ABORTED CONFIDENTIALITY

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Abstract: As the number of abortion-restricting laws continues to grow in the wake of the Supreme Court's ruling in *Dobbs v. Jackson Women's Health Organization*, law enforcement officers are increasingly interested in obtaining and using reproductive health information for law enforcement purposes. Although physicians and other covered entities generally are required to keep protected health information (PHI) confidential under the Health Insurance Portability and Accountability Act Privacy Rule, a number of regulatory exceptions historically have permitted covered entities to disclose PHI for civil, criminal, and administrative investigations and proceedings. On April 26, 2024, the Department of Health and Human Services promulgated a final rule amending certain of these exceptions. In particular, the final rule prohibits covered entities from using and disclosing PHI to conduct criminal, civil, and administrative investigations into any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care that is lawful under the circumstances in which it is provided. The final rule also prohibits covered entities from using and disclosing PHI to impose criminal, civil, and administrative liability on any person, or to identify any person, for the same purposes. Covered entities must comply with these new prohibitions by December 23, 2024.

Using five hypotheticals as a platform, this Article carefully analyzes the final rule in terms of protecting the confidentiality of reproductive health information, supporting shared physician-patient decision making, and burdening vulnerable populations. Finding that the final rule continues to undermine the physician-patient relationship, discourage individuals from seeking health care from licensed health care providers, and burden racial and ethnic minorities, individuals with disabilities, individuals of low socioeconomic status, and other marginalized individuals in certain situations, this Article proposes additional amendments to the final rule that will better balance health information confidentiality and law enforcement activities in the context of reproductive health.

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INTRODUCTION

Consider five abortion-related hypotheticals. The first involves a pregnant adult[1] who lives in Fargo, North Dakota, where state law prohibits most abortions.[2] Assume the adult drives ten minutes east to Moorhead, Minnesota, and obtains a medication abortion at the Red River Women's Clinic,[3] where pre-viability abortions are legal under Minnesota law.[4]

The second hypothetical involves a pregnant minor who lives in Coeur d'Alene, Idaho, where state law prohibits most abortions.[5] Assume the minor's partner, who is an adult, drives the minor forty minutes west to Spokane, Washington, where pre-viability abortions are legal under Washington law.[6] Further assume the partner falsely claims to be the minor's parent when the minor signs in at the Planned Parenthood Clinic in Spokane.[7] Know that the

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[1] Individuals who are capable of becoming pregnant include women, transgender males, intersex persons, non-binary persons, and other persons who have a uterus. *See, e.g.*, Amber Leventry, *Trans and Nonbinary People Can Be Pregnant Too*, PARENTS (Jan. 5, 2023), https://www.parents.com/pregnancy/my-body/pregnancy-health/trans-and-nonbinary-people-can-be-pregnant-too [https://perma.cc/L69S-D2SM] ("When talking about reproduction, reproductive rights, and gynecological health, transgender people deserve the same inclusive and affirming care as cisgender folks. That starts with changing the language around transgender pregnancy."). To this end, this Article uses gender-neutral words and phrases as much as possible to honor all individuals who are capable of becoming pregnant.

[2] *See* N.D. S.B. 2150, § 2 (N.D. 2023) (to be codified at N.D. CENT. CODE § 12.1-19.1-02) (making it a class C felony for a person to perform an abortion); Associated Press, *North Dakota's Governor Has Signed a Law Banning Nearly All Abortions*, NPR (Apr. 25, 2023), https://www.npr.org/2023/04/25/1171816825/north-dakota-abortion-law#:~:text=North%20Dakota's%20governor%20has%20signed%20a%20law%20banning%20nearly%20all%20abortions,-April%2025%2C%202023&text=Tribune%20via%20AP-,North%20Dakota%20Gov.,incest%20%E2%80%94%20into%20law%20on%20Monday [https://perma.cc/Z6DG-VCCH] ("North Dakota . . . [on April 24, 2024] adopted one of the strictest anti-abortion laws in the country as Republican Gov. Doug Burgum signed legislation banning the procedure throughout pregnancy, with slim exceptions up to six weeks' gestation.").

[3] *See* Emily Witt, *An Abortion Clinic One Year Later*, NEW YORKER (June 23, 2023), https://www.newyorker.com/news/us-journal/an-abortion-clinic-one-year-later [https://perma.cc/T954-CGXX] (explaining that some pregnant North Dakotans travel to Moorhead, Minnesota, to obtain abortion services at the Red River Women's Clinic).

[4] *See* Minnesota Protect Reproductive Options Act, MINN. STAT. § 145.409(3)(b) (2023) ("Every individual who becomes pregnant has a fundamental right to . . . obtain an abortion, and to make autonomous decisions about how to exercise this fundamental right.").

[5] *See* Idaho Defense of Life Act, IDAHO CODE § 18-622(1) (2023) ("[E]very person who performs or attempts to perform an abortion as defined in this chapter commits the crime of criminal abortion. Criminal abortion shall be a felony punishable by a sentence of imprisonment of no less than two (2) years and no more than five (5) years in prison.").

[6] *See* WASH. REV. CODE § 9.02.100(2) (2023) ("[I]t is the public policy of the state of Washington that: . . . [e]very pregnant individual has the fundamental right to choose or refuse to have an abortion, except as specifically limited . . . ."); § 9.02.110 ("The state may not deny or interfere with a pregnant individual's right to choose to have an abortion prior to viability of the fetus, or to protect the pregnant individual's life or health.").

[7] *See Spokane Valley Health Center*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/health-center/washington/spokane-valley/99206/spokane-valley-health-center-2792-91850 [https://perma.cc/2DA2-P5V6] (providing medication abortions).

Idaho Abortion Trafficking Act prohibits a non-parental adult from driving a minor to an Idaho state line to obtain an abortion across the state line.[8]

The third hypothetical involves a pregnant adult who lives in Norman, Oklahoma, where abortions are illegal except as necessary to preserve the life of the mother.[9] Assume the adult develops congestive heart failure and undergoes an in-hospital, surgical abortion after the adult's treating physician explains that the adult has an unlikely chance of surviving the pregnancy.[10] Further assume that a second physician who works in the same hospital learns of the abortion and disagrees that the abortion was life preserving.[11]

The fourth hypothetical involves a pregnant adult who lives in Texas, where most abortions are illegal.[12] Assume the adult tells their[13] Texas-licensed physician that they are considering getting an abortion and that they may travel to a Planned Parenthood clinic close to extended family in California, where abortion is legal,[14] or they may obtain mailed abortion medication from a Mas-

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[8] *See* Idaho Abortion Trafficking Act, IDAHO CODE § 18-623(1) (2023) ("An adult who, with the intent to conceal an abortion from the parents or guardian of a pregnant, unemancipated minor . . . procures an abortion . . . by . . . transporting the pregnant minor within this state commits the crime of abortion trafficking."); Associated Press, *Idaho Governor Signs Ban on Abortion Trafficking*, PBS NEWS HOUR (Apr. 6, 2023), https://www.pbs.org/newshour/politics/idaho-governor-signs-ban-on-abortion-trafficking [https://perma.cc/KX4W-TDBN] ("To sidestep violating a constitutional right to travel between states, Idaho's law makes illegal only the in-state segment of a trip to an out-of-state abortion provider.").

[9] *See* OKLA. STAT. ANN. tit. 21, § 861 (West 2023) ("[e]very person who administers to any woman, or who prescribes for any woman . . . with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall be guilty of a felony").

[10] *See* Sheila O'Malley, *Call Jane*, ROGER EBERT (Oct. 28, 2022), https://www.rogerebert.com/reviews/call-jane-movie-review-2022 [https://perma.cc/3KBH-5CL4] (reviewing *Call Jane*, a 2022 movie about a 1960s suburban housewife who develops congestive heart failure during her pregnancy and whose physician gives her only a 50/50 chance of surviving her pregnancy).

[11] *See* Mary Kekatos, *Why Doctors Say the 'Save the Mother's Life' Exception of Abortion Bans Is Medically Risky*, ABC NEWS (June 13, 2022), https://abcnews.go.com/Health/doctors-save-mothers-life-exception-abortion-bans-medically/story?id=84668658 [https://perma.cc/D8UL-9RG7] ("[Some doctors believe] the language of these laws [prohibiting abortion except to preserve the life of the mother] is vague and makes it unclear what qualifies as a mother's life being in danger, what the risk of death is, and how imminent death must be before a provider can act."). *But see* Dana Branham, *AG's Office, State Boards Craft Guidance for Doctors, Law Enforcement on Abortion Laws*, THE OKLAHOMAN (Sept. 1. 2022), https://www.oklahoman.com/story/news/healthcare/2022/09/01/oklahoma-ag-issues-guidance-on-state-abortion-bans-for-law-enforcement/65466509007/ [https://perma.cc/M4FN-4WTD] ("When it comes to criminal prosecution, the attorney general's office told law enforcement agencies that doctors 'should be given substantial leeway' to treat life-threatening or emergency conditions in pregnant patients, 'so long as they are not unnecessarily terminating the life of the unborn child or abusing their position intentionally to facilitate elective abortions.'").

[12] *See* TEX. HEALTH & SAFETY CODE ANN. § 170A.002(a) (West 2023) ("A person may not knowingly perform, induce, or attempt an abortion.").

[13] *See supra* note 1 (explaining that this Article uses gender-neutral language as much as possible).

[14] California Reproductive Privacy Act, CAL. HEALTH & SAFETY CODE § 123466(a) (West 2023) ("The state [of California] shall not deny or interfere with a woman's or pregnant person's right to choose or obtain an abortion prior to viability of the fetus, or when the abortion is necessary to protect the life or health of the woman or pregnant person.").

sachusetts telehealth provider.[15] Further assume the Texas physician wants to report the individual's statements to law enforcement to try to prevent the abortion.

The final hypothetical involves a pregnant adult who lives in Louisville, Kentucky, where state law prohibits most abortions.[16] Assume the adult wishes to obtain an abortion that is prohibited by state law. Further assume the adult finds a physician in Kentucky who strongly believes in the right to abortion, is not afraid to circumvent state law, and who provides medication for an abortion.

This Article critically examines the confidentiality issues raised by the use and disclosure of reproductive health information, including abortion information, in fact patterns like these.[17] For example, is the North Dakota patient's

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[15] *See* Pam Belluck, *Abortion Shield Laws: A New War Between the States*, N.Y. TIMES (Feb. 23, 2024), https://www.nytimes.com/2024/02/22/health/abortion-shield-laws-telemedicine.html?unlocked_article_code=1.XU0.wqAe.BDDXZibcVio4&smid=url-share [https://perma.cc/56K6-LXYE]) (reporting that medications for abortions are being prescribed to patients who reside in abortion-restrictive states by physicians who work in abortion-friendly states (including California, Colorado, Massachusetts, Vermont, and Washington) through telemedicine; describing a particular nurse practitioner who works in Massachusetts and "who sometimes writes [fifty] prescriptions a day," with patients in Texas and other states receiving those prescriptions).

[16] *See* KY. REV. STAT. ANN. § 311.772(3)(a), (b) (West 2023) (making it a class D felony for a person to knowingly "[a]dminister to, prescribe for, procure for, or sell to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being" or to "[u]se or employ any instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being").

[17] Many legal scholars who analyze fact patterns like these focus on whether state laws criminalizing abortion violate a constitutional right to privacy. *Compare* David H. Gans, *No, Really, the Right to an Abortion Is Supported by the Text and History of the Constitution*, THE ATLANTIC (Nov. 4, 2021), https://www.theatlantic.com/ideas/archive/2021/11/roe-was-originalist-reading-constitution/620600/ [https://perma.cc/TAW3-W4S6] ("An originalist reading of the text and history of the Fourteenth Amendment, in fact, provides a strong basis for protecting unenumerated fundamental rights, including rights to bodily integrity, establishing a family, and reproductive liberty. The right to abortion flows logically from there."), *with* Edward Lazarus, *The Lingering Problems with* Roe v. Wade*, and Why the Recent Senate Hearings on Michael McConnell's Nomination Only Underlined Them*, FINDLAW (Oct. 3, 2002), https://supreme.findlaw.com/legal-commentary/the-lingering-problems-with-roe-v-wade-and-why-the-recent-senate-hearings-on-michael-mcconnells-nomination-only-underlined-them.html [https://perma.cc/7DLR-N3ZR] ("The problem [with *Roe v. Wade*], I believe, is that it has little connection to the Constitutional right it purportedly interpreted. A constitutional right to privacy broad enough to include abortion has no meaningful foundation in constitutional text, history, or precedent—at least, it does not if those sources are fairly described and reasonably faithfully followed."). On June 24, 2022, however, the Supreme Court of the United States held in *Dobbs v. Jackson Women's Health Organization* that the U.S. Constitution does not explicitly or implicitly establish a right to an abortion and that the issue should remain in the hands of state lawmakers. 142 S. Ct. 2228, 2242 (2022) ("The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . . ."). Given the Supreme Court's holding in *Dobbs*, this Article focuses not on constitutional privacy questions (for example, "is a state impermissibly invading an individual's privacy by prohibiting the individual from engaging in autonomous abortion decision making?") but on a regulatory confidentiality question (for example, "does the HIPAA Privacy Rule require an abortion provider to maintain the confidentiality of individually identifiable abortion records, even in the face of a law enforcement demand for such records?"). *See* Stacey A. Tovino, *Confidentiality over Privacy*, 44 CARDOZO L. REV. 1243, 1245 (2023) [hereinafter Tovino, *Confidentiality over Privacy*] (distinguishing privacy from confidentiality in the context of abortion).

right to confidentiality violated if the Red River Women's Clinic in Minnesota discloses the patient's abortion record in response to a demand from a North Dakota law enforcement officer investigating a violation of North Dakota's abortion law?[18] Is the Idaho patient's right to confidentiality violated if the Planned Parenthood clinic in Washington discloses the patient's sign-in information and abortion record for use in an Idaho investigation relating to Idaho's criminal abortion law or Idaho's Abortion Trafficking Act[19] or, perhaps, in a Washington investigation relating to Washington's criminal impersonation law?[20] Is the Oklahoma patient's right to confidentiality violated if the Oklahoma Medical Board or an Oklahoma law enforcement officer seizes the patient's abortion records for use in an administrative proceeding to discipline the treating physician[21] or in a criminal proceeding relating to Oklahoma's abortion prohibition?[22] Is the Texas patient's right to confidentiality violated if the Texas physician reports the patient's statements to a Texas law enforcement officer or, if the patient does eventually obtain an abortion in California or from a Massachusetts telehealth provider, if a Texas law enforcement officer obtains a court order demanding the abortion records from the California clinic or the Massachusetts provider?[23] Finally, is the Kentucky patient's right to con-

[18] *See* N.D. S.B. 2150, § 2 (N.D. 2023) (to be codified at N.D. CENT. CODE § 12.1-31-12(2)) (making it a class C felony for a person to perform an abortion); HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 88 Fed. Reg. 23506, 23519 (proposed Apr. 17, 2023) (to be codified at 45 C.F.R. pts. 160, 164) ("[T]he Department [of Health and Human Services (HHS)] is aware of reports that persons or authorities have reached or intend to reach beyond their own states' borders to investigate reproductive health care that has been performed in other states where that health care is legal"; further stating that HHS is concerned that health care providers "after *Dobbs* might be compelled to use or disclose PHI to law enforcement or other persons who may use that health information against an individual . . . who has sought, obtained, provided, or facilitated reproductive health care, even when such health care is lawful in the circumstances in which the health care is obtained.").

[19] *See* Idaho Abortion Trafficking Act, IDAHO CODE § 18-623(1) (2023) ("An adult who, with the intent to conceal an abortion from the parents or guardian of a pregnant, unemancipated minor . . . procures an abortion . . . by . . . transporting the pregnant minor within this state commits the crime of abortion trafficking.").

[20] *See, e.g.*, WASH. REV. CODE § 9A.60.040 (2023) (prohibiting criminal impersonation).

[21] *See generally* Madison Pauly, *Medical Boards That Can Strip Abortion Providers of Licenses Are Stacked with Republican Donors*, MOTHER JONES (Aug. 11, 2022), https://www.motherjones.com/politics/2022/08/medical-boards-that-can-strip-abortion-providers-of-licenses-are-stacked-with-republican-donors/ [https://perma.cc/L8GR-P8WX] (reporting that state medical boards are "stacked with Republican political donors . . . armed with wide-reaching abortion bans" who have "the power to strip doctors of their licenses").

[22] *See* OKLA. STAT. ANN. tit. 21, § 861 (West 2023) ("Every person who administers to any woman, or who prescribes for any woman . . . with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall be guilty of a felony . . . .").

[23] As discussed in more detail at *infra* notes 121–124, California law prohibits a California physician from disclosing medical records pursuant to a subpoena or request based on a different state's law that interferes with the California Reproductive Privacy Act. *See* CAL. CIV. CODE § 56.108(a) (West 2023) ("a provider of health care . . . shall not release medical information related to an individual seeking or obtaining an abortion in response to a subpoena or request if that subpoena or request is based on . . . another state's laws that interfere with a person's rights under the [California] Reproduc-

fidentiality violated if a Kentucky law enforcement officer seizes the patient's abortion record for use in a criminal investigation relating to Kentucky's abortion prohibition?[24]

On April 26, 2024, the federal Department of Health and Human Services (HHS) formally published a final rule[25] that amends the federal HIPAA (Health Insurance Portability and Accountability Act) Privacy Rule to better protect the confidentiality of protected health information, including abortion information, to conduct certain criminal, civil, and administrative investigations and enforcement actions and to identify persons for the same purposes.[26] In theory, the final rule would ensure the confidentiality of the five hypothetical patients whose stories opened this Article. After all, the title of the final rule is "HIPAA Privacy Rule to Support Reproductive Health Care Privacy"[27] and HHS's press release announcing the final rule states that it "strengthens privacy protections for medical records and health information for women."[28] Unfortunately, the

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tive Privacy Act"). Massachusetts has also passed its own abortion shield law. *See* MASS. GEN. LAWS ANN. ch. 12 § 11|1/2 (2023) (providing that "[a]ny public act or record of a foreign jurisdiction that prohibits, criminalizes, sanctions, authorizes a person to bring a civil action against or otherwise interferes with a person, provider, carrier or other entity in the commonwealth that . . . provides . . . reproductive health care services or gender-affirming health care services shall be an interference with the exercise and enjoyment of the rights secured by the constitution and laws of the commonwealth and shall be a violation of the public policy of the commonwealth").

[24] *See* KY. REV. STAT. ANN. § 311.772(3)(a), (b) (West 2023) (making it a class D felony for a person to knowingly "[a]dminister to, prescribe for, procure for, or sell to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being" or to "[u]se or employ any instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being").

[25] *See* HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. 32976, 32976 (Apr. 26, 2024) (to be codified at 45 C.F.R. pts. 160, 164) (amending certain provisions within 45 C.F.R. pts. 160 and 164). Although HHS formally published the final rule in the Federal Register on April 26, 2024, HHS released the final rule outside the Federal Register four days earlier, on April 22, 2024. *See* U.S. Dep't Health & Human Servs., *HIPAA Privacy Rule Final Rule to Support Reproductive Health Care Privacy: Fact Sheet* (Apr. 22, 2024), https://www.hhs.gov/hipaa/for-professionals/special-topics/reproductive-health/final-rule-fact-sheet/index.html [https://perma.cc/H7GV-SAJ9] [hereinafter *HIPAA Privacy Rule Final Rule to Support Reproductive Health Care Privacy: Fact Sheet*] (explaining the new rule which was to be published in the Federal Register in the coming days). Because the effective and compliance dates for the final rule are counted sixty and 240 days, respectively, from the date of the final rule's publication in the Federal Register, this Article will refer to the final rule's formal Federal Register publication date. *See* HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. at 32976 (stating that the final rule is effective sixty days after its publication in the Federal Register (*i.e.*, June 25, 2024) and that covered entities must comply with most provisions in the final rule by 240 days after its publication in the Federal Register (*i.e.*, December 23, 2024)).

[26] The HIPAA Privacy Rule is a federal health information confidentiality regulation codified at 45 C.F.R. Part 164, Subpart E ("Privacy of Individually Identifiable Health Information"). See *infra* Parts I and II for detailed discussions of the HIPAA Privacy Rule and the amendments made thereto by the April 26, 2024, final rule.

[27] HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. at 32976.

[28] Press Release, U.S. Dep't of Health & Human Servs., The Biden-Harris Administration Issues New Rule to Support Reproductive Health Care Privacy Under HIPAA (Apr. 22, 2024), https://www.

final rule does not live up to its billing. Instead, it continues to subordinate patient confidentiality to law enforcement in several situations involving reproductive health care.[29] This regulatory subordination undermines the physician-patient relationship,[30] discourages or delays individuals from seeking health care from licensed health care providers,[31] unduly burdens racial and ethnic minorities, individuals with disabilities, individuals of low socioeconomic status, and other marginalized individuals,[32] and places physicians in an impossible predicament.[33] In particular, providers who perform life-preserving abortions and provide other emergency care risk criminal prosecution when third parties and complainants disagree regarding the necessity of the care and pro-

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hhs.gov/about/news/2024/04/22/biden-harris-administration-issues-new-rule-support-reproductive-health-care-privacy-under-hipaa.html [https://perma.cc/NXR8-X9LR].

[29] See *infra* Part II for a thorough discussion of the limitations of the final rule.

[30] *See, e.g.*, HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. at 32978 ("Th[e] changing legal landscape increases the likelihood that an individual's PHI may be disclosed in ways that cause harm to the interests that HIPAA seeks to protect, including the trust of individuals in health care providers and the health care system. The threat that PHI will be disclosed and used to conduct such an investigation against, or to impose liability upon, an individual or another person is likely to chill an individual's willingness to seek lawful health care treatment or to provide full information to their health care providers when obtaining that treatment . . . .") (citations omitted).

