship. Accordingly, ACOG opposes punitive state laws and policies because "use of the legal system to address perinatal

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[13] Am. Pub. Health Ass'n ("APHA"), *Policy, No. 9020: Illicit Drug Use by Pregnant Women* (Jan. 1, 1990) ("Reaffirms the Association's view of use of illicit drugs by pregnant women as a public health problem, and recommends that no punitive measures be taken against pregnant women who are users of illicit drugs . . .").

[14] March of Dimes, *Policies and Programs to Address Drug-Exposed Newborns* (Dec. 2014), https://www.marchofdimes.org/materials/NAS-Policy-Fact-Sheet-December-2014.pdf ("The March of Dimes opposes policies and programs that impose punitive measures on pregnant women who use or abuse drugs. The March of Dimes believes that targeting women who used or abused drugs during pregnancy for criminal prosecution or forced treatment is inappropriate and will drive women away from treatment vital both for them and the child.")

[15] Nat'l Perinatal Ass'n, *Position Paper, Substance Abuse among Pregnant Women* (Jun. 2012) ("NPA oppose punitive measures that deter women from seeking appropriate care during the course of their pregnancies.").

alcohol and substance abuse is inappropriate."[16] The ANA has also called upon registered nurses who work with pregnant women who use controlled substances to seek out providers that offer clinically "appropriate rehabilitative therapy, rather than law enforcement or the judicial system."[17]

A. Punitive Criminal Justice Responses to Women in Relationship to Their Pregnancies Directly Inflict Substantial Harm on Women and their Children

Physical and mental health professionals' widespread opposition to coercive responses to drug use during pregnancy stems from the scientific and medical research confirming the risks that the criminal justice system poses to pregnant people's health and that of their pregnancies and their future children. The State's perception that prosecuting pregnant women will benefit fetuses misperceives the interests of pregnant women and is medically unsupported.[18]

Attempts to promote fetal wellbeing through laws and policies that punish pregnant women misunderstand this unique relationship between fetal and maternal health and ignore the often-interdependent nature of maternal and fetal interests. A

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[16] ACOG, *supra* note 5.

[17] ANA, *supra* note 12.

[18] See, e.g., Am. Coll. Obstetricians & Gynecologists ("ACOG"), *Committee Opinion 664: Refusal of Medically Recommended Treatment During Pregnancy*, 127 OBSTET. GYNECOL. e175 (2016); APHA, *supra* note 13.

fertilized egg, embryo or fetus is physiologically dependent on the pregnant woman, and any intervention by the State ostensibly on behalf of a fertilized egg, embryo or fetus "must be undertaken through the pregnant woman's body."[19] Anything that affects the pregnant woman's health, autonomy, and privacy in turn, affects her pregnancy, and so "questions of how to care for the fetus cannot be viewed as a simple ratio of maternal and fetal risks but should account for the need to respect fundamental values, such as the pregnant woman's autonomy and control over her body."[20]

Being subject to or facing threat of arrest, preventive detention, prosecution, incarceration, and loss of parental rights is stressful and associated with negative health outcomes, both physical and psychological.[21] For a pregnant woman, who must

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[19] ACOG, *supra* note 18 (citing Howard Minkoff & Mary F. Marshall, *Fetal Risks, Relative Risks, and Relatives' Risks*, 16 AM. J. BIOETHICS 3 (2016)).

[20] *Id.*

[21] Barbara A. Hotelling, *Perinatal Needs of Pregnant, Incarcerated Women*, 17 J. OF PERINATAL EDUC. 37 (2008) (showing negative mental and physical impacts of jail and prison conditions on women, and especially pregnant women); April D. Fernandes, *How Far Up the River? Criminal Justice Contact and Health Outcomes*, SOCIAL CURRENTS (2019) (showing negative physical and mental health outcomes from not only imprisonment but less severe forms of contact, including arrest and prosecution); Robert R. Weidner, Jennifer Schultz, *Examining the relationship between U.S. incarceration rates and population health at the county level*, 9 SSM POPULATION HEALTH (2019) (incarceration of any length associated with increased morbidity and mortality)

contend with the physical aspects of pregnancy as well as added concerns for the health of her fetus, her autonomy to make medical decisions for herself and her pregnancy, and her prospects of retaining parental authority, the psychological strains of state control and coercion are exacerbated.[22] Stress, both chronic and acute, can cause physical and chemical changes in a pregnant woman's body, which has implications for both maternal and fetal health and is associated with increased rates of infant mortality, low birthweight, preterm birth, hypertension, developmental delays, and congenital heart defects.[23]

The adverse effects of criminally prosecuting women for purported risk of harm to their pregnancies continue to affect mothers, their newborns, and their other children long after the pregnancy ends, especially where mothers remain incarcerated or lose temporary or permanent custody of their children.[24] Young

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[22] Hotelling, *supra* note 21; Elena Hontoria Tuerk & Ann Booker Loper, *Contact Between Incarcerated Mothers and Their Children: Assessing Parenting Stress*, 43 J. OF OFFENDER REHABILITATION 23, 28 (2006) (threat of incarceration to mother's authority as parent causes stress).

