

# William & Mary Journal of Race, Gender, and Social Justice

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Volume 21 (2014-2015)  
Issue 3 *William & Mary Journal of Women and  
the Law*

Article 4

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May 2015

## “But I’m Brain-Dead and Pregnant”: Advance Directive Pregnancy Exclusions and End-of-Life Wishes

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### Repository Citation

Wendy Adele Humphrey, *“But I’m Brain-Dead and Pregnant”: Advance Directive Pregnancy Exclusions and End-of-Life Wishes*, 21 Wm. & Mary J. Women & L. 669 (2015), <https://scholarship.law.wm.edu/wmjowl/vol21/iss3/4>

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“BUT I’M BRAIN-DEAD AND PREGNANT”:  
ADVANCE DIRECTIVE PREGNANCY EXCLUSIONS  
AND END-OF-LIFE WISHES

WENDY ADELE HUMPHREY\*

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Marlise Muñoz was approximately fourteen weeks pregnant when she suffered a pulmonary embolism, and two days later doctors declared her brain-dead. Knowing Marlise’s end-of-life wishes, her husband, Erick Muñoz, asked her doctors to withdraw or withhold any “life-sustaining” medical treatment from his brain-dead wife. The hospital refused, and it relied on a Texas statute that automatically invalidates a woman’s advance directive in the event she is pregnant. Ultimately, the trial court held that the Texas statute does not apply to a woman who is brain-dead and pregnant.

This tragic situation warrants action to ensure that a woman’s end-of-life wishes are honored by family members, health care providers, and the state. Louisiana has already taken action. In response

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to the Muñoz case, in June 2014 the Louisiana legislature amended the state's advance directive statute. Yet, based on the plain language of the statutes in Texas and Louisiana, the pregnancy exclusions do not apply to a situation in which a woman is brain-dead and pregnant, and this holds true for other state statutory pregnancy exclusions. Even if the pregnancy exclusions do apply to a pregnant woman who is brain-dead, they arguably violate a woman's constitutional rights, including the right to terminate a pregnancy and the right to refuse medical treatment.

Therefore, state legislatures should propose a statute or amend the language in current pregnancy exclusions to clarify the applicability to a woman who is brain-dead and pregnant. State legislatures should also amend any statutory forms that address a woman's end-of-life wishes, and both attorneys and health care providers should be proactive and discuss the issue with their respective clients and patients.

#### INTRODUCTION

Erick Muñoz and Marlise Muñoz were married in 2013 and worked as paramedics in Fort Worth, Texas.<sup>1</sup> As knowledgeable health care providers, they frequently discussed their end-of-life wishes with each other and also expressed their desires to family members and friends: they did not want to be on life support under any circumstance.<sup>2</sup> Unfortunately, on November 26, 2013, Erick Muñoz awoke to find his wife unconscious on their kitchen floor.<sup>3</sup> At the time, his wife was approximately 14 weeks pregnant with their second child.<sup>4</sup> Despite attempts to save her life after she suffered a

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1. Plaintiff's First Amended Original Petition for Declaratory Judgment and Application for Unopposed Expedited Relief at 3, *Muñoz v. John Peter Smith Hosp.*, No. 096-270080-14 (96th Judicial Dist. Court, Tarrant Cnty., Tex. Jan. 23, 2014), 2014 WL 285057 [hereinafter Plaintiff's Petition].

2. Marlise Muñoz did not leave any written advance directive regarding her end-of-life wishes, but she discussed her wishes many times with her husband and family. Catherine E. Shoichet, *Husband of Brain-Dead Texas Woman: I Asked God to Take Me Instead*, CNN (Jan. 30, 2014, 6:55 PM), <http://www.cnn.com/2014/01/29/health/texas-pregnant-brain-dead-woman/index.html>, archived at <http://perma.cc/SC6Y-XQ6D>.

3. Plaintiff's Petition, *supra* note 1, at 3. It is unclear how long Marlise Muñoz went without oxygen, although she is thought to have been unconscious for about an hour before receiving any medical care. Jacquielynn Floyd, *Marlise Muñoz Case Was About Bureaucracy, Politics—and Cruelty*, DALLAS MORNING NEWS (Jan. 27, 2014, 1:57 PM), <http://www.dallasnews.com/news/columnists/jacquielynn-floyd/20140127-marlise-munoz-case-was-about-bureaucracy-politics---and-cruelty.ece>, archived at <http://perma.cc/37A9-5WE5>; see also Bill Chappell, *Judge Tells Hospital To Take Pregnant Woman Off Life Support*, NPR (Jan. 24, 2014, 5:47 PM), <http://www.npr.org/blogs/thetwo-way/2014/01/24/265785603/judge-tells-hospital-to-take-pregnant-woman-off-life-support>, archived at <http://perma.cc/9KBX-78GM>.

4. Plaintiff's Petition, *supra* note 1, at 3.

suspected pulmonary embolism,<sup>5</sup> doctors declared Marlise Muñoz brain-dead<sup>6</sup> on November 28, 2013.<sup>7</sup>

Marlise Muñoz’s husband and parents expressed her wish not to remain on life support or to receive any life-sustaining medical treatment.<sup>8</sup> The hospital, however, refused to remove her from life support, citing Section 166.049 of the Texas Health and Safety Code as the basis for its refusal.<sup>9</sup> This refusal to follow Marlise Muñoz’s end-of-life wishes prompted her husband to file suit against the hospital to force the doctors to remove her from life support.<sup>10</sup>

In *Muñoz v. John Peter Smith Hospital*, Erick Muñoz opposed the doctors performing any further medical treatment on his wife’s body.<sup>11</sup>

5. Upon her arrival at the John Peter Smith Hospital in Fort Worth, doctors put Marlise Muñoz on ICU technologies, including a ventilator. Arthur L. Caplan & Thaddeus M. Pope, *Pregnant and Dead in Texas: A Bad Law, Badly Interpreted*, L.A. TIMES (Jan. 16, 2014), <http://articles.latimes.com/2014/jan/16/opinion/la-oe-caplan-pope-texas-pregnancy-life-support-20140116-story.html>, archived at <http://perma.cc/W42B-YUZX>.

6. Jeffrey L. Ecker, *Death in Pregnancy—An American Tragedy*, 370 NEW ENG. J. MED. 889, 889–91 (2014), available at <http://www.nejm.org/doi/full/10.1056/NEJM.p1400969>, archived at <http://perma.cc/LE5C-KJ9G>; see TEX. HEALTH & SAFETY CODE ANN. § 671.001 (West 2013) (setting forth the standard used in determining death). Moreover, under the Uniform Determination of Death Act, an individual is dead when he or she “has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem.” UNIF. DETERMINATION OF DEATH ACT § 1, 12A (1980); see also Jacque Wilson & Jen Christensen, *Why Brain Dead Means Really Dead*, CNN (Jan. 7, 2014, 2:03 AM), <http://www.cnn.com/2014/01/06/health/brain-dead-basics/>, archived at <http://perma.cc/FJX5-D5AB> (explaining that the American Academy of Neurology updated its brain death guidelines for adults in 2010 and “‘brain death’ means both the upper and lower part of the brain are not functioning”).

7. Plaintiff’s Petition, *supra* note 1, at 3 (explaining that medical records confirm that doctors declared Marlise Muñoz “brain dead since approximately November 28, 2013”).

8. *Id.* at 3–4.

9. *Id.* at 4; see also TEX. HEALTH & SAFETY CODE ANN. § 166.049 (West 2013) (“A person may not withdraw or withhold life-sustaining treatment under this [advance directive] subchapter from a pregnant patient.”).

10. See Plaintiff’s Petition, *supra* note 1, at 1–7. In a similar case in Texas in July 1999, Tammy Martin was pregnant and in a coma when she was admitted to a hospital in the Houston area. Emma Murphy Sisti, *Die Free or Live: The Constitutionality of New Hampshire’s Living Will Pregnancy Exception*, 30 VT. L. REV. 143, 143 (2005). Her family members wanted the doctors to discontinue the life-sustaining treatment, but the father of the fetus, who claimed to be Tammy Martin’s common-law husband, wanted to have the life-sustaining treatment continued indefinitely. *Id.* Initially, the court ordered the hospital to continue life-sustaining treatment for Tammy Martin. *Id.* A few weeks later, however, the court reversed its order after health care providers declared Tammy Martin brain-dead. *Id.*

11. Erick Muñoz wanted the court to issue an order requiring the hospital: (1) to immediately cease conducting any further medical procedures on his wife’s body, (2) to remove her from any respirators, ventilators, or other “life support,” and (3) to release her body to her family. Plaintiff’s Petition, *supra* note 1, at 3–4; see also Caplan & Pope, *supra* note 5 (“The only question in Fort Worth is who knows best what to do when a body is being used as an incubator for a nonviable and possibly damaged fetus: a woman and her family or the Legislature of Texas?”).

His lawsuit against the hospital included three basic arguments. First, he argued that the hospital misconstrued Section 166.049 of the Texas Health and Safety Code, which on its face disallows a doctor from withdrawing or withholding life-sustaining treatment from a pregnant patient.<sup>12</sup> Second, in the alternative, he argued that Section 166.049 constituted a violation of his wife's right to privacy pursuant to the Fourteenth Amendment to the United States Constitution and article I, section 3 of the Texas Constitution.<sup>13</sup> And third, in the further alternative, he asserted that the hospital's interpretation of Section 166.049 constituted a violation of his wife's right to equal protection of the law pursuant to the Fourteenth Amendment to the United States Constitution and the Equal Protection Clause of the Texas Constitution.<sup>14</sup>

The hospital, on the other hand, maintained that the Texas legislature has expressed a strong interest in protecting the life of an unborn child.<sup>15</sup> More specifically, the hospital argued that "it is unlikely the Legislature contemplated only the welfare of the mother" when it enacted the statute prohibiting the withholding or withdrawal of life-sustaining medical treatment for pregnant patients.<sup>16</sup> In addition, the hospital contended that the pregnancy exclusion in Section 166.049 "is constitutional because the right of privacy is not

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12. Plaintiff's Petition, *supra* note 1, at 5; *see also* TEX. HEALTH & SAFETY CODE ANN. § 166.049 (West 2013).

13. Plaintiff's Petition, *supra* note 1, at 5.

14. *Id.* Under the Fourteenth Amendment, no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1; *see also* TEX. CONST. art. I, § 3. The basic argument is that Section 166.049 violates the Equal Protection Clause because it treats pregnant women differently from everyone else. Thus, because Marliese Muñoz was pregnant at the time her doctors declared her brain-dead, her health care providers treated her differently than a brain-dead woman who is not pregnant. *See* Timothy J. Burch, *Incubator or Individual?: The Legal and Policy Deficiencies of Pregnancy Clauses in Living Will and Advance Health Care Directive Statutes*, 54 MD. L. REV. 528, 551–52 (1995); Katherine A. Taylor, *Compelling Pregnancy at Death's Door*, 7 COLUM. J. GENDER & L. 85, 145–46 (1997).

15. For example, the Texas Penal Code defines an "individual" as a "human being who is alive, including an unborn child at every stage of gestation from fertilization until birth." TEX. PENAL CODE ANN. § 1.07(a)(26) (West 2013). This definition would potentially allow a person to be charged with the criminal offense of murder if an unborn child is killed. *Id.* §§ 19.02, 19.03. Of course, this aspect of the Texas Penal Code is constitutionally suspect.

16. Manny Fernandez, *Judge Orders Hospital to Remove Pregnant Woman From Life Support*, N.Y. TIMES (Jan. 24, 2014), <http://www.nytimes.com/2014/01/25/us/judge-orders-hospital-to-remove-life-support-from-pregnant-woman.html>, archived at <http://perma.cc/DRT8-A67B> (reporting that the hospital argued it was reasonable to infer that the statute was also meant to protect the unborn child); *see also* Defendant's Brief in Response to Plaintiff's Motion to Compel at 3, *Muñoz v. John Peter Smith Hosp.*, No. 096-270080-14 (96th Judicial Dist. Court, Tarrant Cnty., Tex. Jan. 23, 2014) ("[I]f the legislature intended for life sustaining treatment to be withdrawn, allowing the unborn child to die, it could have expressed this intent by adding a second sentence to section 166.049 to the effect that, upon the mother's death, the healthcare providers must withdraw life sustaining treatment and let the unborn child die.").

absolute and must be balanced with the state's interest to protect the life of an unborn child."<sup>17</sup>

Ultimately, the trial court held that Section 166.049 of the Texas Health and Safety Code does not apply when a health care provider has declared a pregnant patient to be brain-dead<sup>18</sup> and thus ordered the hospital to remove Marlise Muñoz's body from all life-sustaining equipment.<sup>19</sup> Pursuant to the trial court's order, the doctors withdrew Marlise Muñoz's life-sustaining equipment on January 26, 2014,<sup>20</sup> when the fetus was twenty-two weeks old.<sup>21</sup>

The situation the Muñoz family faced is not the first of its kind,<sup>22</sup>

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17. Max B. Baker & Elizabeth Campbell, *Texas Law Didn't Anticipate Muñoz Case, Drafters Say*, STAR-TELEGRAM (Jan. 23, 2014, 10:54 PM), <http://www.star-telegram.com/news/local/community/fort-worth/article3843836.html>, archived at <http://perma.cc/MG5H-PFFV>.

