Congress of the United States

Washington, DC 20515

June 16, 2023

VIA Federal eRulemaking Portal

The Honorable Xavier Becerra
Secretary
U.S. Department of Health and Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

RE: Comments on Proposed Rule: HIPAA Privacy Rule To Support Reproductive Health Care Privacy, 88 FR 23506 (April 17, 2023), RIN: 0945-AA20, Docket No. 2023-07517

Dear Secretary Becerra:

We write to express our concern regarding the U.S. Department of Health and Human Services (HHS) proposed rule, "HIPAA Privacy Rule To Support Reproductive Health Care Privacy," 88 Fed. Reg. 23506 published on April 17, 2023 (the "Proposed Rule"), and to urge you to withdraw it immediately.

Abortion is not health care—it is a brutal act that destroys the life of an unborn child and hurts women. Congress did not authorize HHS to extend special provisions for abortion such as these under the guise of "health care." The Proposed Rule unlawfully thwarts the enforcement of compassionate laws protecting unborn children and their mothers, and directs health care providers to defy lawful court orders and search warrants.

The Proposed Rule creates special protections for abortion that limit cooperation with law enforcement, undermine the ability to report abuse, restrict the provision of public health information, and erase the humanity of unborn children. The Proposed Rule would interfere with valid state laws protecting life, arbitrarily permit abortionists to disclose protected health information (PHI) to defend themselves while silencing others, and unlawfully infringe on Congressional power.

The Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* returned the power to regulate or prohibit abortion back to people and their elected representatives. Under the Proposed Rule, HHS attempts to undermine enforcement of Federal and State abortion laws, simply because this administration disagrees with the Court's decision.

As Members of Congress, we have a Constitutional interest in ensuring that in issuing regulations under the Health Insurance Portability and Accountability Act of 1996 (HIPAA), HHS does not exceed its Congressionally authorized power.

I. Summary of the Health Insurance Portability and Accountability Act of 1996

Enacted by Congress in 1996, HIPAA mandated the development of national standards to prevent PHI from being disclosed without the patient's consent.[1] As required under Title II of HIPAA, HHS developed

[1] Public Law 104-191.

the Privacy Rule to regulate the use and disclosure of PHI by covered health entities, including both health care providers and health plans.[2]

In certain circumstances, the HIPAA Privacy Rule permits, but does not require, covered entities to use and disclose PHI without authorization from the patient. These circumstances include the following:

- **Exception for law enforcement purposes:** A covered entity may disclose PHI to a law enforcement official for a law enforcement purpose, including complying with a subpoena, a court order, or a warrant.[3] It may provide PHI in specific criminal, civil, and administrative proceedings.

- **Exceptions for abuse:** A covered entity may report child abuse and neglect to the appropriate government authority authorized by law to receive these reports.[4] It may also disclose PHI about an individual whom the covered entity reasonably believes to be a victim of abuse, neglect, or domestic violence to a government authority.[5]

- **Exception for serious and imminent threats to the health or safety of a person or the public:** A covered entity may disclose PHI if it believes the disclosure is necessary to prevent or lessen a serious or imminent threat to a person or to the public. [6]

- **Exception for public health data collection:** A covered entity may disclose PHI to a public health authority authorized by law to collect this information, including for the purpose of public health surveillance.[7]

II. Summary of Key Changes Made by the Proposed Rule

Definition of Reproductive Health Care

The HHS Proposed Rule creates an arbitrary and capricious new category for abortion under the umbrella of "reproductive health care," which is defined as "care, services, or supplies related to the reproductive health of the individual,".[8] The preamble to the Proposed Rule clarifies that this definition "applies broadly" and includes "non-prescription supplies" furnished either by a health care provider or an individual who is not a health care provider.[9] Under the Proposed Rule "seeking, obtaining, providing, or facilitating reproductive health care," such as abortion, broadly "includes, but is not limited to, any of the following: expressing interest in, inducing, using, performing, furnishing, paying for, disseminating information about, arranging, insuring, assisting, or otherwise taking action to engage in reproductive

