



June 16, 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

RE: Comments of the American Center for Law and Justice Concerning HHS-OCR-2023-0006-0001 – Notice of Proposed Rulemaking – Health Insurance Portability and Accountability Act Privacy Rule to Support Reproductive Health Care Privacy

To Whom It May Concern,

The American Center for Law and Justice (ACLJ) submits the following comment opposing the adoption of the proposed change to the Health Insurance Portability and Accountability Act Privacy Rule to Support Reproductive Health Care Privacy (hereinafter “Rule”) issued by the Department of Health and Human Services (HHS) on April 17, 2023.

The ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion.¹ The ACLJ opposes this rule because it will have the effect of decreasing reporting for abortions, which will lead to a decrease in the detection of abuses that are inherent in the practice. These abuses include sex trafficking, domestic violence, coercion, and neglect. In addition, it will be more difficult to monitor complications that result from abortions. HHS should reverse its course and encourage reporting.

¹ See *Sumnum v. Pleasant Grove*, 555 U.S. 460 (2009); *NOW v. Scheidler*, 547 U.S. 9 (2006); *McConnell v. FEC*, 540 U.S. 93 (2003); *Schenck v. Pro-Choice Network of Western N.Y.*, 519 U.S. 357 (1997); *Lamb’s Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm’rs v. Jews for Jesus*, 482 U.S. 569 (1987).

This is not a measure to protect the woman's privacy, but rather a measure to protect abortion providers – and the abortion industry – from increased scrutiny at the expense of women and their unborn children. As the following facts demonstrate, these additional “protections” are not warranted.

I. Background

The HHS Rule's purported intent is to “modify existing standards permitting uses and disclosures of protected health information (PHI) by limiting uses and disclosures of PHI. . .where the use or disclosure of information is about reproductive health care that is lawful under the circumstances in which such health care is provided.” While protecting PHI from unnecessary disclosure is an important goal, this rule in practice shields abortion providers and enables sex trafficking, domestic violence, coercion, and neglect under the false pretext of privacy. Moreover, the collection of epidemiological data is an important part of protecting human health *regardless* of whether the practice being examined is “lawful” or not.

II. Redefining Key Terms

In § 160.103, the words “person” and “reproductive health” are unnecessarily redefined to advance specific intents of the abortion industry. “Person” is redefined here as “a natural person (meaning a human being who is born alive), trust or estate, partnership, corporation, professional association or corporation, or other entity, public or private.” The specific exclusion of persons in the womb from the definition of “persons” in the Rule dehumanizes tiny innocent human beings by regarding them as somehow “unalive.” This fits hand-in-glove with an abortion industry that euphemizes the destruction of life in the womb as “just a clump of cells.”

Similarly, the definition of “reproductive health” has been broadened to “care, services, or supplies related to the reproductive health of the individual.” This definition is broad enough to extend beyond PHI in an abortion-related context to procedures performed on minors without parental consent, such as hormone replacement therapy (HRT) or sterilization. As such, this Rule also infringes on parental rights, preventing investigations surrounding public health organizations that may provide illegal access to HRT or other transgender-related care without parental consent. This is also a particularly relevant point given that abortion providers such as Planned Parenthood have pivoted to HRT and puberty blockers as an alternative revenue source in the wake of *Dobbs*

allowing numerous states to limit or reduce abortion.² In short, these redefinitions appear to be unnecessary beyond the context of facilitating both a convenient narrative and funding source for the abortion industry.

III. Abortion and Coercion

In its overprotectiveness of abortion-related PHI, the Rule also enables various abortion-linked abuses and crimes to occur free from government scrutiny. For example, Section 164.502 has been revised to read that “a covered entity or business associate may not use or disclose protective health information for...the following purposes.” The Rule proceeds to prevent use or disclosure of PHI “for a criminal, civil, or administrative investigation into or proceeding against any person in connection with seeking, obtaining, providing, or facilitating reproductive health care...” The insertion of the “in connection with” language broadens protection of PHI from disclosure in all criminal, civil, or administrative investigations related to reproductive health care. This includes crimes with a clear nexus to abortion such as sex trafficking, domestic violence, coercion, and neglect. Similarly, Section 164.512 outlines “uses and disclosures for which an authorization or opportunity to agree or object is not required.” The rule of construction outlined in this section reads that “Nothing in this section shall be construed to permit disclosures. . .when the report of abuse, neglect, or domestic violence is based primarily on the provision of reproductive health care.” The proposed rule of construction protects pimps and other sex traffickers who coerce women into having abortions because it prevents a woman who is coerced or forced into abortions from being considered as someone who is necessarily in an abusive, neglected, or endangered situation. The Rule supposedly proposed to help and protect women in turn creates ample opportunity for their exploitation and coercion.