18. Judgment, *Muñoz v. John Peter Smith Hosp.*, No. 096-270080-14 (96th Judicial Dist. Court, Tarrant Cnty., Tex. Jan. 24, 2014) [hereinafter Court's Order]. In making its decision, the trial court looked to the statutory death standards as set forth in Section 671.001 of the Texas Health and Safety Code. *Id.* And, because the court held that Section 166.049 did not apply to Marlise Muñoz's situation, the court did not rule on the constitutionality of the state law. *Id.*

19. *Id.* By the time of the court hearing in late January 2014, the Muñoz family disclosed that ultrasound exams "had revealed significant fetal abnormalities." Ecker, *supra* note 6, at 890. In addition, during the pendency of the case, the hospital also acknowledged that Marlise Muñoz's fetus was not viable. See Chappell, *supra* note 3.

20. Melissa Repko, *Fort Worth Hospital Withdraws Life Support for Pregnant, Brain-Dead Woman*, DALLAS MORNING NEWS (Jan. 26, 2014 11:37 PM), <http://www.dallasnews.com/news/metro/20140126-fort-worth-hospital-withdraws-life-support-for-pregnant-brain-dead-woman.ece>, archived at <http://perma.cc/J4TD-F83L>. Marlise Muñoz's mother, Lynne Machado, explained that before the doctors withdrew the life-sustaining equipment, her daughter's body had begun to visibly deteriorate and decay; it was an "empty shell of what had been her beloved daughter." *Husband of Brain Dead Woman Who Sued to Have Pregnant Wife's Life Support Turned Off May be Forced to Pay For Her Hospital Stay*, DAILYMAIL (Feb. 1, 2014), <http://www.dailymail.co.uk/news/article-2550352/Marlise-Munoz-case-Husband-brain-dead-woman-sued-pregnant-wifes-life-support-turned-forced-pay-hospital-stay.html>, archived at <http://perma.cc/C9WG-YUK7>.

21. Repko, *supra* note 20. Moreover, since the trial court's ruling, Marlise Muñoz's family has submitted a notice for intent to sue John Peter Smith Hospital. Jobin Panicker, *Family of Marlise Muñoz Fights on Against Law, Hospital*, KENS5 (Oct. 31, 2014, 6:25 AM), <http://www.kens5.com/story/news/2014/10/31/family-of-marlise-muoz-fights-on-against-law-hospital/18231221>, archived at <http://perma.cc/65GK-WWT2>.

22. Medical literature between 1982 and 2010 reveals thirty cases of brain-dead pregnant women who received continued life support in order to facilitate development of the fetus. Majid Esmailzadeh, et al., *One Life Ends, Another Begins: Management of a Brain-Dead Pregnant Mother—A Systematic Review*, BMC MEDICINE 8 (2010), available at <http://www.biomedcentral.com/content/pdf/1741-7015-8-74.pdf>, archived at <http://perma.cc/7P5W-4CZ9>. Of the reported cases, only twelve viable infants survived the neonatal period. *Id.* The mean gestational age at the time of the mother's brain death was twenty-two weeks, and the mean gestational age at delivery was 29.5 weeks. *Id.* Since 2010, other cases involving a brain-dead pregnant woman have occurred. See Abuhasna Said, et al., *A Brain-Dead Pregnant Woman With Prolonged Somatic Support and Successful Neonatal Outcome: A Grand Rounds Case With a Detailed Review of Literature and Ethical Considerations*, 3 INT'L J. OF CRITICAL ILLNESS AND INJURY SCI. 220, 220 (2013) (reporting a case where somatic support for 110 days lead to the delivery of a viable child

and considering the advances in medical technology,<sup>23</sup> it leads to a discussion of the treatment of a pregnant woman who has been declared brain-dead. So the legal question remains: should a pregnant woman who is legally and medically dead be forced to be kept on life support for the sake of her non-viable fetus?<sup>24</sup> Arguably, the answer is no. In reaching this answer, Part I of this Article examines the current state legislation that governs withdrawing or withholding life-sustaining medical treatment from a pregnant woman, with a focus on both the Texas pregnancy exclusion that affected the *Muñoz* case and on a recent 2014 statutory amendment in Louisiana, neither of which adequately address the situation when a woman is brain-dead and

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when the mother was declared brain-dead at sixteen weeks gestation). In 2013 in Hungary, a woman with a fifteen-week-old fetus was declared brain-dead, and three months later a baby boy at twenty-seven weeks old was born to the brain-dead mother. *Baby Born to Brain-Dead Mother 3 Months After Woman's Declared Death*, HUFFINGTON POST (Nov. 14, 2013, 1:39 PM), [http://www.huffingtonpost.com/2013/11/14/baby-born-brain-dead-mother-3-months\\_n\\_4274609.html](http://www.huffingtonpost.com/2013/11/14/baby-born-brain-dead-mother-3-months_n_4274609.html), archived at <http://perma.cc/F9PU-9MVK>. In 2014 in Canada, a woman was declared brain dead and was twenty-two weeks pregnant at the time. *Brain-Dead Canadian Woman Taken off Life Support After Giving Birth to Baby Boy*, CBSNEWS (Feb. 11, 2014, 6:34 PM), <http://www.cbsnews.com/news/brain-dead-canadian-woman-taken-off-life-support-after-giving-birth/>, archived at <http://perma.cc/CR39-4D3J>. After the woman remained on life support for approximately six weeks, a baby boy was delivered and has survived. Paula Newton, *Brain-Dead Canadian Woman Dies After Son's Birth*, CNN (Feb. 12, 2014, 7:32 AM), <http://www.cnn.com/2014/02/11/health/canada-brain-dead-pregnant-woman/>, archived at <http://perma.cc/UWK6-FLQF>. And most recently, the High Court in Ireland ruled that a brain-dead woman was 18-weeks pregnant should be taken off life support. Henry McDonald, *Brain-Dead Woman's Life Support Can Be Switched Off, Irish Court Rules*, THE GUARDIAN (Dec. 26, 2014, 8:34 PM), <http://www.theguardian.com/world/2014/dec/26/ireland-court-rules-brain-dead-pregnant-womans-life-support-switched-off>, archived at <http://perma.cc/F999-LGKR>; see also Tim Madigan, *Few Precedents Exist in Case of Brain-Dead Pregnant Woman*, STAR-TELEGRAM (Jan. 23, 2014, 6:06 PM), <http://www.star-telegram.com/mobile/m-local/article3843807.html>, archived at <http://perma.cc/GRU3-475M>.

23. With advances in medical technology, another consideration is the expense for maintaining a woman's body in order to deliver a fetus. In the *Muñoz* case, the hospital bill for continuing to carry the fetus and for post-birth hospital care could have totaled anywhere from \$439,500 to \$984,500. Sarah Wickline, *A Brain-Dead Mother, a Million-Dollar Baby*, MEDPAGE TODAY (Jan. 10, 2014), <http://www.medpagetoday.com/OBGYN/Pregnancy/43736>, archived at <http://perma.cc/56XA-FW4Y>. In this regard, "[i]nsurance coverage for a woman that has been declared brain dead is a gray area." *Id.*; see also Robert Wilonsky, *John Peter Smith Says Hospital Still Trying to Determine Who Will Pay for Brain-Dead Woman's 62-Day Stay*, DALLAS MORNING NEWS (March 14, 2014, 12:42 PM), <http://thescoopblog.dallasnews.com/2014/03/john-peter-smith-says-hospital-still-trying-to-determine-who-will-pay-for-brain-dead-womans-62-day-stay.html>, archived at <http://perma.cc/W8EP-SDWE>.

24. Situations in which a woman who is on life support can communicate her desire for the life support to be withdrawn and situations in which a pregnant woman with an advance directive is in a terminal condition or in a comatose or vegetative state are both beyond the scope of this Article. This Article addresses only the situation in which a woman is brain-dead and pregnant with a non-viable fetus. Although this situation may be rare, due to the *Muñoz* case state legislatures have started amending their advance directive statutes to address the situation. See *infra* Part I.B.

pregnant.<sup>25</sup> In the event a statutory pregnancy exclusion applies to a woman who is brain-dead and pregnant, Part II addresses a woman's constitutional rights that are relevant to this issue, including a woman's right to abortion and a woman's right to refuse life-sustaining treatment.<sup>26</sup> Finally, Part III recommends changes to the state statutory schemes to expressly address a pregnant woman who has been declared brain-dead before her fetus is viable<sup>27</sup> and also proposes language that should be included in a woman's end-of-life decision-making documents. By making these necessary changes, health care providers will be able to honor a woman's end-of-life wishes in the unfortunate event that she is brain-dead and pregnant.

### I. STATE LEGISLATION GOVERNING LIFE-SUSTAINING MEDICAL TREATMENT FOR PREGNANT PATIENTS

In general, a medical advance directive<sup>28</sup> allows a competent person to express his or her wishes concerning medical treatments in the event he or she can no longer communicate those wishes at the end of life,<sup>29</sup> and all fifty states and the District of Columbia have

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25. See *supra* note 14; see also *infra* notes 66–75.

26. A woman's equal protection rights are also implicated. See *supra* text accompanying note 14.

27. Viability occurs around the twenty-fifth week of pregnancy. *Roe v. Wade*, 410 U.S. 113, 160 (1973); see also *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 428 (1983) (quoting *Roe*, 410 U.S. at 163) (defining "viability" as the point in which the fetus has the capability of meaningful life outside the mother's uterus); Mary Mahowald, *Beyond Abortion: Refusal Caesarean Section*, 3 *BIOETHICS* 106, 110 (1989) (defining viability as the "fetus's ability to survive after birth with help from neonatal intensive care"). But see *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 860 (1992) (explaining that a fetus might be viable at twenty-three weeks).

28. Because the terminology used in state statutes varies from state to state, in this Article I use the phrase "advance directive" to globally refer to any end-of-life document that expresses a person's wishes and desires in regard to medical treatment, e.g., a living will, a medical power of attorney, and a Do Not Resuscitate order. Further, "[w]hile advance directives typically apply to the living yet incompetent, they are arguably triggered by brain death as well" because the patient, while competent, expressed his or her desires as to what would happen when he or she can no longer communicate those desires. Alexis Gregorian, *Post-Mortem Pregnancy: A Proposed Methodology for the Resolution of Conflicts over Whether a Brain Dead Pregnant Woman Should Be Maintained on Life-Sustaining Treatment*, 19 *ANNALS HEALTH L.* 401, 412 (2010), available at <http://lawecommons.luc.edu/annals/vol19/iss2/6>, archived at <http://perma.cc/UP4W-PHN7>; see also Janice MacAvoy-Snitzer, Note, *Pregnancy Clauses in Living Will Statutes*, 87 *COLUM. L. REV.* 1280, 1284 (1987). In fact, although Marlise Muñoz's death differs from the typical situation in which an advance directive is operative, i.e., when she did not have a written advance directive and when her death was impending, the hospital still applied the pregnancy exclusion in Section 166.049 of the Texas Health and Safety Code.

29. MacAvoy-Snitzer, *supra* note 28, at 1280 ("Living will statutes provide legislatively defined mechanisms for exercising the constitutional right to bodily integrity, which encompasses the right of competent individuals to designate the course of their medical

statutes that govern advance directives.<sup>30</sup> Many states, however, have included a pregnancy clause, or pregnancy exclusion, to their advance directive statutes to disallow the application of a woman's advance directive when she is pregnant.<sup>31</sup> In this regard, the Center for Women Policy Studies categorizes state statutes addressing pregnancy in this situation into four major categories.<sup>32</sup> This Article will consider the following five categories:

1. The pregnancy exclusion automatically invalidates a woman's advance directive, regardless of the stage of her pregnancy;<sup>33</sup>

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treatment.”) (citing *In re Quinlan*, 355 A.2d 647, 662–64 (N.J. 1976), *cert. denied*, 429 U.S. 922 (1976)).

