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Submitted Electronically

June 12, 2023

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

Subj: HIPAA Privacy Rule to Support Reproductive Health Care Privacy
RIN 0945-AA20

Dear Sir or Madam:

On behalf of the United States Conference of Catholic Bishops (USCCB), we respectfully submit the following comments on the proposed rule, published by the Department of Health and Human Services at 88 Fed. Reg. 23506 (Apr. 17, 2023), in the above-captioned matter.

The proposed regulations would forbid health providers, clearinghouses, and plans to disclose health care information whenever it is requested in connection with a criminal, civil or administrative investigation or proceeding and concerns a "reproductive health service," including an abortion, that was itself lawful.

We oppose the proposed regulations and urge HHS not to adopt them.

1. The Proposed Regulations Will Impede or Prevent the Enforcement of State, Local and Federal Laws

If adopted, the regulations would thwart the enforcement of state, local, and even federal laws, in cases involving abortion, including criminal cases, as long as the abortion itself was lawful where performed, *regardless of what other laws may have been violated*. Given the political context, the exclusive focus on "reproductive health services," statements in the preamble, and the text of the regulations, it seems that, in fact, that is HHS's actual intent. *See, e.g.,* 88 Fed. Reg. at 23516 ("The Department believes that PHI [protected health information] will be increasingly targeted by those seeking evidence for criminal, civil, or administrative

investigations into or proceedings against persons in connection with seeking, obtaining, providing, or facilitating reproductive health care"); *id*. (HHS is proposing to protect "the use or disclosure of PHI for the criminal, civil, or administrative investigation of or proceeding against an individual, regulated entity, or other person" in connection with "reproductive health care"); *id*. (stating that the proposed regulations would protect from disclosure information that could otherwise be used to enforce state laws on abortion now that such laws have been held to be constitutionally permissible).

Just last year, the Supreme Court recognized the authority of the People themselves, through their elected representatives, to regulate and prohibit abortion. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022). The current proposed rule would undermine their ability to do so. That is a manifest injustice. The federal government has no legitimate interest in preventing the enforcement of state, local, or federal law regulating providers who perform abortion. HHS claims that the disclosure of information relating to abortion serves no "substantial interest" (88 Fed. Reg. at 23516), but the enforcement of laws designed to protect human life is *always* a substantial interest. This was true in late pregnancy under *Roe v. Wade*, and true in all stages of pregnancy under *Dobbs*.[1]

In an attempt to justify the proposed regulations, HHS compares information about abortion to a psychotherapist's notes from sessions with a patient. The analogy is inapt. Psychotherapy is a form of health care that, to itself be effective and to bring about an eventual cure, must occur in a confidential setting that is protected from disclosure subject to well-recognized exceptions involving threat to life or limb. Nothing like that can be said of abortion. No one—not even an abortion supporter—can reasonably claim that the "effectiveness" of the abortion procedure, like psychotherapy, *depends* for its effectiveness on its occurrence within a confidential setting. Abortion does not advance health. It does not cure any disease or illness. To the contrary, abortion is the intentional taking of human life. Even women undergoing an abortion do not themselves usually report that the abortion was sought for reasons of health.[2]

In every other context, HHS concedes that it has "applied the *same* privacy standards to nearly all" protected health information. 88 Fed. Reg. at 23509 (emphasis added); *see also id*. at 23521 ("acknowledg[ing] that the Privacy Rule has not previously conditioned uses and disclosures for certain purposes on the specific type of health care about which the disclosure relates"). And for good reason: outside the psychotherapeutic context where a confidential setting is needed to provide effective treatment, there is no legitimate reason to make the confidentiality of information as to health care differ based on the *type* of procedure that is performed.

In one of many surprising statements, HHS claims (88 Fed. Reg. at 23510) that the need for special protection for abortion is "now more acute than it was before, given the actions taken by

[1] *Compare Roe*, 410 U.S. 113, 164-65 (1973) (the state has a compelling interest in protecting unborn human life after viability), with *Dobbs*, 142 S. Ct. at 2284 (the state has a legitimate interest in protecting unborn human life at every stage of pregnancy).