Contrary to the clichéd pro-abortion argument that abortion is a choice made by women that brings freedom, many women, if not an overwhelming majority of women, “choose” abortion because they are pressured or coerced by others. Often, that pressure to have an abortion comes from others who prioritize their own self-interests above the best interests and wishes of the pregnant woman: “once abortion becomes available, it becomes the most attractive option for everyone around the pregnant woman.”³ In a study that compared the experiences of Russian and

² Laretta Brown, *Handing Out Hormones Like Candy*, National Catholic Register (Sep. 9, 2022), <https://www.ncregister.com/news/handing-out-hormones-like-candy-planned-parenthood-transitions-to-top-hormone-provider-for-transgender-identifying-teens-with-little-oversight>.

³ Frederica Mathewes-Green, *When Abortion Suddenly Stopped Making Sense*, NAT’L REV. (Jan. 22, 2016).

American women with abortion, 64% of the American women surveyed reported feeling pressured by others to obtain an abortion.⁴ Another study, published in the Journal of American Physicians and Surgeons, similarly found that nearly 74% of the post-abortive women surveyed admitted “that their decision to abort was [not] entirely free from even subtle pressure from others to abort,” over 58% “reported aborting to make others happy,” and 28.4% of the women specifically chose abortion “out of fear of losing their partner if they did not abort.”⁵ 66% of the women reported “know[ing] in their hearts that they were making a mistake when they underwent the abortion.”⁶ Even the abortion-sympathetic Guttmacher Institute reports that 12% of women seeking abortions gave as a “specified reason[]” for their abortion that a “[h]usband or partner [wanted her] to have the abortion.”⁷ These statistics reveal that a substantial number of women in America who supposedly “choose” abortion, rather than being empowered to make a “choice,” are actually being pressured by others into abortions they may not want. As one former abortion supporter observed, “No one wants an abortion as she wants an ice cream cone or a Porsche. She wants an abortion as only an animal, caught in a trap, wants to gnaw off its own leg.”⁸ This becomes even clearer when examining specific types of coercion to abort.

IV. Abortion and Human Trafficking

Human trafficking “is a widespread and highly profitable crime that generates an estimated \$150 billion worldwide per year . . . ,”⁹ with two-thirds of that \$150 billion stemming from commercial sexual exploitation, or sex trafficking.¹⁰ The National Human Trafficking Hotline’s most recent statistics from 2019 show 11,500 reported cases of human trafficking in the United States alone.¹¹ Of those 11,500 cases, 8,248 of them were sex trafficking cases and another 505

⁴ Vincent M. Rue, et al., *Induced Abortion and Traumatic Stress: a Preliminary Comparison of American and Russian Women*, 10 MED. SCI. MONIT. 9 (2004), available at <https://pubmed.ncbi.nlm.nih.gov/15448616/9>.

⁵ Priscilla K. Coleman, Ph.D., *Women Who Suffered Emotionally from Abortion: A Qualitative Synthesis of Their Experiences*, 22 J. AMER. PHYSICIANS & SURGEONS 113, 115 (2017), available at <https://www.jpands.org/vol22no4/coleman.pdf>.

⁶ *Id.*

⁷ Lawrence B. Finer et al., *Reasons U.S. Women Have Abortions: Quantitative and Qualitative Perspectives*, 37 PERSPS. ON SEXUAL & REPROD. HEALTH 110, 113 (2005) (Table 2).

⁸ Mathewes-Green, *supra* note 3, at 23 (internal quotation marks omitted).

⁹ 2021 Trafficking in Persons Report, U.S. DEP’T OF STATE (July 26, 2021 3:00 PM), <https://www.state.gov/reports/2021-trafficking-in-persons-report/>.

¹⁰ ILO Says Forced Labour Generates Annual Profits of US \$ 150 Billion, INT’L LAB. ORG. (May 20, 2014), https://www.ilo.org/global/about-the-ilo/news-room/news/WCMS_243201/lang--en/index.htm.