[31] *See id.* at 32985 ("[A]n individual may be unwilling to seek treatment or share highly sensitive PHI when they are concerned about the confidentiality and security of PHI provided to treating health care providers.") (citations omitted); TEX. DEP'T OF STATE HEALTH SERVS., TEXAS MATERNAL MORTALITY AND MORBIDITY REVIEW COMMITTEE AND DEPARTMENT OF STATE HEALTH SERVICES JOINT BIENNIAL REPORT 2022, tbl.D-2 (2022), https://www.dshs.texas.gov/sites/default/files/legislative/2022-Reports/2022-MMMRC-DSHS-Joint-Biennial-Report.pdf [https://perma.cc/8ZNZ-G8JE] (reporting that "delay or failure to seek care" is the fourth leading contributing factor to pregnancy-related deaths).

[32] *See generally* Dang Nguyen, Simar S. Bajaj, Danial Ahmed & Fatima Cody Stanford, *Protecting Marginalized Women's Mental Health in the Post*-Dobbs *Era*, 119 PNAS 40 (2022) (stating "[m]ost women who have abortions in the United States are racial and ethnic minorities or of low socioeconomic status, so these [abortion] restrictions will most severely impact already marginalized populations" and "The *Dobbs* decision will exact enduring damage to the health and well-being of all women, especially marginalized women. Unprepared mothers will be forced to carry their pregnancies to term, face immense financial stress via abortion access and mandatory motherhood, and be left increasingly isolated and scrutinized under the veil of criminalization."); Robyn Powell, *Including Disabled People in the Battle to Protect Abortion Rights: A Call to Action*, 70 UCLA L. REV. 774, 774–75 (2023) ("explor[ing] disabled people's unique needs for abortion services and the myriad ways they are disproportionately and adversely affected by restrictions on abortion rights"; and "suggest[ing] normative and transformative legal and policy solutions for challenging the current assault on abortion rights and its impact on disabled people"); HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. at 32988 ("[I]mpingements on the privacy of health information about reproductive health care are likely to have a disproportionately greater effect on women, individuals of reproductive age, and individuals from communities that have been historically underserved, marginalized, or subject to discrimination or systemic disadvantage by virtue of their race, disability, social or economic status, geographic location, or environment.").

[33] *See, e.g.*, Aria Bendix, *How Life-Threatening Must a Pregnancy Be to End It Legally?*, NBC NEWS (June 30, 2022), https://www.nbcnews.com/health/health-news/abortion-ban-exceptions-life-threatening-pregnancy-rcna36026 [https://perma.cc/DHL2-MFD3] (reporting the stories of physicians who are unwilling to provide necessary reproductive health care, cancer care, and other care due to fear of criminal prosecution for violating a state abortion prohibition).

vide evidence of such care, including through affidavits signed by the complainants, to law enforcement.[34] In turn, the fear of criminal investigation and prosecution leads providers to refuse to provide or delay in providing standard-of-care health services, increasing the chance of patient injury and death.[35] The HIPAA Privacy Rule must be re-written in a way that supports the health, safety, and welfare of all individuals seeking reproductive health care and that protects the medical decision making of treating physicians. This Article proposes and justifies additional amendments to the HIPAA Privacy Rule and provides direction to HHS in implementing these amendments.[36]

This Article proceeds as follows: Part I provides background regarding the HIPAA Privacy Rule as it was written before the final rule.[37] Before the final rule, covered entities were permitted to disclose reproductive health in-

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[34] *See, e.g.*, Maggie Koerth & Amelia Thompson-DeVeaux, *Even Exceptions to Abortion Bans Pit a Mother's Life Against Doctors' Fears*, FIVETHIRTYEIGHT (June 30, 2022), https://fivethirtyeight.com/features/even-exceptions-to-abortion-bans-pit-a-mothers-life-against-doctors-fears/ [https://perma.cc/K53P-Z2B9] ("Uncertainty breeds fear and stigma for doctors, who might delay treatment so they can evaluate just how close a person is to dying . . . . [D]octors say they do know at least one thing: Overturning *Roe v. Wade* will lead to more situations where the health and safety of a pregnant person comes second to doctors' own risks and fears."); HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. at 33014 (providing a hypothetical involving an investigator who requests information from a covered health plan about claims for coverage of certain reproductive health care provided by a particular health care provider; explaining that the health plan may generally presume that the reproductive health care provided was lawful, with the final rule therefore prohibiting the disclosure; but further explaining that if the investigator presents the health plan with "affidavits supplied by complainants that contain the circumstances under which the reproductive health care was provided" showing that it was unlawful, the presumption would be overcome and the health plan may disclose the PHI assuming that all applicable conditions of the Privacy Rule were otherwise met).

[35] *See, e.g.*, Jeannie Baumann, *Abortion Restrictions Weakening Cancer Care, Other Treatments*, BLOOMBERG L. NEWS (Aug. 14, 2023), https://news.bloomberglaw.com/pharma-and-life-sciences/abortion-restrictions-weakening-cancer-care-other-treatments [https://perma.cc/C739-J9QL] (reporting a story involving a Kentucky-based physician who could not provide standard-of-care cervical cancer care to her patient while the patient was pregnant; explaining that the patient had to deliver the baby seven weeks early so the patient "could get standard-of-care cancer care after an 11-week delay"); Selena Simmons-Duffin, *For Doctors, Abortion Restrictions Create an 'Impossible Choice' When Providing Care*, NPR (June 24, 2022), https://www.npr.org/sections/health-shots/2022/06/24/1107316711/doctors-ethical-bind-abortion [https://perma.cc/77UG-RWHY] (reporting that reproductive health care providers have an "impossible choice" between adhering to their ethical responsibilities and obeying the law); Andrea MacDonald, Hayley B. Gershengorn & Deepshikha Charan Ashana, *The Challenge of Emergency Abortion Care Following the* Dobbs *Ruling*, 328 JAMA 1691, 1691 (2022) ("Some women with high-risk infectious complications of pregnancy reportedly have been sent home and developed sepsis before abortions were deemed legally permissible, and some hospitals have stopped offering timely, evidence-based abortions for certain types of ectopic pregnancies."); Lauren Coleman-Lochner, Carly Wanna & Elaine Chen, *Doctors Fearing Legal Blowback Are Denying Life-Saving Abortions*, BLOOMBERG L. NEWS (July 12, 2022), https://news.bloomberglaw.com/health-law-and-business/doctors-fearing-legal-blowback-are-denying-life-saving-abortions [https://perma.cc/4VKT-5JCU] (providing examples of pharmacists who refuse to fill or who delay filling certain prescriptions that could affect a pregnancy).

[36] *See infra* Part IV.

[37] *See infra* Part I.

formation to law enforcement officers without the prior authorization of the patient who was the subject of the information pursuant to six different exceptions.[38] These exceptions elevated law enforcement activities over patient confidentiality in situations in which no unlawful activity had taken place.[39] In particular, these exceptions allowed persons that lacked training in medicine and law to speculate that an induced abortion, spontaneous miscarriage, or other pregnancy outcome was illegal when the opposite was true.[40] One result was that the name and hometown of the patient was publicized—sometimes nationally across multiple news outlets resulting in a complete loss of privacy for the patient involved—before law enforcement quickly determined that no law had been broken.[41] Part I shows how these illegal and unauthorized information disclosures uniquely burdened individuals who obtained or sought reproductive health care by publicizing what should have been private health care decision making.[42]

Part II of this Article carefully analyzes HHS's April 26, 2024 final rule, which seeks to restrict uses and disclosures of protected health information for the purposes of investigating, imposing liability, or identifying a person in connection with the person's mere act of seeking, obtaining, providing, or facilitating lawful reproductive health care.[43] Part II applies the provisions of the final rule to the five hypotheticals that open this Article, showing when the final rule improves patient confidentiality and when it does not.[44]

Part III of this Article challenges HHS's new final rule, arguing that it continues to: (1) undermine the physician-patient relationship; (2) discourage individuals from seeking health care from licensed health care providers; (3) unduly burden racial and ethnic minorities, individuals with disabilities, individuals of low socioeconomic status, and other marginalized individuals; (4) place physicians in an impossible situation where they are forced to choose between potential criminal prosecution for lawful reproductive health care and potential civil liability for delaying or refusing to provide standard-of-care health services; (5) fail to protect patients against unauthorized uses and disclosures of their reproductive health information by non-covered entities such as crisis pregnancy centers, mobile health applications, and internet search engines; and (6) fail to provide reproductive health information with protections that are equal to psychotherapy notes (PN) and substance use disorder (SUD)

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[38] *See* 45 C.F.R. § 164.512(f)(1)–(6) (2023).

[39] *See* Dobbins, *infra* note 125 (explaining how hospital workers reported a woman who received reproductive health care to police in Texas resulting in her being criminally charged for conduct that is not a crime in Texas).

[40] *See infra* Part I.

[41] *See infra* Part I.

[42] *See infra* Part I.

[43] *See infra* Part II.

[44] *See infra* Part II.

treatment records when reproductive health information is equally, if not more, sensitive than PN and SUD treatment records.[45]

Part IV re-writes the HIPAA Privacy Rule to better balance the interests of patients in protecting their privacy and health information confidentiality with the interests of law enforcement in investigating and prosecuting unlawful behavior.[46] If adopted by HHS, these amendments will improve the health, safety, and welfare of individuals who seek or obtain reproductive health care and will support the medical decision making of professionals who provide or facilitate such care.[47]

I. THE FORMER HIPAA PRIVACY RULE

This Part carefully analyzes exceptions set forth in the HIPAA Privacy Rule prior to its amendment by the final rule. In particular, Sections A through F examine the former crime on premises exception,[48] emergency care exception,[49] decedent exception,[50] required by law exception,[51] identification and location exception,[52] and crime victim exception,[53] respectively. Section G explains why these exceptions were concerning from the perspectives of patients and providers.[54]

As background, the HIPAA Privacy Rule (Privacy Rule) is a federal health information confidentiality regulation promulgated by HHS[55] that strives to bal-

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[45] *See infra* Part III.
[46] *See infra* Part IV.
[47] *See infra* Part IV.
[48] *See infra* Part I.A.
[49] *See infra* Part I.B.
[50] *See infra* Part I.C.
[51] *See infra* Part I.D.
[52] *See infra* Part I.E.
[53] *See infra* Part I.F.
[54] *See infra* Part I.G.
[55] HIPAA is an acronym that stands for the Health Insurance Portability and Accountability Act of 1996. *See* Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 110 Stat. 1936 (codified in scattered sections of 18 U.S.C., 26 U.S.C., 29 U.S.C., 42 U.S.C.). Section 264(c)(1) of HIPAA directed HHS to promulgate privacy regulations if Congress failed to enact privacy legislation within three years of HIPAA's enactment. *Id.* § 264(c)(1), 110 Stat. at 2033. When Congress failed to enact privacy legislation by 1999, HHS incurred the obligation to promulgate privacy regulations within six additional months. *See* INST. OF MED., BEYOND THE HIPAA PRIVACY RULE: ENHANCING PRIVACY, IMPROVING HEALTH THROUGH RESEARCH 156 (Sharyl J. Nass et al. eds., 2009) (explaining that despite the introduction of eight bills in 1999 alone, Congress was unable to pass privacy legislation within the timeframe mandated by HIPAA). HHS responded by promulgating regulations, which are referred to as the HIPAA Privacy Rule. *See* 45 C.F.R. pt. 164, subpt. E (2023) (promulgating the regulations in Subpart E, entitled "Privacy of Individually Identifiable Health Information"); *infra* notes 153–183 and accompanying text (laying out additional history regarding the promulgation of the Privacy Rule). With technical corrections and conforming amendments, the straightforward discussion of covered entities and protected health information set forth in text accompanying *infra* notes 56–75 is taken from the author's many prior works addressing the HIPAA Privacy Rule. *See, e.g.*, Tovino, *Confidentiality over Privacy*, *supra* note 17 (analyzing the patchwork of federal and state

ance the interest of individuals in maintaining the confidentiality of their health information with the interest of society in obtaining, using, and disclosing health information.[56] As amended over time, the Privacy Rule now regulates covered entities and business associates when they internally use or externally disclose a class of information called protected health information (PHI).[57] As discussed in more detail below, the involvement of a covered entity or business associate[58] as well as the use or disclosure of PHI is necessary before the Privacy Rule applies.[59]

A covered entity is defined to include a health care provider[60] that transmits health information in electronic form in connection with certain standard transactions, including the health insurance claim transaction.[61] Physicians, hospitals, and clinics (including abortion clinics) are expressly or impliedly included within the Privacy Rule's definition of a health care provider.[62] Be-

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health information confidentiality law in the context of reproductive health information); Stacey A. Tovino, *Not So Private*, 71 DUKE L.J. 985 (2022) (analyzing the patchwork of federal and state health information confidentiality law generally); Stacey A. Tovino, *Going Rogue: Mobile Research Applications and the Right to Privacy*, 95 NOTRE DAME L. REV. 155 (2019) [hereinafter Tovino, *Going Rogue*] (providing background information regarding the Privacy Rule); Stacey A. Tovino, *A Timely Right to Privacy*, 104 IOWA L. REV. 1361 (2019) [hereinafter Tovino, *A Timely Right to Privacy*] (same).

[56] *See* Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82461, 82464 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164) ("The rule seeks to balance the needs of the individual with the needs of the society."); *id.* at 82468 ("The task of society and its government is to create a balance in which the individual's needs and rights are balanced against the needs and rights of society as a whole."); *id.* at 82472 ("The need to balance these competing interests—the necessity of protecting privacy and the public interest in using identifiable health information for vital public and private purposes—in a way that is also workable for the varied stakeholders causes much of the complexity in the rule.").

[57] 45 C.F.R. § 164.500(a) (applying the HIPAA Privacy Rule to covered entities); *id.* § 164.502–.514 (setting forth the use and disclosure requirements that apply to covered entities). The HIPAA Privacy Rule also applies to business associates. *Id.* § 164.500(c).

[58] A business associate is a person who performs certain functions or activities for or on behalf of a covered entity other than as a workforce member of the covered entity, and who requires access to protected health information of the covered entity to perform such functions or activities. *Id.* § 160.103. Because business associates of covered entities are infrequently involved in the disclosure of reproductive health information to law enforcement, this Article focuses solely on disclosures by covered entities (not business associates) to law enforcement. *See* HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 88 Fed. Reg. 23506, 23543 (proposed Apr. 17, 2023) (to be codified at 45 C.F.R. pts. 160, 164) (explaining that the proposed rule that preceded the April 26, 2024 final rule will have little effect on business associates because "the primary effect is on the covered entities" served by the business associates). That said, many statements made in this Article about covered entities (including what covered entities can and cannot do under the final rule) apply equally to business associates and should not be read as applying only to covered entities.

[59] 45 C.F.R. § 164.500(a) (applying the HIPAA Privacy Rule to covered entities).

[60] *Id.* § 160.103 (defining health care provider).

[61] *Id.* (defining covered entity, noting that other covered entities include health plans and health care clearinghouses).

[62] *Id.* (defining health care provider to include a "provider of medical or other health services" under Section 1861(s) of the Social Security Act); Social Security Act, 42 U.S.C. 1395x(s) (codifying section 1861(s) of the Social Security Act, which identifies a physician as a "provider of medical or other health services"); 45 C.F.R. § 160.103 (defining health care provider to include a "provider of

cause most physicians, hospitals, and clinics transmit health information in electronic form in connection with health claims sent to health insurers, most physicians, hospitals, and clinics must comply with the HIPAA Privacy Rule when using or disclosing PHI.[63] Indeed, both the Red River Women's Clinic in the first hypothetical and the Planned Parenthood clinics in the second and fourth hypotheticals electronically transmit health information in connection with health insurance claims.[64] Therefore, these clinics must comply with the Privacy Rule when using or disclosing PHI.[65]

That said, not every individual or entity that creates, receives, or maintains reproductive health information must comply with the Privacy Rule. Crisis pregnancy centers (CPCs), for example, do not electronically transmit health information in connection with health insurance claims and do not need to comply with the Privacy Rule.[66] CPCs are religiously-based organizations that intercept pregnant women who may be considering abortion and that promote adoption or parenting instead.[67] CPCs are not regulated by the HIPAA Privacy Rule even though some pregnant individuals think CPCs are licensed health care clinics and some pregnant individuals share significant reproductive health information with CPC staff with the hope of obtaining an abortion or a referral for an abortion.[68] Many mobile health applications and internet search engines also do not

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services" under section 1861(u) of the Social Security Act); Social Security Act, 42 U.S.C. § 1395x(u) (codifying section 1861(u) of the Social Security Act and identifying a hospital as a "provider of services"); 45 C.F.R. § 160.103 [hereinafter catch-all definition] (explaining that any other person or institution that furnishes, bills, or gets paid for providing health care in the normal course of business is a health care provider for purposes of the HIPAA Privacy Rule). Clinics that furnish health care, including abortion care, would meet the catch-all definition. *See id.* (providing that institutions that bill or receive payment for care, as abortion clinics do, meet the catch-all definition).

[63] *See, e.g.*, *Spokane Valley Health Center*, *supra* note 7 ("We accept many private and public insurance plans.").

[64] *See id.*; *Financial Assistance*, RED RIVER WOMEN'S CLINIC, https://www.redriverwomensclinic.com/financial-assistance [https://perma.cc/ZVW2-6E5N] ("Patients who are covered on Minnesota Medical Assistance or Minnesota Care do not need to pay a fee—we will bill these programs for you."); *Paying for Your Visit*, PLANNED PARENTHOOD OF N. CAL., https://www.plannedparenthood.org/planned-parenthood-northern-california/get-care/pricing-insurance [https://perma.cc/AU5R-FS85] (stating that Planned Parenthood accepts Medicare, Medicaid, and "most [other] insurance plans").

[65] 45 C.F.R. § 164.500(a) (applying the HIPAA Privacy Rule to covered entities).

[66] Amy G. Bryant & Jonas J. Swartz, *Why Crisis Pregnancy Centers Are Legal but Unethical*, 20 AMA J. ETHICS 269, 271 (2018) ("CPCs that are not licensed medical clinics cannot legally be held to the privacy provisions of the Health Insurance Portability and Accountability Act (HIPAA), which could lead to violations of client privacy. For example, client information might not be kept confidential, and information about pregnancy or abortion intentions might be shared with people outside the clinic."); Melissa N. Montoya, Colleen Judge-Golden & Jonas J. Swartz, *The Problems with Crisis Pregnancy Centers: Reviewing the Literature and Identifying New Directions for Future Research*, 14 INT'L J. WOMEN'S HEALTH 757, 760 (2022) ("Because they are not medical facilities, CPCs are not subject to [HIPAA] and many are collecting private client data, which could be used for a range of purposes, from evangelizing to informing anti-abortion lawsuits for bounty in Texas.").

[67] Bryant & Swartz, *supra* note 66, at 269.

[68] *Id.* at 270 ("Women who visit CPCs typically do not realize that they are not in an abortion clinic and are surprised to find that abortion is not considered an option at these centers."); Montoya et al.,

meet the definition of a covered entity or a business associate, even though they collect significant reproductive health information and reproductive-related search information from which health status can be inferred.[69] Part IV of this Article corrects this limitation in the HIPAA Privacy Rule.[70]

Once a covered entity is involved, the Privacy Rule applies when the covered entity uses or discloses a class of information known as PHI.[71] With four exceptions, PHI is defined as individually identifiable health information (IIHI).[72] In relevant part, IIHI is defined as information created by a health care provider that relates to the past, present, or future health of an individual and that identifies the individual.[73] Electronic or paper medical records that reference a named patient's past abortion, current pregnancy, or bleeding or other symptoms that may indicate a future miscarriage would meet this definition and would need to be protected in accordance with the Privacy Rule.[74] An oral communication by a physician office worker, a hospital worker, or a clinic worker about a named patient's past, present, or future reproductive health condition also would meet this definition and would need to be protected in accordance with the Privacy Rule.[75]

Before using or disclosing an individual's PHI, the Privacy Rule requires a covered entity to obtain the prior written authorization of the individual who is the subject of the PHI on a HIPAA-compliant authorization form unless an exception applies.[76] If the North Dakota, Idaho, Oklahoma, Texas, and Ken-

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supra note 66, at 758 (explaining that CPCs collect significant reproductive health information from pregnant women).

[69] *See, e.g.*, Tovino, *Confidentiality over Privacy*, *supra* note 17, at Parts I.D and II.F (identifying individuals and entities that collect or maintain reproductive health information but are not regulated by the HIPAA Privacy Rule); Tovino, *Going Rogue, supra* note 55, at Part II.A (explaining that the HIPAA Privacy Rule does not regulate many mobile health applications because they either do not meet the definition of a health care provider or, if they do, they do not transmit health information in electronic form in connection with a standard transaction); Leah R. Fowler & Michael R. Ulrich, *Femtechnodystopia*, 75 STAN. L. REV. 1233, 1281 (2023) (explaining that the HIPAA Privacy Rule does not regulate many period and fertility tracker applications).

[70] *See infra* Part IV.

[71] *See, e.g.*, 45 C.F.R. § 164.500(a) (2023) (explaining that the HIPAA Privacy Rule applies to covered entities "with respect to protected health information").

[72] *Id.* § 160.103. The four IIHI exceptions from PHI include: (1) education records protected by the Family Educational Rights and Privacy Act (FERPA); (2) student treatment records excepted from FERPA; (3) employment records held by a covered entity in its role as an employer; and (4) records regarding persons who have been dead for more than fifty years. *See id.* (defining PHI). The author closely examined two of these exceptions (the exceptions for education records and student treatment records) in Stacey A. Tovino, *Privacy for Student-Patients: A Call to Action*, 73 EMORY L.J. 83 (2023). A discussion of these exceptions is not repeated here.

