



June 15, 2023

U.S. Department of Health and Human Services  
Office for Civil Rights  
Attention: HIPAA and Reproductive Health Care Privacy NPRM  
Hubert H. Humphrey Building, Room 509F,  
200 Independence Avenue SW  
Washington, DC 20201

[SUBMITTED ELECTRONICALLY]

To Whom It May Concern,

We write to you today to address grave concerns regarding the newly Proposed Rule, “HIPAA Privacy Rule To Support Reproductive Health Care Privacy” (“Proposed Rule;” RIN Number 0945-AA20) released by the U.S. Health and Human Services Department (“the Department”) on April 17, 2023, and ask for a full rescission. Family Policy Alliance is a network of hundreds of thousands of families from across the country—all of which care deeply and genuinely about the safety of women and children—as well as a network of state and national organizations that seek to ensure that the rights of families and individuals are protected.

The intended purpose of this rule is to modify the Standards for Privacy of Individually Identifiable Health Information under the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the Health Information Technology for Economic and Clinical Health Act of 2009 (HITECH Act) in order to build “a positive, trusting relationship between individuals and their health care provider,” specifically in reproductive health care.<sup>1</sup> To create that “trusting relationship,” the Department is proposing that protected health information (PHI) not be disclosed “for a criminal, civil, or administrative investigation into or proceeding against any person in connection with seeking, obtaining, providing, or facilitating lawful reproductive healthcare.”<sup>2</sup> The Department lists *Dobbs v. Jackson Women’s Health Organization (Dobbs)* as the reason for concern that an individual’s PHI could be disclosed against a patient’s will and used against that patient in the case of reproductive health care services rendered.

We argue that this is a false claim and is only meant to invoke fear in women, and the Department provides no evidence to back up these claims. While HIPAA is necessary for

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<sup>1</sup> 88 Fed. Reg. 23506 (Apr. 25, 2023) (to be codified at 45 C.F.R. pts. 160, 164).

<sup>2</sup> 45 C.F.R. § 164.502 (2013).



protecting the personal information of patients, under this Proposed Rule, the Department alters HIPAA by devaluing the life of the unborn, undermining state laws seeking to protect the health and safety of women and children, including children seeking dangerous transgender interventions, and stripping victims of crucial safeguards. For these reasons, we argue that this rule be immediately rescinded.

## **Redefining Person to Exclude Unborn Child**

The Department unfortunately uses this Proposed Rule to claim that the definition of the word “person,” as used in HIPAA, only includes a “human being that is born alive” and “does not include a fertilized egg, embryo, or fetus.”<sup>3</sup> The Department’s new definition of “person” directly dehumanizes lives in the womb. When a medical professional serves a pregnant woman, she is actively ensuring care for both the woman and the unborn child within her. To claim that a child in the womb is not a person devalues the work and attention those professionals and the women they serve offer to that child. It leaves one wondering: how *does* the department see that unborn child if not as a person?

The vast majority of the scientific community agrees that human life begins at fertilization, understanding that the child already carries specific genetic instructions, separate and distinct from the mother’s.<sup>4</sup> At a mere six weeks gestation, the child has a beating heart.<sup>5</sup> By seven weeks gestation, all of the major organs have begun to form, and the child moves and responds to touch, proving complex neuron connections; and, by at least gestational week 15, the child experiences pain.<sup>6</sup> An unborn child is clearly a human person worth protecting and ensuring proper care.

The actions of dehumanizing the vulnerable unborn population, such as only recognizing those “born alive” as persons, will inevitably lead to the loss of many additional lives of innocent children by the inhumane action of abortion and promote a radical abortion agenda and lobby often fueled by financially profiting from the difficulties mothers are experiencing in their pregnancy. This greatly troubles us because we know that human life—both of the mother and the child—has innate and immeasurable value, from conception to death, and we believe that it should be treated as such.

## **Circumventing State Laws**

As stated previously, the Proposed Rule prohibits medical facilities and professionals from sharing PHI “in connection with seeking, obtaining, providing, or facilitating lawful reproductive health care.” This includes “expressing interest in, inducing, using,

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<sup>3</sup> 88 Fed. Reg. at 23523.

<sup>4</sup> Steven Andrew Jacobs, *The Scientific Consensus on When a Human's Life Begins*, 36 ISSUES L. & MED. 221, 221 (2021).

<sup>5</sup> *The Voyage of Life*, CHARLOTTE LOZIER INST., <https://lozierinstitute.org/voyage/> (last visited Jun. 1, 2023).