30. In 1976, California became the first state to enact a living will statute. See Bretton J. Horttor, *A Survey of Living Will and Advanced Health Care Directives*, 74 N.D. L. REV. 233, 233–40 (1998) (surveying state advance directives). The laws governing advance directives, however, vary from state to state, e.g., witness and notary requirements, and the effect of divorce. *Id.* Accordingly, a woman should confirm that her advance directive executed in one state will be honored in another state.

31. According to Katherine A. Taylor, a lawyer and bioethicist at Drexel University, these restrictive provisions helped “ease the qualms of the Roman Catholic church and others” about advance directives. Manny Fernandez & Erik Eckholm, *Pregnant, and Forced to Stay on Life Support*, N.Y. TIMES (Jan. 7, 2014), <http://www.nytimes.com/2014/01/08/us/pregnant-and-forced-to-stay-on-life-support.html>, archived at <http://perma.cc/776Q-FU2L>; Burch, *supra* note 14, at 537 (“[T]he majority of states . . . give a woman fewer constitutional and common-law rights if she is pregnant and incompetent than if she were either (a) competent and pregnant, (b) competent and chose to have an abortion before fetal viability, or (c) incompetent and with a prior directive.”).

32. MEGAN GREENE & LESLIE R. WOLFE, PREGNANCY EXCLUSIONS IN STATE LIVING WILL AND MEDICAL PROXY STATUTES (Aug. 2012), available at [http://www.centerwomenpolicy.org/programs%5Chealth/statepolicy/documents/REPRO\\_PregnancyExclusionsinStateLivingWillandMedicalProxyStatutesMeganGreeneandLeslieR.Wolfe.pdf](http://www.centerwomenpolicy.org/programs%5Chealth/statepolicy/documents/REPRO_PregnancyExclusionsinStateLivingWillandMedicalProxyStatutesMeganGreeneandLeslieR.Wolfe.pdf), archived at <http://perma.cc/384Q-74K3>.

33. ALA. CODE § 22-8A-4(e) (2014) (“The advance directive for health care of a declarant who is known by the attending physician to be pregnant shall have no effect during the course of the declarant’s pregnancy.”); CONN. GEN. STAT. ANN. § 19a-574 (West 2014) (“nonapplicability (sic) to pregnant patient”); IDAHO CODE ANN. § 39-4510 (West 2014) (statutory form states that “[i]f I have been diagnosed as pregnant, this Directive shall have no force during the course of my pregnancy”); IND. CODE ANN. § 16-36-4-8(d) (West 2014) (“The living will declaration of a person diagnosed as pregnant by the attending physician has no effect during the person’s pregnancy.”); KAN. STAT. ANN. § 65-28,103(a) (West 2014) (“The declaration of a qualified patient diagnosed as pregnant by the attending physician shall have no effect during the course of the qualified patient’s pregnancy.”); KY. REV. STAT. ANN. § 311.625 (West 2014) (statutory form states that “[i]f I have been diagnosed as pregnant and that diagnosis is known to my attending physician, this directive shall have no force or effect during the course of my pregnancy”); MICH. COMP. LAWS ANN. § 700.5512(1) (West 2014) (“A patient advocate cannot make a medical treatment decision under the authority of or under the process created by this section . . . to withhold or withdraw treatment from a pregnant patient that would result in the pregnant patient’s death.”); MO. ANN. STAT. § 459.025 (West 2014) (“The declaration to withdraw or withhold treatment by a patient diagnosed as pregnant by the attending physician

2. The pregnancy exclusion is similar to those suggested in the Uniform Rights of the Terminally Ill Act, which includes language as to the probability of the fetus developing to a live birth;<sup>34</sup>
3. The pregnancy exclusion includes a fetus viability standard that determines enforceability of the directive;<sup>35</sup>
4. The pregnancy clause creates a presumption in favor of life-sustaining treatment, which may be rebutted by a woman's advance directive;<sup>36</sup> and,
5. No state statute addresses the validity of an advance directive when a woman is pregnant.<sup>37</sup>

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shall have no effect during the course of the declarant's pregnancy."); S.C. CODE ANN. § 44-77-70 (West 2014) ("If a declarant has been diagnosed as pregnant, the Declaration is not effective during the course of the declarant's pregnancy."); TEX. HEALTH & SAFETY CODE ANN. § 166.049 (West 2013); UTAH CODE ANN. § 75-2a-123 (West 2014) ("A health care directive that provides for the withholding or withdrawal of life sustaining procedures has no force during the course of the declarant's pregnancy."); WASH. REV. CODE ANN. § 70.122.030(1)(d) (West 2014) ("If I have been diagnosed as pregnant and that diagnosis is known to my physician, this directive shall have no force or effect during the course of my pregnancy."); WIS. STAT. ANN. § 154.03 (West 2013) ("If you [the attending physician] know that the patient is pregnant, this document has no effect during her pregnancy.").

34. The National Conference of Commissioners on Uniform State Laws drafted the Uniform Rights of the Terminally Ill Act and suggested a model law covering living wills where a person is in a terminal condition, and the suggested model law states that "[l]ife-sustaining treatment must not be withheld or withdrawn pursuant to a declaration from an individual known to the attending physician to be pregnant so long as it is probable that the fetus will develop to the point of live birth with the continued application of life-sustaining treatment." UNIFORM RIGHTS OF THE TERMINALLY ILL ACT § 6(c) (1989), *available at* <http://www.lawandbioethics.com/demo/Main/Media/Resources/UniformRightsOfTerminallyIllAct.pdf>, *archived at* <http://perma.cc/A3UR-GP3W>. States taking this approach to pregnancy include the following: ALASKA STAT. ANN. § 13.52.055 (West 2014); ARIZ. REV. STAT. ANN. § 36-3262 (West 2014); ARK. CODE ANN. § 20-17-206(c) (West 2014); 755 ILL. COMP. STAT. ANN. 35/3(c) (West 2014); IOWA CODE ANN. § 144A.6(2) (West 2014); LA. REV. STAT. ANN. §§ 40:1299.58.10(E), 40:1299.64.6(D) (West 2014); MINN. STAT. ANN. § 145B.13(3) (West 2014); MONT. CODE ANN. § 50-9-106(7) (West 2014); NEB. REV. STAT. ANN. § 20-408 (West 2014); NEV. REV. STAT. ANN. § 449.624 (West 2014); N.H. REV. STAT. ANN. § 137-J:10 (West 2014); N.D. CENT. CODE ANN. § 23.06.5-09 (West 2013); OHIO REV. CODE ANN. § 1337.13 (West 2014); 20 PA. CONS. STAT. ANN. 5429 (West 2014); R.I. GEN. LAWS ANN. § 23-4.11-6 (West 2014); S.D. CODIFIED LAWS § 34-12D-10 (West 2014).

35. COLO. REV. STAT. ANN. § 15-18-104 (West 2014); DEL. CODE ANN. tit. 16, § 2503(j) (West 2014); FLA. STAT. ANN. § 765.113(2) (West 2014); GA. CODE ANN. § 31-32-9(a)(1) (West 2014).

36. MD. CODE ANN. HEALTH-GEN. § 5-603 (West 2014); MINN. STAT. ANN. § 145B.13 (West 2014); N.J. STAT. ANN. § 26:2H-56 (West 2014) ("[A] female declarant may include in an advance directive, information as to what effect the directive shall have if she is pregnant."); OKLA. STAT. ANN. tit. 63 § 3101.4 (West 2014); VT. STAT. ANN. tit. 18 § 9702(8) (West 2014).

37. *See* CAL. PROB. CODE §§ 4670–4701 (West 2014); D.C. CODE §§ 7-621–7-630 (2013); HAW. REV. STAT. §§ 327E-1–327E-16 (West 2014); ME. REV. STAT. ANN. tit. 18-A, §§ 5-802–5-817 (2013); MASS. GEN. LAWS ANN. CH. 201D, §§ 1–17 (West 2014); MISS. CODE ANN. §§ 41-41-209–41-41-229 (West 2013); N.M. STAT. ANN. §§ 24-7A-1–24-7A-17 (West

### A. Texas Advance Directive Pregnancy Exclusion

The seminal point in regard to the advance directive pregnancy exclusions explained above is that many state statutes arguably do not apply when the woman is brain-dead and pregnant with a non-viable fetus.<sup>38</sup> This was the first argument made by Marlise Muñoz's husband,<sup>39</sup> and the court held that the advance directive pregnancy exclusion set out in Section 166.049 of the Texas Health and Safety Code did not apply to her situation because she was no longer a "patient" when brain-dead.<sup>40</sup> Thus, the court in *Muñoz v. John Peter Hospital* is the first Texas court to hold that a pregnancy exclusion does not apply to a woman who is brain-dead and pregnant.<sup>41</sup> Accordingly, Section 166.049 of the Texas Health and Safety Code is the prime example to illustrate how the pregnancy exclusions categorized above should not apply when woman is brain-dead and pregnant with a non-viable fetus.<sup>42</sup> It also reiterates the need for state legislatures to take action to clarify the applicability of their current pregnancy exclusions when a woman is brain-dead and pregnant.<sup>43</sup>

In Texas, the Texas Advance Directives Act (the "Texas Act") sets out the statutory procedures by which a person may provide an "advance directive"<sup>44</sup> to his or her physician regarding life-sustaining medical procedures in the event he or she has a terminal or irreversible condition.<sup>45</sup> Under the Texas Act, a person may take three means

2014); N.Y. PUB. HEALTH LAW §§ 2980–2994 (McKinney 2014); N.C. GEN. STAT. ANN. §§ 90-320–90-323 (West 2014); OR. REV. STAT. §§ 127.505–127.660 (West 2014); TENN. CODE ANN. §§ 32-11-101–32-11-113 (West 2014); VA. CODE ANN. §§ 54.1-2981–54.1-2993 (West 2014); W. VA. CODE ANN. §§ 16-30-2–16-30-13 (West 2014); WYO. STAT. ANN. §§ 35-22-401–35-22-416 (West 2014).

38. See, e.g., Plaintiff's Petition, *supra* note 1, at 4.

39. *Id.* at 5; see also Plaintiff's First Amended Motion to Compel Defendants to Remove Marlise Muñoz From "Life Sustaining" Measures and Application for Unopposed Expedited Relief at 2–4, *Muñoz v. John Peter Smith Hosp.*, No. 096-270080-14 (96th Judicial Dist. Court, Tarrant Cnty., Tex. Jan. 23, 2014), 2014 WL 285054.

40. Court's Order, *supra* note 18.

41. *Id.*

42. The Texas statute automatically invalidates the effect of a woman's advance directive, regardless of the stage of her pregnancy, but the same rationale applies to other categories of pregnancy exclusions, as they all contemplate some type of "life-sustaining" treatment for a pregnant woman who is still alive. See *supra* notes 33–36; see also TEX. HEALTH & SAFETY CODE ANN. § 166.049 (West 2013).

43. See *infra* Part III.

44. Under the Texas Act, the term "advance directive" encompasses the following: (a) a directive, or living will, (b) an out-of-hospital Do Not Resuscitate order, or (c) "a medical power of attorney." TEX. HEALTH & SAFETY CODE ANN. § 166.002(1) (West 2013).

45. *Id.* §§ 166.001–166.66; see also *id.* § 166.031, Revisor's n. 2 (explaining that the "definition of 'life-sustaining procedure'" was revised to use the term "postpone" the moment of death "to more accurately reflect legislative intent," as the term "postpone" is also used in the definition of "terminal condition"). Further, an advance directive or similar

by which he or she may control the amount and type of medical care.<sup>46</sup> First, a competent<sup>47</sup> person may execute an advance directive, or living will, to physicians and family members to retain some control over medical decisions in the event of a terminal or irreversible condition.<sup>48</sup> Second, a person may execute an out-of-hospital “Do Not Resuscitate” (DNR) order.<sup>49</sup> And third, a person may execute a medical power of attorney, or healthcare proxy.<sup>50</sup> If a person has not taken

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instrument validly executed in another jurisdiction will be given the same effect as an advance directive validly executed under Texas law. *Id.* § 166.005.