[73] 45 C.F.R. § 160.103 (defining IIHI).

[74] *See id.* (defining IIHI).

[75] *See id.* (including oral communications as IIHI).

[76] *Id.* § 164.508(a), (c)(1)(2) (setting forth the general rule that a covered entity may not use or disclose a patient's PHI without their prior written authorization and listing the core elements and required statements that must be included in a HIPAA-compliant authorization form).

tucky residents described in the opening of this Article signed HIPAA-compliant forms authorizing the release of their abortion records to law enforcement, their abortion providers would be permitted to disclose their records.[77] That said, most individuals who have had abortions do not authorize the subsequent use and disclosure of their abortion records.[78] As a result, abortion providers generally must meet a law enforcement-related exception to the authorization requirement before disclosing PHI to law enforcement.[79]

A. Crime on Premises Exception

Before the final rule, there were six exceptions that permitted a covered entity to disclose PHI to law enforcement without the prior written authorization of the individual who is the subject of that information.[80] One exception—known as the "crime on premises" exception—permitted a covered entity to disclose to law enforcement PHI "that the covered entity believes in good faith constitutes evidence of criminal conduct that occurred on the premises of the covered entity."[81] The hypotheticals that opened this Article may be used to illustrate the application of this exception, including its unintended consequences.

Recall the third hypothetical, which involved a pregnant Oklahoman who developed congestive heart failure during the second trimester and whose treating physician believed had an unlikely chance of surviving the pregnancy. The physician believed that an abortion was necessary to preserve the patient's life—and this is the only situation in which abortion is permitted in Oklahoma[82]—but a second physician who worked at the same hospital disagreed and wanted to report the abortion to law enforcement. Because the crime on premises provision allowed a workforce member of a covered entity, such as a physician on staff at a hospital, to disclose PHI that the physician believed in good faith constituted evidence of criminal conduct,[83] the patient's right to confidentiality was subordinated to the second physician's belief that the abortion was unnecessary.[84] This was so even if the second physician had not personally examined the patient and even if the second physician's belief was not shared by the patient's personal,

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[77] *See id.* (providing that a covered entity may disclose PHI pursuant to prior written authorization of the patient).

[78] *See infra* note 141 and accompanying text (discussing social stigma around abortion).

[79] *See* 45 C.F.R. § 164.512(f)(l)–(6) (setting out exceptions to the authorization requirement).

[80] *See id.* (listing the six exceptions). These six exceptions are discussed in a substantively logical, but not chronological, order. That is, they are discussed in the order of 45 C.F.R. § 164.512(f)(5), (6), (4), (1), (2), and (3).

[81] *Id.* § 164.512(f)(5).

[82] *See* OKLA. STAT. ANN. tit. 21, § 861 (West 2023) ("Every person who administers to any woman, or who prescribes for any woman . . . with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall be guilty of a felony . . . .").

[83] 45 C.F.R. § 164.512(f)(5).

[84] *Id.*

attending physician who had taken care of the patient throughout the pregnancy and had seen a material decline in the patient's condition.[85]

The same result occurred in situations involving non-health care professionals who worked at covered entities.[86] For example, a medical records custodian or a person responsible for billing and coding at a hospital who had access to a patient's medical record was permitted by the HIPAA Privacy Rule to report an induced abortion or a natural pregnancy outcome to law enforcement, thus violating the patient's right to confidentiality. This was so even though the worker lacked the medical training necessary to determine whether an induced abortion was life preserving or whether another pregnancy outcome was natural or induced.[87]

Note that the crime on premises exception would not have applied in the first hypothetical that opened this Article. This is because the North Dakota patient in the first hypothetical obtained a legal-in-Minnesota abortion inside a Minnesota abortion clinic. Therefore, no crime occurred on the premises of the Minnesota clinic.[88] The crime-on-premises exception also would not have applied in the fourth hypothetical. This is because a patient who states that they are considering getting an abortion or that they plan to get an abortion has not committed a crime on the provider's premises.[89] An individual's consideration of an abortion, or desire to obtain an abortion, is not a crime in Texas.[90] Only the provision of an abortion in Texas is a crime.

The crime on premises exception also would appear (at least at first glance) not to apply in the second hypothetical. Recall that the second hypothetical involved a non-parental adult who transported a minor Idahoan across the Idaho state line, to Washington, to obtain a legal-in-Washington abortion. Because

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[85] *Id.* § 164.500(a) (regulating covered entities, including their workforce members).

[86] *See id.*

[87] *See* Jill Kalman & Stacey E. Rosen, *Abortion Rights Get to the Heart of the Doctor-Patient Relationship*, MEDPAGE TODAY (June 28, 2022), https://www.medpagetoday.com/opinion/second-opinions/99479 [https://perma.cc/H3AW-5AJF] (arguing in line with American Medical Association guidance that "clinical assessments, such as viability of the pregnancy and safety of the pregnant person, are determinations to be made only by healthcare professionals with their patients," not by medically untrained third parties) (quoting AMA, *Preserving Access to Reproductive Health Services D-5.999*, Res. 711, A-23 (2023), https://policysearch.ama-assn.org/policyfinder/detail/clinical%20assessments,%20such%20as%20viability%20of%20the%20pregnancy%20and%20safety%20of%20the%20pregnant%20person?uri=%2FAMADoc%2Fdirectives.xml-D-5.999.xml [https://perma.cc/G63J-SFED]).

[88] *See* 45 C.F.R. § 164.512(f)(5) (providing that a crime must have occurred on the premises of the covered entity in order for the exception to apply).

[89] *See id.* (providing that a crime must have occurred on the premises of the covered entity in order for the exception to apply).

[90] *See* TEX. HEALTH & SAFETY CODE ANN. § 170A.002(a) (West 2023) (prohibiting providing an abortion, inducing an abortion, or attempting to provide or induce an abortion, but not considering getting an abortion); *id.* § 171.204(a) (prohibiting a physician from performing or inducing an abortion on a pregnant woman); *id.* § 171.206(b) ("This subchapter may not be construed to . . . [a]uthorize the initiation of a cause of action against or the prosecution of a woman on whom an abortion is performed or induced or attempted to be performed or induced in violation of this subchapter.").

abortion is legal in Washington, the abortion that occurred on the premises of the Washington clinic could not be the crime that triggered the crime on premises exception.[91] Moreover, recall the Idaho Abortion Trafficking Law, which prohibits in-state (for example, within Idaho) travel that results in a person crossing an Idaho border to obtain an abortion beyond the border. [92] Because the within-Idaho travel in the second hypothetical did not occur on the premises of the Washington clinic from which Idaho law enforcement is demanding PHI, the within-Idaho travel also could not be the crime that triggered the crime on premises exception. That said, also recall that the adult partner falsely claimed to be the minor's parent when the minor signed in at the Planned Parenthood Clinic in Spokane. In addition to other possible crimes, the adult partner could have committed criminal impersonation on the premises of the Washington clinic.[93] In this case, the crime on premises exception would have permitted the Washington clinic to disclose to law enforcement PHI, such as the consent-to-abortion form signed by the adult, that evidenced the criminal impersonation.[94]

B. Emergency Care Exception

In addition to the crime on premises exception, the former HIPAA Privacy Rule contained additional exceptions that permitted covered entities to disclose PHI to law enforcement without the prior written authorization of the individual who was the subject of the information.[95] The second exception—the "emergency care" exception—permitted a covered entity "providing emergency health care in response to a medical emergency, other than such emergency on the premises of the covered health care provider," to disclose PHI to a law enforcement officer if the disclosure was necessary to notify law enforcement of the commission and details of a criminal act, its location or location of victims, or the "identity, description, and location of the perpetrator of

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[91] *See* WASH. REV. CODE § 9.02.100(2) (2023) ("it is the public policy of the state of Washington that:. . . [e]very pregnant individual has the fundamental right to choose or refuse to have an abortion, except as specifically limited"); *id.* § 9.02.110 ("The state may not deny or interfere with a pregnant individual's right to choose to have an abortion prior to viability of the fetus, or to protect the pregnant individual's life or health."); 45 C.F.R. § 164.512(f)(5) (providing that a crime must have occurred on the premises of the covered entity in order for the exception to apply).

[92] *See* IDAHO CODE ANN. § 18-623(1) (West 2023) ("An adult who, with the intent to conceal an abortion from the parents or guardian of a pregnant, unemancipated minor . . . procures an abortion . . . by . . . transporting the pregnant minor within this state commits the crime of abortion trafficking.").

[93] *See* WASH. REV. CODE § 9A.60.040(1) (2023) (prohibiting criminal impersonation).

[94] *See* 45 C.F.R. § 164.512(f)(5) (providing that a crime must have occurred on the premises of the covered entity in order for the exception to apply).

[95] *Id.* § 164.512(f)(6)(i) ("A covered health care provider providing emergency health care in response to a medical emergency, other than such emergency on the premises of the covered health care provider, may disclose protected health information to a law enforcement official if such disclosure appears necessary to alert law enforcement to: (A) The commission and nature of a crime; (B) The location of such crime or of the victim(s) of such crime; and (C) The identity, description, and location of the perpetrator of such crime.").

the crime."[96] This exception only applied, however, when the emergency health care was being provided off the premises of the covered entity.[97] For example, the driver of a covered ambulance that was dispatched to an abortion clinic or an individual's home that was located off the premises of the ambulance company would have been permitted to report to law enforcement evidence of a suspected criminal abortion, even if the patient had not authorized the disclosure.

Because most abortions do not require the provision of subsequent, emergency care, the emergency care exception rarely applied in the abortion context.[98] That said, if a surgical abortion at a clinic, a medication abortion at an individual's home, or another abortion did require the provision of subsequent emergency care, or the patient thought that emergency care was needed, the driver of a covered ambulance would be permitted to report the name of the patient who had the abortion, the name of the physician who performed the abortion, and other information to law enforcement if the driver suspected that the abortion was illegal.[99] This opened the door for ambulance personnel to report legal abortions and natural pregnancy outcomes to law enforcement, thus violating the patient's right to confidentiality. For example, ambulance personnel might have thought that a patient's abortion was past the point of viability in a state that allows pre-viability, but not post-viability, abortions.[100] Similarly, ambulance personnel might have thought that a patient's abortion was unnecessary to preserve a patient's life even though the attending physician, who may have completed a residency in obstetrics and gynecology and a fellowship in maternal-fetal medicine, firmly believed the abortion was necessary to save the patient's life.[101] Along the same lines, ambulance personnel might have incorrectly thought that an individual's bleeding associated with

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[96] *Id.*

[97] *See id.* (establishing that the exception applies only when "providing emergency health care in response to a medical emergency, other than such emergency on the premises of the covered health care provider").

[98] *See, e.g.*, Ushma D. Upadhyay et al., *Abortion-Related Emergency Department Visits in the United States: An Analysis of a National Emergency Department Sample*, 16 BMC MED. 88, 1 (2018) ("Media depictions and laws passed in state legislatures regulating abortion suggest abortion-related medical emergencies are common . . . . [However, a]mong all ED visits by women aged 15–49, only .01% [*i.e.*, one hundredth of one percent] were abortion-related."); Ushma D. Upadhyay et al., *Incidence of Emergency Department Visits and Complications After Abortion*, 125 OBSTETRICS & GYNECOLOGY 175, 175 (2015) ("Among all abortions . . . only 1 of 115 (0.87% . . .) resulted in an [emergency department] visit for an abortion-related complication.").

[99] *See* 45 C.F.R. § 164.512(f)(6)(i) (setting out the emergency care exception).

[100] *See, e.g.*, WASH. REV. CODE § 9.02.110 (2023) ("The state may not deny or interfere with a pregnant individual's right to choose to have an abortion *prior to viability of the fetus*, or to protect the pregnant individual's life or health.") (emphasis added).

[101] *See, e.g.*, OKLA. STAT. ANN. tit. 21, § 861 (West 2023) ("Every person who administers to any woman, or who prescribes for any woman . . . with intent thereby to procure the miscarriage of such woman, *unless the same is necessary to preserve her life*, shall be guilty of a felony . . . .") (emphasis added).

spontaneous miscarriage was evidence of a criminal abortion.[102] Finally, non-legally trained ambulance personnel might have an incorrect understanding of state criminal law and made a legally unfounded disclosure of PHI to law enforcement. For example, ambulance personnel might have reported a patient to law enforcement even though the state's abortion law only applied to physicians who performed abortions but not to patients who had abortions.[103]

In summary, the former Privacy Rule's emergency exception opened the door to medically and/or legally mistaken emergency medical services (EMS) personnel violating patient confidentiality. That medical or legal mistakes could have been made in these situations is not hypothetical. In Texas, a health care worker misunderstood Texas abortion law and reported a patient requesting emergency care to law enforcement.[104] Only after law enforcement investigated and charged the patient with murder (and only after the patient's first and last name and hometown were referenced in news reports, drawing significant national attention to the woman's plight and destroying her privacy) did the district attorney realize the patient had not committed a crime and that the health care worker's report was legally unfounded.[105]

C. Decedent Exception

In addition to the crime on premises and the emergency exception, the former HIPAA Privacy Rule contained still other exceptions that permitted a covered entity to disclose PHI to law enforcement without patient authorization.[106] A third exception—known as the "decedent exception"—permitted a covered entity to disclose PHI "about an individual who has died to a law en-

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[102] *See, e.g.*, Henry Redman, *Criminalized Abortion Will Lead to Cops Investigating Miscarriages, Advocates Say*, WIS. EXAM'R (July 5, 2022), https://wisconsinexaminer.com/2022/07/05/criminalized-abortion-will-lead-to-cops-investigating-miscarriages-advocates-say/ [https://perma.cc/ZEC8-BUYC] (reporting that a woman who miscarries and requires medical attention may be reported to the local sheriff's office or police chief; explaining that criminal investigations of miscarriage are a "horrifying effect" of the Supreme Court's decision to overturn *Roe v. Wade*).

[103] *See, e.g.*, *id.* ("[Noting that Wisconsin's abortion ban] only allows for criminal charges to be brought against the person who performs the abortion, not the mother."); TEX. HEALTH & SAFETY CODE ANN. § 171.206(b)(1) (West 2023) (referencing a Texas law that allows physicians to be prosecuted for providing abortions but shields women on whom abortions are performed from prosecution).

[104] *See, e.g.*, Jolie McCullough, *After Pursuing an Indictment, Starr County District Attorney Drops Murder Charge Over Self-Induced Abortion*, TEX. TRIB. (Apr. 10, 2022), https://www.texastribune.org/2022/04/10/starr-county-murder-charge/ [https://perma.cc/4G95-FXWQ] (reporting that "[a]fter charging a woman with murder over a self-induced abortion, forcing her to spend three days in jail and drawing national attention, Starr County officials announced Sunday they would change course and move to dismiss the case" because "'[i]n reviewing applicable Texas law, it is clear that [the named patient] cannot and should not be prosecuted for the allegation against her;'" further explaining that Texas's abortion law only applies to persons who perform abortions on others, not patients who have abortions).

[105] *See id.* (stating the full name of the patient and detailing the charges against her).

[106] *See* 45 C.F.R. § 164.512(f) (2023) (setting forth other exceptions).

forcement official for the purpose of alerting law enforcement of the death of the individual if the covered entity has a suspicion that such death may have resulted from criminal conduct."[107] An extraordinarily low number of individuals who have abortions die from abortions.[108] Pregnancy and childbirth are far more dangerous than abortion.[109] The hypotheticals that open this Article, none of which involve patient death,[110] were drafted to reflect this fact. That said, if an individual did die from an abortion,[111] the former HIPAA Privacy Rule permitted a covered entity to disclose PHI that evidenced the death to law enforcement, but only if the covered entity had a suspicion that the death resulted from criminal conduct.[112]

As with the crime on premises exception and the emergency exception, the decedent exception opened the door to patient confidentiality violations being based on medically and legally incorrect foundations. A patient may have died from a legal abortion, but a medically untrained individual might incorrectly have thought that the abortion was beyond the point of viability[113] or was not life preserving[114] in a state that regulated abortion in that way. Likewise, a legally untrained individual might have reported a patient in a jurisdiction that makes only physician behavior (but not patient behavior) in the abortion context illegal.[115] Along the same lines, a factually misinformed per-

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[107] *Id.* § 164.512(f)(4).

[108] *See, e.g.*, Jaclyn Diaz, Koko Nakajima & Nick Underwood, *7 Persistent Claims About Abortion, Fact-Checked*, NPR (June 24, 2022), https://www.npr.org/2022/05/06/1096676197/7-persistent-claims-about-abortion-fact-checked [https://perma.cc/WD8J-CYXK] (reporting CDC data showing that the national case fatality rate for induced abortion is .41 deaths per 100,000 abortions compared to 17.4 pregnancy-related deaths per 100,000 live births).

[109] *Id.* In fact, pregnancy is approximately fourteen times more likely to result in death than an abortion is. Bella Miller, Note: *My Uterus, My Choice: Abortion Bans and Property Interests in the Female Body*, 64 B.C. L. REV. 2131, 2148 (2023).

[110] *See supra* notes 2–16 and accompanying text (setting out the hypotheticals the Article examines).

[111] *See, e.g.*, *Teen Dies After Taking Abortion Pill*, NBC NEWS (Sept. 22, 2003), https://www.nbcnews.com/id/wbna3088036 [https://perma.cc/2LVL-TZ59] (reporting the story of an eighteen-year-old patient who died following a legal, medication abortion due to an infection caused by fragments of the fetus that remained inside her uterus, leading to septic shock).

[112] *See* 45 C.F.R. § 164.512(f)(4) (permitting disclosure under limited circumstances).

[113] *See, e.g.*, WASH. REV. CODE § 9.02.110 (2023) ("The state may not deny or interfere with a pregnant individual's right to choose to have an abortion *prior to viability of the fetus* . . . .") (emphasis added).

[114] *See, e.g.*, OKLA. STAT. ANN. tit. 21, § 861 (2023) ("Every person who administers to any woman, or who prescribes for any woman . . . with intent thereby to procure the miscarriage of such woman, *unless the same is necessary to preserve her life*, shall be guilty of a felony . . . .") (emphasis added).

[115] *See, e.g.*, WISC. STAT. § 940.04(1) (West 2023) ("Any person, *other than the mother*, who intentionally destroys the life of an unborn child is guilty of a Class H felony.") (emphasis added); *id.* § 940.04(2) ("Any person, *other than the mother*, who does either of the following is guilty of a Class E felony: (a) Intentionally destroys the life of an unborn quick child; or (b) Causes the death of the mother by an act done with intent to destroy the life of an unborn child.") (emphasis added).

son might have reported a patient who died from an incomplete, spontaneous miscarriage[116] rather than an induced medication or surgical abortion.

D. Required by Law Exception

A fourth exception—the "required by law" exception—permitted a covered entity to disclose PHI as required by law, including in compliance with a court order, grand jury subpoena, or administrative request.[117] This exception was potentially applicable to all five of the hypotheticals that opened this Article. In particular, if the North Dakota, Idaho, Oklahoma, Texas, or Kentucky law enforcement officers obtained a court order or grand jury subpoena, or if a state medical board issued an administrative request, the required by law exception allowed the health care providers referenced in the hypotheticals to release their patient records[118] even without the authorization of the patient involved so long as state law did not forbid the disclosure.[119] If the abortion provider refused to release the records in a state that did not forbid the disclosure, the provider could have been in contempt of court.[120]

In the fourth hypothetical, recall the Texas patient who told their provider that they were considering getting an abortion either at a Planned Parenthood clinic located near extended family who live out of state, where pre-viability abortions are legal, or by obtaining mailed medication from a telehealth provider located in an abortion-allowing state. The former HIPAA Privacy Rule's required by law exception would have allowed a health care provider in that other state to release the patient's abortion record in accordance with a Texas court order, grand jury subpoena, or administrative request unless that other state had an abortion shield law.[121] As background, some states have new abor-

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[116] *See, e.g.*, Ashely Redinger & Hao Nguyen, *Incomplete Abortions*, STATPEARLS (Feb. 12, 2024), https://www.ncbi.nlm.nih.gov/books/NBK559071/ [https://perma.cc/535A-LFXF] (reporting complications associated with incomplete, spontaneous miscarriages, "including maternal death, major surgery, or sterility" as well as "uterine rupture, uterine perforation, subsequent hysterectomy, multisystem organ failure, pelvic infection, [and] cervical damage"; further stating that, "[a]fter 14 weeks of gestation, there is an even further increased risk of maternal death and serious complications").

[117] 45 C.F.R. § 164.512(f)(1).

[118] *Id.*

[119] *See, e.g.*, CAL. CIV. CODE § 56.108(a) (West 2023) ("[A] provider of health care . . . shall not release medical information related to an individual seeking or obtaining an abortion in response to a subpoena or request if that subpoena or request is based on . . . another state's laws that interfere with a person's rights under the Reproductive Privacy Act.").

[120] *See, e.g.*, WASH. REV. CODE § 7.21.010(1)(b), (d) (2023) (defining contempt of court to include "disobedience of any lawful . . . order" as well as "refusal, without lawful authority, to produce a record . . . [or] document").