[2] HIPAA Administrative Simplification. Regulation Text. 45 CFR Parts 160, 162, and 164 (Unofficial Version, as amended through March 26, 2013). https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/administrative/combined/hipaa-simplification-201303.pdf.
[3] 45 CRS § 164.512(f).
[4] Section 1178(b) of HIPAA [42 U.S.C. 1320d–7], 45 CFR § 164.512 (b)(1)(ii).
[5] 45 CFR § 164.512(c)(1)(i).
[6] 45 CFR § 164.512(j).
[7] 45 CFR § 164.512(b)(1)(i).
[8] Proposed 45 CFR § 160.103.
[9] 88 FR 23527.

health care; or attempting any of the same."[10] In addition to including performing surgical and chemical abortion, this definition would encompass actions like mailing abortion drugs, promoting abortion, illicitly transporting minors or victims of sexual abuse to undergo abortions, and providing equipment intended to induce abortions, to name only a few examples.

The Proposed Rule would systematically undercut pro-life state laws in order to give abortion special protection. As described below, the rule limits cooperation with law enforcement, restricts the provision of public health information, and strips unborn children from the scope of protections under the HIPAA Privacy Rule.

Changing the HIPAA Privacy Rule's Exception for Law Enforcement Purposes

The Proposed Rule amends the Privacy Rule to prohibit covered entities from cooperating with law enforcement or even following a court order by using or disclosing PHI "for a criminal, civil or administrative investigation into or proceeding against any person in connection with seeking, obtaining, providing, or facilitating" an abortion, or to identify any person for the purpose of initiating such an investigation or proceeding,[11] if one or more of following three conditions are met ("Rule of Applicability"):[12]

(1) the abortion is provided "outside of the state where the investigation or proceeding is authorized" and the abortion "is lawful in the state in which it is provided."

(2) the abortion is "protected, required, or authorized by Federal law, regardless of the state in which such health care is provided."

(3) the abortion is "provided in the state in which the investigation or proceeding is authorized" and the abortion "is permitted by the law of that state."

HHS states that the purpose of this proposed Rule of Applicability is to "limit the application of the prohibition to circumstances in which the care [the abortion] is lawful under the circumstances in which such health care is provided."[13] As explained further on, however, the Rule of Applicability is premised on dubious and untested legal arguments that displace vast swaths of State abortion laws and inhibit States in carrying out their legitimate interests in protecting unborn children.

Changing the HIPAA Exceptions for Abuse

This Proposed Rule interferes with, and exerts a chilling effect on, the investigation and reporting of child abuse and sexual abuse, protecting abusers instead of victims.

Consistent with Section 1178(b) of the Social Security Act (as added by HIPAA), the Privacy Rule allows covered entities to use or disclose PHI in reporting suspected child abuse or neglect to the appropriate government authority.[14] The Privacy Rule also allows for the disclosure of PHI to the appropriate

[10] Proposed 45 CFR § 164.502(a)(5)(iii)(B).
[11] Proposed 45 CFR § 164.502(a)(5)(iii)(A).
[12] Proposed 45 CFR § 164.502(a)(5)(iii)(C)(1),(2),(3).
[13] 88 FR 23530-23531.
[14] 45 CFR § 164.512(b)(1)(i).

government authority when the covered entity "reasonably believes [an individual] to be a victim of abuse, neglect, or domestic violence," subject to certain other requirements.[15]

Under the Proposed Rule, neither of these longstanding exceptions to protect victims of abuse would permit disclosures of PHI for investigating or prosecuting any individual for providing or facilitating an abortion (in the applicable circumstances) "when the report of abuse, neglect, or domestic violence is *based primarily* on the provision of reproductive health care" (emphasis added).[16] The broad definition of "reproductive health care" means this provision not only protects abortions sought or coerced by abusers to cover up their abuse, but also covers cases where the reporting is based on the administration of rape kits and medical treatment for victims of sexual assault. Consequently, the Proposed Rule would protect abusers and abortionists who turn a blind eye to them, while exerting a chilling effect on the reporting of child and sexual abuse and the ability of States to prosecute perpetrators of abuse.