¹¹ Hotline Statistics, NAT’L HUM. TRAFFICKING HOTLINE (July 26, 2021, 3:08 PM), <https://humantraffickinghotline.org/states>. 11According to the Trafficking Hotline, “[t]rafficking situations learned about through the Trafficking Hotline likely represent only a small subset of actual trafficking occurring in the United States. Therefore, this data must not be confused with the prevalence of human trafficking in the United States.”

cases were sex and labor related, meaning over 76% of all reported human trafficking cases in the United States in 2019 involved some sort of sexual exploitation.¹² According to a 2005 report funded by the Department of Justice, “[h]uman traffickers are engaged in a wide range of crimes both against their victims (rape, assault, extortion, homicide, forced abortions, etc.) and against the state”¹³ Another study found “[t]he prevalence of forced abortions is an especially disturbing trend in sex trafficking.”¹⁴ The survivors of sex trafficking studied “reported that they often did not freely choose the abortions they had while being trafficked.”¹⁵ One victim noted that “in most of [my six abortions,] I was under serious pressure from my pimps to abort the babies.” Another survivor, whose abuse at the hands of her traffickers was particularly brutal, reported seventeen abortions and indicated that at least some of them were forced on her.¹⁶ Forced abortions in the context of sex trafficking, whether by subtle or more forceful pressure, cannot in any way be viewed as a liberating “choice” for women. Yet, the abortion industry does little if anything to combat forced abortion at the hands of sex traffickers. In 2017, a former Planned Parenthood employee stated that Planned Parenthood did not “train[] employees how to spot and report sex trafficking but [instead] how not to get caught saying incriminating things to undercover journalists.”¹⁷ This training was in response to “Live Action’s 2011 investigation [which] caught on camera eight Planned Parenthood workers at seven facilities who were willing to help a man who identified himself as a sex trafficker covertly obtain abortions and other reproductive health care services for minors as young as 14.”¹⁸ Of course, if abortion providers will give a pass to someone who openly admits to trafficking, they are still more likely to “serve” pimps and traffickers who pretend to be the woman’s boyfriend or relative.

https://humantraffickinghotline.org/sites/default/files/Polaris-20_19-US-National-Human-Trafficking-Hotline-Data-Report.pdf (see “About this Data” box).

¹² *Id.*

¹³ Kevin Bales & Steven Lize, *Trafficking in Persons in the United States: A Report to the National Institute of Justice*, U.S. DEP’T OF JUST. 45 (Mar. 2005), available at <https://www.ojp.gov/pdffiles1/nij/grants/211980.pdf>.

¹⁴ 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, 73 (2014), available at <https://www.icmec.org/wpcontent/uploads/2015/10/Health-Consequences-of-Sex-Trafficking-and-Implications-for-Identifying-VictimsLederer.pdf>.

¹⁵ *Id.*

¹⁶ *Id.* at 73-74.

¹⁷ Bradford Richardson, *Planned Parenthood Failed to Take Sex Trafficking Seriously After Infamous Sting, Ex-Employee Says*, WASH. TIMES (Jan. 17, 2017), <https://www.washingtontimes.com/news/2017/jan/17/planned-parenthood-failed-take-sex-trafficking-ser/>.

¹⁸ *Id.*

V. Abortion and Domestic Abuse

Abortion is an act of violence that takes the life of a prenatal child. Often, the woman getting an abortion is also a victim of violence which greatly influences the woman's "choice." One study revealed that among women who chose abortion "the probability of being a victim of [intimate partner violence] in the past year . . . was almost three times higher than for women [who chose to continue their pregnancy]." ¹⁹ According to abortion advocates, a woman should be able to obtain an abortion on the theory that acceding to the abuser's desires will reduce future abuse. The truth, however, is that abortion even as appeasement does not free a woman from abuse. A survey of 1127 women undergoing a second or subsequent abortion found that they were more likely to have experienced abuse by a male partner, sexual abuse or coercion. Of women presenting for a first abortion, 24% reported a major conflict and fights with the man involved in the pregnancy; 30% of women having a second abortion reported relationship violence; and women having a third or subsequent abortion were >2.5 times as likely to report a history of physical or sexual abuse by a male partner. ²⁰ Consider as well the following examples:

- Eryn Taylor, "Police: Man Beats Girlfriend After She Refuses to Have an Abortion," ²¹ (man beat his girlfriend because she refused to get an abortion; he "told the woman she needed to get rid of her baby," and when she refused, the man "allegedly began hitting her with his fist and began choking her. The victim frantically tried to get out of the car, but [he] pulled her back in. He then parked the car, pulled the victim out and reportedly began kicking her in the head creating a large gash to her head").
- Joe Nelson, "Charge: Pregnant Woman Beaten by Duo After Refusing to Have an Abortion," ²² (woman, six months pregnant, was beaten by two men who "specifically targeted her abdomen"; woman stated that the father "consistently pressured her to have an abortion and threatened to get people to jump her and cause her to lose the baby. She told police that [he] once told her, 'I'm gonna get somebody to stomp that baby out of you.'")