[121] *See, e.g.,* CAL. CIV. CODE § 56.108(a) (West 2023) ("[A] provider of health care . . . shall not release medical information related to an individual seeking or obtaining an abortion in response to a subpoena or request if that subpoena or request is based on . . . another state's laws that interfere with a person's rights under the Reproductive Privacy Act.").

tion shield laws that, among other things, prohibit health care providers in the state with the shield law from releasing abortion or other reproductive health care records in response to an out-of-state subpoena or other foreign request.[122] California, for example, does have an abortion shield law, so if the patient went to a California clinic, the disclosure to Texas law enforcement would be prohibited by California law (but interestingly not the former HIPAA Privacy Rule).[123] If California did not have an abortion shield law, the disclosure would have been allowed under both federal and state law.[124]

As with the crime on premises, emergency care, and decedent exceptions, the former required by law exception opened the door for confidentiality to be violated in cases involving no unlawful activity. In Starr County, Texas, for example, a legally unfounded abortion report by a health care worker led to a criminal investigation of a patient and a grand jury subpoena for her hospital records.[125] The grand jury and a judge subsequently agreed that the patient should be indicted.[126] The story, including the patient's full name and the abortion report, received national media attention, ruining the patient's privacy.[127] Shortly thereafter, the district attorney dropped the charges, admitting the pa-

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[122] *See id.* (preventing disclosure of abortion information in response to a subpoena based on the laws of another state).

[123] *See id.* (establishing the California shield law).

[124] *See generally Abortion Policy in the Absence of* Roe, GUTTMACHER INST. (Apr. 24, 2023), https://www.guttmacher.org/state-policy/explore/abortion-policy-absence-roe#:~:text=Once%20the%20US%20Supreme%20Court,to%20be%20used%20for%20abortion [hereinafter *Abortion Policy in the Absence of* Roe] [https://perma.cc/LUE2-DF2S] (reporting the number of states that have abortion shield laws that protect abortion providers and, in some cases, individuals who support patients, from the reach of out-of-state abortion restrictions and bans).

[125] *See, e.g.*, James Dobbins, *Why Was a Texas Woman Charged with Murder for a 'Self-Induced' Abortion? Officials Won't Say*, TEX. OBSERVER (Apr. 15, 2022), https://www.texasobserver.org/why-was-a-texas-woman-charged-with-murder-for-a-self-induced-abortion-officials-wont-say/ [https://perma.cc/3UJ7-DAFM] ("In January, [the patient] went to a Starr County hospital for treatment. Staff at the hospital contacted the Sheriff's Office after [she] reportedly said her symptoms were related to an abortion. It is a mystery why the medical workers reported [her] to law enforcement, why Ramirez's office pursued a murder charge, and why a grand jury and a judge chose to agree with the prosecution.").

[126] Eleanor Klibanoff, *If* Roe v. Wade *Is Overturned, Texas District Attorney Offices Would Become a New Battleground*, TEX. TRIB. (Apr. 21, 2022), https://www.texastribune.org/2022/04/21/abortion-texas-lizelle-herrera-prosecutors/#:~:text=If%20the%20court%20overturns%20Roe,criminal%20charges%20in%20abortion%20cases. [https://perma.cc/WRL6-SNC6] ("[T]he grand jury decided there was reason to charge 26-year-old [patient's name] with murder . . . . [The patient] was arrested on a $500,000 bond and booked into the Starr County Jail even though Texas' murder statute explicitly prohibits bringing murder charges against a pregnant person in the 'death of an unborn child.'") (quoting TEX. PENAL CODE ANN. § 19.06 (West 2023)).

[127] *See, e.g.*, Mary Ziegler, *Lizelle Herrera's Texas Arrest Is a Warning*, NBC NEWS (Apr 16, 2022), https://www.nbcnews.com/think/opinion/lizelle-herreras-texas-abortion-arrest-warning-rcna24639 [https://perma.cc/BJP8-D25A] (containing the name of the patient who should have received confidential emergency care in the headline of the article).

tient never should have been prosecuted.[128] Even though charges were dropped, the patient was saddled with a permanent loss of privacy and the corresponding emotional toll.[129] The patient's first and last name and the fact that she had an abortion were forever memorialized in the national, printed news.[130]

E. Identification and Location Exception

Three of the four former exceptions described above permitted a covered entity to voluntarily initiate a disclosure of PHI to law enforcement without a prior request from law enforcement, and the fourth permitted a disclosure as required by law, such as upon receipt of a court order.[131] Two additional exceptions existed for situations in which a law enforcement officer requested PHI from a covered entity. In the first additional exception—known as the "identification and location" exception—a covered entity was permitted to "disclose protected health information in response to a law enforcement official's request for such information for the purpose of identifying or locating a suspect, fugitive, material witness, or missing person."[132] Under this exception, the information that was permitted to be disclosed included the patient's name, address, date of birth, place of birth, social security number, blood type and rh factor, type of injury, date and time of treatment, as well as a description of distinguishing physical characteristics such as height, weight, gender, race, hair color, eye color, facial hair, scars, and tattoos.[133]

The identification and location exception would have allowed workforce members of the Washington and Kentucky abortion providers described in the second and fifth hypotheticals that open this Article to disclose to the Idaho

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[128] *See Texas Prosecutor Drops Murder Charge Against Woman Arrested for Self-Induced Abortion*, CBS NEWS (Apr. 10, 2022), https://www.cbsnews.com/news/lizelle-herrera-abortion-texas-murder-charge-dropped/ [https://perma.cc/2BLC-C94D] (quoting Starr County District Attorney Gocha Allen Ramirez: "it is clear that [the patient] cannot and should not be prosecuted for the allegation against her").

[129] *See id.* (quoting the Starr County District Attorney's recognition that "the events leading up to this indictment have taken a toll on [the patient] and her family" and that "[t]o ignore this fact would be shortsighted").

[130] *See, e.g.*, Carrie N. Baker, *Texas Woman Lizelle Herrera's Arrest Foreshadows Post-*Roe *Future*, MS. MAG. (Apr. 16, 2022), https://msmagazine.com/2022/04/16/texas-woman-lizelle-herrera-arrest-murder-roe-v-wade-abortion/ [https://perma.cc/PG34-STR8] (using the name of the woman who was wrongfully indicted after she sought emergency care in the title of the article published by a prominent national magazine); *see also* Praveena Somasundaram, *Texas Woman Charged with Murder After Having Abortion Sues County, DA*, WASH. POST (Apr. 2, 2024), https://www.washingtonpost.com/nation/2024/04/02/texas-murder-charge-abortion-lawsuit/ [https://perma.cc/7THX-LV9W] (reporting that the patient is now suing Starr County and the District Attorney for over one million dollars in damages and that the District Attorney was fined and is currently serving a probated suspension imposed by the State Bar of Texas under which he may still practice law pursuant to agreed conditions).

[131] *See* 45 C.F.R. § 164.512(f)(1), (4)–(6) (2023) (setting out the exceptions previously discussed).

[132] *Id.* § 164.512(f)(2)(1).

[133] *Id.*

and Kentucky law enforcement officers PHI that the officers stated was necessary to identify or locate a suspect, fugitive, material witness, or missing person.[134] For example, the adult partner who drove the minor to (and across) the Idaho state line in the second hypothetical could have been a suspect (for purposes of the Idaho Abortion Trafficking Law or the Washington criminal impersonation law) and the minor could have been either a material witness or a missing person, depending on the facts.[135] By further example, the Kentucky physician who was not afraid to intentionally circumvent the law in the fifth hypothetical could have been a suspect and the patient could have been a material witness for purposes of Kentucky's criminal abortion provision.[136] In the Idaho and Kentucky cases, the minor's adult partner and the Kentucky physician clearly broke relevant laws. That said, in other cases, where no law had been broken, the identification and location exception allowed legally and medically misinformed law enforcement officers to request PHI about individuals who had legal abortions and natural pregnancy outcomes.

F. Crime Victim Exception

The sixth and final exception under the former HIPAA Privacy Rule permitted a covered entity to disclose PHI "in response to a law enforcement official's request for such information about an individual who is or is suspected to be a victim of a crime."[137] The exception applied if either the individual agreed to the disclosure or the covered entity could not obtain that agreement due to an emergency or patient incapacity, but only if: (1) the law enforcement officer represented that the information was needed to determine whether a violation of law by a person other than the victim had occurred and the information would not be used against the victim; (2) the law enforcement official represented that immediate law enforcement activity depended on the disclosure and would be materially and adversely affected by waiting until the individual could agree to the disclosure; and (3) the disclosure was in the best interests of the individual as determined by the covered entity, in the exercise of professional judgment.[138] Importantly, the individual must have agreed to the disclosure if not in an emergency or incapacitated situation; otherwise, all three criteria (that is, the PHI cannot be used against the victim; immediate law enforcement ac-

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[134] *See id.* (permitting disclosure of PHI to identify suspects or witnesses).

[135] *See supra* notes 5–8 and accompanying text.

[136] *See* KY. REV. STAT. ANN. § 311.772(3)(a), (b) (West 2023) (making it a class D felony for a person to knowingly "[a]dminister to, prescribe for, procure for, or sell to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being" or to "[u]se or employ any instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being").

[137] 45 C.F.R. § 164.512(f)(3).

[138] *Id.*

tivity depends on the disclosure; and the disclosure is in the best interests of the patient) must have been met before confidentiality could be violated.[139]

This exception had very limited applicability in the abortion context for two reasons. First, most individuals who have abortions do not agree to the disclosure of their abortion information to law enforcement.[140] Abortion has been heavily stigmatized and is even more so post-*Dobbs v. Jackson Women's Health Organization* (*Dobbs*), and recent law enforcement blunders in criminal abortion investigations have resulted in a loss of privacy—and unwanted national publicity—for the individuals who had the abortions.[141] Second, for individuals who were incapacitated or in an emergency circumstance, a violation of confidentiality would not have been in their best interests for the same reasons as articulated above.[142]

G. Summary

Before the final rule, covered entities were permitted to disclose PHI, including identifiable abortion records and other pregnancy outcome information, to law enforcement without patient authorization pursuant to a number of regulatory exceptions.[143] The first four exceptions were troublesome from a confidentiality standpoint, because they allowed legally and medically misinformed people to report legal abortions and natural pregnancy outcomes to law enforcement, sometimes leading to wrongful criminal investigations and pros-

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[139] *See id.* (providing the limitations on the crime victim exception).

[140] *See, e.g.*, M. Antonia Biggs, Katherine Brown & Diana Greene Foster, *Perceived Abortion Stigma and Psychological Well-Being Over Five Years After Receiving or Being Denied an Abortion*, 15 PLOS ONE 1, 2 (2020) ("Most people considering abortion perceive some abortion stigma, which is associated with psychological distress years later.").

[141] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) ("The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . . ."); Nguyen et al., *supra* note 32 at 2 ("[T]he criminalization of abortion [post-*Dobbs*] will further stigmatize women who terminate their pregnancies and place them under constant fear of legal repercussions."); *supra* notes 125–129 (explaining how the name of one Texas woman who had an abortion became national news after a health care worker violated her confidentiality); *Texas Prosecutor Drops Murder Charge Against Woman Arrested for Self-Induced Abortion*, *supra* note 128 (noting the emotional toll taken on the woman (and the family of the woman) whose confidentiality was violated).

[142] *See* 45 C.F.R. § 164.512(f)(3)(ii)(C) (requiring the disclosure of the patient's information to law enforcement to be in the patient's best interests (not law enforcement's best interest)). Of course, it is possible that an individual who has had an abortion may want to authorize the disclosure of their abortion records to law enforcement if, for example, the individual felt forced, either by the physician or by a partner, to have the abortion. In this case, the individual would be accusing the physician or the partner of violating a law and would be voluntarily providing evidence of such violation to law enforcement. Because the individual wants to disclose their abortion record to law enforcement, there would be no confidentiality concerns associated with the disclosure. *See id.* § 164.512(f)(3) (not regulating or restricting voluntary disclosures by victims themselves). Stated another way, the disclosure would be a voluntary expression of the individual's autonomy. This Article is concerned with involuntary (rather than voluntary) disclosures of reproductive health information.

[143] *See id.* § 164.512(f)(1)–(6) (detailing the disclosure exceptions).

ecutions.[144] The fifth exception allowed legally and medically misinformed law enforcement to request from covered entities health information that related to a lawful activity or a natural occurrence.[145] As discussed above, the sixth exception rarely applied in the abortion context.[146] Given law enforcement's increased interest in reproductive health information post-*Dobbs,*[147] the question becomes whether and how the HIPAA Privacy Rule should be modified to better protect patient privacy and health information confidentiality.

II. THE FINAL RULE

On April 26, 2024, HHS published a final rule titled "HIPAA Privacy Rule to Support Reproductive Health Care Privacy" (final rule),[148] the stated goal of which is to better protect patient privacy and health information confidentiality in the context of reproductive health care.[149] This Part II carefully analyzes HHS's final rule. In particular, Section A reviews the final rule's new purpose-based disclosure prohibition,[150] Section B examines the new attestation requirement,[151] and Section C applies the final rule to the five hypotheticals that open this Article.[152] Some background information regarding the regulatory history of the HIPAA Privacy Rule, including HHS's ability to make changes to the HIPAA Privacy Rule, will be helpful before proceeding.

When President Bill Clinton signed HIPAA into law in 1996, section 264 of the statute directed HHS to promulgate privacy regulations if Congress failed to enact privacy legislation within three years.[153] When Congress failed

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[144] *See Texas Prosecutor Drops Murder Charge Against Woman Arrested for Self-Induced Abortion*, *supra* note 128 (discussing a Texas patient's wrongful indictment following disclosure of her PHI by hospital workers to law enforcement).

[145] 45 C.F.R. § 164.512(f)(2)(1).

[146] *But see supra* note 142 and accompanying text (explaining when the sixth exception could apply).

[147] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) ("The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . . ."); Allison McCann & Amy Schoenfeld Walker, *Tracking Abortion Bans Across the Country*, N.Y. TIMES (July 1, 2024), https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html [https://perma.cc/DJ89-D596] (demonstrating law enforcement officers in many states are dealing with new grounds for criminal investigation).

[148] HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. 32976, 32976 (Apr. 26, 2024) (to be codified at 45 C.F.R. pts. 160, 164).

[149] *See id.* at 32978 (stating that the Privacy Rule "must be modified to limit the circumstances in which provisions of the Privacy Rule permit the use or disclosure of an individual's PHI about reproductive health care for certain non-health care purposes, where such use or disclosure could be detrimental to privacy of the individual or another person or the individual's trust in their health care providers").

[150] *See infra* Part II.A.

[151] *See infra* Part II.B.

[152] *See infra* Part II.C.

[153] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 264(c)(1) 110 Stat. 1936, 2033 (1996) ("If legislation governing standards with respect to the privacy of individually identifiable health information transmitted in connection with the transactions described in

to enact timely privacy legislation, HHS incurred the obligation to promulgate privacy regulations.[154] HHS responded in a timely manner.[155] On November 3, 1999[156] and December 28, 2000,[157] HHS issued its first set of proposed and final privacy rules. On March 27, 2002,[158] and August 14, 2002,[159] HHS issued proposed and final modifications to the HIPAA Privacy Rule. With the exception of technical corrections and conforming amendments, these rules as reconciled remained largely unchanged between 2002 and 2009.[160]

On February 17, 2009, President Barack Obama signed the American Recovery and Reinvestment Act ("ARRA") into law.[161] Division A, Title XIII of ARRA, better known as the Health Information Technology for Economic and Clinical Health Act ("HITECH"), contained certain provisions requiring HHS to expand the application of the HIPAA Privacy Rule to business associates,[162] modify certain use and disclosure requirements,[163] adopt new breach notification rules,[164] provide education regarding the Privacy Rule,[165] and improve enforce-

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section 1173(a) of the Social Security Act (as added by section 262) is not enacted by the date that is 36 months after the date of the enactment of this Act, the Secretary of Health and Human Services shall promulgate final regulations containing such standards.").

[154] *See id.* (obligating HHS to promulgate regulations).

[155] *See infra* notes 156–157 and accompanying text (discussing promulgation of privacy regulations).

[156] Standards for Privacy of Individually Identifiable Health Information, 64 Fed. Reg. 59918 (proposed Nov. 3, 1999) (to be codified at 45 C.F.R. pts. 160–64).

[157] Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82462 (Dec. 28, 2000) (codified at 45 C.F.R. pts. 160, 164).

[158] Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 14776 (proposed Mar. 27, 2002) (to be codified at 45 C.F.R. pts. 160, 164).

[159] Standards for Privacy of Individually Identifiable Health Information, 67 Fed. Reg. 53182 (Aug. 14, 2002) (codified at 45 C.F.R. pts. 160, 164).

[160] *See, e.g.*, Standards for Privacy of Individually Identifiable Health Information, 66 Fed. Reg. 12434 (Feb. 26, 2001) (codified at 45 C.F.R. pts. 160, 164) ("This action corrects the effective date of the final rules adopting standards for privacy of individually identifiable health information published on December 28, 2000, in the Federal Register (65 Fed. Reg. 82462), resulting in a new effective date of April 14, 2001.") (emphasis omitted); Technical Corrections to the Standards for Privacy of Individually Identifiable Health Information Published December 28, 2000, 65 Fed. Reg. 82944 (Dec. 29, 2000) (codified at 45 C.F.R. pts. 160, 164) ("These technical corrections address changes that inadvertently were excluded from the preamble of the Standards for Privacy of Individually Identifiable Health Information published December 28, 2000.").

[161] *See* American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, § 13001–13424, 123 Stat. 115, 226–79 (expanding the application of HIPAA to business associates).

[162] *See* 42 U.S.C. § 17934 (applying the HIPAA Privacy Rule and its civil and criminal penalties to business associates).

[163] *See id.* § 17935 (providing "[r]estrictions on certain disclosures and sales of health information").

[164] *See id.* § 17932 (requiring "[n]otification in the case of breach").

[165] *See id.* § 17933 (providing for education in a section titled "Education on health information privacy").

ment of the HIPAA Privacy Rule.[166] HHS responded with proposed and final rules on July 14, 2010,[167] and January 25, 2013,[168] implementing these changes.

HHS has made additional changes to the Privacy Rule since then. In 2014, for example, HHS published a final rulemaking, providing patients with the right to access their laboratory test results directly from their testing laboratories rather than their treating physicians.[169] In this rulemaking, HHS wanted to "demonstrate the supremacy of the individual's right of access over the potential burden imposed on others, in this case, the laboratory."[170] In 2016, HHS published another final rulemaking, this time balancing patient privacy and public safety in the context of firearm purchases.[171]

In all of these different rulemakings,[172] HHS has provided the same level of confidentiality protections to all PHI—with one exception relating to psychotherapy notes.[173] HHS gave psychotherapy notes, defined as the notes of a mental health professional that document or analyze a counseling session and that are maintained separate and apart from the rest of medical record,[174] heightened protection for three reasons. First, HHS wanted to ensure that a patient would "feel comfortable freely and completely disclosing [during therapy] very personal information essential to successful treatment."[175] According to HHS, "[e]ven 'the mere possibility of disclosure may impede development

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[166] *See id.* § 17939 (providing for improved enforcement in a section titled "Improved enforcement").

[167] *See* Modifications to the HIPAA Privacy, Security, and Enforcement Rules Under the Health Information Technology for Economic and Clinical Health Act, 75 Fed. Reg. 40868 (proposed July 14, 2010) (to be codified at 45 C.F.R. pts. 160, 164) (setting out the proposed rules).

[168] Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules Under the Health Information Technology for Economic and Clinical Health Act and the Genetic Information Nondiscrimination Act; Other Modifications to the HIPAA Rules, 78 Fed. Reg. 5566, 5688 (Jan. 25, 2013) [hereinafter Final HITECH Rules] (codified at 45 C.F.R. pts. 160, 164).

[169] CLIA Program and HIPAA Privacy Rule; Patients' Access to Test Reports, 67 Fed. Reg. 53209 (Feb. 6, 2014) (to be codified at 45 C.F.R. pt. 164).

[170] HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 88 Fed. Reg. 23506, 23518 (proposed Apr. 17, 2023) (to be codified at 45 C.F.R. pts. 160, 164).

[171] Health Insurance Portability and Accountability Act (HIPAA) Privacy Rule and the National Instant Criminal Background Check System (NICS), 81 Fed. Reg. 382, 386 (Jan. 6, 2016) (to be codified at 45 C.F.R. pt. 164).

[172] *See supra* notes 156–171 and accompanying text (describing the different rulemakings).

[173] *See* 45 C.F.R. § 164.508(a)(2) (2023) (giving psychotherapy notes heightened confidentiality protections under the HIPAA Privacy Rule); HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 88 Fed. Reg. at 23509 ("In the past, [HHS] generally . . . applied the same privacy standards to nearly all PHI, regardless of the type of health care at issue. But the Department has also recognized that some forms of PHI may be particularly sensitive and thus may warrant heightened protections. For example, the Department has accorded 'special protections' to psychotherapy notes under the Privacy Rule, owing in part to the 'particularly sensitive information' those notes contain.").

[174] 45 C.F.R. § 164.501 (defining psychotherapy notes).

[175] HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 88 Fed. Reg. at 23518 (emphasis omitted).

of the confidential relationship necessary for successful treatment.'"[176] Second, psychotherapy notes contain particularly sensitive information that could be harmful if used or disclosed for non-treatment purposes.[177] Third, psychotherapy notes are the personal notes of the therapist, intended to help the therapist later remember the contents of the therapy discussion, and are not intended to be seen by persons other than the therapist.[178]

On June 24, 2022, the Supreme Court of the United States issued its opinion in *Dobbs*, holding that the U.S. Constitution does not explicitly or implicitly establish a right to an abortion[179] and that the issue should remain in the hands of state lawmakers.[180] More than two-fifths of states now prohibit abortion or restrict abortion earlier in pregnancy than viability.[181] Law enforcement officers in these states now have renewed interest in obtaining reproductive health information for law enforcement activities.[182] This renewed interest led HHS on April 26, 2024 to promulgate its latest final rule designed to prohibit some (but not all) uses and disclosures of PHI to investigate, prosecute, or identify persons in connection with the mere act of seeking, obtaining, providing, or facilitating lawful reproductive health care.[183] The final rule contains two major changes to the HIPAA Privacy Rule, each of which is described in more detail below.