HHS openly admits that it intends for this provision to protect abortionists rather than victims in a bid to override the will of pro-life States: "The Department is concerned that *recent state actions* may lead regulated entities to think that they are permitted to make such disclosures of PHI when they believe that persons who provide or facilitate access to reproductive health care are perpetrators of such crimes" (emphasis added).[17]

Changing the HIPAA Privacy Rule's Exception for Serious and Imminent Threats to the Health or Safety of a Person or the Public

The Privacy Rule allows a covered entity to disclose PHI when it is "necessary to prevent or lessen a serious and imminent threat to the health or safety of a person or the public" and is "to a person or persons reasonably able to prevent or lessen the threat, including the target of the threat."[18]

The Proposed Rule's redefinition limits the term "person" to a human being "who is born alive,"[19] wrongfully preventing the Privacy Rule's exception for a serious and imminent threat to the health or safety from applying to an unborn child. The use of this exception is appropriate for an unborn child because every pregnancy involves two patients, the unborn child and his or her mother. Both patients have their own DNA, sex, limbs, eye color, and heartbeat. Abortion is the most serious threat imaginable to the health and safety of the child in the womb.

Congress has recognized the unborn child explicitly in several laws, including the Unborn Victims of Violence Act,[20] the Emergency Medical Treatment and Active Labor Act (EMTALA),[21] and the National

[15] 45 CFR § 164.512(c)(1)(i).
[16] Proposed 45 CFR 164.152(c)(3)
[17] 88 FR 23519.
[18] 45 CFR § 164.512(j).
[19] Proposed 45 CFR § 160.103.
[20] 18 U.S.C. § 1841 (establishing a separate offense for unborn children who are killed or injured through the commission of certain Federal crimes).
[21] 42 U.S.C. §§ 1395w-22(d)(B)(i), 1395dd(c)(1)(A)(ii), (c)(2)(A), (e)(1)(A)(i),(B)(ii) (recognizing threats to the health of the unborn child as well as the mother).

Childhood Vaccine Injury Act.[22] HHS regulations governing the Child Health Insurance Program similarly recognize the unborn child.[23]

The preamble to the Proposed Rule wrongly cites the Born Alive Infants Protection Act to limit the scope of protections in the Privacy Rule for unborn human beings. That law rightfully recognizes that children born alive, even after failed abortions, are "persons" under Federal law. However, the law did not thereby state that unborn children were not "persons." In fact, to avoid this very misunderstanding, the law included a rule of construction that states: "Nothing in this section shall be construed to affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being `born alive' as defined in this section."[24] Therefore, HHS' use of this 2002 law exclude "unborn children" as persons is arbitrary and capricious.

Changing the HIPAA Exception for Public Health

As directed by Section 1178(b) of the Social Security Act (as added by HIPAA), the Privacy Rule allows covered entities to use or disclose PHI in matters related to public health surveillance. The Proposed Rule arbitrarily thwarts legitimate public health oversight of the abortion industry. Specifically, the rule redefines "public health," to exclude "uses and disclosures for the criminal, civil, or administrative investigation into or proceeding against a person in connection with obtaining, providing, or facilitating" an abortion.[25] In addition, the Administration also clarifies that it believes state laws requiring the disclosure of PHI for purposes such as criminal, civil, or administrative investigations related to abortion are preempted by HIPAA.[26] It also states that public health reporting activities, including categories like "disease or injury," "birth," or "death," will exclude information about abortion for purposes of HIPAA.[27]

III. Key Anti-Life Consequences of the Proposed Rule

The Proposed Rule Interferes with Valid State Laws Protecting Life

The Proposed Rule interferes with the administration and enforcement of valid State laws that regulate or prohibit abortion. This is by design and in response to *Dobbs*, as HHS itself admits the rule would "create a conflict" with "some state laws."[28] HHS states that, in the circumstances when the Proposed Rule applies, "the state lacks any substantial interest in seeking the disclosure"[29] and elsewhere describes states as lacking even a "legitimate interest."[30]