46. TEX. HEALTH & SAFETY CODE ANN. § 166.002(1)(a)–(c) (West 2013).

47. *Id.* § 166.002(4) (defining “competent” as “possessing the ability, based on reasonable medical judgment, to understand and appreciate the nature and consequences of a treatment decision, including the significant benefits and harms of and reasonable alternatives to a proposed treatment decision”).

48. *Id.* §§ 166.031–166.051. A “directive,” or living will, refers to an instruction to “administer, withhold, or withdraw life-sustaining treatment in the event of a terminal or irreversible condition.” *Id.* § 166.031(1). A person also may identify specific treatments that he or she does or does not want in specific circumstances. *Id.* § 166.033. In addition, in the directive a person may designate another person to make treatment decisions on his or her behalf in the event he or she becomes incompetent or otherwise incapable of communication. *Id.* § 166.033(c); *see also* TEX. HEALTH & SAFETY CODE ANN. § 166.038(b). For a written advance directive to be effective, the person must sign the directive in the presence of two qualified witnesses, who must also sign the document, or the person must sign the directive and have the signature acknowledged before a notary public. *Id.* § 166.163(b). A competent adult also may issue a non-written advance directive in the presence of the attending physician and two witnesses. *Id.* § 166.034(b). A suggested advance directive form is found in Section 166.033 of the Texas Health and Safety Code and includes the following language:

This is an important legal document known as an Advance Directive. It is *designed to help you communicate your wishes about medical treatment at some time in the future when you are unable to make your wishes known because of illness or injury. These wishes are usually based on personal values*, in particular, you may want to consider what burdens or hardships of treatment you would be willing to accept for a particular amount of benefit obtained if you were seriously ill. . . . If, in the judgment of my physician, I am suffering with a terminal condition which I am *expected to die* within six months, even with available life-sustaining treatment provided in accordance with prevailing standards of medical care . . . I request that I be kept alive in this terminal condition using available life-sustaining treatment . . . *I understand that under Texas law this directive has no effect if I have been diagnosed as pregnant.*

*Id.* § 166.033 (emphasis added). Thus, the suggested language in regard to pregnancy is consistent with the pregnancy exclusion in Section 166.049. Finally, a person may revoke his or her advance directive by physically destroying the directive, by executing a written revocation, or by making an oral statement of his or her “intent to revoke the directive.” *Id.* § 166.042.

49. TEX. HEALTH & SAFETY CODE ANN. §§ 166.081–166.101, 166.082(a) (DNR instructs health care professionals acting in an out-of-hospital setting to withhold some life-sustaining medical treatments). A statutory DNR form is provided, and like a person’s living will, a DNR may be unwritten. *See id.* §§ 166.083, 166.084.

50. *Id.* §§ 166.151–166.166. (medical power of attorney permits the designated agent to make health care decisions on behalf of the incompetent person’s behalf that the person

one of these steps to express his or her wishes, medical decisions regarding the withholding or withdrawing of life-sustaining treatment are entrusted a relative. . . guardian, or agent.<sup>51</sup>

Specifically in regard to a living will, under Section 166.049 of the Texas Health and Safety Code<sup>52</sup> “[a] person may not withdraw or withhold life-sustaining treatment under this subchapter from a pregnant<sup>53</sup> patient.”<sup>54</sup> Thus, Texas is one of the states that automatically invalidates a pregnant woman’s end-of-life directive, regardless of the stage of pregnancy, and the statute does not allow any exception to the umbrella directive that doctors may not withdraw or withhold life-sustaining treatment when the patient is pregnant.<sup>55</sup> The result is that pregnancy completely suspends the operation of an advance directive during the course of the pregnancy.<sup>56</sup> Section 166.049, however, arguably does not apply to a woman who is brain-dead and pregnant and thwarts the stated wishes of the woman.<sup>57</sup>

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could make if he or she was competent); *see also id.* § 166.152 (listing out certain exceptions to the health care decisions that a designated person can make, including the decision to abort a fetus); *id.* § 166.164 (providing a statutory form for a medical power of attorney).

51. *See* TEX. HEALTH & SAFETY CODE ANN. §§ 166.039, 166.088 (West 2013).

52. The sub-chapter addressing living wills states that it “does not impair or supersede any legal right or responsibility a person may have to affect the withholding or withdrawal of life-sustaining treatment in a lawful manner . . .” *Id.* § 166.051. Thus, the Texas Act is nonexclusive and leaves other legal structures in place for situations not addressed in the Act. And arguably, because Marlise Muñoz did not have an effective written or non-written advance directive pursuant to Sections 166.023 and 166.034 of the Texas Health and Safety Code, the hospital should not have employed the pregnancy exclusion in Section 166.049 in the first place.

53. This raises the question: Must a health care provider be required to perform a pregnancy test on every patient of child-bearing years? The pregnancy exclusion suspends the effectiveness of an advance directive for a patient who is pregnant, not for a patient who knows she is pregnant. *Id.* § 166.049 (referring only to a “pregnant patient”). Thus, a physician or health care provider would need to perform a pregnancy test on every patient of child-bearing years, whether or not she has the capacity to answer questions about her health status. *See* Anne E. Malley, TEX. FAM. L. SERV. § 52:26, Pregnancy (West 2010); *see also* Ecker, *supra* note 6, at 890 (explaining that the Muñoz’s attorney argued that “if the hospital’s approach were taken to its utilitarian conclusion, paramedics arriving at accident scenes would need to do on-site pregnancy tests to know which bodies to ventilate.”).

54. TEX. HEALTH & SAFETY CODE ANN. § 166.049 (West 2013); *id.* § 166.098 (“A person may not withhold cardiopulmonary resuscitation or certain other life-sustaining treatment . . . from a person known by the responding health care professionals to be pregnant.”). In regard to the drafting of Section 166.049, Thomas Mayo, an associate professor who assisted in its drafting, stated that “[i]t never would have occurred to us that anything in the statute applied to anyone who was dead. The statute was meant for making treatment decisions for patients with [only] terminal or irreversible conditions.” Jacque Mingle, *States Differ on Whether Living Wills Are Followed During Pregnancy*, BOGUTZ & GORDON (Jan. 31, 2014), <http://bogutzandgordon.com/states-differ-on-whether-living-wills-are-followed-during-pregnancy/>, archived at <http://perma.cc/A7ZF-TBN5>.

55. *See* TEX. HEALTH & SAFETY CODE ANN. § 166.049 (West 2013).

56. *Id.*

57. *Id.*

In this regard, a consideration of basic statutory construction<sup>58</sup> leads to the conclusion that Section 169.049 requires that only a living pregnant woman be kept alive; it does not require that a woman who is both brain-dead and pregnant be subjected to treatment.<sup>59</sup>

Because an advance directive refers to an instruction to “administer, withhold, or withdraw life-sustaining treatment in the event of a terminal or irreversible condition,”<sup>60</sup> several other definitions are relevant to construing the Texas pregnancy exclusion and determining whether or not it applies to a woman who is brain-dead and pregnant. As defined in the Texas Act, “life-sustaining treatment’ means treatment that, based on reasonable medical judgment, *sustains the life of a patient and without which the patient will die.*”<sup>61</sup>

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58. In determining the legislative intent behind a statute, the court should first examine the plain language of the statute. *Hernandez v. Ebrom*, 289 S.W.3d 316, 318 (Tex. 2009). Thus, where the language of the statute is unambiguous and its meaning is clear, the court should give effect to the statute according to its literal terms. *Id.* If the court cannot discern legislative intent from the plain language of the statute, then the court may utilize the canons of construction and other extrinsic aids for guidance in determining the statute’s meaning. *See, e.g.*, *Texas Lottery Comm’n v. First State Bank of DeQueen*, 325 S.W.3d 628, 637–38 (Tex. 2010). Yet, when the application of the statute’s plain language would lead to absurd consequences that the legislature could not possibly have intended, a court should not apply the literal language. *Ex parte Noyola*, 215 S.W.3d 862, 866–67 (Tex. Crim. App. 2007). In addition to common-law canons, Texas has statutory guidelines for statutory construction. *See* TEX. GOV’T CODE ANN. § 311.023 (West 2013). Under the Texas Construction Act, courts should resort to extrinsic aids of construction regardless of whether a statutory provision is ambiguous. *Id.* Specifically, when construing a statute courts should consider the following: (1) “the object sought to be attained;” (2) the circumstances under which the statute was enacted; (3) common law or other statutory provisions, “including laws on the same or similar subjects;” (4) “consequences of a particular construction;” (5) “administrative construction of the statute;” and (6) “the title, preamble, and emergency provision.” *Helena Chem. Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001). *But see* *Fitzgerald v. Advanced Spine Fixation Sys.*, 996 S.W.2d 864, 865–66 (“[I]f a statute is unambiguous, rules of construction or other extrinsic aids cannot be used to create ambiguity.”); *Nat’l Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000) (“If possible, we must ascertain the Legislature’s intent from the language it used in the statute and not look to extraneous matters for an intent the statute does not state.”).

59. *See* Thomas Wm. Mayo, *Brain-Dead and Pregnant in Texas*, 14 THE AM. J. OF BIOETHICS, 15, 15–18 (Aug. 2014) (discussing the inapplicability of the Texas Advance Directive Act to patients who have died as well as the inapplicability of the Texas Act’s pregnancy-exclusion provision to pregnant cadavers); Valerie Longmire-Jefferis, *Termination of Pregnancy Pre-Viability and the Dilemma of Maternal Artificial Life Support: An Examination of Texas State Law and Advance Directives*, HEALTH L. PERSP. (Sept. 25, 2014, 1:21 PM), [http://www.law.uh.edu/healthlaw/perspectives/2014/Longmire-Jefferis\\_Termination%20of%20Pregnancy%20Pre-Viability%20and%20the%20Dilemma%20of%20Maternal.pdf](http://www.law.uh.edu/healthlaw/perspectives/2014/Longmire-Jefferis_Termination%20of%20Pregnancy%20Pre-Viability%20and%20the%20Dilemma%20of%20Maternal.pdf), archived at <http://perma.cc/HS9R-FQLW>.

60. TEX. HEALTH & SAFETY CODE ANN. § 166.031(1) (West 2013).

61. *Id.* § 166.002(10) (emphasis added). Further, “[t]he term includes both *life-sustaining* medications and artificial *life support*, such as mechanical breathing machines, kidney dialysis treatment, and artificial nutrition and hydration. The term does not include the administration of pain management medication or the performance of medical procedure considered to be necessary to provide comfort care, or any other medical care provided to alleviate a patient’s pain.” *Id.* (emphasis added).

In addition, “‘terminal condition’ means an incurable condition caused by injury, disease, or illness that according to reasonable medical judgment *will produce death within six months*, even with available life-sustaining treatment provided in accordance with the prevailing standard of medical care.”<sup>62</sup> Furthermore:

irreversible condition means a condition, injury, or illness: (A) that may be treated but is never cured or eliminated; (B) that leaves a person unable to care for or make decisions for the person’s own self; and (C) that, without life-sustaining treatment provided in accordance with the prevailing standard of medical care, is *fatal*.<sup>63</sup>

Moreover, the Texas pregnancy exclusion uses the terms “life-sustaining treatment” and “patient,”<sup>64</sup> so the literal language of the exclusion itself requires that the person must be living in order for him or her to be subjected to life support.<sup>65</sup>

Thus, based on the express language of the statutory definitions relevant to Section 166.049 and based on the plain language of Section 166.049, the pregnancy exclusion does not apply when a woman is legally dead under Texas law<sup>66</sup> and pregnant with a non-viable fetus. Indeed, the concept of “life support” for someone who has been declared brain-dead is an oxymoron because the life of the “patient” can no longer be sustained; he or she is legally and medically dead and is not a “patient.”<sup>67</sup> Accordingly, the Texas pregnancy exclusion does not apply to a situation in which a woman is brain-dead and pregnant.<sup>68</sup> Similarly, comparable pregnancy exclusions across the country also should not apply to such a situation.<sup>69</sup>

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62. *Id.* § 166.002(13) (emphasis added).

63. *Id.* § 166.002(9) (emphasis added).

64. *Id.* § 166.049.

65. MacAvoy-Snitzer, *supra* note 28, at 1281 (explaining that in a typical statute, life-sustaining treatment refers to treatment that only “prolongs the dying process”).