[2] Lawrence B. Finer, et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPECTIVES ON REPRODUCTIVE HEALTH (Sept. 2005), https://www.guttmacher.org/journals/psrh/2005/reasons-us-women-have-abortions-quantitative-and-qualitative-perspectives.

states to regulate, and even criminalize" abortion (*id*. at 23510) in the wake of *Dobbs*. But the states have a substantial interest in regulating providers who perform, and prohibiting their performance of, abortion and in seeing that state laws in this area are enforced, an interest that *Dobbs* vindicates. The reason that the protection of information about abortion is "acute," in HHS's view, is apparently that, armed with such information, states may *enforce* their own laws. But that is entirely backwards. The power of states to enforce their own valid laws on abortion is not a legitimate reason for the federal government to *shield* information about abortion from disclosure. Quite the opposite, it is a reason to *permit* the disclosure of the information.

Pressed to its logical extreme, the rationale for the proposed rule could form a basis for a future rule preventing states from enforcing their own law on *any* issue relating to health care. Such a rule would impede or render impossible the enforcement of state law in an area in which *states* (not the federal government) have a general police power. The federal government has no police power in the regulation of medicine, but only such powers as the Constitution delegates to it. Any proposal that would blunt the enforcement of state or local law whenever the enforcement proceeding pertains to an abortion is, at its very foundation, arbitrary and capricious.

HHS cites the need to foster trust between patient and health care provider as a basis for its proposed rule, but that need does not vitiate the interest of states and localities in enforcing their own valid laws. Oddly, in support of its proposed rule, HHS cites the interest in "enhanc[ing] support for victims of rape, incest, and sex trafficking." *Id.* at 23522. To the contrary, the proposed rule would *impede* the investigation and prosecution of persons who commit rape, incest, and sex trafficking, all for the purported purpose of maintaining trust between patient and provider. For that matter, it may be the assailant himself who procures the abortion of a child whom he has fathered and, if state lines were crossed, there may be an underlying *federal* violation even if the abortion itself was lawful. This is not a situation that calls for shielding information from the authorities.

The proposed rule would likewise make it difficult to enforce countless state laws that are designed to protect the lives and health of women, such as requirements pertaining to informed consent and parental notification, including in instances where the procedure itself is legal. Indeed, the rule would seem to foreclose even data collection sought for purposes of protecting the lives and health of pregnant women and their unborn children. Indeed, it seems ironic that the Department proposes to exclude abortion from the definition of "public health" when proponents of abortion claim (wrongly) that it is a form of health care.

And because "reproductive health service," is defined broadly (88 Fed. Reg. at 23552) to mean "care, services, or supplies *related* to the reproductive health of the individual" (emphasis added), all the problems we have noted with respect to abortion would have a similar adverse impact on federal, state, and local laws regulating health care providers who provide contraceptives, sterilization, and transgender procedures. To take just one example, the proposed regulations would seem to impede investigations into possible violations of the informed consent requirements set forth in 45 C.F.R. §§ 50.201 *et seq*. with respect to sterilization, and comparable state law requirements.

The adverse impact on the enforceability of federal, state, and local laws is sweeping enough to raise questions whether the Department has exceeded its authority under the major questions doctrine. Under that doctrine, agency regulations that have breathtaking scope or great political significance are permissible only if Congress clearly conferred that authority on the agency.[3] While HIPAA has a preemption clause, there is no evidence that Congress intended HIPAA enforcement to have the sort of disruptive and unprecedented sweep that HHS is now giving the statute.

2. The Proposed Regulations Are Unworkable

Under the proposed regulations, the ability to obtain covered health information depends on whether the abortion about which information is sought was lawfully provided. But the question of a specific abortion's legality can be fraught with difficulty, both legal and factual.

Two examples illustrate the legal difficulty.

First, HHS claims that the Emergency Medical Treatment and Active Labor Act (EMTALA) "protects access" to abortion "in particular circumstances." 88 Fed. Reg. at 23519. We respectfully disagree. EMTALA itself says nothing about abortion but, by its express terms, protects *both* the pregnant woman and her "unborn child" (a term that EMTALA uses no less than four times). Additionally, were the Department to require a hospital to provide an abortion, it would violate the Weldon amendment. In our view, there is no conflict between EMTALA and the Weldon amendment because EMTALA does not ever require the performance of an abortion. But if there were a conflict, the Weldon amendment would govern because it is the more recent enactment and more specific to abortion. *See Texas v. Becerra*, No. 5:22-CV-185-H, 2022 WL 3639525 (N.D. Tex. Aug. 23, 2022) (enjoining HHS from enforcing its interpretation of EMTALA in the State of Texas or against members of two national associations of health professionals).

Second, the Department of Veterans Affairs claims that VA health programs authorize the performance of abortions notwithstanding express statutory language barring elective abortions in VA programs. For a fuller explanation of why the VA's position is in error, see the comments filed on September 21, 2022 by the USCCB and the Archdiocese for the Military Services USA, found here.