¹⁹ Dominique Bourassa, MD, & Jocelyn Bérubé, MD, *The Prevalence of Intimate Partner Violence Among Women and Teenagers Seeking Abortion Compared with Those Continuing Pregnancy*, 29 J. OBSTET. GYNAECOL. CAN. 415, 415 (2007).

²⁰ Gillian Aston & Susan Bewley, *Abortion and Domestic Violence*, 11, THE OBSTETRICIAN & GYNAECOLOGIST 163, 165 (2009).

²¹ News Channel 3 (Sep. 5, 2016), <https://www.wreg.com/news/suspect-beats-girlfriend-after-she-refuses-to-have-abortion/>.

²² Bring Me The News: Minn. News (May 1 2021), <https://bringmethenews.com/minnesota-news/charges-pregnant-woman-beaten-by-duo-after-refusing-to-have-abortion>.

- “Ohio man Dominic Holt-Reid sentenced to 13 years for attempted forced abortion,”²³(man took his pregnant girlfriend to abortion clinic at gunpoint; prosecutor said man grabbed Burgess by the neck and began strangling her while saying, “We are not having this baby, Yolanda”)

Countless further instances could be added. *See, e.g.*, Steven Ertelt, “Man Threatened to Slit His Baby’s Throat if His Ex-Girlfriend Didn’t Have Abortion”²⁴ The abortion, rather than freeing the woman, only adds to the list of emotional and physical traumas she has suffered.

VI. Abortion and Male Irresponsibility

Of course, abortion provides an escape hatch for irresponsible men who fall short of physical abusers as well. While some may resort to drastic methods for imposing their will, e.g., AP, “*Man Uses Sex Video in Abortion Plot*,” L.A. Times (Nov. 8, 1998) (threat of distributing sex tape to family to extort woman’s acceding to abortion), countless others will exert less blatant pressure, perhaps suggesting an abortion would preserve the relationship or that waiting until “a better time” would be wise.²⁵ Abortion likewise supplies a handy means for sexual predators to conceal obvious evidence of exploitation, such as pregnancy and childbirth.²⁶

VII. Abortion and Employer Coercion

Abortion can also be an appealing “solution” for an employer who does not want pregnancy or child care to hamper an employee’s devotion to the company. The passage of the Pregnancy Discrimination Act of 1978 (five years after *Roe v. Wade*) reflects this very real concern. Cases illustrate the problem as well. *See, e.g.*, *Bergstrom-Ek v. Best Oil Co.*, 153 F.3d 851 (8th Cir. 1998) (manager repeatedly pressured employee to have an abortion, contending it would wreck her life and her career); Jessica Hopp & Greg Sandoval, “Mystics Coach Was Cited in Pregnancy Suit,”

²³ CBSNews.com (June 10, 2011).

²⁴ LifeNews (Aug. 19, 2020) (listing, after article, numerous other instances, with links).

²⁵ Elizabeth Dwoskin, *Coerced Abortions: A New Study Shows They’re Common*, DAILY BEAST (Oct. 8, 2010).

²⁶ *See, e.g.*, *United States v. Raniere*, 2019 U.S. Dist. LEXIS 84634 (EDNY May 3, 2019) (abortions for women impregnated by leader of apparent cult); Tonya Alanez, *58 porno videos of 15-year-old girl lead to Davie man’s arrest*, SOUTH FLORIDA SUN SENTINEL (Oct. 23, 2019) (“The victim stated that she got pregnant from the defendant and he took her to the clinic to have an abortion”); Carole Novielli, *Man Took 14-Year-Old For Three Abortions 27 After Impregnating Her, Clinics Ignored the Rapes*, LIFE NEWS (July 30, 2014); David McFadden, *Probation revoked for man in impregnating 11-year-old, forcing to get abortion*, ABC13 NEWS (July 19, 2018); *Settlement reached in suit over teen abortion*, THE COLUMBUS DISPATCH (Apr. 28, 2011) (soccer coach impregnated 14-year-old, then pretended to be her father in consenting to the abortion).

Wash. Post (Sept. 16, 2002) (head coach allegedly told assistant to choose between aborting or quitting; suit was settled).

VIII. General harm to women from abortion

In addition to the ways in which abortion supports trafficking, abuse, and emotional trauma, the procedure itself is not as safe as many women are led to believe. And with underreporting of abortion complications and delayed abortion deaths, women are continuously misled into thinking that an abortion is safer than childbirth. Impairing the reporting of abortion data serves to conceal any harms abortion inflicts upon women's lives and health.