Such assertions run directly counter to the ruling of the Supreme Court in *Dobbs*, which made clear that "[a] law regulating abortion . . . is entitled to a 'strong presumption of validity.'"[31] This presumption "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." Such legitimate interests "include respect for and preservation of

[22] 42 U.S.C. §§ 300aa-11(b)(2),(f) (applying the maternal immunization provisions to recognize children who were in utero when their mothers received a vaccine as "persons" who received a vaccine).
[23] 42 CFR § 457.10 (permitting States to consider the unborn child a "targeted low-income child" by defining "child" to include "an individual" during "the period from conception to birth").
[24] 1 U.S.C. 8(c).
[25] Proposed 45 CFR § 160.103.
[26] 88 FR 23524.
[27] 88 FR 23524.
[28] 88 FR 23530.
[29] 88 FR 23522.
[30] 88 FR 23531.
[31] *Dobbs v. Jackson Women's Health Org*., 142 S. Ct. 2228, 2284 (2022)

prenatal life at all stages of development, … the protection of maternal health and safety; the elimination of particularly gruesome or barbaric medical procedures; the preservation of the integrity of the medical profession; the mitigation of fetal pain; and the prevention of discrimination on the basis of race, sex, or disability."[32]

The Proposed Rule would contradict the presumption of validity of State abortion laws and massively expand the power of the Federal bureaucracy to undermine them. HHS would be empowered to launch investigations or impose crippling fines on health providers for obeying state laws, complying with state court orders, or cooperating with law enforcement.

Despite HHS claim that the Proposed Rule only applies when abortion related activities are lawful,[33] the rule will hamper the ability of states and the Federal government to investigate and enforce valid and enforceable pro-life laws.

This result stems from how each of the three prongs of the proposed Rule of Applicability is drafted:

1. ***Under the first prong of the Rule of Applicability, States that protect life would be unable to obtain PHI from health care providers to investigate the provision, trafficking or shipping of abortion drugs, or otherwise performing or facilitating abortion if the action begins, ends, or otherwise is connected with activities that occur in a State where abortion is legal.***

   HHS explains that "[t]he proposal is not limited to circumstances in which the health care has not yet been obtained, provided, or facilitated. It also includes situations *where the health care is ongoing* or has been completed" (emphasis added).

   Below is a non-exhaustive list of examples of circumstances where the prohibitions of the Proposed Rule appear to apply:
   - An out-of-State (or international) abortionist or abortion drug trafficker uses telemedicine or the mail to prescribe or transport an abortion drug.[34]
   - An abortionist begins the process of a late-term abortion in a State where abortion on demand is legal and he or another abortionist completes it in a State where abortion is prohibited (or vice-versa).
   - A child is trafficked across State lines without the consent of a parent to obtain an abortion. (Idaho recently enacted a law to prevent this.)[35]
   - A victim of sexual abuse is transported across State lines from a pro-life State to a pro-abortion State to undergo an abortion and cover up the abuser's crimes.

   It is arbitrary and capricious for the Proposed Rule to allow pro-abortion States to extend the reach of their radical abortion policies into pro-life States, while inhibiting pro-life States in enforcing laws that seek to do the contrary.

[32] Ibid.
[33] 88 FR 23531.
[34] Ibid., Footnote 270 further suggests HHS intends to protect the illegal interstate shipping of abortion drugs by citing the Department of Justice Office of Legal Counsel's misguided memo that seeks reinterpret longstanding Federal laws prohibiting the mailing and interstate carriage of abortion drugs.
[35] Idaho House Bill 242 (2023) https://legislature.idaho.gov/sessioninfo/2023/legislation/h0242.

To the extent State laws on abortion involve novel interjurisdictional issues between the States, it is the role of the Federal Courts, not HHS to adjudicate any constitutional questions that may arise in this context. HHS does not have the authority to declare that a sweeping category of State laws that protect life should not receive the presumption of validity that they are entitled to under *Dobbs*.