A. The Purpose-Based Prohibition

The first major change is known as the "purpose-based prohibition."[184] This prohibition restricts covered entities from using or disclosing PHI for certain investigation purposes, certain imposition of liability purposes, and certain individual identification purposes. Because it is critical to understand this prohibition, the provision will be quoted directly. The prohibition forbids covered entities from using or disclosing PHI for any of the following purposes: (1) "To conduct a criminal, civil, or administrative *investigation* into any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care"; (2) "To *impose* criminal, civil, or administrative *liability* on any

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[176] *Id.*

[177] *See* Tedford v. Coastal Behavioral Health, 2014 WL 683866, 57 Conn. L. Rptr. 537, at *2 (Conn. Super. Ct. Jan. 24, 2014) (acknowledging the sensitive nature of psychotherapy notes).

[178] *Id.*

[179] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) ("The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . . .").

[180] *Id.* at 2243 ("It is time to heed the Constitution and return the issue of abortion to the people's elected representatives.").

[181] Allison McCann & Amy Schoenfeld Walker, *supra* note 147.

[182] *See id.* (demonstrating that state law enforcement officers have new motivation to investigate and obtain reproductive health information).

[183] HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. 32976 (Apr. 26, 2024) (to be codified at 45 C.F.R. pts. 160, 164).

[184] *Id.* at 32983, 33063 (adding new 45 C.F.R. § 164.502(a)(5)(iii)(A)(1)–(3)).

person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care"; or (3) "To *identify any person* for any purpose described in [the preceding two clauses]."[185] The final rule clarifies that "seeking, obtaining, providing, or facilitating reproductive health care" includes, but is not limited to, "expressing interest in, using, performing, furnishing, paying for, disseminating information about, arranging, insuring, administering, authorizing, providing coverage for, approving, counseling about, assisting, or otherwise taking action to engage in reproductive health care; or attempting any of the same."[186]

The preamble to the final rule provides examples of prohibited investigatory and prohibited imposition of liability activities, including "law enforcement investigations, third party investigations in furtherance of civil proceedings, state licensure proceedings, criminal prosecutions . . . family law proceedings, [and] civil suit[s]"[187] as well as "proceedings to consider [provider] censure, medical license revocation, the imposition of fines or other penalties, or detainment or imprisonment, or the actual imposition of such liability."[188] Note that the prohibition focuses on the purpose of the PHI use or disclosure (for example, conducting a criminal, civil, or administrative investigation into any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care; imposing criminal, civil, or administrative liability in the same situation; or identifying a person for either of these two purposes in the same situation), rather than the type of PHI requested (for example, abortion information, miscarriage information, missed period information).[189] Because of this focus, the prohibition is described by HHS as purpose based.[190]

Under the final rule, the purpose-based prohibition only applies when the relevant activity "is in connection with any person seeking, obtaining, providing, or facilitating reproductive health care" and the covered entity "that received the request for [PHI] has reasonably determined" that at least one of three conditions exists.[191] The first condition is that the reproductive health care is lawful under the law of the state in which the care is provided and under the circumstances in which it is provided.[192] The second condition is that the reproductive health care is protected, required, or authorized by federal law, including the U.S. Constitution, under the circumstances in which it is

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[185] *Id.* (emphasis added).

[186] *Id.* (adding new 45 C.F.R. § 164.502(a)(5)(iii)(D)).

[187] *Id.* at 33012.

[188] *Id.* at 33011.

[189] *Id.* at 33009–25 (HHS's preamble to the final rule referring to the new prohibition as purpose based).

[190] *See id.* (repeatedly focusing on the purpose of the use or disclosure, not the class or type of information used or disclosed).

[191] *Id.* at 33063 (adding new 45 C.F.R. § 164.502(a)(5)(iii)(B)).

[192] *Id.* (adding new 45 C.F.R. § 164.502(a)(5)(iii)(B)(1)).

provided, regardless of the state in which it is provided.[193] The third condition is that the reproductive health care was provided by another person and is presumed lawful.[194] Note that the covered entity must "reasonably determine" the existence of one of the three conditions, two of which require lawfulness under state or federal law. The preamble to the final rule clarifies that this is an objective standard. That is, a covered entity's determination is reasonable if another covered entity in the same position would believe that the care is lawful under state or federal law.[195]

The presumption of lawfulness with respect to care provided by another person applies *unless* the covered entity has: (1) actual knowledge that the reproductive health care provided by another person was not lawful under the circumstances in which it was provided; or (2) factual information supplied by the person requesting the disclosure of PHI that demonstrates a substantial factual basis that the reproductive health care provided by another person was not lawful under the specific circumstances in which it was provided.[196]

Importantly, the purpose-based prohibition serves as a modification to some of the law enforcement exceptions discussed in Part I of this Article.[197] Note how the purpose-based prohibition appears to be limited to situations in which a covered entity has received a request for PHI.[198] That is, the purpose-based prohibition appears not to apply to situations in which a covered entity volunteers PHI to law enforcement without a prior request for the PHI.[199]

B. The Attestation Requirement

The final rule's second major change[200] is the attestation requirement. Under the final rule, covered entities are prohibited from using and disclosing

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[193] *Id.* (adding new 45 C.F.R. § 164.502(a)(5)(iii)(B)(2)).

[194] *Id.* (adding new 45 C.F.R. § 164.502(a)(5)(iii)(B)(3)).

[195] *See id.* at 33028 (explaining the objective standard).

[196] *Id.* at 33063 (adding new 45 C.F.R. § 164.502(a)(5)(iii)(C)(1–2)).

[197] *See id.* at 33064 (amending the opening clause of 45 C.F.R. § 164.512 (where the law enforcement exceptions are currently codified) to provide: "[e]xcept as provided by § 164.502(a)(5)(iii), a covered entity may use or disclose protected health information without the written authorization of the individual").

[198] *See id.* at 33063 (adding new 45 C.F.R. 164.502(a)(5)(iii)(B)) (providing "the covered entity . . . *that received the request* for protected health information has reasonably determined that one or more of the following conditions exists") (emphasis added).

[199] *See id.*

[200] The final rule makes several other changes to the HIPAA Privacy Rule that are not the focus of this Article. As one illustrative example, covered entities must amend their notices of privacy practices to include a description, including at least one example, of the types of uses and disclosures of PHI that are prohibited under the purpose-based disclosure prohibition in sufficient detail for an individual to understand the prohibition and a description, including at least one example, of the types of uses and disclosures for which an attestation is required. *Id.* at 33065 (adding new 45 C.F.R. § 164.520(b)(1)(2)(F), (G)). As a second illustrative example, the final rule clarifies that the provision or facilitation of reproductive health care does not constitute abuse, neglect, or domestic violence for

PHI potentially related to reproductive health care for law enforcement purposes unless they first obtain a valid attestation from the person requesting the use or disclosure.[201] According to the final rule, an attestation is a written or electronic document that verifies that the PHI use or disclosure does not violate the purpose-based prohibition.[202] To comply with the final rule, the attestation must contain six required elements.[203] These elements include: (1) "a description of the information requested that identifies the information in a specific fashion," including either the name of any individuals "whose [PHI] is sought, if practicable" or, if not practicable, "a description of the class of individuals whose [PHI] is sought"; (2) "the name or other specific identification of the person(s), or class of persons, who are requested to make the use or disclosure"; (3) "the name or other specific identification of the person(s), or class of persons, to whom the covered entity is to make the requested use or disclosure"; (4) a clear statement that the disclosure is not for a purpose that violates the purpose-based disclosure prohibition; (5) a statement that a person may be subject to criminal penalties under the HIPAA statute if that person "knowingly and in violation of HIPAA obtains individually identifiable health information relating to an individual or discloses individually identifiable health information to another person"; and (6) the signature of the person requesting the PHI (or the representative of such person) and the date of the signature.[204]

Importantly, an attestation is "defective," or "not valid," if the covered entity has "actual knowledge that material information in the attestation is false" or if a "reasonable covered entity . . . in the same position would not believe that the attestation is true" with respect to the attestation's fourth required element, which is the clear statement that the use or disclosure does not violate the purpose-based prohibition.[205] The preamble to the final rule clarifies that, in determining whether it is reasonable to rely on the attestation, covered entities should consider the person

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purposes of provisions in the Privacy Rule that allow reporting of such abuse, neglect, or violence under state law without the patient's prior written authorization. *Id.* at 33064 (adding 45 C.F.R. § 164.512(c)(3)). As a final illustrative, but not exhaustive, example, the final rule adds a new definition of "public health" (*i.e.*, population-level efforts to prevent disease and promote community health) and distinguishes public health activities from law enforcement activities, the latter of which are designed to investigate or impose liability on a person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care. *Id.* at 33062 (adding a new definition of public health at 45 C.F.R. § 160.103).

[201] *Id.* at 33063 (adding new 45 C.F.R. § 164.509(a)). The attestation requirement applies not only to disclosures for law enforcement purposes but also to disclosures for health oversight activities, disclosures as part of judicial and administrative proceedings, and disclosures to coroners and medical examiners. *Id.* (listing the regulatory sections that pertain to disclosures for health oversight activities, judicial and administrative proceedings, and coroners and medical examiners).

[202] *Id.* (adding new 45 C.F.R. § 164.509(b)(1)(ii), (iii)).

[203] *Id.* at 33064 (adding new 45 C.F.R. § 164.509(c)(1)(i)–(vi)).

[204] *Id.*

[205] *Id.* (adding 45 C.F.R. § 164.509(b)(2)(iv), (v)).

> who is requesting the use or disclosure of PHI; the permission upon which the person making the request is relying; . . . the PHI requested and its relationship to the stated purpose of the request; and, where the reproductive health care was supplied by another person, whether the covered entity has: (1) actual knowledge that the reproductive health care was not lawful under the circumstances in which it was provided; or (2) factual information supplied by the person requesting the use or disclosure of PHI that would demonstrate to a reasonable regulated entity a substantial factual basis that the reproductive health care was not lawful under the specific circumstances in which such health care was provided.[206]

Finally, covered entities receiving attestations must comply with the minimum necessary rule when disclosing PHI pursuant to the attestation.[207] This means that the covered entity would have to limit the disclosure of PHI to the minimum amount of information necessary to accomplish the intended purpose of the attestation.[208]

C. Application of the Final Rule to the Five Hypotheticals

At this point, it may be helpful to reconsider the five hypotheticals that opened this Article to see whether the final rule improves the confidentiality of the individuals in those hypotheticals.

1. The First Hypothetical

Recall that the first hypothetical involved a pregnant adult from Fargo, North Dakota, where state law prohibits most abortions. In the hypothetical, the adult drives ten minutes east to Moorhead, Minnesota, and obtains a medication abortion at the Red River Women's Clinic, where pre-viability abortions are legal under Minnesota law.[209] The question is whether the North Dakota patient's right to confidentiality is violated if a North Dakota law enforcement officer, investigating a violation of North Dakota's criminal abortion law, demands that

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[206] *Id.* at 33031–32.

[207] *Id.* at 33020, 33031.

[208] *Id.* at 33031 ("There is no exception to the minimum necessary standard for uses and disclosures made pursuant to an attestation . . . Thus, a regulated entity will have to limit a use or disclosure to the minimum necessary when provided in response to a request that would be subject to the proposed attestation requirement, unless one of the specified exceptions to the minimum necessary standard . . . applies.").

[209] *See* Minnesota Protect Reproductive Options Act, MINN. STAT. § 145.409(3)(b) (2023) ("Every individual who becomes pregnant has a fundamental right to . . . obtain an abortion, and to make autonomous decisions about how to exercise this fundamental right."); *supra* note 4 and accompanying text.

the Red River Women's Clinic in Minnesota disclose the patient's abortion record.

Before the final rule, the disclosure would have been allowed if the North Dakota law enforcement officer obtained a court order, a court-ordered warrant, or a subpoena or summons issued by a judicial officer, a grand jury subpoena, or an administrative subpoena or summons.[210] Under the final rule, the disclosure would not be allowed, even with a court order, because: (1) the disclosure would be for a criminal investigation involving a physician who provided reproductive health care or a patient who sought and obtained such care;[211] and (2) the Red River Women's Clinic, from which the PHI is requested, can reasonably determine that the reproductive health care it provided was lawful under Minnesota law.[212] The final rule thus improves the confidentiality of the adult in the first hypothetical. Note, however, that the North Dakota resident had to have the means to travel to Minnesota—not only to obtain the legal-in-Minnesota abortion but also to obtain the confidentiality protections that the final rule newly creates for the Minnesota abortion records. Unfortunately, and as discussed in more detail below, not all individuals have the financial and other means to travel across state lines to receive legal abortions. And, only those individuals who have the financial and other means to travel across state lines to obtain legal abortions will benefit from the heightened confidentiality protections afforded by the final rule.

2. The Second Hypothetical

Let us move to the second hypothetical. Remember that the second hypothetical involves a pregnant minor from Coeur d'Alene, Idaho, where state law prohibits most abortions.[213] The minor's partner, who is an adult, drives the minor forty minutes west to Spokane, Washington, where pre-viability abortions are legal under Washington law.[214] The partner then falsely claims to be

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[210] 45 C.F.R. § 164.512(f)(1)(ii) (2023).

[211] HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. at 33063 (proposing 45 C.F.R. § 164.502(a)(5)(iii)(A)(1)).

[212] *Id.* (adding 45 C.F.R. § 164.502(a)(5)(iii)(B)(1)); HIPAA Privacy Rule Final Rule to Support Reproductive Health Care Privacy: Fact Sheet, *supra* note 25 ("Under the Final Rule, the prohibition applies where a covered health care provider . . . has reasonably determined that one or more of the following conditions exists: [t]he reproductive health care is lawful under the law of the state in which such health care is provided under the circumstances in which it is provided: *For example, if a resident of one state traveled to another state to receive reproductive health care, such as an abortion, that is lawful in the state where such health care was provided*.") (emphasis added).

[213] *See* Idaho Defense of Life Act, IDAHO CODE § 18-622(1) (2023) ("[E]very person who performs or attempts to perform an abortion as defined in this chapter commits the crime of criminal abortion. Criminal abortion shall be a felony punishable by a sentence of imprisonment of no less than two (2) years and no more than five (5) years in prison.").

[214] *See* WASH. REV. CODE § 9.02.100(2) (2023) ("it is the public policy of the state of Washington that: . . . [e]very pregnant individual has the fundamental right to choose or refuse to have an abor-

the minor's parent when the minor signs in at the Planned Parenthood clinic in Spokane.[215] In Idaho, there is an Abortion Trafficking Act that prohibits a non-parental adult from driving a minor to an Idaho state line to obtain an abortion across the state line.[216] The question is whether the Idaho patient's right to confidentiality is violated if law enforcement try to force the Planned Parenthood clinic in Washington to disclose the patient's sign-in information and abortion record for use in an Idaho investigation relating to Idaho's Abortion Trafficking Act or in a Washington investigation relating to criminal impersonation.

Before the final rule, the information disclosure would have been allowed under three exceptions, including the: (1) required by law exception if the Idaho law enforcement officer obtained a court order, a court-ordered warrant, a subpoena or summons issued by a judicial officer, a grand jury subpoena, or an administrative subpoena or summons;[217] (2) crime on premises provision because Washington makes it criminal for a non-parental adult to impersonate a parent;[218] and (3) identification and location exception if an Idaho or Washington law enforcement officer requested information for purposes of identifying a suspect (for example, the non-parental adult) or a material witness or missing person (for example, the minor) and the information requested by the officer is limited to that allowed by the exception.[219] That is, the former HIPAA Privacy Rule subordinated patient confidentiality to law enforcement's interest in obtaining PHI in these three situations.

The final rule should change this result if the purpose of the law enforcement activity is to penalize the physician or the patient for providing or obtaining the abortion.[220] In particular, if the Idaho law enforcement officer wants to investigate the Washington physician who performed the abortion or the Idaho patient who received the abortion, the disclosure should not be allowed under the final rule because: (1) the disclosure would be for a criminal investigation

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tion, except as specifically limited"); *id.* § 9.02.110 ("The state may not deny or interfere with a pregnant individual's right to choose to have an abortion prior to viability of the fetus, or to protect the pregnant individual's life or health.").

[215] *See Spokane Valley Health Center*, PLANNED PARENTHOOD, https://www.plannedparenthood.org/health-center/washington/spokane-valley/99206/spokane-valley-health-center-2792-91850/abortion [https://perma.cc/Q8RU-CA85] (providing medication abortions).

[216] *See* Idaho Abortion Trafficking Act, IDAHO CODE § 18-623(1) (2023) ("An adult who, with the intent to conceal an abortion from the parents or guardian of a pregnant, unemancipated minor . . . procures an abortion . . . by . . . transporting the pregnant minor within this state commits the crime of abortion trafficking."); *Idaho Governor Signs Ban on Abortion Trafficking*, *supra* note 8 ("To sidestep violating a constitutional right to travel between states, Idaho's law makes illegal only the in-state segment of a trip to an out-of-state abortion provider.").

[217] 45 C.F.R. § 164.512(f)(1)(ii) (2023).

[218] *Id.* § 164.512(f)(5).

[219] *Id.* § 164.512(f)(2)(i).

[220] HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. 32976, 33063 (Apr. 26, 2024) (to be codified at 45 C.F.R. pts. 160, 164) (adding 45 C.F.R. § 164.502(a)(5)(iii)(A)(1) and (B)(1)).

involving a physician who provided reproductive health care or a patient who sought and obtained such care;[221] and (2) the Washington Planned Parenthood clinic receiving the demand for PHI from Idaho law enforcement officer can reasonably determine that the abortion was legal under Washington law. Note that Washington law does not require parental notification or consent for minor abortions.[222] That said, if a Washington law enforcement officer was investigating the non-parental adult for criminal impersonation or, perhaps, coercing the minor into having an abortion, then the disclosure likely would be allowed under the final rule.[223] This is because criminal impersonation and coercion of a minor are not listed in the final rule's purpose-base prohibition.[224] That said: (1) the Washington Planned Parenthood clinic would have to obtain an attestation from Washington law enforcement stating that the disclosure is not restricted by the purpose-based prohibition; (2) it must be reasonable for the Washington Planned Parenthood clinic to believe that the purpose of the disclosure is to allow Washington law enforcement to conduct an investigation into the adult partner's criminal impersonation or coercion of the minor; and (3) the clinic could only disclose the minimum amount of information necessary to accomplish the criminal impersonation or coercion of a minor investigation.[225] The final rule thus improves—but does not ensure—the confidentiality of the minor in the second hypothetical because some (albeit minimally necessary) information about the minor's check in at the Washington Planned Parenthood clinic may be disclosed to law enforcement to allow investigation of the adult partner for impersonation or coercion.

3. The Third Hypothetical

Let us move to the third hypothetical. Remember that the third hypothetical involves a pregnant adult who lives in Norman, Oklahoma, where abortion is illegal except as necessary to preserve the life of the mother.[226] The adult develops congestive heart failure and undergoes an in-hospital, surgical abortion after the adult's treating physician explains that the adult has an unlikely

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[221] *Id.* at 33063 (adding 45 C.F.R. § 164.502(a)(5)(iii)(A)(1)).

[222] *Id.* (adding 45 C.F.R. § 164.502(a)(5)(iii)(B)(1)).

[223] WASH. REV. CODE § 9A.60.040(1) (2023) (Washington's criminal impersonation statute); HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. at 32995 (stating that coercing a minor into obtaining reproductive health care is not covered by the purpose-based prohibition).

[224] HIPAA Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. at 33063 (adding 45 C.F.R. § 164.502(a)(5)(iii)(A)(1)–(3)).

[225] *Id.* at 33031 (stating, "[t]here is no exception to the minimum necessary standard for uses and disclosures made pursuant to an attestation").

[226] *See* OKLA. STAT. ANN. tit. 21, § 861 (West 2023) ("Every person who administers to any woman, or who prescribes for any woman . . . with intent thereby to procure the miscarriage of such woman, unless the same is necessary to preserve her life, shall be guilty of a felony . . . .").

chance of surviving the pregnancy. A second physician who works in the same hospital, however, later learns of the abortion and disagrees that the abortion was lifesaving.[227] The question is whether the Oklahoma patient's right to confidentiality is violated if the second physician reports the abortion to law enforcement or if the Oklahoma Medical Board or an Oklahoma law enforcement officer tries to seize the patient's abortion records for use in an administrative proceeding to discipline the first physician or in a criminal proceeding relating to Oklahoma's abortion prohibition, respectively.

Before the final rule, the disclosure would have been allowed under three exceptions, including the: (1) required by law exception if the Oklahoma law enforcement officer obtained a court order, a court-ordered warrant, a subpoena or summons issued by a judicial officer, a grand jury subpoena, or an administrative subpoena or summons;[228] (2) crime on premises provision if the second physician believed in good faith that the patient's abortion was non-life-preserving and reported the abortion as such;[229] and (3) identification and location exception if the Oklahoma law enforcement officer requested information for purposes of identifying a suspect (for example, the first physician) or a material witness (for example, the patient) and the information requested by the officer was limited to that allowed by the exception.[230] That is, the former HIPAA Privacy Rule subordinated patient confidentiality to law enforcement's interest in obtaining PHI in these three situations.