To be sure, data collection from abortion providers will still understate the risks of harm. Not all serious complications after abortion manifest themselves quickly enough to result in ambulance transport from the abortion facility itself or documentation at the abortion facility itself. Indeed, the abortion providers in *Whole Woman's Health v. Hellerstedt* insisted with their expert evidence that "in respect to surgical abortion patients who do suffer complications requiring hospitalization, most of these complications occur in the days after the abortion, not on the spot."²⁷ The abortion providers in *June Medical Services v. Russo*,²⁸ went so far as to characterize it as a "universal fact" that "complications are most likely to occur after the patient has left the clinic."²⁹

The fact of the matter is that abortion complications and deaths are grossly underreported as it is. Abortion mortality statistics likely will not include many delayed deaths that result from abortion, deaths such as those reflected in the increased rates of suicide or other longer-term fatal post-abortion health consequences, even though studies show a greater risk of death from these and other causes after abortion (as opposed to childbirth).³⁰ The last thing that should be done is to make the data less complete, as the proposed rule unfortunately would do.

An important part of the public discourse on abortion is the relative safety of abortion and childbirth. Currently, domestic data is ill-suited to address that question. Abortion deaths, for example, are also counted as "pregnancy deaths," thereby misleadingly inflating the measure of deaths supposedly from childbirth. This point bears emphasis: when a woman dies from abortion, that death counts both as an abortion mortality and as a pregnancy mortality. With such an

²⁷ *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 610 (2016)

²⁸ *June Medical Services v. Russo*, 140 S. Ct. 2103 (2020).

²⁹ Pet. Br. at 25, *June Medical*, No. 18-1323 (U.S. Nov. 25, 2019).

³⁰ *Infra* § III.

approach, the results are mathematically stacked against childbirth ever being deemed safer than abortion.³¹

Comprehensive data collection can remedy the current underreporting which gives a falsely rosy picture of abortion safety. In Finland, for example, researchers drew upon national health care data to examine the pregnancy history of all women of childbearing age who died, for any reason, within one year of childbirth, abortion, or miscarriage, between 1987 and 1994 (a total of nearly 10,000 women). The study found that, adjusting for age, women who had abortions were 3.5 times more likely to die within a year than women who carried to term.³² A study based upon Medicaid records in California likewise found significantly higher mortality rates after abortion. The study linked abortion and childbirth records in 1989 with death certificates for the years 1989-97. This study found that, adjusting for age, women who had an abortion were 62% more likely to die from any cause than women who gave birth.³³ Another study of the entire population of Denmark found a dose effect that is, each additional abortion increased the risk of premature death of the woman: “Increased risks of death were 45%, 114% and 191% for 1, 2 and 3 abortions, respectively, compared with no abortions after controlling for other reproductive outcomes and last pregnancy age.”³⁴ In fact, a systematic literature review has shown that every record linkage study examining mortality rates after abortion and childbirth has found an elevated risk of death associated with abortion.³⁵ The federal government should not be making it harder to conduct such analyses in this country.

Even if a woman is not a victim to abuse, trafficking, or coercion, abortion is not a harmless procedure. Allowing the very real dangers that women face during and after receiving an abortion to be underreported and ignored only furthers – at the expense of countless women – the lie that abortion is a safe and routine alternative to giving birth. In short, this harmful Rule change would help conceal and facilitate the most egregious abuses, crimes, and harms associated with abortion

³¹ *Pregnancy Mortality Surveillance System*, CDC <https://tinyurl.com/CDCPregMortality> (last visited May 24, 2023).

³² Mika Gissler, et al., *Pregnancy-Associated Deaths in Finland 1987-1994 Definition Problems and Benefits of Record Linkage*, 76 ACTA OBSTETRICA ET GYNECOLOGICA SCANDINAVICA 651 (1997).

³³ David C. Reardon, et al., *Deaths associated with pregnancy outcome: A record linkage study of low income women*, 95 SO. MED. J. 834 (2002).

³⁴ Priscilla K. Coleman et al., *Reproductive History Patterns and Long-Term Mortality Rates: a Danish, Population-Based Record Linkage Study*, 23 EUR. J. PUB. HEALTH 569, 569 (2012).

³⁵ David C.23 Reardon & John M. Thorp, *Pregnancy Associated Death in Record Linkage Studies Relative to Delivery, Termination of Pregnancy, and Natural Losses: A Systematic Review with a Narrative Synthesis and Meta-Analysis*, SAGE OPEN MED. (Nov 13, 2017), <https://tinyurl.com/RecordLinkageReview>.

under the guise of protecting women's health and privacy. HHS should withdraw this rule immediately, as it will inevitably exacerbate the very harms and abuses it purports to prevent.