2. ***Under the second prong of the Rule of Applicability, HHS baselessly asserts that Federal law authorizes or even requires abortions that are prohibited under state law.***
As an example, HHS cites the Department of Veterans Affairs (VA) interim final rule, which purports to authorize VA to provide abortions on demand even in defiance of State law.[36] HHS fails to acknowledge, however, that a 1992 Federal law expressly prohibits the VA from providing abortions.[37] Furthermore, under the Assimilative Crimes Act, it is a Federal crime to violate a State abortion law in a Federal enclave located within that State.[38] As a second example, HHS cites the Emergency Medical Treatment and Labor Act (EMTALA), which the Biden administration claims "requires" the performance of abortion when a woman's health is at risk, preempting State laws prohibiting elective abortions.[39] In reality, EMTALA explicitly recognizes the health of the unborn child alongside the mother's health.[40]

   We ask that HHS provide a complete list and justification of every Federal law it believes protects, requires, or authorizes abortion or abortion-related activities in violation of State law, and which State laws on abortion HHS believes are unenforceable by reason of Federal law.

3. ***Under the third prong of the Rule of Applicability, HHS prevents health care providers from disclosing PHI to law enforcement or a Court if the State has not made the abortion at issue unlawful.***
The Proposed Rule would have a chilling effect on the ability of States to enforce their laws. HHS states: "if a state has not made the relevant reproductive health care unlawful, *it lacks a legitimate interest* in conducting a criminal, civil, or administrative investigation or proceeding into such health care where the investigation is centered on the mere fact that reproductive health care was or is being provided" (emphasis added).[41] This justification is without merit. States have a legitimate interest in investigating conduct that they have probable cause to believe may be unlawful. States that prohibit abortion except in limited circumstances, or only after the attainment of a certain gestational age or developmental milestone like a detectable heartbeat, must be allowed to investigate to determine whether or not a given abortion was lawful in the first place.

   Under the Proposed Rule, however, States would be forced to cede their powers to investigate criminal abortion-related activity to a health care provider (who may even be the subject of the investigation) and HHS' determination and understanding of State law. But in many cases, a violation of State law can only be determined through an investigation. HHS explains that a State investigation or proceeding regarding abortion could only obtain PHI "[w]here *the regulated entity determines* that the reproductive health care was provided under circumstances where it was unlawful"[42]

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[36] 88 FR 23531.
[37] Section 106 of the Veterans Health Care Act of 1992 (38 USC 1710 note).
[38] 18 U.S.C. § 13.
[39] 88 FR 23531.
[40] 42 U.S.C. §§ 1395w-22(d)(B)(i), 1395dd(c)(1)(A)(ii), (c)(2)(A), (e)(1)(A)(i),(B)(ii).
[41] 88 FR 23531.
[42] Ibid.

(emphasis added). This makes the Proposed Rule completely unworkable and wrongfully assigns health care providers and HHS bureaucrats power to self-enforce and oversee, respectively, State abortion laws in manner unlike how any legitimate health care service is treated under the Privacy Rule. The Proposed Rule also creates confusion for health care providers, who could be subjected to crippling fines imposed by HHS for cooperating with legitimate State law enforcement activities and Court orders.

By tying its requirements to circumstances where the abortion is "permitted by the law of that state,"[43] the Proposed Rule unlawfully thwarts enforcement of Federal criminal laws on abortion, such as those mentioned below. Specifically, this prong would prohibit disclosures for purposes of enforcing Federal abortion laws in States where statutes permit the Federally-prohibited abortion or abortion-related activities at issue, such as partial-birth abortions.

The Proposed Rule Arbitrarily Permits Abortionists to Disclose PHI to Defend Themselves

The Proposed Rule arbitrarily and capriciously permits abortionists and others who facilitate abortion to disclosure abortion-related PHI "to defend any person in a criminal, civil, or administrative proceeding where liability could be imposed on that person for providing such health care,"[44] while simultaneously inhibiting the ability of the state to obtain that same information as part of an investigation or proceeding. The aim of the Proposed Rule is not, therefore, about protecting "an individual's highly sensitive PHI," as HHS asserts in numerous places;[45] rather, it is about insulating the abortion industry from accountability.