Under the final rule, the analysis is more difficult. Let us focus first on the question whether the second physician can, on their own initiative, report the abortion to law enforcement without a prior request from law enforcement. The final rule would seem, at first glance, to prohibit the second physician from making the report to law enforcement based on the purpose-based prohibition because the report would be to identify a person for purposes of a potential criminal investigation into the treating physician for the mere act of providing reproductive health care.[231] That said, the final rule clarifies that the

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[227] *See* Kekatos, *supra* note 11 (reporting that some doctors believe "the language of these laws [prohibiting abortion except to preserve the life of the mother] is vague and makes it unclear what qualifies as a mother's life being in danger, what the risk of death is, and how imminent death must be before a provider can act"). *But see* Branham, *supra* note 11 ("When it comes to criminal prosecution, the attorney general's office told law enforcement agencies that doctors 'should be given substantial leeway' to treat life-threatening or emergency conditions in pregnant patients, 'so long as they are not unnecessarily terminating the life of the unborn child or abusing their position intentionally to facilitate elective abortions.'").

[228] 45 C.F.R. § 164.512(f)(1)(ii) (2023).

[229] *Id.* § 164.512(f)(5).

[230] *Id.* § 164.512(f)(2)(i).

[231] HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. 32976, 33063 (Apr. 26, 2024) (to be codified at 45 C.F.R. pts. 160, 164) (adding 45 C.F.R. § 164.502(a)(5)(iii)(A)(1)); *id.* at 33012 (explaining that an "investigation into whether a particular abortion was nec-

purpose-based prohibition only applies when the "covered entity . . . that received the request for [PHI] . . . " has made one of the three reasonable determinations.[232] The catch is that the second covered physician did not receive a law enforcement request for PHI. The second covered physician is, instead, trying to alert law enforcement to the commission of what the second physician believes is a crime. Thus, the purpose-based prohibition would seem not to apply, thus permitting the second physician to make the report. Assuming for the moment that HHS did not intend to apply the purpose-based prohibition only to situations in which a law enforcement officer has made a prior request to a covered entity for PHI, then the presumption of lawfulness would seem, at first glance, to apply.[233] However, the second physician could overcome that presumption based on their own actual belief that the abortion was not necessary to save the life of the patient. Again, the result would be that the second physician would be permitted to make the report.

Let us now change the question to whether a law enforcement officer can request the hospital's medical records department to disclose the medical records relating to the abortion that the first physician believed was lifesaving. How law enforcement received the tip and knew to ask for the information will have to be ignored for purposes of this second analysis. Since there is a prior law enforcement request for the PHI, the purpose-based prohibition would appear to apply because the purpose of the request is to conduct a criminal investigation into the treating physician for the mere act of providing reproductive health care and the medical records department can reasonably determine that the care was lawful under Oklahoma law. The reasonable determination can be made based on the medical records in its possession, which will include the patient's diagnosis of congestive heart failure and probably some type of statement by the treating physician that the abortion was necessary to preserve the patient's life.[234]

Even if the first physician is considered to be "another person" vis-a-vis the medical records personnel receiving the request,[235] the medical records

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essary to save a pregnant person's life would constitute an investigation into the 'mere act' of seeking, obtaining, providing, or facilitating reproductive health care").

[232] *Id.* at 33063 (adding 45 C.F.R. § 164.502(a)(5)(iii)(B)).

[233] *Id.* (adding 45 C.F.R. §§ 164.502(a)(5)(iii)(B)(3), 164.502(a)(5)(iii)(C)).

[234] *Id.* (adding 45 C.F.R. § 164.502(a)(5)(iii)(B)(1)).

[235] The final rule distinguishes between law enforcement requests for PHI received by covered entities who provided the reproductive health care at issue and law enforcement requests for PHI received by covered entities that involve reproductive health care provided by "another person." *Id.* (adding 45 C.F.R. § 164.502(a)(5)(iii)(C)) ("The reproductive health care *provided by another person*") (emphasis added); s*ee also id.* at 33015 ("[T]he presumption applies only where the reproductive health care at issue is provided *by someone other than the regulated entity that received the request for the use or disclosure of PHI* . . . .") (emphasis added). In the case of a hospital medical staff that includes many physicians, some of whom may disagree with each other regarding the legality of an abortion provided at the hospital, it is not crystal clear whether the medical records department is

personnel can presume that the reproductive health care provided by the first physician was lawful under Oklahoma law (which permits abortions that preserve the life of the patient)[236] unless the medical records department has either actual knowledge that the reproductive health care was unlawful (for example, the patient told the medical records department that they did not have congestive heart failure and that the physician helped the patient lie so she could get an otherwise illegal abortion) or factual information supplied by the Oklahoma medical board or Oklahoma law enforcement that demonstrates a substantial factual basis that the reproductive health care was unlawful.[237] In the latter case (that is, in the case of supplied factual information), the preamble to the final rule suggests that a formal affidavit signed by the second physician specifying why the abortion was unlawful might be sufficient to overcome the presumption but that an anonymous report stating that the first physician provided an unlawful abortion would not be sufficient to overcome to the presumption.[238] This requires us to return to the question of whether the second physician can disclose PHI as part of that affidavit, analyzed above.

To make matters more confusing, the third (Oklahoma) hypothetical is written to suggest that the adult patient learned from their treating physician, presumably during a regularly scheduled prenatal appointment, that surviving the pregnancy was unlikely and that the adult patient then scheduled a surgical abortion. If the adult had presented to the emergency department in a slightly different situation (for example, the adult was in severe pain due to a rupturing ectopic pregnancy) and the adult had an abortion in the emergency department (ED), the final rule also may (depending on the ultimate outcome of litigation) still prohibit the adult patient's abortion records from being disclosed to law enforcement.[239] This is because the purpose-based prohibition also applies to situations involving patients who seek reproductive health care that is "protected, required, or authorized by Federal law, including the United States

considered "another person" vis-à-vis the providing physician. Given that a hospital and its medical staff meet the definition of an organized health care arrangement under the HIPAA Privacy Rule (*see* 45 C.F.R. § 160.103 (defining organized health care arrangement as a clinically integrated care setting in which patients typically receive from more than one provider)), this Article will assume that medical records personnel are considered part of the same regulated entity and therefore the "another person" provision added by the final rule at 45 C.F.R. § 164.502(a)(5)(iii)(C) is not applicable. In the case that it is applicable, the text that accompanies *infra* notes 237–238 explains the possible legal result.

[236] HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. at 33063 (adding 45 C.F.R. § 164.502(a)(5)(iii)(B)(1)); *id.* at 33014 (explaining that "where the reproductive health care was permitted by the law of the state in which it was provided (*e.g.*, for pregnancy termination that occurs before a state-specific gestational limit or under a relevant exception in a state law restricting pregnancy termination such as when . . . the life of the pregnant individual is endangered . . .)," the purpose-based disclosure applies).

[237] *Id.* at 33063 (adding 45 C.F.R. §§ 164.502(a)(5)(iii)(B)(3), 164.502(a)(5)(iii)(C)(1), (2)).

[238] *Id.* at 33014.

[239] *Id.* at 33063 (adding new 45 C.F.R. § 164.502(a)(5)(iii)(B)(2)).

Constitution, under the circumstances in which such health care is provided, regardless of the state in which it is provided."[240] As background, a federal law, the Emergency Medical Treatment and Active Labor Act (EMTALA), requires Medicare-participating hospitals with dedicated EDs to screen patients who present to the ED and to provide necessary stabilizing treatment if they have an emergency medical condition.[241] Ectopic pregnancy is generally considered an emergency medical condition and surgery removing the ectopic pregnancy (or sometimes the entire fallopian tube) is generally considered the standard-of-care treatment for a patient with an ectopic pregnancy.[242] Indeed, on July 11, 2022, the Secretary of HHS released a letter to providers stating that:

> [I]f a physician believes that a pregnant patient presenting at an emergency department, including certain labor and delivery departments, is experiencing an emergency medical condition as defined by EMTALA, and that abortion is the stabilizing treatment necessary to resolve that condition, the physician must provide that treatment. And when a state law prohibits abortion and does not include an exception for the life and health of the pregnant person—or draws the exception more narrowly than EMTALA's emergency medical condition definition—that state law is preempted.[243]

On January 2, 2024, however, the U.S. Court of Appeals for the Fifth Circuit affirmed a lower court's decision to enjoin the Secretary of HHS's interpretation of EMTALA within the State of Texas, which is pending certiorari in the Supreme Court.[244] Three days later, on January 5, 2024, the Supreme Court of the United States granted certiorari in a set of consolidated cases from Idaho challenging EMTALA's preemption of state abortion bans.[245] On June 27,

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[240] *Id.*

[241] *See* 42 U.S.C. § 1395dd(b)(1) ("If any individual . . . comes to a hospital and the hospital determines that the individual has an emergency medical condition, the hospital must provide . . . within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition . . . .").

[242] *See, e.g.*, Catherine Pearson, *What Is Ectopic Pregnancy?*, N.Y. TIMES (June 28, 2022), https://www.nytimes.com/article/ectopic-pregnancy-symptoms-treatment.html [https://perma.cc/MET2-992K] (explaining that the treatment for an ectopic pregnancy, which is not viable, is "medication to remove the pregnancy or surgery").

[243] *See* Xavier Becerra, *Letter to Health Care Providers About Emergency Medical Treatment and Active Labor Act (EMTALA)*, U.S. DEP'T OF HEALTH & HUM. SERVS. 1–2 (2022), https://www.hhs.gov/sites/default/files/emergency-medical-care-letter-to-health-care-providers.pdf [https://perma.cc/2RCB-WEZ5] (stating HHS position on abortions as emergency care).

[244] *See* Texas v. Becerra, 89 F.4th 529, (5th Cir. 2024), *cert. pending* (affirming the district court's injunction against HHS's interpretation of EMTALA within Texas).

[245] *See* Idaho v. United States, 144 S. Ct. 541, *cert. granted* (U.S. Jan. 5, 2024) (No. 23-726) (granting certiorari and consolidating the cases into one); Sara Rosenbaum, *EMTALA Pregnancy Protections Versus State Abortion Bans: The Supreme Court Will Decide*, HEALTH AFFAIRS (Jan. 9, 2024), https://

2024, the Supreme Court dismissed the Idaho cases as improvidently granted, thus keeping open (for now) the statutory interpretation issue.[246]

In summary, the application of the final rule is not entirely clear in hypotheticals like the Oklahoma one. HHS needs to clarify whether the purpose-based prohibition only applies to situations in which law enforcement has made a prior request for PHI or whether the prohibition also applies when a covered third party or complainant disagrees that care is legal and wishes to volunteer that disagreement to law enforcement. HHS also must clarify the application of the purpose-based prohibition to organized health care arrangements, including hospitals and their medical staffs, in situations in which one medical staff member disagrees with the legality of care provided by another medical staff member.[247] That is, HHS needs to clarify whether a treating physician is "another person" vis-à-vis a second medical staff member who disagrees with the legality of the treating physician's treatment.[248]

4. The Fourth Hypothetical

Let us move to the fourth hypothetical, which involves a pregnant adult from Texas, where most abortions are illegal.[249] The adult tells their Texas-licensed physician that they are considering getting an abortion, maybe at a Planned Parenthood clinic close to extended family in California, where abortion is legal,[250] or through a telehealth provider located in an abortion-friendly state like Massachusetts.[251] The Texas physician wants to report the individual's statements to Texas law enforcement to try to prevent the abortion and/or Texas law enforcement wants to obtain evidence from the California clinic or Massachusetts provider. The question is whether the Texas physician's report or the California clinic's (or Massachusetts provider's) release of the abortion records violates the Texas patient's legal right to confidentiality.

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www.healthaffairs.org/content/forefront/emtala-pregnancy-protections-versus-state-abortion-bans-supreme-court-decide [https://perma.cc/7L6U-UUXV] (summarizing the litigation out of Idaho and Texas).

[246] *See* Moyle v. United States, No. 23–726, 603 U.S. (June 27, 2024) (declining to formally strike down the Idaho abortion law but instead withdrawing certiorari, permitting EMTALA to persevere over state law but ultimately returning the decision to the state).

[247] *See supra* note 235 (explaining organized health care arrangements and explaining the open issue).

[248] *See supra* note 235 (explaining the open issue).

[249] *See* TEX. HEALTH & SAFETY CODE ANN. § 170A.002(a) (West 2023) ("A person may not knowingly perform, induce, or attempt an abortion.").

[250] California Reproductive Privacy Act, CAL. HEALTH & SAFETY CODE § 123466(a) (West 2023) ("The state [of California] shall not deny or interfere with a woman's or pregnant person's right to choose or obtain an abortion prior to viability of the fetus, or when the abortion is necessary to protect the life or health of the woman or pregnant person.").

[251] *See* Belluck, *supra* note 15 (discussing telehealth providers' provision of abortion medications to patients located in abortion-restrictive states).

Before the final rule, the report or disclosure would have been technically allowed under the required by law exception if the Texas law enforcement officer obtained a court order, a court-ordered warrant, a subpoena or summons issued by a judicial officer, a grand jury subpoena, or an administrative subpoena or summons for the information.[252] That said, the Texas court order or other warrant, subpoena, or summons should not have been issued because the Texas patient did nothing illegal. Considering getting an abortion is not a crime in Texas.[253]

Under the final rule, however, the report or disclosure would not be allowed, even if the patient ultimately obtained an abortion, so long as law enforcement requested the information from the California or Massachusetts provider (versus the Texas physician volunteering the information). This is because: (1) the disclosure would be for a criminal investigation involving a physician who provided reproductive health care or a patient who sought and obtained such care;[254] and (2) the California and Massachusetts providers could make a reasonable determination that the reproductive health care was lawful in California and Massachusetts.[255] The final rule thus improves the confidentiality of the adult in this hypothetical. Note, however, that the Texas resident had to have the means to travel to California (or the technology and the means to access and pay for a Massachusetts telehealth visit)—not only to obtain the legal-in-California (or Massachusetts) abortion but also to obtain the confidentiality protections that the final rule creates for the California (or Massachusetts) abortion records. Again, not all individuals have the financial means to travel across state lines and not all individuals have the technology and the financial means to secure and pay for a telehealth visit. Thus, the heightened confidentiality protections afforded by the final rule to some abortion records are not available to individuals without means.

5. The Fifth Hypothetical

Let us move to the fifth and final hypothetical. Here, a pregnant adult from Louisville, Kentucky, where state law prohibits most abortions,[256] wishes to obtain a prohibited abortion. The adult finds a physician in Kentucky who

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[252] 45 C.F.R. § 164.512(f)(1) (2023).

[253] *See* TEX. HEALTH & SAFETY CODE ANN. § 170A.002(a) (not criminalizing or prohibiting consideration of an out-of-state abortion).

[254] HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. 32976, 33063 (Apr. 26, 2024) (to be codified at 45 C.F.R. pts. 160, 164) (adding 45 C.F.R. § 164.502(a)(5)(iii)(A)(1)).

[255] *Id.* (adding 45 C.F.R. § 164.502(a)(5)(iii)(B)(1)).

[256] KY. REV. STAT. ANN. § 311.772(3)(a), (b) (West 2023) (making it a class D felony for a person to knowingly "[a]dminister to, prescribe for, procure for, or sell to any pregnant woman any medicine, drug, or other substance with the specific intent of causing or abetting the termination of the life of an unborn human being" or to "[u]se or employ any instrument or procedure upon a pregnant woman with the specific intent of causing or abetting the termination of the life of an unborn human being").

strongly believes in the right to abortion, is not afraid to circumvent state law, and who provides medication for an abortion. The question is whether the Kentucky patient's right to confidentiality is violated if a co-worker of the physician learns that medication was given and reports this fact to Kentucky law enforcement. Alternatively, the question is whether the patient's confidentiality rights are violated when a Kentucky law enforcement officer attempts to seize the patient's abortion record for use in a criminal investigation involving the physician who gave the medication for the abortion.

Before the final rule, the disclosure would have been allowed under three exceptions, including the: (1) crime on premises provision if the co-worker believed in good faith that the medication abortion was illegal and reported the medication abortion to law enforcement as such;[257] (2) required by law exception if the Kentucky law enforcement officer obtained a court order, a court-ordered warrant, a subpoena or summons issued by a judicial officer, a grand jury subpoena, or an administrative subpoena or summons;[258] and (3) identification and location exception if the Kentucky law enforcement officer requested information for purposes of identifying a suspect (for example, the physician who gave the medication) or a material witness (for example, the patient) and the information requested by the officer was limited to that allowed by the exception.[259] That is, the former HIPAA Privacy Rule subordinated patient confidentiality to law enforcement's interest in obtaining PHI in these three situations.

The answer is the same under the final rule because, although the disclosure is for a criminal investigation into or proceeding against a person who provided reproductive health care,[260] the reproductive health care (that is, the abortion) was not lawful in Kentucky, where it was provided, and the Kentucky physician could not reasonably determine that it was legal.[261] In the preamble to the final rule, HHS acknowledges that, in situations like the Kentucky hypothetical, law enforcement interest in the PHI will outweigh the privacy interest of the individual who had the abortion.[262] As discussed in more detail below, this reasoning is problematic because HHS is treating reproductive health information differently than psychotherapy notes and substance use dis-

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[257] 45 C.F.R. § 164.512(f)(5).

[258] *Id.* § 164.512(f)(1)(ii).

[259] *Id.* § 164.512(f)(2)(i).

[260] HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. at 33063 (adding 45 C.F.R. § 164.502(a)(5)(iii)(A)(1)).

[261] *Id.* (adding 45 C.F.R. § 164.502(a)(5)(iii)(B)(1)); *id.* at 33012 ("[I]f a person obtains reproductive health care that was unlawful, such health care would not be lawful under the circumstances in which it was provided, and the [purpose-based] prohibition would not apply.").

[262] *Id.* at 33012 ("The Department acknowledges that this final rule will not prohibit the use or disclosure of PHI in all instances in which persons request the use or disclosure of PHI for an investigation or to impose liability on a person for seeking, obtaining, providing, or facilitating reproductive health care. . . . [W]e acknowledge that in some circumstances . . . law enforcement's interests in the PHI will outweigh the privacy interests of individuals.").

order treatment records without adequate justification. In addition, and as mentioned before, HHS is only providing confidentiality protections to patients who can afford to travel across state lines or who have the technology and financial means to pay for telehealth visits. This disproportionately and unfairly impacts racial and ethnic minorities, individuals with disabilities, individuals of low socioeconomic class, and other marginalized individuals.[263]

III. ABORTED CONFIDENTIALITY

Thus far, it appears that the proposed rule would improve patient confidentiality in some of the hypotheticals that open this Article. That said, HHS could—and should—have gone further to protect the confidentiality of individuals seeking reproductive health care. Sections A and B of this Part III argue that HHS should treat reproductive health information like psychotherapy notes[264] and substance use disorder treatment records,[265] respectively. Section C explains that the proposed rule disproportionately impacts racial and ethnic minorities, individuals with disabilities, individuals of low socioeconomic status, and other vulnerable populations.[266] Section D asserts that the proposed rule places physicians in an impossible predicament that endangers lives.[267] Section E contends that the proposed rule fails to regulate crisis pregnancy centers, internet search engines, and other non-covered entities.[268]

A. HHS Should Have Treated Reproductive Health Information Like Psychotherapy Notes

In the final rule, HHS continues to apply one baseline set of confidentiality protections to all PHI,[269] with one exception. The one exception is psychotherapy notes,[270] defined as the notes of a mental health professional that record or evaluate a counseling session and that are maintained separate and apart from the rest of medical record.[271] HHS has long provided an exception for psychotherapy notes because HHS wants to ensure that patients will "feel com-

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[263] *See, e.g.*, Kiara Alfonseca, *Why Abortion Restrictions Disproportionately Impact People of Color*, ABC NEWS (June 24, 2022), https://abcnews.go.com/Health/abortion-restrictions-disproportionately-impact-people-color/story?id=84467809 [https://perma.cc/7YQK-NNTA] (referencing statistics on the disproportionate impact of abortion restrictions on marginalized individuals).

[264] *See infra* Part III.A.

[265] *See infra* Part III.B.

[266] *See infra* Part III.C.

[267] *See infra* Part III.D.

[268] *See infra* Part III.E.

[269] *See, e.g.*, 45 C.F.R. § 164.500 (2023) ("[The HIPAA Privacy Rule applies] to covered entities with respect to *protected health information*.") (emphasis added).

[270] *See id.* § 164.508(a)(2) (giving psychotherapy notes heightened confidentiality protections under the HIPAA Privacy Rule).

[271] *Id.* § 164.501 (defining psychotherapy notes).

fortable freely and completely disclosing [during therapy] very personal information essential to successful treatment."[272] According to HHS, "[e]ven 'the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment.'"[273] HHS strongly believes that psychotherapy notes contain particularly sensitive information that could be harmful if used or disclosed for non-treatment purposes.[274]

In the context of non-psychotherapy note PHI, the HIPAA Privacy Rule as amended by the final rule continues to contain dozens of treatment, payment, health care operations, and public benefit activity exceptions for which covered entities can use and disclose PHI without the prior written authorization of their patients.[275] In the context of psychotherapy notes, however, there are just a few activities for which covered entities can use and disclose these notes without their patients' prior written authorization.[276] These activities include only: (1) use of the notes by the author of the notes (for example, the psychotherapist) to treat the patient; (2) use of the notes by the covered entity to train mental health students and practitioners regarding conducting counseling sessions; (3) use or disclosure by the covered entity to defend itself in a legal action (for example, in a medical malpractice case or a sexual assault case) brought by the patient; (4) disclosure to the Secretary of HHS as necessary to investigate or determine a covered entity's compliance with the HIPAA Privacy Rule; (5) use or disclosure that is required by law; (6) disclosure to a health oversight agency (for example, the HHS Office of Inspector General) for the purposes of overseeing the psychotherapist (for example, in a health care fraud case); (7) disclosure to a coroner or medical examiner to help identify a deceased patient or determine a patient's cause of death; and (8) disclosure to the police or to an intended victim as necessary to avert a serious threat to health or safety (for example, when the patient threatens during a counseling session to take the patient's own life later that evening).[277]

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[272] *See, e.g.*, HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 88 Fed. Reg. 23506, 23518 (proposed Apr. 17, 2023) (to be codified at 45 C.F.R. pts. 160, 164).