[23] See March of Dimes, *Issue Brief, Stress and Pregnancy* (2015), available at https://www.marchofdimes.org/materials/Maternal-Stress-Issue-Brief-January2015.pdf; Michael T. Kinsella & Catherine Monk, *Impact of Maternal Stress, Depression & Anxiety on Fetal Neurobehavioral Development*, 53 CLINICAL OBSTET. GYNECOL. 425 (2009); Lydia M. Sagrestano & Ruthbeth Finerman, *Pregnancy and Prenatal Care: A Reproductive Justice Perspective*, *in* Reproductive Justice: A Global Concern 211 (Joan C. Chrisler, ed., 2012).

[24] Human Rights Watch & Am. Civ. Liberties Union, *You Miss So Much When You're Gone: The Lasting Harm of Jailing Mothers*

children separated from their mothers experience traumatic stress with lifelong consequences, even if they are eventually reunified.[25] Throughout the United States children of incarcerated parents have increased risk of mental health conditions, higher rates of chronic disease, decreased success in school, and increased likelihood of drug use, criminal justice involvement, homelessness, and poverty.[26] Thus, the direct harms of criminalizing pregnant women are serious and apparent.

Before Trial in Oklahoma (2018), available at https://www.aclu.org/sites/default/files/field_document/jailing_mothers_before_trial_in_ok_final_report.pdf; Michigan Family Impact Seminars, *Briefing Report No. 2002-1 What About Me? Children with Incarcerated Parents* (2002) (Eileen Trzcinski et al., eds.).

[25] Women in Prison Project of the Correctional Ass'n of New York, *When "Free" Means Losing Your Mother: The Collision of Child Welfare and the Incarceration of Women in New York State* (2006), available at https://repositories.lib.utexas.edu/bitstream/handle/2152/15159/When_Free_Rpt_Feb_2006.pdf? sequence=2.

[26] Annie Gjelsvik et al., *Adverse Childhood Events: Incarceration of Household Members and Health-Related Quality of Life in Adulthood*, 25 J. HEALTH CARE FOR THE POOR & UNDERSERVED 1169 (2014); Dorothy Roberts, *Prison, Foster Care, and the Systemic Punishment of Black Mothers*, 59 UCLA L. REV. 1474, 1481-82 (2012); Kristin Turney, *Stress Proliferation across Generations? Examining the Relationship between Parental Incarceration and Childhood Health*, 55 J. OF HEALTH AND SOCIAL BEHAVIOR 302 (2014).

B. The Threat and Prospect of Prosecution Deters Women from Securing Treatment and Prenatal Care and Undermines Maternal and Fetal Health

Women and mothers who use drugs are, like other women and mothers, concerned about their own, their fetuses', and their children's mutual wellbeing.[27] Clear evidence establishes that women who desire drug treatment and prenatal care are dissuaded from seeking it when faced with the threat of prosecution and its attendant harms for themselves, their pregnancies, their future children, and their families.[28] Studies consistently show that "fear of being reported to the police or child welfare authorities [is] related strongly to a lack of prenatal

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[27] Martha A. Jessup et al., *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, 33 J. DRUG ISSUES 285 (2003) (Pregnant women who use controlled substances "fear and worry about loss of infant custody, arrest . . . and incarceration for use of drugs."); *see also* Ashley H. Schempf & Donna M. Strobino, *Drug Use and Limited Prenatal Care: An Examination of Responsible Barriers*, 200 AM. J. OBSTET. GYNECOL. 412.e1 (2009); Marilyn L. Poland et al., *Punishing Pregnant Drug Users: Enhancing the Flight from Care*, 31 DRUG & ALCOHOL DEPEND. 199 (1993); Wendy Chavkin, *Drug Addiction and Pregnancy: Policy Crossroads*, 80 AM J. PUBLIC HEALTH 483 (1990).