<sup>6</sup> *Id.*

performing, furnishing, paying for, disseminating information about, arranging, insuring, assisting, or otherwise taking action to engage in reproductive health care; or attempting any of the same.”<sup>7</sup> This is a wide array of actions that covers beyond even the woman seeking an abortion.

The rule also includes a new definition of “reproductive health care” as “care, services, or supplies related to the reproductive health of the individual.”<sup>8</sup> This definition is so expansive and broad that it will foreseeably encompass more than just abortion services and may also apply to fertility services, sterilization services (including gender transition surgery, hormone therapy, and puberty blockers), and health and safety regulations for abortion providers to follow.

Specifically, the Proposed Rule would prohibit sharing PHI in three scenarios when the health care provided: “(1) is outside of the state where the investigation or proceeding is authorized and where such health care is lawful in the state in which it is provided; (2) is protected, required, or authorized by Federal law, regardless of the state in which such health care is provided; and (3) is provided in the state in which the investigation or proceeding is authorized and that is permitted by the law of that state.”<sup>9</sup> The Proposed Rule continues overtly that states “lack[] any substantial interest” in PHI disclosure in those circumstances.<sup>10</sup> Thus, states will be dangerously barred from effectively conducting investigations to enforce any state laws that broadly pertain to “reproductive health care” as defined by this newly Proposed Rule. This rule will lead to circumventing state laws that protect women and children, among other vulnerable groups, despite their vested interests.

To provide an example of a category of state laws that may be circumvented by the Proposed Rule, many state laws regulate harmful gender transition services for minors.<sup>11</sup> If the definition were to be interpreted to include transgender interventions as we understand them, the Proposed Rule would prevent information about a minor receiving harmful gender transition procedures, such as double mastectomies, from being used in holding those medical professionals accountable.<sup>12</sup> This would effectively prevent at least 15 states from enforcing laws that protect minors from transgender intervention services. Especially with states like California passing legislation to recruit minors into California from surrounding states for the purpose of transgender surgeries—including at the subversion of parental notification or consent, this Proposed Rule will have dangerous implications for those children harmed.

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<sup>7</sup> 88 Fed. Reg. at 23552.

<sup>8</sup> 88 Fed. Reg. at 23552.

<sup>9</sup> 88 Fed. Reg. at 23516.

<sup>10</sup> *Id.*

<sup>11</sup> *See, e.g.*, H.B. 1570, 93rd Gen. Assemb., Reg. Sess. (Ark. 2021) (establishing a civil cause of action and disciplinary procedures for individuals who provide gender reassignment services to minors).

<sup>12</sup> 88 Fed. Reg. at 23516.

To provide another example, many states have adopted laws regulating abortion safety in the wake of *Dobbs*, the Supreme Court decision that returned the power to regulate abortions to elected representatives. The Proposed Rule will interfere with investigations into violations of state abortion prohibitions on minors, compliance with abortion reporting requirements, and other state laws regulating the safety of abortion. Indeed, the Department even cites *Dobbs* and state abortion regulations as a justification for its Proposed Rule.<sup>13</sup> Here, the Department makes it clear that at least part of the intention behind the Proposed Rule is to overtly allow medical professionals to circumvent state abortion laws.

Additionally, the administration does not point to any legitimate legislative initiative that would prosecute women seeking or obtaining “reproductive health care,” despite that being the stated intention of this Proposed Rule at least in part. Women having an abortion are victims of being cornered into a false dichotomy that there is only one way to get out of the situation she has found herself in—ending the life of the child. Studies find that at least 44% of women who have had an abortion express feelings of regret about it, in addition to enduring adverse psychological effects for up to ten years after the abortion.<sup>14</sup> Rather than focusing on supporting credible solutions in states to help women toward finding solutions that allow them to keep their baby alive and still live a fulfilling life, the administration has attempted to invent a way to go around state laws to advocate for an agenda that would harm women in the long run.

The Proposed Rule should not be adopted because it dangerously subverts the authority of the states to promote the safety of women and public health by regulating abortion procedures, sterilization procedures, and other reproductive health services.

### **Stripping Victims of Safeguards**

Although the Department states the intention of this Proposed Rule is to protect privacy of those seeking reproductive health care, this rule will unfortunately leave the door open to women and children being taken advantage of, especially in states that are expanding abortion and transgender intervention access with little to no limitations. We argue that the Proposed Rule will dangerously strip victims of domestic abuse and sex trafficking of their HIPAA protections and interfere with criminal and civil investigations of coercion, abuse, and trafficking.

HIPAA is a shield of protection for privacy, but it is also a tool to protect medical professionals who suspect they are treating victims of abuse. The Proposed Rule twists how HIPAA can be used by prohibiting “covered entit[ies] or business associate[s]”—i.e.