66. Section 671.001 of the Texas Health and Safety Code states, in relevant part:

(a) A person is dead when, according to ordinary standards of medical practice, there is irreversible cessation of the person’s spontaneous respiratory and circulatory functions. (b) If artificial means of support preclude a determination that a person’s spontaneous respiratory and circulatory functions have ceased, the person is dead when, in the announced opinion of the physician, according to ordinary standards of medical practice, there is irreversible cessation of all spontaneous brain function. Death occurs when the relevant functions cease.

TEX. HEALTH & SAFETY CODE ANN. § 671.001 (West 2013). In the *Muñoz* case, there was no dispute that Marlise Muñoz was brain-dead as of November 28, 2013. Plaintiff’s Petition, *supra* note 1, at 3.

67. TEX. HEALTH & SAFETY CODE ANN. § 166.002(10).

68. *See infra* Part II.B.

69. The outcome of issues surrounding the Louisiana pregnancy exclusion statute

### B. Louisiana’s 2014 Statutory Amendment

In response to the issues raised by the case in Texas involving Marliese Muñoz,<sup>70</sup> in early 2014 the Louisiana legislature acted swiftly to address the exceptional situation in which a pregnant woman is declared brain-dead.<sup>71</sup> House Bill 1274, passed by the Louisiana state legislature in early June<sup>72</sup> and signed into law by the Governor on June 23, 2014,<sup>73</sup> “essentially prohibits withdrawing life support for a pregnant woman if the obstetrician has determined that the fetus is at least 20-weeks gestation and that the pregnant woman’s bodily functions can reasonably be maintained to support the continued development and live birth of the fetus.”<sup>74</sup>

In general, under Louisiana’s advance directive law “all persons have the fundamental right to control the decisions relating to their own medical care.”<sup>75</sup> In this regard, “[a]ny adult person may, at any time, make a written declaration directing the withholding or withdrawal of life-sustaining procedures in the event such person should have a terminal and irreversible condition.”<sup>76</sup> Furthermore, the

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showcases why pregnancy exclusions should not apply to the situation in which a woman is brain-dead and pregnant. *See infra* Part II.B.

70. Representative Austin Badon proposed the measure in response to the *Muñoz* case in Texas. Clare Kim, *Louisiana Bill Would Keep Brain-Dead Pregnant Women on Life Support*, MSNBC (June 9, 2014, 10:21 PM), <http://www.msnbc.com/the-last-word/gov-jindal-brain-dead-pregnant-life-support-bill>, archived at <http://perma.cc/SMM7-79E6>.

71. H.B. 1274, 2014 Leg., Reg. Sess. (La. 2014).

72. The House passed the bill 87 to 1, and the Senate passed it 31 to 2. *Id.*

73. The effective date of the statute was June 23, 2014, which is the day Governor Jindal signed the law. *Id.*

74. Imani Gandy, *Vague Louisiana Bill Would Force Brain-Dead Pregnant Women to Serve as Incubators*, RH REALITY CHECK (June 9, 2014, 4:59 PM), <http://rhrealitycheck.org/article/2014/06/09/vague-louisiana-bill-force-brain-dead-pregnant-women-serve-incubators>, archived at <http://perma.cc/S27K-APF8>. Senator J.P. Morrell “proposed an amendment to the bill that would have allowed [the patient’s] family members to make end of life decisions.” Kim, *supra* note 70. The amendment passed in the Senate, but it was then rejected by a conference committee comprised of both House and Senate legislators. *Id.*

75. LA. REV. STAT. ANN. § 40:1299.58.1(1) (2014).

76. *Id.* § 40:1299.58.3(A). Similar to the definition in the Texas Advance Directive Act, a “life-sustaining procedure” is one that “within reasonable medical judgment, would serve only to *prolong the dying process* for a person diagnosed as having a terminal and irreversible condition . . .” *Id.* § 40:1299.58.2(8) (emphasis added). In addition:

“terminal and irreversible condition” means a continual profound comatose state with no reasonable chance of recovery or a condition caused by injury, disease, or illness which, within reasonable medical judgment, *would produce death* and for which the application of life-sustaining procedures would serve only to *postpone the moment of death*.

*Id.* § 40:1299.58.2(14) (emphasis added). If a woman, however, has experienced an irreversible total cessation of brain function, she will be considered “dead” in Louisiana, and thus the terms used in the amendment are inapplicable. *See id.* § 9:111.A.

statutory advance directive form in Louisiana does not mention the effect of pregnancy on a woman's directive.<sup>77</sup>

Proposed by State Representative Austin Badon, House Bill 1274 amended Section 40:1299.58.10 of the Louisiana Code<sup>78</sup> and states:

It is the policy of the state of Louisiana that human life is of the highest and inestimable value through natural death. When interpreting this Part, any ambiguity shall be interpreted to preserve human life, including the life of an unborn child if the qualified patient is pregnant and an obstetrician who examines the woman determines that the probable postfertilization age of the unborn child is twenty<sup>79</sup> or more weeks and the pregnant woman's life can reasonably be maintained in such a way as to permit the continuing development and live birth of the unborn child, and such determination is communicated to the relevant classes of family members and persons designated in R.S. 40:1299.58.5.<sup>80</sup>

Arguably, as with the Texas pregnancy exclusion, this recent amendment in Louisiana does not apply to a woman who is brain-dead and pregnant.<sup>81</sup> First, the added language is qualified by the pre-existing language "[w]hen interpreting this Part, any ambiguity shall be interpreted to preserve human life . . ."<sup>82</sup> Because a person can make a written declaration as to when to withhold or withdraw life-sustaining equipment, the amendment would apply only when a

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77. LA. REV. STAT. ANN. § 40:1299.58.3 (2014).

78. House Bill 1274 also amends § 40:1299.64.6(D) of the Louisiana Code. See H.B. 1274, *supra* note 71.

79. *Id.* Incorporating a reference to twenty weeks gestation makes the law similar to a twenty-week abortion ban, which is currently the legal cutoff for abortion in Louisiana. LA. REV. STAT. ANN. § 40:1299.30.1.E (2014). In addition, the amended statute permits "the continuing development and live birth of the unborn child" regardless of the wishes of the mother's spouse and other immediate family. H.B. 1274, *supra* note 71.

80. LA. REV. STAT. ANN. § 40:1299.58.10.E (amending the statute by adding all of the language after "shall be interpreted to preserve human life").

81. See Lamar White, Jr., *Everyone is Wrong About Austin Badon's Bill Requiring Brain-Dead Pregnant Women to Be on Life Support, Including Austin Badon*, CENLAMAR (June 22, 2014), <http://cenlamar.com/2014/06/22/everyone-is-wrong-about-austin-badon-bill-requiring-brain-dead-pregnant-women-to-be-on-life-support-including-austin-badon>, archived at <http://perma.cc/C8UH-W2P2>. The majority of news media, however, misreported the application of the amendment proposed by Representative Badon, as they reported that the amendment would force a brain-dead woman to remain on life support. See, e.g., Laura Bassett, *Jindal Mulls Mandatory Life Support for Brain-Dead Pregnant Women*, HUFFINGTON POST (June 9, 2014, 12:59 PM), [http://www.huffingtonpost.com/2014/06/09/jindal-signs-bill-to-keep\\_n\\_5473633.html](http://www.huffingtonpost.com/2014/06/09/jindal-signs-bill-to-keep_n_5473633.html), archived at <http://perma.cc/4XK7-U7RR>; Marsha Shuler, *Bill to Keep Brain-Dead Pregnant Women Alive Heads to Jindal's Desk*, THE ADVOCATE (June 11, 2014), <http://theadvocate.com/news/9344105-123/another-pro-life-bill-goes-to>, archived at <http://perma.cc/PEL8-H6QA>.

82. LA. REV. STAT. ANN. § 40:1299.58.10.E (2014).

woman has not expressed her wishes in an end-of-life document or when her fetus is twenty or more weeks old.<sup>83</sup> In other words, under any circumstance a woman could override the amended statute if: (1) she expresses her wishes in writing in an end-of-life document,<sup>84</sup> or (2) the fetus is under twenty weeks old.<sup>85</sup> Second, the amendment expressly refers to a "qualified patient"<sup>86</sup> and explains that an obstetrician must examine the woman and determine that her "life can reasonably be maintained."<sup>87</sup> But, after a physician or other health care provider declares a pregnant woman "brain-dead," the woman's "life" cannot be maintained because she would be legally dead. As a result, although the Louisiana legislature took action in response to the *Muñoz* case, the amended statute does not provide any clarity when a woman is brain-dead and pregnant.

## II. CONSTITUTIONAL RIGHTS IMPLICATED IF THE PREGNANCY EXCLUSIONS APPLY TO A WOMAN WHO IS BRAIN-DEAD AND PREGNANT

As described above, although the state pregnancy exclusions should not be applicable to a woman who is brain-dead and pregnant, the impact of these statutes would be substantial if they are broadly interpreted to encompass a brain-dead and pregnant woman.<sup>88</sup> Accordingly, a thorough analysis of the state pregnancy exclusions necessitates an examination of the long line of legal precedent that has established certain women's constitutional rights.<sup>89</sup> First, a woman's

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83. *See id.*

84. However, nothing "shall be construed to be the exclusive means by which life-sustaining procedures may be withheld or withdrawn." *Id.* § 40:1299.58.1.A(4). Thus, when a woman does not have a written advance directive that includes specific instructions in the event she is pregnant, she should be able to express her wish in some other way, e.g., by telling her spouse or another family member.

85. *See Kim, supra* note 70.

86. A "qualified patient" refers to "a patient diagnosed and certified in writing as having a terminal and irreversible condition by two physicians who have personally examined the patient, one of whom shall be the attending physician." LA. REV. STAT. § 40:1299.58.2(11) (2014).

87. *Id.* § 40:1299.58.10.E.

88. To date, no state or federal court has addressed the specific issue of whether or not pregnancy exclusions can withstand constitutional scrutiny.

89. Legal scholars have previously addressed the constitutionality of pregnancy clauses in light of jurisprudence concerning fetal rights and the areas of privacy and abortion. For excellent analyses, see Molly C. Dyke, Note, *A Matter of Life and Death: Pregnancy Clauses in Living Will Statutes*, 70 B.U. L. REV. 867, 869–81 (1990); James M. Jordan, Note, *Incubating for the State: The Precarious Autonomy of Persistently Vegetative and Brain-Dead Pregnant Women*, 22 GA. L. REV. 1103, 1115–26, 1135–54 (1988); Hope E. Matchan & Kathryn E. Sheffield, Comment, *Adding Constitutional Deprivation to Untimely Death: South Dakota's Living Will Pregnancy Provision*, 37 S.D. L. REV. 388, 403–08 (1992);

constitutional right to have an abortion<sup>90</sup> is implicated in the situation when a woman is brain-dead and pregnant. Second, a woman's fundamental right to refuse medical treatment is implicated under these circumstances.<sup>91</sup>

### A. *Right to Terminate a Pregnancy*

Certain fundamental rights are protected despite the lack of express language in the Constitution or Bill of Rights.<sup>92</sup> One such right is the right to privacy, which is "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action."<sup>93</sup> The scope of this constitutional right likely determines the constitutionality of statutory pregnancy exclusions, and thus *Roe* and *Casey* must be analyzed in order to provide context for dealing with the situation in which a woman is brain-dead and pregnant.<sup>94</sup>

In *Roe v. Wade*, the United State Supreme Court held that a fundamental right to privacy under the Due Process Clause of the Fourteenth Amendment ensured a woman's right to privacy, which is broad enough to encompass a woman's right to have an abortion.<sup>95</sup> The Court used a temporal framework in order to balance the state's

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Elizabeth Carlin Benton, Note, *The Constitutionality of Pregnancy Clauses in Living Will Statutes*, 43 VAND. L. REV. 1821, 1826 (1990); Kristeena L. Johnson, Note, *Forcing Life on the Dead: Why the Pregnancy Exemption Clause of the Kentucky Living Will Directive Act is Unconstitutional*, 100 KY. L.J. 209, 212 (2011); see also Sisti, *supra* note 10, at 155 ("[I]t is necessary to analyze both the liberty interest and the privacy interest to determine if the State is infringing upon the patient's right to direct her medical care and her right to choose.").

90. See *Roe v. Wade*, 410 U.S. 113 (1973); *Doe v. Bolton*, 410 U.S. 179 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

91. See *Cruzan v. Dir., Missouri Dep't of Health*, 497 U.S. 261 (1990). In addition to a woman's constitutional right to terminate a pregnancy and her right to forego medical treatment, a woman's equal protection rights may be implicated if the pregnancy exclusions apply to a woman who is brain-dead and pregnant. See *supra* note 14 and accompanying text.