[28] *See* Southern Reg'l Project on Infant Mortality, A Step Toward Recovery: Improving Access to Substance Abuse Treatment for Pregnant and parenting Women 6 (1993); Sarah C. M. Roberts & Amani Nuru-Jeter, *Women's Perspectives on Screening for Alcohol and Drug Use in Prenatal Care*, 20 WOMENS HEALTH ISSUES 193 (2010); AWHONN, *supra* note 6.

care."[29] Even a small number of stories of women losing custody of their children or being subjected to state coercion may have a chilling effect on a woman's likelihood of accessing medical care while pregnant if she has used or is using criminalized substances.[30] One study, for example, found that women who used controlled substances during pregnancy avoided or delayed care because they did not trust their health care providers to protect them from the negative consequences of identification as pregnant drug users.[31]

Women who do seek prenatal care are likely to be discouraged from truthfully discussing their drug use by fear that they will be prosecuted or shamed, labeled "neglectful," or

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[29] Schempf & Strobino, *supra* note 27; *see also* Stone, *supra* note 3 ("[F]ear of detention and punishment presents a significant barrier to care for mothers and pregnant women."); Mishka Terplan et al., *Methamphetamine Use Among Pregnant Women*, 113 OBSTET. & GYNECOL. 1290 (2009) ("Although the desire for behavioral change may be strong in pregnancy, substance-using women may be afraid to seek prenatal care out of fear of prosecution or child protection intervention."); ACOG, *supra* note 5 (citing study showing that women who used drugs during pregnancy did not trust health care providers to protect them from criminal justice system and avoided or disengaged from prenatal care).

[30] See Kristen Burgess, *Comment: Protective Custody: Will It Eradicate Fetal Abuse and Lead to the Perfect Womb?*, 35 HOUSTON L. REV. 227, 265-66 (1998).

[31] Roberts & Nuru-Jester, *supra* note 28; Ayman El-Mohandes et al., *Prenatal Care Reduces the Impact of Illicit Drug Use on Perinatal Outcomes*, 23 J. PERINATOLOGY 354 (2003).

branded as harmful to their own children.[32] These barriers to trust and communication are particularly damaging because access to early and comprehensive prenatal care is one of the most effective tools for reducing infant mortality, whether or not the pregnant woman is experiencing a substance use disorder.[33] Studies also show that prenatal care substantially reduces risks of low birthweight and prematurity among infants born to women experiencing a substance use disorder.[34] Open communication is also especially critical for women who do seek, or who would otherwise seek, treatment for a substance use disorder.[35] Women who have a substance use disorder also face higher rates of depression, increasing the importance of a strong "therapeutic alliance" between patient and health care provider for ensuring

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[32] See Stephen R. Kandall, Substance & Shadow: Women & Addiction in the United States 278-79 (1996); ACOG, *supra* note 5.

[33] *See, e.g.*, Southern Reg'l Project on Infant Mortality, *supra* note 28, at 6; Paul Moran et al., *Substance Misuse During Pregnancy: Its Effects and Treatment*, 20 FETAL MATERN. MED. REV. 1 (2009); Andrew Racine et al., *The Association Between Prenatal Care and Birth Weight Among Women Exposed to Cocaine in New York City*, 270 J. AM. MED. ASS'N 1581, 1585-86 (1993) (at least four prenatal care visits significantly reduces likelihood of low birth weight babies among women who use cocaine).

[34] El-Mohandes et al., *supra* note 31; *see also* Terplan et al., *supra* note 29 ("prenatal care has shown improvement in birth outcomes, even given continued substance abuse").

[35] See Rosemary H. Kelly et al., *The Detection & Treatment of Psychiatric Disorders and Substance Use Among Pregnant Women Cared for in Obstetrics*, 158 AM. J. PSYCH. 213 (2001).

successful completion of treatment.[36] By contrast, threats of criminal sanctions have been shown to increase women's stress and thereby increase their risk of relapse.[37]

The prosecution's pursuit of criminal legal sanctions for pregnant women in the name of protecting embryos and fetuses disregards the medical evidence and scientific research on this issue. Evidence confirms the negative health impacts of subjecting pregnant women to prosecution and incarceration, and even the fear of such treatment; prosecuting women for their substance use while pregnant undermines the prosecution's objectives.[38] Such prosecutions directly threaten pregnant women's physical and psychological wellbeing, and indirectly discourages women from obtaining prenatal care.

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[36] See Ctr. on Addiction & Substance Abuse, Substance Abuse & the American Woman 64 (1996); Carol E. Tracy & Harriet C. Williams, *Social Consequences of Substance Abuse Among Pregnant and Parenting Women*, 20 PEDIATRIC ANNALS 548 (1991).