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<sup>13</sup> 88 Fed. Reg. at 23507.

<sup>14</sup> Douglas Brown, Thomas E. Elkins, & David B. Larson, *Prolonged Grieving After Abortion: A Descriptive Study*, 4.2 J. CLINICAL ETHICS 118 (1993).

health care professionals and insurance companies—from disclosing an individual’s PHI “in connection with seeking, obtaining, providing, or facilitating reproductive health care” for “a criminal, civil, or administrative investigation” or “to identify any person for the purpose of initiating” an investigation in these categories.<sup>15</sup> HIPAA protections currently contain exceptions for law enforcement purposes to pursue an investigation and to ensure the safety of an individual when there is a threat, but here the Department limits these protections when “reproductive health care” is the reason for treatment.

By including “reproductive health care” as a limiting factor for law enforcement investigations, the Proposed Rule creates a safe harbor for abusers and traffickers. Law enforcement will no longer be able to use PHI in criminal and civil investigations when the case involves reproductive health care. Victims of domestic abuse and sex trafficking are often pressured into abortion by their domestic abuser or trafficker. Sixty-one percent of women have reported feeling coerced to have an abortion, and coerced abortion disproportionately affects women experiencing abuse.<sup>16</sup> Additionally, studies have found that—among women who were sex trafficked—nearly half reported being coerced into at least one abortion.<sup>17</sup> The proposed changes will aid abusers and traffickers by protecting their ability to coerce women into having an abortion.

HIPAA confidentiality rules also currently contain exceptions allowing for the disclosure of confidential information “to public health authority or other appropriate government authority” in cases of “abuse.”<sup>18</sup> However, the Proposed Rule excludes abortion—even coerced abortion—from the definition of abuse, preventing healthcare professionals from reporting cases of coerced abortion—even in the case of child abuse—to the proper authorities.<sup>19</sup> This would dangerously remove safeguards for victims of abusers and traffickers that coerce their victims into abortion.

The Proposed Rule will also strip some women experiencing domestic abuse of their confidentiality protections. Although the rule contains an exception prohibiting disclosures to abusive individuals,<sup>20</sup> it excludes abortion from the definition of abuse as noted above.<sup>21</sup> Because of this, victims of domestic abuse are at risk of losing confidentiality protections and may lose control of their PHI from their abusive spouses or family members in cases of “reproductive health care.” The Department has sadly elevated a radical abortion agenda and gender ideology over the safety and well-being of

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<sup>15</sup> 88 Fed. Reg. at 23552.

<sup>16</sup> David C. Reardon & Tessa Longbons, *Effects of Pressure to Abort on Women’s Emotional Responses and Mental Health*, 15 CUREUS 1, 8 (2023); Karen T. Grace & Jocelyn C. Anderson, *Reproductive Coercion: A Systematic Review*, 19 TRAUMA VIOLENCE ABUSE 371, 385 (2018).

<sup>17</sup> Laura J. Lederer & Christopher A. Wetzel, *The Health consequences of Sex Trafficking and Their Implications for Identifying Victims in Healthcare Facilities*, 23 ANNALS HEALTH L. 61, 72–73 (2014).

<sup>18</sup> 45 C.F.R. § 164.512(b)(1)(ii) (2016).

<sup>19</sup> 88 Fed. Reg. at 23552 n.273.

<sup>20</sup> 45 C.F.R. § 164.512(b)(1)(ii).

<sup>21</sup> 88 Fed. Reg. at 23552 n.273.

women and children. We argue that the Proposed Rule should not be adopted because it deprives victims of domestic abuse and sex trafficking of vital confidentiality and legal protections to the benefit of their abusers and traffickers.

## **Conclusion**

The Biden Administration has been laser focused on promoting the destruction of human life in the womb, specifically following *Dobbs*. It is difficult to imagine that this rule will lead to anything but more unborn children losing their lives rather than the stated intention to protect women's privacy. The administration has repeatedly and concerningly referred to women as "birthing people" or "adult female human being" and not been able to define "woman" when asked. Additionally, despite ample research to suggest otherwise, the administration has done nothing to protect children from being persuaded under dangerous gender ideology to pursue life-altering transgender interventions, such as double mastectomies in healthy adolescent females. We believe that this Proposed Rule should be rescinded because it will only further endanger the lives of the unborn, undermine state laws seeking to protect women and children, and severely restrict safeguards for cases of abuse and trafficking. Thank you for your consideration of these requests and concerns.

Sincerely,  
Ruth Ward  
Director, Government Affairs  
Family Policy Alliance