Not only are there legal questions, as these examples illustrate, there may be (and indeed, there often will be) a factual dispute over whether any particular abortion is lawful or not. For example, the lawfulness or unlawfulness of an abortion will often depend on the age of the aborted child and/or the reason for the abortion. Indeed, information may be sought precisely to determine whether, under the particular facts presented, a given abortion was lawful.

[3] *See*, *e.g., West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (EPA lacked the statutory authority to devise emissions standards under the Clean Power Act); *Nat'l Fed. of Indep. Bus. v. Dep't of Labor*, 142 S. Ct. 661 (2022) (OSHA lacked the statutory authority to impose a COVID vaccine mandate in the workplace); *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021) (CDC likely had no statutory authority to impose a nationwide moratorium on tenant evictions).

Our point is this: it is unreasonable to expect that stakeholders, both officials and providers, will necessarily know with certainty, prior to an investigation, when an abortion is lawful and when it isn't. Information may be sought in criminal, civil, and administrative proceedings for the very purpose of *making* that determination. The proposed regulations therefore create a "Catch 22" by requiring stakeholders to know in advance whether an abortion was lawful, essentially requiring a legal opinion and a factual investigation that is hampered at the outset by the inability to obtain the very information needed to form such an opinion and complete such an investigation.

3. The Proposed Exclusion of "Unborn Child" from the Definition of Person is Arbitrary and Capricious

The Department proposes (88 Fed. Reg. at 23552) to exclude unborn children from the definition of "person." There are four problems with this.

First and most fundamentally, the proposed exclusion fails to recognize and respect the dignity and sanctity of human life in the womb.

Second, the exclusion contradicts (a) the common law,[4] (b) state statutes that protect unborn children by prohibiting abortion and in other ways, such as by allowing recovery for injury to, or the wrongful death of, an unborn child,[5] and (c) federal statutes, including the Unborn Victims of Violence Act, Pub. L. No. 108-212 (Apr. 1, 2004), which recognizes the humanity of the child in utero, and EMTALA, which protects both the pregnant woman and her "unborn child" in an emergency.

Third, the exclusion of unborn children from the definition of "person" appears to create contradictory and absurd results. On the one hand, if unborn children are not persons, then medical information about them would seem to have no privacy protection under HIPAA even in instances where it should enjoy such protection. For example, HIPAA should generally protect from disclosure the results of a genetic test of an unborn child. On the other hand, if medical information about an unborn child is not subject to disclosure under HIPAA, perhaps on the theory that it is medical information pertaining to the pregnant woman, then the ability to disclose information about unborn children may be chilled under the proposed rule in cases where it should otherwise be disclosable, as, for example, when there is a threat to the health and safety of unborn children owing to a disease to which unborn children are uniquely or especially susceptible. For example, providers should be able to disclose information sought for purposes relating to a possible outbreak of German measles or the Zika virus.

Fourth, whatever the intent, the exclusion of unborn children from HIPAA does not appear to

[4] *See Dobbs v. Jackson Women's Health Org*., No. 19-1392 (U.S.), Brief of Amici Scholars of Jurisprudence John M. Finnis and Robert P. George in Support of Petitioners (July 29, 2021).

[5] The vast majority of states allow recovery for non-fatal and fatal injuries to an unborn child—47 and 43 states, respectively—usually without regard to the stage of pregnancy in which the injury occurs. Paul Benjamin Linton, & Marua K. Quinlan, *Does Stare Decisis Preclude Reconsideration of Roe v. Wade? A Critique of Planned Parenthood v. Casey*, 70 CASE W. RES. L. REV. 283, 323-25 (2019).

serve any legitimate government purpose, let alone any purpose that Congress intended when it enacted HIPAA.

For these reasons, we oppose the exclusion of unborn children from the definition of "person." Respect for the sanctity of human life in the womb, consistency with the law, and the avoidance of absurd results can be achieved only by continuing to allow the inclusion of unborn children in the definition of "person."

Conclusion

For the reasons stated here, and with respect to each issue discussed above, the proposed regulations are arbitrary and capricious, an abuse of discretion, and contrary to law. If adopted, the regulations are likely to be challenged and, if challenged, likely to be struck down on their face or, at a minimum, as applied to situations where they would impede or prevent the enforcement of federal, state, or local law, create unworkability and uncertainty, and undermine the law's treatment of unborn children by excluding them from the definition of "person."

We urge HHS to reconsider.

Sincerely,

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Associate General Secretary &
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Michael F. Moses
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