[37] See Danielle E. Ramo & Sandra A. Brown, *Classes of Substance Abuse Relapse Situations: A Comparison of Adolescents and Adults*, 22 PSYCH. ADDICTIVE BEHAVIOR 372, 377 (2008) (adults are more likely to relapse while in a negative emotional state); *see also* Michael S. Gordon et al., *A Randomized Clinical Trial of Methadone Maintenance for Prisoners: Findings at 6 Months Post- Release*, 103 ADDICTION 1333 (2008).

[38] Laura J. Faherty et al., *Association of Punitive and Reporting State Polices Related to Substance Use in Pregnancy with Rates of Neonatal Abstinence Syndrome*, 2 JAMA NETWORK OPEN, e1914078 (2019); Daisy Goodman & Bonny Whalen, *It's Time to Support, Rather than Punish, Pregnant Women with Substance Use Disorder*, 2 JAMA NETWORK OPEN e1914135 (2019).

Extending the reach of criminal justice into matters of maternal, fetal, and newborn health care would also exacerbate the economic and racial disparities that are already pervasive in the health care, criminal justice, and child welfare systems. For example, obstetric and gynecologic outcomes and care are marked by racial and ethnic disparities, with people of color, and especially black women, experiencing higher rates of adverse maternal, fetal and newborn health outcomes, and less access to health care services.[39]

II. NO MEDICAL OR SCIENTIFIC EVIDENCE JUSTIFIES A PUNITIVE, NON-THERAPEUTIC APPROACH TO PREGNANT WOMEN WHO USE DRUGS

Preeminent health care organizations agree that drug use during pregnancy is a medical and public health issue that calls for non-punitive and family-centered responses and, if necessary, voluntary treatment. The consensus is that an appropriate response should ensure access to quality prenatal and primary medical care, evidence-based education on drug use during

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[39] See Am. Coll. of Obstetricians & Gynecologists, Comm. On Health Care for Underserved Women, *Comm. Opinion No. 649: Racial and Ethnic Disparities in Obstetrics and Gynecology* (Dec. 2015) (reaffirmed 2018), available at https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2015/12/racial-and-ethnic-disparities-in-obstetrics-and-gynecology; Elizabeth Howell & Jennifer Zetlin, *Quality of Care and Disparities in Obstetrics*, 44 OBSTETRICS & GYNECOLOGY CLINICS OF N. AM. 13 (2017).

pregnancy, comprehensive drug treatment programs that keep mothers and children together, and social service programs such as life skills training, mental health services, and strategies for managing relapse and stress.

The prosecution's suggestions that experiencing a pregnancy loss and having used certain drugs constitutes a criminal act misunderstands the nature of the risk it poses, ignores the wide variety of conduct that would be criminalized by regulating pregnant women and the outcome of their pregnancies under California's homicide statute, and would inhibit doctors from determining and providing the most effective and appropriate care from a range of medical and public health options.[40] *Amici* do not dispute that drug use during pregnancy presents risks for a developing fetus, particularly if unsupervised or not appropriately medically indicated. But standing alone, evidence of drug use provides no meaningful information about the nature or degree of risk, and does not indicate certain or even likely harm of any kind.[41]

Moreover, proof of a pregnant woman's drug use and possible addiction does not show her to be more morally weak, condemnable, or unconcerned with the development of her fetus

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[40] Am. Soc'y of Addiction Med., *supra* note 8.

[41] *Id.* ("It is important to recognize again that drug testing can provide evidence on the presence or absence of a compound in urine, but does not diagnose addiction or define an impairment in the individual's ability to carry out life functions at work or at home.")

than any pregnant woman who chooses to carry a pregnancy to term despite a disease, condition, or circumstance like diabetes, obesity, tobacco use, or a high-risk occupation. "[I]f the patient is viewed as being the problem or having a problem, as opposed to the substance being a problem," the risk cannot be most effectively addressed.[42]

A. Substance Use Disorders are Chronic Health Conditions

Substance use may be a medically complex matter with a wide variety of causes, risk factors, and prognoses. The once-popular misconception of substance use as a failure of moral grit or determination has long been abandoned by medical professionals, social scientists and most courts. It is medically unrealistic to assume that all women who use substances can or even should simply choose to immediately abstain the moment they become pregnant.