[273] *Id.*

[274] *See* Tedford v. Coastal Behavioral Health, 2014 WL 683866, 57 Conn. L. Rptr. 537, at *2 (Conn. Super. Ct. Jan. 24, 2014) (recognizing the sensitive nature of psychotherapy notes).

[275] *See generally* 45 C.F.R. § 164.506(c)(1)–(5) (listing a range of treatment, payment, and health care operations activities for which non-psychotherapy note PHI can be used and disclosed without the patient's prior written authorization); *id.* § 164.512(b) (listing twelve additional public benefit activities for which non-psychotherapy note PHI can be used and disclosed without the patient's prior written authorization); *id.* § 164.510 (listing a range of additional activities for which non-psychotherapy note PHI can be used and disclosed with just the patient's prior oral agreement).

[276] *Id.* § 164.508(a)(1)–(2).

[277] *Id.*; OFF. FOR CIV. RTS., U.S. DEP'T OF HEALTH & HUM. SERVS., SUMMARY OF THE HIPAA PRIVACY RULE 9 (2003) (summarizing the heightened confidentiality protections applicable to psychotherapy notes).

Importantly, the activities for which a psychotherapist can use or disclose psychotherapy notes without prior patient authorization do not include five out of six of the law enforcement exceptions discussed in Part I of this Article.[278] The HIPAA Privacy Rule simply does not permit disclosures of psychotherapy notes to law enforcement pursuant to the crime on premises exception, the emergency care exception, the decedent exception, the identification and location exception, or the crime victim exception.[279] This is true even if the patient admits during therapy that the patient committed a crime in a state violating the laws of that same state.[280] In comparison, the final rule waives the confidentiality of reproductive health information in situations where a patient's abortion violates the laws of the state where the abortion occurred.[281] Reproductive health information thus receives significantly less confidentiality protections than psychotherapy notes.

Why is this the case? If statements made during a counseling session regarding a patient's bitter divorce, a patient's difficult relationship with a parent, or a patient's challenging rapport with a boss are given heightened confidentiality protections under the theory that those statements are "particularly sensitive,"[282] certainly reproductive health information (including abortion information) also qualifies. Abortion is heavily stigmatized, even more so post-*Dobbs*, and reproductive health information is incredibly sensitive.[283] Individ-

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[278] *See supra* Part I. *See generally* 45 C.F.R. § 164.512(f)(1)–(6) (listing the six law enforcement exceptions, only one of which (*i.e.*, the required by law exception) applies to psychotherapy notes). The judicial and administrative proceeding exceptions codified at 45 C.F.R. 164.512(e) also do not apply to psychotherapy notes. *Id.* § 164.508(a)(1)–(2).

[279] *Id.* § 164.508(a)(1)–(2).

[280] *Id.*

[281] HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. 32976, 33063 (Apr. 26, 2024) (to be codified at 45 C.F.R. pts. 160, 164) (adding 45 C.F.R. § 164.502(a)(5)(iii)(B)(1)).

[282] *See supra* note 177 and accompanying text (discussing the sensitive nature of psychotherapy notes).

[283] *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 ("The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision . . . ."); Nguyen et al., *supra* note 32 ("[T]he criminalization of abortion [post-*Dobbs*] will further stigmatize women who terminate their pregnancies and place them under constant fear of legal repercussions."); *Texas Prosecutor Drops Murder Charge Against Woman Arrested for Self-Induced Abortion, supra* note 128 (noting the emotional toll taken on the woman (and the family of the woman) who had an abortion and then whose confidentiality was violated by a health care worker and a too-aggressive law enforcement officer). *See generally* Jonathan Kelley, M.D.R. Evans & Bruce Headey, *Moral Reasoning and Political Conflict: The Abortion Controversy*, 44 BRIT. J. SOCIO. 589, 589–91 (1993) (arguing that women who have abortions are judged in terms of their "sexual permissiveness," their violation of the "sanctity of life," their "rebellion against God's design," their attempt to control their reproductive lives, and their opposition to being confined to work within (versus outside) the home); PEW RSCH. CTR., AMERICA'S ABORTION QUANDARY 50 (2022) (reporting research results showing that certain classes of individuals who oppose abortion believe it is "morally wrong in most cases") (emphasis omitted); Laurent Bègue, *Social Judgment of Abortion: A Black-Sheep Effect in a Catholic Sheepfold*, 141 J. SOC. PSYCH. 640 (2001) (explaining the relationship between attitudes relating to abortion and social judgment of others).

uals who have abortions are judged religiously, morally, ethically, and socially.[284] There is no reason that a patient's reproductive health information should receive less confidentiality than statements made by a patient during the course of a counseling session.

B. HHS Should Have Treated Reproductive Health Information Like Substance Use Disorder Treatment Information

As discussed above, the HIPAA Privacy Rule as amended by the final rule continues to provide heightened confidentiality protections only to psychotherapy notes.[285] That said, other federal regulations codified at 42 C.F.R. Part 2 (referred to as Part 2) provide heightened confidentiality protections to substance use disorder (SUD) patient records maintained by federally assisted SUD treatment programs (Part 2 Programs).[286] In particular, Part 2 significantly limits the situations in which Part 2 Programs are permitted to release SUD patient records, including pursuant to a court order.[287] For example, one provision in Part 2 specifies that a court order may be used to authorize the "disclosure of confidential communications made by a patient to a [P]art 2 [P]rogram in the course of diagnosis, treatment, or referral for treatment," but only if the disclosure is necessary for the "investigation or prosecution of an extremely serious crime, such as one that directly threatens loss of life or serious bodily injury, including homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, or child abuse and neglect."[288] Notably, criminalized reproductive health care is not listed as a major crime that outweighs the need to maintain confidentiality.[289] The effect of this provision is to prioritize the confidentiality of patients with SUDs over the interests of law enforcement, including in cases in which patients have shared with their treatment providers their possession or trafficking of drugs or their operation of a motor vehicle while intoxicated.[290] This includes situations in which patients engage in behavior in a state that violates that same state's law.[291] The theory behind this provision is that encouraging patients with SUDs to seek treatment and preventing further patient inju-

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[284] *See* Kelley et al., *supra* note 283 (arguing that women who have abortions are subjected to social judgement).

[285] *See* 45 C.F.R. § 164.508(a)(2) (giving psychotherapy notes heightened confidentiality protections under the HIPAA Privacy Rule).

[286] Confidentiality of Substance Use Disorder Patient Records, 42 C.F.R. pt. 2 (2024).

[287] *See* 42 C.F.R. § 2.61–.67 (providing heightened confidentiality protections to substance use disorder patient records).

[288] *Id.* § 2.63(a)(2). There are two other situations in which disclosures may be made, but they are irrelevant (by analogy) to this Article. *Id.*

[289] *See id.* (providing narrow disclosure exceptions).

[290] *Id.* § 2.65.

[291] *Id.*

ry and death (such as a motor vehicle-related death or a death by overdose) is more important than investigating and prosecuting non-major crimes.[292]

An additional provision in Part 2 authorizes the use or disclosure of SUD records pursuant to a court order to investigate a patient in connection with a criminal proceeding.[293] The crime, however, for which the patient is being investigated, must also be an "extremely serious" crime, such as "homicide, rape, kidnapping, armed robbery, assault with a deadly weapon, and child abuse and neglect."[294] This additional provision does not apply to criminalized reproductive health care. The effect of this additional provision, like the prior provision, is to encourage patients with SUDs to seek and obtain treatment and to prioritize the confidentiality of patients with SUDs over the interests of law enforcement in non-major crimes cases.[295] A third provision in Part 2 authorizes the issuance of a court order to use or disclose SUD records not to investigate or prosecute a patient, but to investigate or prosecute a Part 2 treatment program if certain requirements are satisfied.[296] One such requirement is that patient information must be deleted before the information is made public.[297]

In summary, federal regulations that are designed to encourage patients with SUDs to obtain treatment prioritize confidentiality over law enforcement and require the redaction of patient identifying information before the investigation or prosecution is publicized.[298] This is so even when the patient has committed a crime such as drug possession, drug trafficking, or driving while intoxicated in the state where they are receiving treatment.[299] These regulations are instructive as to the proper balancing of confidentiality and law enforcement in the context of reproductive health care; that is, the patient's health, safety, and welfare can and should be prioritized over the interest of law enforcement.

In the context of SUDs, it may seem obvious to prioritize treatment over law enforcement interest due to the well-known—and very serious—risk of drug overdose, intravenous drug-related infections such as HIV, and motor ve-

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[292] *See* Press Release, Dep't Health & Human Servs., HHS Finalizes New Provisions to Enhance Integrated Care and Confidentiality for Patients with Substance Use Conditions (Feb. 8, 2024), https://www.hhs.gov/about/news/2024/02/08/hhs-finalizes-new-provisions-enhance-integrated-care-confidentiality-patients-substance-use-conditions.html [hereinafter New Provisions to Enhance Confidentiality] (stating that ensuring privacy for substance use disorder patients is a priority for the HHS as it seeks to promote treatment).

[293] 42 C.F.R. § 2.65.

[294] *Id.* § 2.65(d)(1).

[295] *See* New Provisions to Enhance Confidentiality, *supra* note 292 (stating that ensuring privacy for substance use disorder patients is a priority for the HHS as it seeks to promote treatment).

[296] 42 C.F.R. § 2.66.

[297] *Id*. § 2.66(d)(1).

[298] *See* New Provisions to Enhance Confidentiality, *supra* note 292 (stating that ensuring privacy for substance use disorder patients is a priority for the HHS as it seeks to promote treatment).

[299] *See* 42 C.F.R. § 2.63(a)(2) (not including drug trafficking or driving under the influence as among the "extremely serious crime[s]").

hicle-related fatalities associated with impaired driving. Unfortunately, the final rule fails to give proper weight to the comparable risks associated with untreated reproductive health conditions and concerns that follows from the fear of a lack of confidentiality.[300] For example, research shows that medical mistrust—especially in vulnerable communities—can discourage individuals from seeking appropriate and lawful care for health conditions that can worsen without treatment.[301] Maternal morbidity and mortality can be reduced, however, by encouraging proper communication between patients and providers, bolstered by the promise of confidentiality.[302] Research also shows that mental health and emotional well-being suffers when individuals fear criminal investigation and prosecution for seeking or obtaining reproductive health care.[303] Still additional research shows that individuals who have survived rape and incest can be re-victimized when their confidentiality is breached in the process of trying to prove the rape or incest, which necessarily requires a disclosure of their sensitive health information.[304] A failure to maintain confidentiality has very real impacts on the physical and mental health of individuals who seek reproductive health care. In its final rule, HHS did not properly weigh

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[300] *See supra* note 31 and accompanying text (discussing privacy risks and consequences faced by patients seeking reproductive health care).

[301] *See supra* note 31 and accompanying text (reporting that "delay or failure to seek care" is the fourth leading contributing factor to pregnancy-related deaths).

[302] *See* Eugene Declercq, Ruby Barnard-Mayers, Laurie C. Zephyrin & Kay Johnson, *The U.S. Maternal Health Divide: The Limited Maternal Health Services and Worse Outcomes of States Proposing New Abortion Restrictions*, COMMONWEALTH FUND (Dec. 14, 2022), https://www.commonwealthfund.org/publications/issue-briefs/2022/dec/us-maternal-health-divide-limited-services-worse-outcomes [https://perma.cc/ZZ2F-BCUJ] ("[States that banned abortion] have fewer maternity care providers; more maternity care 'deserts'; higher rates of maternal mortality and infant death, especially among women of color; higher overall death rates for women of reproductive age; and greater racial inequities across their health care systems."); Doha Madani, *States with More Abortion Restrictions Have Higher Maternal and Infant Mortality, Report Finds*, NBC NEWS (Dec. 13, 2022), https://www.nbcnews.com/health/health-news/abortion-restrictions-higher-maternal-infant-mortality-rcna61585 [https://perma.cc/2527-H767] (discussing the "growing body of evidence showing a link between more restrictive abortion policies and higher rates of maternal and infant mortality").

[303] *Cf.* Nguyen, *supra* note 32 ("[T]he criminalization of abortion will further stigmatize women who terminate their pregnancies and place them under constant fear of legal repercussions. Concealing and revealing one's abortion history have long been associated with adverse psychological consequences.").

[304] *See, e.g.*, Cazembe Murphy Jackson, *Abortion Exceptions for Rape Don't Ensure Victims of Rape Like Me Can Get Abortions*, NBC NEWS THINK (May 31, 2019), https://www.nbcnews.com/think/opinion/abortion-exceptions-rape-don-t-ensure-victims-rape-me-can-ncna1012176 [https://perma.cc/7CHF-VB48] (explaining that "[rape e]xemption laws that make it the survivors' responsibility to prove that a rape has occurred by filing a police report, among other reporting requirements that vary by state, place tremendous added pressure on someone already dealing with the emotions from the rape and the subsequent pregnancy"); HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 88 Fed. Reg. 23506, 23529 (proposed Apr. 17, 2023) (to be codified at 45 C.F.R. pts. 160, 164) ("[P]ermitting a covered entity to disclose a sexual assault survivor's PHI to law enforcement or others to enable them to investigate that individual for obtaining lawful reproductive health care as a result of the assault compounds the harm experienced by the individual by violating their privacy.").

these risks as did the Substance Abuse and Mental Health Services Administration when it promulgated Part 2.

C. The Final Rule Disproportionately Impacts Racial and Ethnic Minorities, Individuals with Disabilities, and Individuals of Low Socioeconomic Status

In the first, second, and fourth hypotheticals, pregnant individuals obtained abortions only after traveling from a state that prohibited abortion (for example, North Dakota, Idaho, or Texas) to a state that permitted abortion (for example, Minnesota, Washington, or California). Once these individuals traveled out of state, or obtained telehealth services from the out-of-state provider, the final rule protected the confidentiality of their abortion records in the hands of the out-of-state provider. Note, then, that both access to abortion and the right to confidentiality are premised on an individual's ability to travel out of state or to obtain services from an out-of-state telehealth provider.

Unfortunately, making abortion access and confidentiality rights conditional on an individual's ability to travel across state lines or having the technology and internet needed to access telehealth services disproportionately impacts racial and ethnic minorities, individuals with disabilities, individuals of low socioeconomic status, and other marginalized individuals. Racial and ethnic minorities are already impacted by higher rates of poverty, lower rates of access to sexual health information, lower rates of access to in-person health care (including birth control), lower rates of access to telehealth care, lower rates of health insurance coverage, and greater discrimination in health care.[305] In addition, racial and ethnic minorities are more likely than white women to experience health complications during pregnancy and childbirth.[306] Indeed,

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[305] *See, e.g.*, COMM. ON UNDERSTANDING & ELIMINATING RACIAL & ETHNIC DISPARITIES IN HEALTH CARE, UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE (Brian D. Smedley, Arrienne Y. Stith & Alan R. Nelson eds., 2003), https://pubmed.ncbi.nlm.nih.gov/25032386/ [hereinafter UNEQUAL TREATMENT] ("Racial and ethnic disparities in health care are known to reflect access to care and other issues that arise from differing socioeconomic conditions. There is, however, increasing evidence that even after such differences are accounted for, race and ethnicity remain significant predictors of the quality of health care received."); Thomas C. Buchmueller & Helen G. Levy, *The ACA's Impact on Racial and Ethnic Disparities in Health Insurance Coverage and Access to Care*, 39 HEALTH AFFS. 395, 395 (2020) ("[The health] uninsurance rate among [B]lacks and Hispanics is substantially higher than the rate among whites."); Cynthia White-Williams, Xinliang Liu, Di Shang & Jared Santiago, *Use of Telehealth Among Racial and Ethnic Minority Groups in the United States Before and During the COVID-19 Pandemic*, 138 PUB. HEALTH REP. 149, 150 (2023) ("Because of the lack of resources, many people who have low incomes and who identify as a member of a racial or ethnic minority population do not have access to adequate technological support that encourages telehealth use.").

[306] *See, e.g.*, BLUE CROSS BLUE SHIELD, RACIAL DISPARITIES IN MATERNAL HEALTH 2 (2021), https://www.bcbs.com/the-health-of-america/reports/racial-disparities-in-maternal-health [https://perma.cc/4756-RRZL] (reporting higher childbirth complication rates for Black and Hispanic women

the Centers for Disease Control and Prevention (CDC) found that Black women died of maternal causes at nearly three times the rate of white women.[307] Moreover, racial and ethnic minorities have higher rates of abortions (23.8 and 11.7 abortions per 1,000 individuals) compared to white individuals (6.6 abortions per 1,000 individuals).[308] As a result, racial and ethnic minorities are disproportionately affected by abortion bans and restrictions in states such as North Dakota, Idaho, Oklahoma, Texas, and Kentucky.[309] In terms of surgical abortions, higher rates of poverty translate to an inability to afford (or a delay while saving for the means to afford) an expensive, out-of-state abortion.[310] In terms of medication abortions, higher rates of poverty are associated with decreased access to telehealth, including telehealth-prescribed abortion medications.[311] Decreased access to abortion translates to higher rates of pregnancy-related complications and maternal deaths for racial and ethnic minorities when compared to their white counterparts.[312]

Individuals with disabilities also are disproportionately impacted by stringent abortion restrictions. Individuals with disabilities already experience "considerable structural, legal, and institutional barriers that often put access to safe and legal abortion services out of reach."[313] As explained by Professor Robyn Powell, a leading disability law scholar, individuals with disabilities experience increased risk of maternal death alongside high poverty rates, limiting their "reproductive freedom."[314] Disabled individuals also lack access to reproductive

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regardless of age; stating that these findings reinforce the need for urgent action to reduce racial disparities in maternal health).

[307] *See, e.g.*, DONNA L. HOYERT, CTRS. FOR DISEASE CONTROL & PREVENTION, MATERNAL MORTALITY RATES IN THE UNITED STATES, 2020 (2020), https://www.cdc.gov/nchs/data/hestat/maternal-mortality/2020/E-stat-Maternal-Mortality-Rates-2022.pdf [https://perma.cc/3HSH-QGBS] ("In 2020, the maternal mortality rate for non-Hispanic Black women was 55.3 deaths per 100,000 live births, 2.9 times the rate for non-Hispanic White women (19.1). Rates for non-Hispanic Black women were significantly higher than rates for non-Hispanic White and Hispanic women. The increases from 2019 to 2020 for non-Hispanic Black and Hispanic women were significant.") (citations omitted).

[308] *See, e.g.*, Alfonseca, *supra* note 263 (referencing these statistics).

[309] *See id.* (explaining that marginalized individuals in states with abortion bans are disproportionally impacted by those bans).

[310] *See* UNEQUAL TREATMENT, *supra* note 305 (explaining how race, ethnicity, and socioeconomic status can limit access to health care).

[311] *See* DANA NORTHCRAFT ET AL., REPROD. HEALTH INITIATIVE FOR TELEHEALTH EQUITY & SOLS., EXPANDING ACCESS TO TELEHEALTH FOR MEDICATION ABORTION CARE IN A CONSTRAINED POLICY ENVIRONMENT 3 (2024), https://static1.squarespace.com/static/637e5bcdbfee712c3baf45b8/t/6627da164482cf1859362846/1713887766854/RHITES-ExpandingAccess-final.pdf [https://perma.cc/TZS9-EJ7R] ("Restrictions on abortion access exacerbate the persistent inequities and access challenges across the nation that disproportionately continue to impact people of color.").

[312] *See* Hoyert, *supra* note 307 (documenting higher maternal mortality rates for people of color).

[313] Powell, *supra* note 32, at 779.

[314] *Id.* at 780.

health guidance and services.[315] These factors limit use of contraceptives in this community.[316] As a result, rates of unintended pregnancy among disabled individuals are higher than in the general population. Sexual assault, domestic violence, and sexual coercion are also more common in the disabled community.[317]

When located in a state with an abortion ban or restriction, the result can be devastating. For example, in a state that restricts abortion beyond six weeks, it may take an individual with a disability longer than six weeks to find an accessible abortion provider and to procure accessible, affordable transportation to the provider.[318] Indeed, expensive, out-of-state travel may be entirely out of the question for low-income individuals with disabilities as well as for individuals with severe disabilities regardless of income and resources.[319] Regardless of race, ethnicity, or disability, abortion restrictions also disproportionately affect young individuals. Women in their twenties obtained over half of abortions (57.2%) in 2020, although women of this age are less likely than older women to be able to afford an abortion or travel to obtain an abortion.[320]

Statistics like these have been used to challenge abortion restrictions, but they must also be used to challenge federal limitations on health information confidentiality.[321] Not only will racial and ethnic minorities, individuals with disabilities, and individuals of low socioeconomic means have less access to abortion, higher rates of complications associated with pregnancy, and higher rates of death associated with pregnancy and childbirth, but now they will also suffer from a lack of sufficient confidentiality protections.[322] Under the final rule, remember, confidentiality protections only attach when an individual seeks reproductive health care in a state where such care is legal or when the reproduc-

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[315] *Id.*

[316] *Id.*

[317] *Id.*

[318] *See, e.g.*, *id.* at 776–77 (reporting the story of Samantha, who visited three abortion providers before finding one equipped to accommodate her disability).

[319] *See id.* (describing the challenges and delays people with disabilities face in attempting to find accessible abortion care).