92. See *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965) (Goldberg, J., concurring).

93. *Roe*, 410 U.S. at 153; see also *Griswold*, 381 U.S. at 485–86 (recognizing the right to privacy in regard to procreation and invalidating a state provision that prohibited a married couple's use of contraceptives).

94. See, e.g., Johnson, *supra* note 89, at 218.

95. *Roe*, 410 U.S. at 152–53; see also *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (recognizing that "[i]f the right to privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental instruction into matters so fundamentally affecting a person as the decision whether to bear or beget a child."). *But see Webster v. Reprod. Health Servs.*, 492 U.S. 490, 517–20 (1989) (holding that a state statute limiting the use of public employees and facilities for abortions is not an unconstitutional burden on a woman's right to an abortion and allowing the state to regulate abortions during the second trimester).

interest in a fetus and the mother’s right to control her own body.<sup>96</sup> Further, the Court explained that a state may regulate abortion to promote the health of the mother.<sup>97</sup>

Then, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court reaffirmed a woman’s right to abortion, but the plurality dismissed the temporal framework established in *Roe v. Wade*.<sup>98</sup> In regard to viability of a fetus, the Court explained that a fetus might be considered viable at twenty-three weeks rather than at twenty-eight weeks.<sup>99</sup> The plurality also explained viability as the point at which a state’s interest in the fetus may outweigh a woman’s right to abortion.<sup>100</sup> It is the point of “viability [that] marks the earliest point at which the State’s interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions.”<sup>101</sup>

In making its decision, the Court utilized the “undue burden” standard to assess the abortion laws, which in effect diminished abortion as a fundamental right.<sup>102</sup> The State’s interest in the fetus does not become a compelling interest until the point of viability.<sup>103</sup>

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96. The Court explained that the state’s interest increased as prenatal life advanced. *Roe*, 410 U.S. at 163–66. If a woman is less than one trimester into her pregnancy, the state does not have a legitimate interest to interfere with her decision to continue with the pregnancy or to terminate her pregnancy. *Id.* at 162–63.

97. *Id.* at 164–65.

98. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 872–73 (1992). In general, the plaintiff in *Casey* challenged several provisions under The Pennsylvania Abortion Act, including a spousal notification rule requiring a woman to give prior notice to her husband, a required 24-hour waiting period, and an informed consent rule requiring a woman to receive information about the health risks related to the abortion procedure. *Id.* at 844–45.

99. *Id.* at 860–61; *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 428 (1983) (quoting *Roe*, 410 U.S. at 163) (defining “viability” as “the point at which the fetus ‘has the capability of meaningful life outside of the mother’s [uterus]’”); Burch, *supra* note 14, at 545 n.111 (quoting Mary Mahowald, *Beyond Abortion: Refusal Caesarean Section*, 3 *BIOETHICS* 106, 111 (1989)) (viability means that “the fetus’s condition is such that it can survive after birth with help from neonatal intensive care”).

100. *Casey*, 505 U.S. at 870–71.

101. *Id.* at 860.

102. *Id.* at 874–77 (explaining that the strict scrutiny standard no longer applied to abortion law and defining the “undue burden” standard as “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus”).

103. *Id.* at 860. In this regard, currently forty-two states have enacted abortion restrictions at different stages of pregnancy. *State Policies in Brief: An Overview of Abortion Laws*, GUTTMACHER INSTITUTE (Aug. 2014), <http://www.guttmacher.org/sections/abortion.php>, archived at <http://perma.cc/P25H-8FHR>. Although, state gestational limits that are less than viability are constitutionally suspect under both *Roe* and *Casey*. See, e.g., ARK. CODE ANN. § 20-16-1304 (West 2013) (banning abortion at twelve weeks of pregnancy, when a fetal heartbeat can typically be detected); N.D. CENT. CODE ANN. § 14.02.1-05.1 (West 2012) (banning abortion as soon as a heart beat is detectable). Of course, both the Arkansas and North Dakota laws have been challenged in court as being unconstitutional, and the courts have prevented them from going into effect while the cases move through the appellate court system. See *MKB Mgmt. Corp. v. Burdick*, 954

Accordingly, a state cannot impose an “undue burden” on a woman’s ability to make a decision to terminate her pregnancy without violating her Due Process rights.<sup>104</sup> A state may, however, enact laws to ensure “informed consent.”<sup>105</sup>

### *B. Right to Refuse Medical Treatment*

It is also well established in common law that a competent or incompetent person has the right to refuse or forego medical treatment,<sup>106</sup> and this right “usually parallels analysis of the privacy rights found in *Griswold* and *Roe*.”<sup>107</sup> This right is based on the doctrine of informed consent and generally encompasses “the right of a competent individual to refuse medical treatment.”<sup>108</sup>

For example, in *Cruzan v. Director, Missouri Department of Health*, Nancy Cruzan suffered brain damage due to oxygen deprivation after she was involved in a car accident.<sup>109</sup> The hospital used

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F. Supp. 2d 900, 903 (D.N.D. 2013); *Edwards v. Beck*, 8 F. Supp. 3d 1091, 1101 (E.D. Ark. 2014); *see also Isaacson v. Horne*, 716 F.3d 1213, 1222–25 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014) (holding that the Arizona statute prohibiting abortion beginning at twenty-weeks gestation violated the right of women to make the ultimate decision to terminate a pregnancy prior to fetal viability).

104. *Casey*, 505 U.S. at 874.

105. *Id.* at 885–87 (finding that a 24-hour waiting period, intended to ensure the woman was informed of her choices, did not constitute an undue burden). Twenty-six states currently require a woman to wait a specific amount of time before she can obtain an abortion, usually twenty-four hours. *See 2013 State Level Abortion Restrictions: An Extreme Overreach into Women’s Reproductive Health Care*, NATIONAL WOMEN’S LAW CENTER (Jan. 28, 2014), [http://www.nwlc.org/sites/default/files/pdfs/2013\\_state\\_legislation\\_fact\\_sheet\\_1-27-14.pdf](http://www.nwlc.org/sites/default/files/pdfs/2013_state_legislation_fact_sheet_1-27-14.pdf), archived at <http://perma.cc/F4CS-VR56>.

106. The first court decision to validate an advance directive at the state level was *In re Quinlan*, 355 A.2d 647 (N.J. 1976). In that case, Karen Ann Quinlan’s father requested the ability to make legally binding health care decisions on her behalf. *Id.* at 651. Among other things, the court held that an individual, whether competent or incompetent, had the right to forego medical treatment. *Id.* at 662–64. And, although the case did not involve an incompetent or brain-dead woman who was pregnant, it illustrates a person’s constitutional right to refuse medical treatment.

107. Dyke, *supra* note 89, at 874; MacAvoy-Snitzer, *supra* note 28, at 1287 (pointing out that *Roe v. Wade* addressed a broad right to privacy and not only a right when a woman seeks to have an abortion; thus, the decision to forego life-sustaining treatment may also be protected by the right of privacy of liberty); *see also* Amy Lynn Jerdee, Note, *Breaking Through the Silence: Minnesota’s Pregnancy Presumption and the Right to Refuse Medical Treatment*, 84 MINN. L. REV. 971, 997–1000 (2000).

108. *Cruzan v. Dir., Missouri Dep’t of Health*, 497 U.S. 261, 277 (1990). However, the right of a person to refuse medical treatment is not absolute. *See Burch, supra* note 14, at 529. The right still must be balanced against the state’s interests in its role as *parens patriae*. *Id.* Thus, courts should consider the following interests when balancing a person’s right to refuse medical treatment against the state’s countervailing interests: “(1) the preservation of life; (2) the protection of interests of innocent third parties; (3) the prevention of suicide; and (4) the maintenance of the ethical integrity of the medical profession.” *Id.* at 529 n.7.

109. *Cruzan*, 497 U.S. at 266; *see also* Sharon E. Hollins, *Something Worth Writing*

life-sustaining equipment because she was in a persistent vegetative state.<sup>110</sup> Prior to the accident, she had verbally expressed her wish not to be on life support in the event she was injured; therefore, her parents requested that the doctors withdraw the life-sustaining medical treatment.<sup>111</sup> In its decision, the Court recognized that a person has a constitutionally protected liberty interest to refuse life-sustaining medical treatment and also suggested that living will statutes are constitutional.<sup>112</sup> Further, the Court held that the State could require clear and convincing evidence proving that the patient had a desire to have life-sustaining medical treatment withheld or removed.<sup>113</sup>

### C. University Health Services, Inc. v. Piazzi

Although a woman has the constitutional right to terminate a pregnancy and the right to refuse medical treatment, the existence of a pregnant woman's privacy interests is less clear in the instance where an advance directive is triggered by a doctor declaring her brain-dead.<sup>114</sup> The main case that addresses this specific issue is *University Health Services, Inc. v. Piazzi*, in which the hospital filed

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*Home About: Clear and Convincing Evidence, Living Wills, and Cruzan v. Director, Missouri Department of Health*, 22 U. TOL. L. REV. 871, 882–83 (1991).

110. *Cruzan*, 497 U.S. at 266.

111. *See id.* at 268.

112. *Id.* at 281, 291–92.

113. More specifically, the Court held that life-sustaining medical treatment should not be withheld from Nancy Cruzan because her parents could not show that their daughter desired not to have such treatment. *Id.* at 284–85. Her parents argued that she made statements to her roommate “that she would not want to live should she face life as a ‘vegetable,’ and other observations to the same effect.” *Id.* at 285. But, this comment and other observations did not specifically deal with the withholding or withdrawal of life-sustaining treatment. *Id.* As a result, the Court found that it was permissible for the trial court to require clear and convincing evidence of Nancy Cruzan's end-of-life wishes before a healthcare provider could be ordered to withdraw life-sustaining treatment from an incompetent person. *Cruzan*, 497 U.S. at 286–87; *see also In re Westchester Cnty. Med. Ctr. ex rel. O'Connor*, 531 N.E.2d 607, 613 (N.Y. 1988) (holding that the existence of an advance directive made while a woman was competent was clear and convincing evidence of the woman's intent to have life-sustaining treatment withheld or withdrawn).

114. *See MacAvoy-Snitzer*, *supra* note 28, at 1297. And, in reality, a plaintiff may never have the standing necessary to pursue a challenge to a statutory pregnancy exclusion. *See Gabrynowicz v. Heitkamp*, 904 F. Supp. 1061, 1064 (D.N.D. 1995) (holding that a woman challenging the pregnancy exclusion did not have a justiciable claim); *DiNino v. State ex rel. Gorton*, 684 P.2d 1297, 1301 (Wash. 1984) (dismissing the plaintiff's claims because she was not pregnant and did not have a terminal condition; thus, she did not have standing to challenge the statute). Yet, a pregnancy exclusion is arguably analogous to an abortion statute because it deals with the termination of a pregnancy; thus, a woman should be allowed to challenge a pregnancy exclusion before she is in a condition that triggers the exclusion. *See MacAvoy-Snitzer*, *supra* note 28, at 1292–94. *But see Daniel Sperling, Maternal Brain Death*, 30 AM. J.L. & MED. 453, 464–65 (2004) (explaining that perhaps the *Roe* decision cannot easily be applied when a woman is brain-dead and pregnant).

a petition for a declaratory judgment asserting that life support systems should be maintained for Donna Piazzi to preserve the life of her unborn child.<sup>115</sup> In late June of 1986, Donna Piazzi, who was pregnant at the time, was transported to the hospital in an unconscious condition, and at some point after her condition deteriorated, her physician declared her brain-dead.<sup>116</sup> Unfortunately, her end-of-life wishes were unknown.<sup>117</sup> And, by July 25th the fetus was 20½ weeks, but her physician determined that the fetus was not viable because it was not capable of surviving outside of her womb.<sup>118</sup> A dispute arose because Donna Piazzi's husband, who was undisputedly not the father of the unborn child, requested that the hospital withhold life-sustaining medical treatment, which would render death to the fetus.<sup>119</sup> The unborn child's father,<sup>120</sup> however, "requested that the hospital maintain life support systems for Donna Piazzi in order that the fetus [could] be given the opportunity to develop and survive."<sup>121</sup>

In its findings of fact, the court explained that "[t]here exists a reasonable possibility that with continued life support Donna Piazzi's body can remain functioning until the point that the fetus would be viable and could be delivered with a reasonable possibility of survival."<sup>122</sup> Further, the findings of fact stated that "[i]f the fetus is delivered and survives there is a possibility it will suffer from abnormalities such as mental retardation, but it was and is impossible to determine the existence of such abnormalities prior to birth."<sup>123</sup>

In general, the *Piazzi* court held that any constitutional privacy rights Donna Piazzi possessed were extinguished by her death.<sup>124</sup> In

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115. Daniel Sperling, *Do Pregnant Women Have (Living) Will?*, 8 J. HEALTH CARE L. & POL'Y 331, 336 (2005); Dyke, *supra* note 89, at 871 (citing the unreported case *Univ. Health Servs. v. Piazzi*, No. CV86-RCCV-464 (Ga. Super. Ct. Aug. 4, 1986)); *see also* Jordan, *supra* note 89, at 1108–09.