Due to the nature of addiction, even women who seek out treatment for substance use disorders during pregnancy, and who achieve abstinence, cannot do so totally and immediately. In one study of women receiving treatment for substance use during pregnancy, the average amount of time needed to achieve abstinence from cocaine and marijuana was approximately five

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[42] *Id.*

months.[43] Substance use disorders are chronic health conditions influenced by sociocultural, economic, biological, and psychological factors.[44] The American Society of Addiction Medicine, the nation's largest organization representing medical professionals who specialize in addiction prevention and treatment, defines addiction as "a treatable, chronic disease involving complex interactions among brain circuits, genetics, the environment, and an individual's life experiences."[45] The most recent Diagnostic and Statistical Manual of Mental Disorders (DSM-5) defines a substance use disorder as "a cluster of cognitive, behavioral, and physiological symptoms indicating that the individual continues using the substance despite significant substance-related problems."[46] A person with a substance use disorder may experience a physical need for the controlled

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[43] Ariadna Forray, *Perinatal Substance Use: A Prospective Evaluation of Abstinence and Relapse*, 150 DRUG & ALCOHOL DEPENDENCE 147 (2015).

[44] AWHONN, *supra* note 6.

[45] Am. Soc'y of Addiction Med., *Definition of Addiction* (Sep. 15, 2019), https://www.asam.org/resources/definition-of-addiction; U.S. Dep't of Health &Human Servs., Office of the Surgeon General, Facing Addiction in America: The Surgeon General's Report on Alcohol, Drugs, and Health (2016).

[46] Am. Psychiatric Ass'n, Diagnostic and Statistical Manual of Mental Disorders 481, 483 (5th ed. 2013) (hereinafter DSM-5). The DSM-5 separates substance abuse disorders by type of drug, such as opioid use disorder, cocaine use disorder, and alcohol use disorder.

substance, which results in cravings and withdrawal symptoms.[47] "People with addiction use substances or engage in behaviors that become compulsive and often continue despite harmful consequences."[48] Studies have increasingly found that, even when a person experiencing a substance use disorder pursues treatment, relapses are a normal part of recovery.[49]

Under the criminal justice theory of deterrence, punitive sanctions are used to lessen the likelihood of similar crimes in future. But as a matter of both law and medicine, people suffering from a substance use disorder "may be unable to abstain even for a limited period." *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 676 (1989). "[T]he inability to control drug use regardless of consequences is a key feature of substance and alcohol use disorders."[50] People grappling with addiction may "compulsively have urges to abuse and they are remarkably unencumbered by the memory of negative consequences of drug taking."[51] An instance of drug use by a

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[47] Harold W. Goforth et al., *Neurologic Aspects Of Drug Abuse*, 28 NEUROLOGIC CLINICS 199 (2010).

[48] Am. Soc'y of Addiction Med., *supra* note 45.

[49] Christian S. Hendershot et al., *Relapse Prevention for Addictive Behaviors*, 6 SUBSTANCE ABUSE TREATMENT, PREVENTION, AND POL'Y 2 (2011).

[50] AWHONN, *supra* note 6.

[51] George F. Koob & Michel Le Moal, *Drug Addiction, Dysregulation of Reward, and Allostasis*, 24 NEUROPSYCHOPHARMACOLOGY 97, 98 (2001).

pregnant woman therefore does not necessarily reflect a decision about how to treat her own body or that of her developing fetus but should instead be understood to reflect a symptom of a chronic health condition that can and should be managed as such.[52]

The physiological and psychological characteristics of substance use disorders do not cease to apply and transform into a matter of willpower just because a user becomes pregnant. For pregnant women who experience substance use disorders, as for all other pregnant women experiencing chronic disorders, negative outcomes for both mothers and children are most effectively avoided or diminished with medical and public health strategies.

B. Medical and Scientific Evidence Does Not Show that Substance Use During Pregnancy Causes Uniquely Certain or Severe Harms

A common perception, reflected for example in the myth of the "crack baby," is that prenatal exposure to any amount of a controlled substance necessarily causes negative health impacts in newborns, and that these health impacts are unusually certain, unusually severe, and distinct from harms associated with social and environmental factors or other actions taken by

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[52] Am. Soc'y of Addiction Med., *supra* note 45; U.S. Dep't of Health &Human Servs., *supra* note 45; World Health Org. et al., Substitution Maintenance Therapy in the Management of Opioid Dependence and HIV/AIDS Prevention 7 (2004).

pregnant women. This perception is false. Medical consensus does not identify a safe level of use of alcohol and other substances during pregnancy, but studies have failed to isolate the harms caused by prenatal drug exposure from the effects of exposure to other pregnancy risk factors, such as poverty and lack of access to prenatal care.[53] Scientific studies have failed to prove that *in utero* exposure to controlled substances—including