[320] *See, e.g.*, Katherine Kortsmit et al., *Abortion Surveillance—United States*, 2021, MORBIDITY & MORTALITY WKLY., Nov. 2023, at 71, 71, https://www.cdc.gov/mmwr/volumes/72/ss/pdfs/ss7209a1-H.pdf [https://perma.cc/5HH4-4E2P] ("Women aged 20–24 and 25–29 years accounted for the highest percentages of abortions (27.9% and 29.3%, respectively) and had the highest abortion rates (19.2 and 19.0 abortions per 1,000 women aged 20–24 and 25–29 years, respectively). By contrast, . . . women aged ≥40 years accounted for the lowest percentages of abortions (3.7% . . .) and had the lowest abortion rates (2.6 abortions per 1,000 women aged ≥40 years")).

[321] *See* Alfonseca*, supra* note 263 (relying on statistics to challenge abortion restrictions).

[322] *See, e.g.*, HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. 32976, 32988 (Apr. 26, 2024) (to be codified at 45 C.F.R. pts. 160, 164) ("As explained by commenters and supported by research, these impingements on the privacy of health information about reproductive health care are likely to have a disproportionately greater effect on women, individuals of reproductive age, and individuals from communities that have been historically underserved, marginalized, or subject to discrimination or systemic disadvantage by virtue of their race, disability, social or economic status, geographic location, or environment.").

tive health care is protected, required, or authorized by federal law regardless of the state in which it is provided.[323] To obtain federally backed confidentiality, the final rule essentially forces individuals in states with abortion bans to travel (or obtain telehealth services) out of state, a luxury available only to some but not to all. In summary, abortion access is not just a racial, ethnic, disability, and socioeconomic justice issue, but it is a confidentiality issue as well.

D. The Final Rule Places Physicians in an Impossible Predicament That Endangers Lives

The final rule may be critiqued on still other grounds. For example, physicians who perform life-preserving abortions and provide other emergency care risk criminal prosecution when third parties disagree regarding the necessity of the care and are permitted to disclose evidence of such care to law enforcement.[324] In turn, the fear of criminal investigation and prosecution leads professionals to refuse to provide or to delay in providing standard-of-care health services, increasing the chance of patient injury and death.[325] Many physicians have gone on record, admitting that they have refused to provide or have delayed in providing standard-of-care cancer care,[326] standard infection prevention care following miscarriage,[327] and standard surgical care for ectopic pregnancies[328] due to fear of criminal investigation and prosecution. Pharmacists also have gone on record, admitting that they have refused to fill or that they have delayed in filling prescriptions that can affect a pregnancy.[329] Indeed, a recent survey found that sixty-eight percent of current obstetrician-gynecologists reported that *Dobbs* has "worsened their ability to manage pregnancy-related emergencies" and over one third believed their "ability to prac-

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[323] *See id.* at 33063 (adding 45 C.F.R. § 164.502(a)(5)(iii)(B)(1), (2)).

[324] *See, e.g.*, *supra* Part II.C.3 and accompanying text (discussing a hypothetical involving a pregnant individual who had an unlikely chance of surviving and who required an urgent abortion).

[325] *See* Baumann, *supra* note 35 (describing physicians who have delayed care due to abortion restrictions).

[326] *See id.* (reporting a story involving a Kentucky-based physician who could not provide standard-of-care cervical cancer care to her patient while the patient was pregnant; explaining that the patient had to deliver the baby seven weeks early so the patient could get "standard-of-care [cancer care] after an eleven-week delay").

[327] *See, e.g.*, Macdonald et al., *supra* note 35, at 1691 (stating that "[s]ome women with high-risk infectious complications of pregnancy reportedly have been sent home and developed sepsis before abortions were deemed legally permissible"; further stating that "some hospitals have stopped offering timely, evidence-based abortions for certain types of ectopic pregnancies").

[328] *See, e.g.*, *id.* (stating that "women with high-risk infectious complications of pregnancy have been sent home and have developed sepsis before abortions were deemed legally permissible"; further stating that "some hospitals have stopped offering timely, evidence-based abortions for certain types of ectopic pregnancies").

[329] *See, e.g.*, Coleman-Lochner et al., *supra* note 35 (providing examples of pharmacists who refuse to fill or who delay filling certain prescriptions that could affect a pregnancy).

tice within the accepted standard of care had deteriorated."[330] In its final rule, HHS has tried to help some covered physicians feel comfortable providing standard-of-care health services by specifying that a covered entity may not rely on a law enforcement officer's request for information if the covered entity has made a reasonable determination that the health care services were legally provided.[331] It is unclear, however, the extent to which physicians will feel comfortable relying on this regulatory language when their livelihoods are at stake. The result may be that physicians will continue choosing not to provide (or will delay in providing) standard-of-care health services so they are not ever in the position of facing law enforcement. Although that decision could subject them to negligence allegations by the patient, remember that malpractice insurance covers patient damages caused by negligence but does not protect physicians from criminal investigation or prosecution.[332]

E. The Final Rule Fails to Regulate Crisis Pregnancy Centers, Mobile Health Applications, Internet Search Engines, and Other Non-Covered Entities That Obtain or Maintain Reproductive Health Information

There are still other reasons to criticize the final rule. For example, the final rule does not change the fact that the HIPAA Privacy Rule only applies to covered entities (defined to include health care providers that transmit health information in electronic form in connection with certain standard transactions, health plans, and health care clearinghouses) and their business associates.[333] As a result, not every individual or entity that creates, receives, or maintains reproductive health information is regulated. Crisis pregnancy centers (CPCs), for example, do not electronically transmit health information in connection with health insurance claims and do not need to comply with the Privacy Rule.[334] Additionally, most mobile health applications are not regulated by the

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[330] Lucy Tu, *One Year After* Dobbs*, Abortion Bans Are Harming Reproductive Care, Ob-Gyns Say*, SCI. AM. (June 23, 2023), https://www.scientificamerican.com/article/one-year-after-dobbs-abortion-bans-are-harming-reproductive-care-ob-gyns-say1/ [https://perma.cc/XL8W-N97D].

[331] *See* HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. 32976, 33013 (Apr. 26, 2024) (to be codified at 45 C.F.R. pts. 160, 164) (adding new 45 C.F.R. § 164.502(a)(5)(iii)(B)(1)).

[332] *See What Is and Isn't Covered by Malpractice Insurance?*, NOW INS. (Apr. 14, 2021), https://nowinsurance.com/blog/what-is-and-isnt-covered-by-malpractice-insurance/ [https://perma.cc/H69P-V3H3] ("Despite covering many areas of misconduct, [including negligence], a medical malpractice insurance policy does not cover . . . criminal acts").

[333] *See supra* notes 57–70 and accompanying text.

[334] Bryant & Swartz, *supra* note 66, at 271 ("CPCs that are not licensed medical clinics cannot legally be held to the privacy provisions of the Health Insurance Portability and Accountability Act (HIPAA), which could lead to violations of client privacy. For example, client information might not be kept confidential, and information about pregnancy or abortion intentions might be shared with people outside the clinic.") (citations omitted); Montoya et al., *supra* note 66, at 760 ("Because they are not medical facilities, CPCs are not subject to [HIPAA] and many are collecting private client data, which could be used for a range of purposes, from evangelizing to informing anti-abortion law-

HIPAA Privacy Rule, even though they collect significant reproductive health information, including menstruation information, ovulation information, missed period information, and pregnancy information.[335] Internet search engines also are not regulated by the HIPAA Privacy Rule, even though individuals may use these engines to search online for symptoms of pregnancy, medication abortion providers, surgical abortion providers, abortion transportation providers, and abortion funding. Because the HIPAA Privacy Rule does not regulate CPCs, mobile health applications, internet search engines, and other non-covered entities, law enforcement officers can obtain reproductive health information from these entities without patient authorization and use that information to investigate or prosecute an individual for seeking, obtaining, providing, or facilitating reproductive health care.[336]

Unfortunately, the final rule does nothing to correct this problem. The final rule does not amend or otherwise expand the definition of covered entity or business associate to capture these CPCs, mobile health applications, and internet search engines.[337] One of the biggest weaknesses in the HIPAA Privacy Rule is its limited application. To better protect reproductive health information, Congress needs to amend the HIPAA statute to expand the application of the HIPAA Privacy Rule and HHS must respond to that directive by promulgating implementing regulations.[338]

IV. RE-WRITING THE HIPAA PRIVACY RULE

How can the HIPAA Privacy Rule be re-written so that it does not condition health information confidentiality on the ability to cross state lines or ac-

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suits for bounty in Texas."). For additional information on CPCs, see *supra* notes 66–68 and accompanying text.

[335] *See, e.g.*, Tovino, *Confidentiality over Privacy*, *supra* note 17, at Parts I.D and II.F (identifying individuals and entities that collect or maintain reproductive health information but are not regulated by the HIPAA Privacy Rule); Tovino, *Going Rogue, supra* note 55, at Part II.A (explaining that the HIPAA Privacy Rule does not regulate many mobile health applications because they either do not meet the definition of a health care provider or, if they do, they do not transmit health information in electronic form in connection with a standard transaction); Fowler & Ulrich, *supra* note 69, at 1281 (explaining that the HPAA Privacy Rule does not regulate many period and fertility tracker applications).

[336] *See* Tovino, *Going Rogue, supra* note 55, at Part II.A (explaining that the HIPAA Privacy Rule does not regulate many mobile health applications because they either do not meet the definition of a health care provider or, if they do, they do not transmit health information in electronic form in connection with a standard transaction).

[337] *See* HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 88 Fed. Reg. 23506, 23506 (proposed Apr. 17, 2023) (to be codified at 45 C.F.R. pts. 160, 164) (not revising the definition of covered entity). To be fair, Congress in the HIPAA statute limited the application of the HIPAA Privacy Rule to covered entities and, after ARRA, to business associates. *See supra* notes 161–162 and accompanying text (explaining that ARRA directed HHS to regulate business associates in addition to covered entities).

[338] *See generally* Tovino, *Going Rogue, supra* note 55 (arguing that the HIPAA Privacy Rule needs to be expanded to regulate mobile health applications).

cess to technology making telehealth possible? How should the HIPAA Privacy Rule be amended so that it does not disproportionately impact racial and ethnic minorities, individuals with disabilities, individuals of low socioeconomic status, and other marginalized individuals who need reproductive health care? How can the HIPAA Privacy Rule be revised so that it does not place physicians in the impossible situation where they are forced to choose between potential criminal prosecution for providing lawful reproductive health care and potential civil liability for delaying or refusing to provide standard-of-care health services? How do we regulate crisis pregnancy centers, mobile health applications, internet search engines, and other non-regulated entities who collect, use, and disclose reproductive health information, including for law enforcement purposes?

We can start by giving reproductive health information the same confidentiality protections that currently apply to psychotherapy notes. Recall that the HIPAA Privacy Rule permits psychotherapy notes to be used or disclosed without patient authorization in only a handful of situations.[339] Any other use or disclosure, beyond those limited scenarios, requires the individual's prior written authorization on a HIPAA-compliant authorization form.[340]

The approach taken by HHS with respect to the protection of psychotherapy notes is much more straightforward than the approach taken by HHS in the final rule with respect to reproductive health information. Psychotherapists are not put in the position of having to understand a complex, purpose-based prohibition that applies in only three very confusing situations.[341] Moreover, psychotherapists do not have to understand the complex overlay of federal and state law, including new abortion shield laws, before using or disclosing psychotherapy notes.[342] These same benefits should apply to reproductive health care providers and others who maintain reproductive health information. To implement this approach, HHS should abandon its complex and confusing final rule, including the purpose-based prohibition and the attestation requirement, and simply amend 45 C.F.R. § 164.508(a)(2) to apply not just to psychotherapy notes but also to reproductive health information.[343]

Recall that the psychotherapy note provision does allow a psychotherapist to disclose psychotherapy notes as "required by law."[344] This is the only law

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[339] 45 C.F.R. § 164.508(a)(2) (2023) (listing the limited situations in which psychotherapy notes may be used or disclosed without patient authorization).

[340] *Id.* § 164.508(a)(1), § 164.508(1), (2) (setting forth the core elements and required statements that must be included in a HIPAA-compliant authorization form).

[341] HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 89 Fed. Reg. at 33063 (Apr. 26, 2024) (to be codified at 45 C.F.R. pts. 160, 164) (adding new 45 C.F.R. § 164.502(a)(5)(iii)(B)(1), (2), and (3)).

[342] *See supra* note 250 and accompanying text.

[343] 45 C.F.R. § 164.508(a)(2).

[344] *Id.* § 164.508(a)(2)(ii).

enforcement exception out of the six exceptions that apply to reproductive health information that also applies to psychotherapy notes. [345] The Privacy Rule defines "as required by law" to include disclosures demanded pursuant to a court order.[346] The result is that a covered psychotherapist may disclose psychotherapy notes pursuant to a court order without violating the HIPAA Privacy Rule. Because a law enforcement officer in a state like North Dakota, Idaho, Oklahoma, Texas, or Kentucky could easily obtain a court order demanding an abortion provider to disclose reproductive health information, including information relating to a lawful abortion or a natural pregnancy outcome, further amendment of the psychotherapy note provision (which would be newly extended to reproductive health information) will be needed.

Here, 42 C.F.R. Part 2 (Part 2) is instructive. Remember that Part 2 heavily restricts the situations in which a Part 2 Program may disclose SUD treatment records pursuant to a court order.[347] For example, the crime that the individual is suspected of violating must be a major crime such as homicide, rape, kidnapping, armed robbery, or assault with a deadly weapon.[348] Even when a patient who is receiving SUD treatment admits to behavior (for example, drug possession, drug trafficking, driving while impaired) that violates the laws of the state in which the behavior occurred and in which the patient is receiving treatment, the Part 2 Program is prohibited from releasing information pursuant to the court order unless the patient's admission relates to a major crime.[349] Again, the theory behind this provision is to encourage the individual to seek and obtain treatment and to trust their health care providers.[350] To do this, Part 2 subordinates law enforcement to health information confidentiality.

The approach taken by the Substance Abuse and Mental Health Services Administration (SAMHSA) in Part 2 with respect to SUD records should be layered on top of the approach taken by HHS in the HIPAA Privacy Rule with respect to psychotherapy notes. That is, in addition to expanding the application of the psychotherapy note protection provision at 45 C.F.R. § 164.508(a)(2) to reproductive health information, HHS should also apply the limitations of the court order provisions currently codified in Part 2 at 42 C.F.R. §§ 2.63–.66.[351] The result would be that: (1) covered entities would be permitted to use and

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[345] *See id.* § 164.508(a)(2)(ii); § 164.512(f)(1)–(6) (listing the six law enforcement exceptions that apply to non-psychotherapy note PHI, the first of which, at (f)(1), is the "as required by law" exception).

[346] *Id.* § 164.512(f)(1)(ii)(a).

[347] *See supra* Part III.B (discussing Part 2).

[348] 42 C.F.R. § 2.63(a)(2) (2024).

[349] *Id.*

[350] *See* New Provisions to Enhance Confidentiality, *supra* note 292 (stating that ensuring privacy for substance use disorder patients is a priority for the HHS as it seeks to promote treatment).

[351] *See* 45 C.F.R. § 164.508(a)(2); 42 C.F.R. § 2.63–.66 (setting out the court order limitation provisions).

disclose reproductive health information without patient authorization, but only in the same, limited situations that already apply to psychotherapy notes; and (2) because the psychotherapy note provision does allow disclosures pursuant to court orders, covered entities would also be prohibited from using or disclosing reproductive health information pursuant to a court order unless the information related to the commission of a major crime.[352] The borrowed Part 2 provisions could be placed at a new subsection in the HIPAA Privacy Rule after the current psychotherapy notes provision[353] but before the current marketing provision;[354] that is, at a newly created 45 C.F.R. § 164.508(a)(2.5). These amendments would take physicians out of the impossible situation they are in now. Physicians would no longer be forced to risk criminal investigation and prosecution for providing lawful reproductive health care or to risk negligence allegations for refusing to provide or delaying in providing standard-of-care health services.

The re-writes described above do not address all of the confidentiality concerns raised in this Article, however. Still additional amendments are needed. For example, the current HIPAA Privacy Rule only regulates covered entities and business associates.[355] This is because the HIPAA statute signed into law by President Clinton in 1996 limited the application of the Privacy Rule to health plans, health care clearinghouses, and only certain health care providers.[356] Crisis pregnancy centers, mobile health applications, internet search engines, and many other individuals and entities that obtain or maintain reproductive health information fall out of these definitions. Thus, Congress must amend the HIPAA statute to direct HHS to expand the application of the HIPAA Privacy Rule to other individuals and entities that obtain or maintain PHI. Congress has already done this once before. In 2009, Congress directed HHS to amend the HIPAA Privacy Rule to directly regulate business associates.[357] It is time for Congress to expand the application of the HIPAA Privacy Rule again.

CONCLUSION

Using five hypothetical fact patterns, this Article has carefully analyzed the permissibility of using and disclosing PHI, including abortion information,

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[352] *See* 45 C.F.R. § 164.508(a)(2); 42 C.F.R. § 2.63(a)(2) (setting out the rules for when psychotherapy notes may be disclosed).

[353] 45 C.F.R. § 164.508(a)(2).

[354] *Id.* § 164.508(a)(3).

[355] *See supra* notes 57–70 and accompanying text.

[356] *See* Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, § 261 110 Stat. 1936, 2021–23 (1996) (stating that the HIPAA Administrative Simplification Rules only apply to "[a] health plan," "[a] health care clearinghouse," or "[a] health care provider who transmits any health information in electronic form in connection with a [standard] transaction").

[357] *See supra* note 162 and accompanying text (explaining that ARRA directed HHS to also regulate business associates).

for law enforcement activities before and after HHS's new final rule. Although the final rule improves the confidentiality of some individuals who seek reproductive health care in some situations, the final rule continues to subordinate patient confidentiality to law enforcement in other situations. This regulatory subordination undermines the physician-patient relationship; discourages or delays individuals from seeking health care; disproportionately impacts racial and ethnic minorities, individuals with disabilities, individuals of low socioeconomic status, and other marginalized individuals; and places physicians in an impossible predicament that endangers lives.

The HIPAA Privacy Rule must be re-written in a way that supports the health, safety, and welfare of all individuals seeking reproductive health care and that protects the medical decision making of treating physicians. This Article has offered and has justified additional amendments to the HIPAA Privacy Rule. This Article also provides direction for HHS to use in implementing these amendments. If adopted by HHS, these amendments will improve the health, safety, and welfare of individuals seeking reproductive health care and support the medical decision making of professionals who provide such care.

This Article focuses on amending the HIPAA Privacy Rule, which is the subject of HHS's April 2024 final rulemaking. It goes without saying that solutions outside the HIPAA Privacy Rule must be considered as well. For example, many states have enacted new consumer data protection laws that have broad applicability and that could be amended to specifically protect reproductive health information.[358] Some states have enacted new abortion shield laws that bolster the federal protections described in this Article.[359] Other states should be encouraged to do so as well. Congress has repeatedly tried to enact broad data privacy legislation that would apply to non-HIPAA covered entities inside and outside the context of reproductive health care.[360] For example, the federal My Body, My Data Act would forbid regulated entities from collecting, retaining, using, or disclosing "personal reproductive or sexual health information" unless the individual who is the subject of the PHI gives "express consent."[361] The only exception that would apply is when the information collection, retention, use, or disclosure "is strictly necessary [for the regulated entity] to provide a [requested] product or service" to the individual who is the subject of the PHI.[362] To date, this bill and other, similar, federal data privacy bills have not been successful. Congress should continue to try to enact legislation

[358] *See generally* Tovino, *Confidentiality over Privacy*, *supra* note 17 (discussing the application of state consumer data protection laws).

[359] *See generally Abortion Policy in the Absence of* Roe, *supra* note 124 (reporting the number of states that have abortion shield laws that protect abortion providers and, in some cases, individuals who support patients, from the reach of out-of-state abortion restrictions and bans).

[360] *See, e.g.*, My Body, My Data Act of 2022, H.R. 8111, 117th Cong. (2022).

[361] *Id.* § 2(a)(1).

[362] *Id.* § 2(a)(2).

specifically designed to protect the confidentiality of individuals seeking reproductive health care. The Federal Trade Commission (FTC) also should continue to enforce the laws over which it has jurisdiction, including laws that prohibit false confidentiality promises.[363]

Solutions offered by the Author in prior works also should be reiterated here. For example, HHS and state agencies must vigorously enforce existing health information confidentiality laws at the federal and state levels.[364] By further example, HHS should launch a "HIPAA Reproductive Health Information Initiative" that would commit HHS and the Department of Justice to the prompt identification, investigation, and enforcement of HIPAA Privacy Rule violations in the context of reproductive health information.[365] In addition, HHS should publicize HIPAA Privacy Rule provisions that allow any person, not just the patient who is the subject of reproductive health information wrongly used or disclosed, to complain to the government.[366] HHS also should promulgate regulations allowing private parties who assist HHS in identifying violations of the HIPAA Privacy Rule to receive a percentage of any settlement amount or civil money penalty imposed by HHS.[367] Finally, HHS should implement a private right of action, allowing individuals harmed by HIPAA Privacy Rule violations to sue for damages, rather than just complain to the federal government.[368] These measures, taken together with the solutions offered in this Article, are necessary given law enforcement's increased interest in reproductive health information post-*Dobbs*.

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[363] *See generally* Tovino, *Going Rogue*, *supra* note 55 (discussing FTC enforcement actions involving broken confidentiality promises).

[364] *See* Tovino, *Confidentiality over Privacy*, *supra* note 17, at Part II.A (discussing FTC enforcement of laws prohibiting false confidentiality promises).

[365] *See id.* (advocating for enforcement of existing laws).

[366] *See id.* (arguing for increased publicization of HIPAA rules which would allow third party complaints to the government for violation of patient rights).

[367] Tovino, *A Timely Right to Privacy*, *supra* note 55, at Part IV.

[368] *See id.* at Part V (proposing a private right of action).