The Proposed Rule is Unlawful and Infringes on Congressional Power

The Proposed Rule is plainly unlawful, and, if finalized, would far exceed HHS' authorized power. HIPAA does not provide "clear authorization required by [the Supreme Court's] precedents" to promulgate regulations setting national policy on an issue of major political significance, which abortion surely is.[46] Moreover, the rule comes as Congress "conspicuously and repeatedly declined to enact" legislation similar in nature to the Proposed Rule.[47] The mere fact that HIPAA authorizes the preemption of contrary State laws does not change the fact Congress never authorized HHS to promulgate special protections for abortion, particularly, not to hinder valid criminal and civil investigations under State law.

Far from promoting abortion as the Proposed Rule would, Congress has on numerous occasions acted to limit abortion nationally and rejected attempts to use Federal law to expand or protect abortion. To the contrary, the Proposed Rule's attempt to create special protections for abortion unlawfully interferes with several Federal criminal laws that protect life and prohibit coercive family planning practices. These include: the Federal ban on partial birth abortions,[48] the Federal ban on the mailing and interstate shipment of abortion drugs,[49] the Assimilative Crimes Act (as explained above),[50] the Federal ban on trafficking in human fetal tissue,[51] the Federal ban on coercive abortion and sterilization in Federal

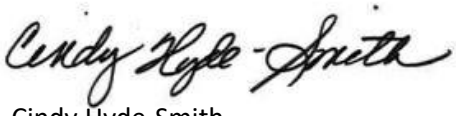
[43] Proposed 45 CFR § 164.502(a)(5)(iii)(C)(3).
[44] 88 FR 23532.
[45] 88 FR 23508.
[46] West Virginia v. EPA, 142 S. Ct. 2587, 2614 (2022).
[47] Ibid., *See* S.1656, H.R. 3420, 118th Congress.
[48] 18 U.S.C. § 1531.
[49] 18 U.S.C. §§ 1461-1462.
[50] 18 U.S.C. § 13.
[51] 42 U.S.C. § 289g-2.

programs,[52] and the Federal ban on Female genital mutilation.[53] Congress' enactment of laws that limit abortion demonstrates Congressional intent that it never intended HIPAA to be used to promote or create special protections for abortion.

IV. Conclusion

This Proposed Rule far exceeds the power HHS was given by Congress to implement HIPAA. It massively expands the power of the federal bureaucracy to illegally override pro-life state laws and to undermine the decision of the Supreme Court in *Dobbs*. If finalized, the Proposed Rule will suppress compliance with Court orders and hamper necessary and legitimate investigations by law enforcement while protecting sex abusers and traffickers and individuals flooding the mail with deadly abortion drugs. We urge HHS to immediately withdraw this dangerous and irresponsible regulation.

Sincerely,



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United States Senator

Christopher H. Smith
Member of Congress

Roger Marshall
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Andy Harris, M.D.
Member of Congress

James Lankford
United States Senator

Diana Harshbarger
Member of Congress

[52] 42 U.S.C. § 300a-8.
[53] 18 U.S.C. § 116.

Mike Lee
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Jim Banks
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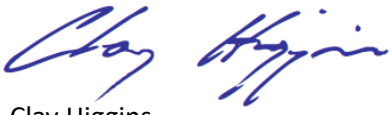

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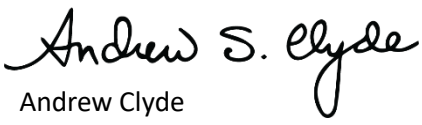
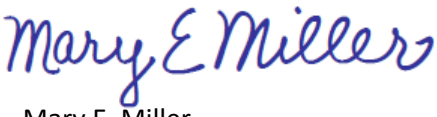


Andrew Clyde
Member of Congress



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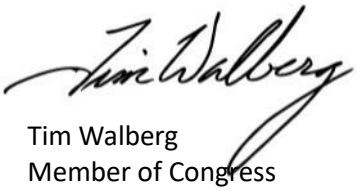
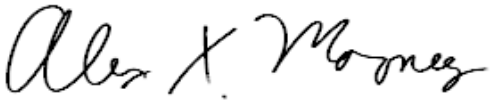


Tim Walberg
Member of Congress



Alex X. Mooney
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