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[53] See, e.g., Deborah A. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure*, 285 J. AM. MED. ASS'N 1613 (2001) (finding "no convincing evidence" among children 6 and under "that prenatal cocaine exposure is associated with any developmental toxicity different in severity, scope, or kind from the sequelae of many other risk factors"); Gary D. Helmbrecht & Siva Thiagarajah, *Management of Addiction Disorders in Pregnancy*, 2 J. ADDICTION MED. 1 (2008); Ashley H. Schempf, *Illicit Drug Use and Neonatal Outcomes: A Critical Review*, 62 OBSTETRICAL & GYNECOLOGICAL SURVEY 749 (2007).

cocaine,[54] methamphetamine,[55] heroin and other opioids,[56] and marijuana[57]—is the clear cause of any severe or certain harms. Many pregnancy complications and adverse outcomes

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[54] *See, e.g.*, Henrietta S. Bada et al., *Impact of Prenatal Cocaine Exposure on Child Behavior Problems Through School Age*, 119 PEDIATRICS e328 (2007); Daniel S. Messinger et al., *The Maternal Lifestyle Study: Cognitive, Motor, and Behavioral Outcomes of Cocaine-Exposed Infants Through Three Years of Age*, 113 PEDIATRICS 1677 (2004) ("infant prenatal exposure to cocaine and to opiates was not associated with mental, motor, or behavioral deficits"); Mishka Terplan & Tricia Wright, *The Effects of Cocaine & Amphetamine Use During Pregnancy on the Newborn: Myth versus Reality*, 30 J. OF ADDICTION DISEASES 1, 1-5 (2010); Editorial Board, *Slandering the Unborn*, N.Y. TIMES (Dec. 28. 2018), https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html.

[55] A national expert panel concluded that "the data regarding illicit methamphetamine are insufficient to draw conclusions concerning developmental toxicity in humans." Ctr. for the Evaluation of Risks to Human Reproduction, *Report of the NTP-DERHR Expert Panel on the Reproductive & Developmental Toxicity of Amphetamine and Methamphetamine*, 74 BIRTH DEFECTS RESEARCH PART B DEVELOPMENTAL & REPRODUCTIVE TOXICOLOGY 471 (2005). *See also* Am. Coll. Obstetricians & Gynecologists, *Committee Opinion 479: Methamphetamine Abuse in Women of Reproductive Age*, 117 OBSTET. GYNECOL. 751 (2011); Terplan & Wright, *supra* note 54.

[56] Decades of research makes clear that exposure to opioids is not associated with birth defects. *See* Helmbrecht & Thiagarajah, *supra* note 53. Some newborns who are exposed opioids in utero experience a transitory and treatable set of symptoms at birth known as neonatal abstinence syndrome (NAS) that can be safely and effectively treated in the nursery setting. Substance Abuse & Mental Health Servs. Admin., Methadone Treatment for Pregnant Woman (2006).

experienced by women who have used substances during pregnancy may be attributable to risk factors other than the substance use, including social determinants and environmental factors such as poverty, lack of access to medical care, malnutrition, or chronic stress, each of which may cause fetal and maternal harm.[58] Drug use during pregnancy is a medical and public health concern requiring the attention of medical providers. Extraordinary law enforcement measures—which are supposed to "protect" an embryo or fetus at the pregnant woman's expense, but that risk harm to her pregnancy, future children, and family—cannot be justified on the unfounded belief that drug use causes universal and uniquely devastating harms to fetal development.

In a large majority of cases in which women have been prosecuted for being pregnant and using a criminalized substance, no adverse pregnancy outcome as a result of that drug

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[57] Marijuana use by pregnant women has not been shown to cause specific harm to the fetus or child. Science has failed to establish that in utero exposure to marijuana causes unique harms distinguishable from those caused by other uncontrollable factors. *See, e.g.*, Schempf, *supra* note 53; Am. Coll. Obstetricians & Gynecologists, *Committee Opinion 637: Marijuana Use During Pregnancy and Lactation*, 126 OBSTET. GYNECOL. 234 (2015).