116. *Univ. Health Serv. v. Piazzi*, 2 ISSUES L. & MED. 415, 415–16 (Ga. Super. Ct. Aug. 4, 1986), available at [http://www.thaddeuspope.com/images/Univrsity\\_Health\\_v\\_Piazzi\\_Ga\\_Sup\\_1986\\_.pdf](http://www.thaddeuspope.com/images/Univrsity_Health_v_Piazzi_Ga_Sup_1986_.pdf), archived at <http://perma.cc/A6D5-NAZ8> [hereinafter *Piazzi Order*].

117. Sperling, *supra* note 115, at 336.

118. *Piazzi Order*, *supra* note 116, at 416.

119. *Id.* at 416. Also, the Division of Family and Children Services argued that the court did not have jurisdiction in the case because the decision should be a medical decision and not a legal decision. *Id.* The court, however, held that it did have "jurisdiction to decide whether the life of the unborn fetus should be protected." *Id.* at 416–17.

120. *Id.* at 416.

121. *Piazzi Order*, *supra* note 116, at 416. The court appointed a guardian ad litem to "represent the interest of the unborn child. The guardian ad litem request[ed] that life support systems be maintained." *Id.*

122. *Id.*

123. *Id.*

124. *Id.* at 417–18 (citing *Roe v. Wade* for the proposition that a "state may assert interest in protecting potential life," but not providing any authority for concluding that Donna Piazzi did not have any interest at all).

other words, the court decided that she no longer had any interests, so her wishes (had she expressed any) were irrelevant.<sup>125</sup> The court also looked to case law and the Georgia statute that specifically restricted the effect of a living will when a woman is pregnant and found that the State supported the policy of protecting life.<sup>126</sup> The court explained that the "public policy in Georgia requires the maintenance of life support systems for a brain dead mother so long as there exists a reasonable possibility that the fetus may develop and survive."<sup>127</sup> The court, however, failed to cite any specific authority for the proposition that a woman's constitutional privacy rights, e.g., the right of a woman to abort a non-viable fetus, are extinguished upon brain death.<sup>128</sup> And, at no point did the court address any other legally recognized interests that remain after death<sup>129</sup> or how the State could have a compelling interest in a non-viable fetus.<sup>130</sup> Moreover, the court implied that even if Donna Piazzi did have a right to privacy under these circumstances, any interest she had would be irrelevant under the Georgia living will statute.<sup>131</sup> Of course, the applicability of a

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125. Some scholars have argued that upon death, a patient ceases to be a person "in the eyes of the law," and thus his or her right to determine what happens no longer exists. Gregorian, *supra* note 28, at 404 (citing Nicola S. Peart et al., *Maintaining a Pregnancy Following Loss of Capacity*, 8 MED. L. REV. 275, 291 (2000)); Sperling, *supra* note 115, at 479; David R. Field, et al., *Maternal Brain Death During Pregnancy: Medical and Ethical Issues*, 260 JAMA 816, 821 (1988); Norman Fost & Laura M. Purdy, *Case Study: The Baby in the Body*, 24 HASTINGS CTR. REP. 31, 32 (1994)). Others argue that "a constitutional right to make future directives that bind oneself directly or through an agent has no constitutional precedent and poses many problems." John A. Robertson, *Advance Directives, Rights, and Brain Death Pregnancies*, BILL OF HEALTH (Mar. 24, 2014), <http://blogs.law.harvard.edu/billofhealth/2014/03/24/advance-directives-rights-and-brain-death-pregnancies/>, archived at <http://perma.cc/3EPX-WDF7> (arguing that "there is no constitutional right to make a directive at Time 1 that binds at Time 2"). Yet, the American legal system promotes other interests that are protected after death, and the right to refuse medical treatment should apply after death as well. See MacAvoy-Snitzer, *supra* note 28, at 1297–98. For example, a parent's interest in child rearing also can transcend death in the case of guardianship appointments. *Id.* at 1298.

126. *Piazzi Order*, *supra* note 116, at 417–18.

127. *Id.* at 418.

128. *Id.*

129. See MacAvoy-Snitzer, *supra* note 28, at 1297–98; Sperling, *supra* note 115, at 480 ("[T]he view that a brain-dead patient is deprived of rights or interests, and exists solely as a corpse . . . goes against most of our societal norms, which accord great respect and reverence for the dead and sanctity for their bodies."); Jordan, *supra* note 89, at 1165 ("Brain death does not extinguish the rights of a woman over her body, because a statutory standard of death cannot arbitrarily limit a fundamental constitutional right, and because her bodily control also derives from a posthumous property right in her own cadaver."); Kirsten Rabe Smolensky, *Rights of the Dead*, 37 HOFSTRA L. REV. 763, 771–72 (2008) (discussing that courts have recognized that persons who are medically dead still have certain constitutional rights).

130. MacAvoy-Snitzer, *supra* note 28, at 1298; *Piazzi Order*, *supra* note 116, at 418.

131. MacAvoy-Snitzer, *supra* note 28, at 1283–84.

pregnancy exclusion to a pregnant woman who has been declared brain-dead would vary from state to state.<sup>132</sup>

#### *D. Application to Pregnancy Exclusions*

Based on legal precedent establishing a woman's rights, certain categories of statutory pregnancy exclusions arguably violate a woman's constitutional right to terminate a pregnancy and to refuse medical treatment.<sup>133</sup> First, pregnancy exclusions that automatically invalidate a woman's advance directive impose a substantial obstacle in the path of a woman seeking to terminate her pregnancy when the fetus is non-viable, and thus likely violate the "undue burden" test set forth in *Casey*.<sup>134</sup> Moreover, these overly broad exclusions create a problem when a woman is brain-dead and pregnant: the woman is obviously unable to communicate her current wish to have what could be a legal abortion.<sup>135</sup> This is the same result for those states that have a statute with suggested language from the Uniform Rights of the Terminally Ill Act (URITA).<sup>136</sup> The terms "probable" and "live birth" are vague and overbroad because any stage of pregnancy may fall under this umbrella language.<sup>137</sup> In other words, doctors could consider a woman who is only four weeks pregnant to have a fetus that will reach the "probable live birth" stage.<sup>138</sup> As a result, denying enforcement of an advance directive when a brain-dead woman is pregnant with a nonviable fetus appears to be an "undue burden" on both her right to terminate a pregnancy and her right to refuse

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132. GREENE & WOLFE, *supra* note 32, at 3–5.

133. *See supra* notes 33, 34 (listing state statutes that automatically invalidate an advance directive and listing state statutes that follow the potential for "live birth" approach).

134. GREENE & WOLFE, *supra* note 32, at 5. In other words, the statutes that automatically invalidate a pregnant woman's living will or advance directive and the statutes that may invalidate a woman's wishes when her fetus is not viable arguably violate both a woman's right to terminate her pregnancy and her right to refuse life-sustaining treatment. *Id.* In addition, the pregnancy exclusion in twelve states does not distinguish between being a day pregnant and being eight months pregnant. This creates a problem because "[t]reating all instances of pregnancy as voiding a woman's right not to be treated is far too broad an intrusion on her autonomy, privacy and liberty," and "even when applied correctly, [the law] affords no choice in the face of uncertainty and doubt about the health of the fetus, which reasonable people might have." Caplan & Pope, *supra* note 5.

135. GREENE & WOLFE, *supra* note 32, at 5. Furthermore, the pregnancy exclusions that automatically invalidate the woman's end-of-life documents preclude a pregnant woman who is seeking to withhold or withdraw life-sustaining treatment from obtaining an abortion under *any* circumstance. *Id.*

136. *Id.* at 5–6.

137. *Id.*; *see also supra* note 33 (listing states that follow the URTIA approach).

138. This also creates uncertainty in the medical field because doctors cannot determine when a non-viable fetus has developed to the point in which it will have a "probable live birth." GREENE & WOLFE, *supra* note 32, at 6.

medical treatment. Indeed, only when a fetus has become viable may the state's interest in the fetus become compelling.<sup>139</sup>

Furthermore, the few states that use the term "viability" in pregnancy exclusions may also have an inherent problem with the application of the law.<sup>140</sup> The problem is that society continues to debate what the term "viability" actually means.<sup>141</sup> Courts are reluctant to define "viability,"<sup>142</sup> and the scientific community continues to disagree about when a fetus becomes viable.<sup>143</sup> In addition, this language puts doctors in the position of having to determine viability on a case-by-case basis, thus putting them "in charge of determining the fate of their patients."<sup>144</sup>

Finally, in states where the laws do not address a woman's rights in the event she is pregnant when doctors declare her brain dead, women are left even more uncertain about whether their end-of-life wishes will be honored.<sup>145</sup>

### III. RECOMMENDATIONS

The current state advance directive statutes are inadequate in addressing the dilemma posed by the *Muñoz v. Joseph Peter Smith Hospital* case. A woman should not have to forfeit her end-of-life decision-making power to the state when doctors have declared her brain-dead, as she deserves to have her wishes honored and her constitutional rights respected in the event she suffers brain death when pregnant with a nonviable fetus.<sup>146</sup>

The changes that are necessary to clarify the current pregnancy exclusions involve a two-step process. First, each state legislature should pass a statute or amend the current pregnancy exclusion.<sup>147</sup> Second, legislatures should amend any statutory forms that relate to end-of-life decisions. Similarly, attorneys who draft end-of-life documents for their female clients who are of child-bearing age should include specific language addressing the situation in which a woman

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139. *Roe v. Wade*, 410 U.S. 113, 163–65 (1973); *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876–77 (1992). According to *Roe* and its prodigy, at this viability stage the state may prohibit an abortion unless the mother's health is in danger. *Roe*, 410 U.S. at 164–65. Further, "pre-viability, the state's interest in keeping a brain dead woman on life-sustaining treatment is not compelling." Gregorian, *supra* note 28, at 420.

140. GREENE & WOLFE, *supra* note 32, at 6.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. Gregorian, *supra* note 28, at 419.

147. See Burch, *supra* note 14, at 565–70.

is brain-dead and pregnant. In addition, health care providers should discuss the issue with their female patients.<sup>148</sup>

### A. Changes to Pregnancy Exclusions

State legislatures first need to propose legislation proactively to create or amend pregnancy clauses to clarify what doctors and hospitals should do when a woman is brain-dead and pregnant.<sup>149</sup> The specific solution for each state legislature will depend, of course, on the state's current approach to the effect of pregnancy on a woman's advance directive.<sup>150</sup>

To clear up any potential ambiguity about whether the pregnancy exclusion applies to a brain-dead woman, a simple solution is to add a line into the provision that nullifies it if the woman has been declared brain-dead.<sup>151</sup> Using the current Texas pregnancy exclusion as an example, the revised statute could readily be amended by adding a new subsection (b):

- (a) A person may not withdraw or withhold life-sustaining treatment under this subchapter from a pregnant patient.

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148. Some health care providers are required to discuss advance directives in general with their patients. See GREENE & WOLFE, *supra* note 32, at 2–3 (explaining that following *Cruzan* Congress passed the Patient Self-Determination Act of 1991, which requires certain health care providers receiving federal Medicare or Medicaid funds to discuss an advance directive with all adult patients).

149. See Burch, *supra* note 14, at 566–70; see also Jordan, *supra* note 89, at 1159–60.

150. States should not, however, take the Louisiana approach when drafting or revising statutory language. The Louisiana amendment in 2014 did not clarify the application of the law to a woman who is brain dead and pregnant. See discussion *supra* Part I.B. And, legislatures should be mindful that the constitutionality of pregnancy exclusions when applied to a woman who is pregnant is in a coma or in a permanent vegetative state is also highly questionable. See discussion *supra* Part II.