[58] See e.g., Am. Pub. Health Ass'n, *Transforming Public Health Works: Targeting Causes of Health Disparities*, 46 THE NATION'S HEALTH 1 (2016) ("at least 50% of health outcomes are due to the social determinants . . ."); Marleen M. H. J. van Gelder et al., *Characteristics of Pregnant Illicit Drug Users And Associations Between Cannabis Use and Perinatal Outcome in A Population-Based Study*, 109 DRUG & ALCOHOL DEPENDENCE 243 (2010).

use was reported.[59] Among many of the remaining cases, including those involving stillbirths or other adverse outcomes, prosecutions have proceeded without any causal evidence that the woman's drug use or other criminalized conduct caused the harm. But higher courts have now recognized, after reviewing the relevant scientific research, that such prosecutions should not and cannot be sustained based on untested, and now disproven, assumptions about the harms of drug use during pregnancy.

For example, the Supreme Court of South Carolina unanimously overturned the conviction of a woman charged with causing a stillbirth based on evidence of cocaine use. *McKnight v. State*, 661 S.E.2d 354 (S.C. 2008). The court held that the woman's counsel provided ineffective assistance of counsel when she failed to educate the jury about "recent studies showing that cocaine is no more harmful to a fetus than nicotine use, poor nutrition, lack of prenatal care, or other conditions commonly associated with the urban poor." *Id*. at 358 n.2. The conviction could not stand given the "reasonable probability" that the jury relied on "apparently outdated scientific studies" suggesting that cocaine use caused the death of her fetus, which the defendant's counsel had failed to rebut. *Id.* at 360-61. There is no justification for imposing criminal measures so destructive that they harm not only the women they target but the fetuses they purport to protect.

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[59] Lynn M. Paltrow & Jeanne 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. OF HEALTH POLITICS, POL'Y, & L. 299, 318 (2013).

III. **CONCLUSION**

Even assuming all of the conduct alleged by the prosecution to be true, it cannot be the basis for a conviction under the plain reading of California's homicide law. Ms. Perez entered a plea deal without trial counsel informing her that she could not legally be convicted of homicide under the circumstances, and appellate counsel failed to raise this issue on appeal. California's legislature and courts have never expanded the statute in the manner applied by the prosecution, and the medical and scientific communities stand in direct opposition to such an expansion. For the foregoing reasons, *amici curiae* respectfully request this Court grant the Petitioner's request for relief.

Dated: October 21, 2020 Respectfully submitted,

/s/ Kellen Russoniello
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CERTIFICATE OF WORD COUNT
CALIFORNIA RULE OF COURT, RULE 8.204(C)(1)

I hereby certify, pursuant to rule 8.204(c)(1) of the California Rules of Court, that relying on the word count of the computer program used to prepare this Amicus Brief, Microsoft Word, counsel certifies that the text is proportionally spaced, and contains 9.372 words, including footnotes but excluding cover information, Certificate of Interested Entities or Persons, tables, signature blocks, and this certificate.

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DECLARATION OF SERVICE

I, Kellen Russoniello, declare that I am a citizen of the United States and over eighteen (18) years of age, employed in the County of Los Angeles, and not a party to the within action; my business address is 533 Glendale Blvd., Suite 101, Los Angeles, CA 90026.

On October 21, 2020, I served the Proposed *Amicus Curiae* Brief by mail to the addresses below:

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APPENDIX A: STATEMENTS OF INTEREST

Amicus curiae **American College of Obstetricians and Gynecologists (ACOG)** is a non-profit educational and professional membership organization dedicated to the improvement of women's health. Founded in 1951, it has more than 58,000 members, representing more than 90 percent of board-certified ob-gyns in the United States. ACOG's objectives are to foster improvements in all aspects of women's health care, to establish and maintain the highest possible standards for education, to publish evidence-based practice guidelines, to promote high ethical standards, and to encourage contributions to medical and scientific literature.

Amicus Curiae **The Association for Multidisciplinary Education and Research in Substance use and Addiction (AMERSA)**, founded in 1976, is a national non-profit organization composed of academic addiction professionals from numerous disciplines, including physicians, nurses, pharmacists, social workers, psychologists, dentists, and public health experts. AMERSA's mission is to improve health and well-being through interdisciplinary leadership in substance use education, research, clinical care and policy. AMERSA is particularly concerned about the exponential harm caused by criminal justice actions pursued against women who use drugs during pregnancy and is committed to supporting and advocating for the rights and protections of pregnant persons and their families.

Amicus Curiae **The California Nurse-Midwives Association** is the California affiliate of the American College of Nurse-Midwives. There are approximately 1000 Certified Nurse-Midwives (CNMs) in California, acting as the birth attendant for 50,000 births per year in the state. The kind of care nurse-midwives provide is rooted in a "trauma informed" approach. The association believes that efforts to penalize pregnant women and individuals or implementing negative consequences for substance use during pregnancy will prevent patients from seeking prenatal care and other preventive health care services, resulting in poorer outcomes and undercutting efforts by prenatal and primary care providers in California to improve outcomes for mothers and babies exposed to substances.

Amicus Curiae **The California Women's Law Center (CWLC)** is a statewide, non-profit law and policy center dedicated to breaking down barriers and advancing the potential of women and girls through transformative litigation, policy advocacy and education. CWLC's issue priorities include gender discrimination, economic justice, violence against women and women's health. For 30 years, CWLC has placed a particular emphasis on fighting for reproductive health, rights, and justice by ensuring pregnant women have access to the health care opportunities they need, free of discrimination or penalty.

Amicus Curiae **Citizens for Choice** is a nonprofit that was formed to promote and defend reproductive rights. Citizens for Choice is opposed to the very idea of charging a pregnant person with a crime based on the stillbirth of her newborn and believes a

person's status as a pregnant person should not be used to impose criminal responsibility over the outcome of her pregnancy.

Amicus Curiae **Drug Policy Alliance (DPA)** is a 501(c)(3) nonprofit organization that leads the nation in promoting drug policies that are grounded in science, compassion, health, and human rights. Established in 1994, DPA is a non-partisan organization with tens of thousands of members nationwide. DPA is dedicated to advancing policies that reduce the harms of drug use and drug prohibition, and seeking solutions that promote public health and public safety. DPA is actively involved in the legislative process across the country and strives to roll back the excesses of the drug war, block new, harmful initiatives, and promote sensible drug policy reforms. The organization also regularly files legal briefs as amicus curiae, including in other cases pertaining to pregnant women who use drugs.

Amicus Curiae **If/When/How: Lawyering for Reproductive Justice** is a legal organization that, for more than a decade has built a powerful network of thousands of lawyers law students and former reproductive justice fellows who work for a future when all people can self-determine their reproductive lives free from discrimination, coercion, or violence. If/When/How transforms the law and policy landscape through advocacy, legal support, and organizing so all people have the power to determine if when and how to define, create, and sustain families with dignity and to actualize sexual and reproductive wellbeing on their own terms. This vision of reproductive justice includes a right to access to comprehensive, voluntary, and non-punitive

health care during pregnancy, and to be free from stigma and criminal penalties based on the circumstances or outcome of a pregnancy.

Amicus Curiae **Legal Action Center (LAC)** is a national public interest law firm, with offices in New York and Washington, D.C., that performs legal and policy work to fight discrimination against and promote the privacy rights of individuals with criminal records, substance use disorders, and/or HIV/AIDS. LAC has done a tremendous amount of policy advocacy work to expand treatment opportunities for people with substance use disorders and to oppose legislation and other measures that employ a punitive approach, rather than a public health approach, to addiction. LAC has also represented individuals and substance use disorder treatment programs who face discrimination based on inaccurate and outmoded stereotypes about the disease of addiction.

Amicus Curiae **Movement for Family Power** works to end the Foster System's policing and punishment of families and to create a world where the dignity and integrity of all families is valued and supported. Our Areas of Work include: Building out a loving, healthy community with and amongst people working to contract the Foster system; Raising social consciousness around the harms of the Foster System and forced family separation; and Dismantling systems that surveil, control, and destroy families.

Amicus Curiae **NARAL Pro-Choice California** is the California chapter of NARAL Pro-Choice America, an organization whose

network of state affiliates and chapters are dedicated to protecting and expanding reproductive freedom for all people. NARAL Pro-Choice California represents more than 265,000 members statewide. For more than 50 years, NARAL has worked to guarantee that every person has the right to make personal decisions regarding the full range of reproductive choices, including preventing unintended pregnancy, bearing healthy children, and choosing legal abortion. Ensuring that pregnant people can make these decisions free from criminalization is a critical piece of its mission.

Amicus curiae **The National Women's Health Network (NWHN)** was founded in Washington, DC, in 1975 to improve the health of all women by developing and promoting a critical analysis of women's health issues. NWHN works to defend women's sexual and reproductive health and autonomy against threats that seek to undermine women's ability to make the best decisions regarding their own health.

Amicus Curiae **Our Bodies Ourselves (OBOS)** provides clear, truthful information about health, sexuality and reproduction from a feminist and consumer perspective. OBOS vigorously advocates for women's health by challenging the institutions and systems that block women from full control over our bodies and devalue our lives. OBOS is noted for its long-standing commitment to serve only in the public interest and its bridge-building capacity. OBOS is dedicated to the autonomy and well-being of all women.