151. Two Texas representatives plan to review the pregnancy exclusion during the 2015 legislative session. See *Muñoz Case Could Bring Changes to Texas Health Code*, WFAA (Jan. 27, 2014, 8:04 PM), <http://www.wfaa.com/news/health/2014/08/20/14162268>, archived at <http://perma.cc/C2HJ-5QK2>. Representative Garnet Coleman (D-Houston) thinks the simple fix is to add a line into the statute that nullifies it if the pregnant woman has already been declared dead. *Id.* On the other hand, Representative Matt Krause (R-Fort Worth) wants to add more protections for the fetus and prefers to have a guardian appointed to protect the interest of the fetus. See H.B. 1901, 84th Leg. Reg. Sess. (Tex. 2015); see also Jason Wheeler, *Fort Worth End-of-Life Case May Weigh on Legislature*, WFAA (Nov. 16, 2014, 12:36 PM), <http://www.wfaa.com/story/news/local/tarrant-county/2014/11/17/marlise-munoz-case-may-spur-legislation-in-next-session-in-austin/19155891/>, archived at <http://perma.cc/J4TD-F83L> (explaining on Inside Texas Politics that the bill would require a special legal guardian be appointed in future pregnancy life support situations to represent the fetus). Yet, if the woman is pregnant with a non-viable fetus, the State probably does not have a “compelling interest” in the potential life of the fetus. See discussion *supra* Part II.A.

(b) Subsection (a) does not apply to a woman who has been declared brain-dead pursuant to section 671.001 of this Code.<sup>152</sup>

This proposed language is explicit so that a neither the doctor nor the hospital will question the applicability of the pregnancy exclusion to a woman who is brain-dead.<sup>153</sup>

If a state legislature prefers to apply the pregnancy exclusion to a woman who has been declared brain-dead, the statutory language must still comport with the woman’s rights.<sup>154</sup> Thus, one potential approach is to include language that hinges on the viability of the fetus.<sup>155</sup> The viability approach would balance the pregnant woman’s interests and rights against the state’s interests in the woman’s fetus and would make the pregnancy exclusion consistent with the viability distinction in the abortion context.<sup>156</sup>

Finally, as an alternative to using viability language, at a minimum, a state legislature should make the applicability of the pregnancy exclusion consistent with the state’s abortion law.<sup>157</sup> For example, if a state allows a woman to have an abortion up to 22 weeks, then the pregnancy exclusion provision should allow the woman’s advance directive to be effective if the woman is less than 22 weeks pregnant.<sup>158</sup> Overall, this approach will promote uniformity of laws. By crafting a statute that includes language that is consistent with the temporal framework of the state’s abortion law,<sup>159</sup> the legislatures would lift the burden from doctors because they will have an objective

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152. See TEX. HEALTH & SAFETY CODE ANN. § 166.049 (West 2013). And, because the proposed language in subsection (b) would also apply to a brain-dead woman who is pregnant with a viable fetus, a state legislature may choose to add additional language to narrow its application.

153. This proposed language solves the issue when a woman is brain-dead and pregnant. As previously discussed, the constitutionality of the actual pregnancy exclusion may still be questioned. See discussion *supra* Part II.

154. See discussion *supra* Parts II.A, II.B.

155. Admittedly, the “viability” standard may still pose problems, see *supra* Part II.A, but using viability as a benchmark would at least make the pregnancy exclusion constitutional when it comes to the application to a woman who is brain-dead and pregnant.

156. See *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 870–71 (1992).

157. This approach assumes that the state’s abortion law is constitutional.

158. Louisiana’s recent amendment does take this approach to the age of the fetus, but other problems with the added statutory language render it inapplicable to a woman who is brain-dead and pregnant. See discussion *supra* Part I.B.

159. This forces the question: Do the requirements for a valid living will satisfy the informed-consent requirements? See Sperling, *supra* note 115, at 486–90; see also Sisti, *supra* note 10, at 164. To ensure that any potential problem with informed consent is addressed, it would be prudent to include a provision in the advance directive that the woman has complied with the informed consent laws of the state, and a woman could also sign her advance directive after she has waited for the required time period to comply with any informed consent law. Sisti, *supra* note 10, at 164.

way of determining whether to withhold or withdraw the woman's life-sustaining treatment when she has been declared brain-dead.<sup>160</sup>

In any event, state legislatures should endeavor to either express that a pregnancy exclusion (1) does not apply to a woman who is brain-dead and pregnant, (2) applies only if the brain-dead woman is pregnant with a viable fetus, or (3) applies only if the brain-dead woman is less than a certain number of weeks pregnant, consistent with the state's abortion law. The failure to make changes to the current statutory schemes will result in a woman's end-of-life wishes not being honored and will leave doctors and hospitals second-guessing the intent of the pregnancy exclusion.<sup>161</sup>

### *B. Changes to Language in Advance Directives*

In addition to the state legislatures enacting changes to their pregnancy exclusions, specific language in a woman's end-of-life documents should be included to express her end-of-life wishes in the event she is pregnant when she is declared brain-dead. Accomplishing this change will require statutory changes to suggested or mandatory advance directive forms as well as changes to the way attorneys and health care providers proactively discuss the rare and unfortunate situation with their respective clients and patients.

First, for further consistency, any advance directive forms in a state's statutory scheme should be amended to include language addressing the potential for brain death and pregnancy.<sup>162</sup> In this regard, the statutory forms should include a special provision contemplating pregnancy and expressing the woman's wish for life-sustaining treatment to be withheld or withdrawn even if she were pregnant. Such language in the forms should be consistent with the overall approach the state legislature takes; for example, if a state takes the viability approach discussed in Part III.A, the language in the statutory form could read as follows<sup>163</sup>:

If a physician should declare my brain death while I am pregnant,  
and if at the time of my brain death a physician determines that

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160. See Burch, *supra* note 14, at 566 n. 231.

161. See *supra* text accompanying note 151.

162. See, e.g., ALA. CODE § 22-8A-4(h) (West 2014); ARIZ. REV. STAT. ANN. § 36-3262 (West 2014); see also A.B. 861, 2013–14 Leg., 101st Sess. (Wis. 2013), available at <https://docs.legis.wisconsin.gov/2013/related/proposals/ab861>, archived at <http://perma.cc/835Z-Y3DY> (legislation introduced by Representatives Taylor (D-Madison) and Berceau (D-Madison), the Pregnancy Protection Package seeks to remove the statutory pregnancy exclusion from the statutory advance directive form).

163. See Burch, *supra* note 14, at 565–68 (explaining a broader proposal that would address the effect of an advance directive during pregnancy).

to a reasonable degree of medical certainty the fetus is not viable, then I wish that life-sustaining medical treatment be withheld or withdrawn and that the fetus be allowed to die naturally in my body.

Second, attorneys and health care providers need to be proactive when communicating with a woman of child-bearing age when she plans her end-of-life documents.<sup>164</sup> Attorneys should include a question on their advance directive checklist and discuss the issue during the initial interview with any woman of child-bearing age.<sup>165</sup> Similarly, because advance directives instruct health care providers about medical care that a person would or would not want to have in the event he or she becomes incompetent, health care providers should discuss the issue during their standard prenatal interview. By discussing a woman's wishes in the event she is declared brain-dead when pregnant and then having the woman execute the appropriate end-of-life documents, no one will have to question her wishes later.<sup>166</sup>

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164. See GREENE & WOLFE, *supra* note 32, at 7 (suggesting an amendment to the Patient Self-Determination Act in order to require health care providers to inform a woman of her rights when creating her advance directive, as the Act provides no guidance on the issue of pregnancy exclusions).

165. As previously mentioned, an attorney may want to include a provision in the advance directive that the woman has complied with the informed consent laws of the state, to the extent she can considering she may not be pregnant when she executes the advance directive. See *supra* text accompanying note 159.

166. Unfortunately, the large majority of the population does not have a written, advance directive. Glenn Cohen, *Negotiating Death: ADR and End of Life Decision-Making*, 9 HARV. NEGOT. L. REV. 253, 283 (2004). In the event the woman does not express her wishes in an advance directive, the woman's decision to withhold or withdraw life-sustaining treatment should still be honored. Of course, having a written advance directive, even without language specifically addressing a potential pregnancy, could still constitute "clear and convincing" evidence of the woman's intent to be removed from life-sustaining treatment. See *Cruzan v. Dir. Missouri Dept. of Health*, 497 U.S. 261, 284–87 (1990).

Furthermore, the common law doctrine of substituted judgment is a means by which the courts may address a brain-dead, pregnant woman without an effective advance directive. Burch, *supra* note 14, at 563–65. Courts typically apply a "substituted judgment standard" when a woman is no longer competent and she did not express her wishes. *Id.*; see, e.g., TEX. HEALTH & SAFETY CODE ANN. § 166.039(b) (West 2013) (explaining the priority of persons who may make a treatment decision, including a decision to withhold or withdraw life-sustaining treatment, include the following: "(1) the patient's spouse, (2) the patient's reasonably available adult children, (3) the patient's parents, or (4) the patient's nearest living relative").

For example, in the case of *In re A.C.*, the issue involved a woman's right to decline medical treatment, i.e., a caesarean section for a cancer-associated death at twenty-six weeks of gestation. 573 A.2d 1235, 1237–38 (D.C. 1990). The court identified the following factors to be considered when determining how to proceed with a woman who is no longer competent: (1) the person's written and oral directions concerning treatment to family, friends, and health care providers; (2) the person's past decisions concerning medical treatment; and (3) the person's value system. *Id.* at 1249–51; see also Mary R. Anderlik, *End-of-Life Decision-Making for Pregnant Women*, HEALTH L. & POLICY INST.

## CONCLUSION

The tragic situation in which a woman is pregnant at the time she is declared brain-dead is rare circumstance, but it warrants action to ensure that a woman's end-of-life wishes are honored and respected by her family, health care providers, and the state. Current state statutes addressing the effect of an advance directive on a pregnant woman's wishes arguably do not apply in the event of a woman's brain death, as the plain language of the statutes dictate that they apply to a living woman, not a woman who is brain-dead.<sup>167</sup>

Moreover, even if the statutory pregnancy exclusions are deemed to apply to a woman who is brain-dead and pregnant, then the exclusions arguably violate a woman's constitutional rights.<sup>168</sup> A woman's right to terminate her pregnancy when the fetus is non-viable is violated, and her right to refuse medical treatment is also violated.<sup>169</sup>

To remedy these problems, state legislatures first should either draft a statute or amend the language in their pregnancy exclusions to clarify the applicability to a woman who is brain-dead and pregnant. In addition, end-of-life planning documents need to include clear language that expresses the woman's wishes in the event she is declared brain-dead when she is pregnant. Correspondingly, state legislatures also need to amend the statutory forms for advance directives, and both attorneys and health care providers should be proactive and discuss the issue with their respective clients and patients. Not taking such measures will lead to repeats of the *Muñoz v. John Peter Smith Hospital* case and place a woman's important end-of-life decisions in the hands of the courts.

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(Aug. 12, 1999), <http://www.law.uh.edu/healthlaw/perspectives/Reproductive/990812EOLDecisions.html>, archived at <http://perma.cc/JC77-R7PK>. If uncertainty remains, the court should then consider "what most [people] would likely do in a similar situation . . . [including] the viability of the fetus . . ." *In re A.C.*, 573 A.2d at 1251; see also Benton, *supra* note 89, at 1826 ("[R]isk of psychological harm to the woman's partner and family must [also] be considered when a pregnant woman's body is maintained against her express wishes.").

Moreover, it has been suggested that when the woman's post-mortem wishes are in dispute or cannot be determined, the biological father's interests and role should be given greater weight. Gregorian, *supra* note 28, at 422 ("When the mother's wishes are unknown and cannot be determined, her judgment cannot be substituted and her interests cannot be protected over the interest of the biological father. At that point, courts should defer to the judgment of the biological father, giving his preference priority."). *But see* Sperling, *supra* note 115, at 491 (arguing that the biological father should be allowed to "reflect" on the woman's wishes, but not be able to "determine this understanding").

167. See, e.g., ALA. CODE § 22-8A-4(h) (West 2014); ARIZ. REV. STAT. ANN. § 36-3262 (West 2014).

168. See discussion *supra* Parts II.A, II.B.

169. See discussion *supra* Parts II.A, II.B.