



June 16, 2023

BY ELECTRONIC SUBMISSION

Health & Human Services Department
Office of Civil Rights
200 Independence Avenue SW
Washington, DC 20201

Re: Request for Public Comment Concerning Proposed Rule on the HIPAA Privacy Rule To Support Reproductive Health Care Privacy; RIN 0945-AA20

Dear Sir or Madam:

The Ethics & Religious Liberty Commission (ERLC) of the Southern Baptist Convention (SBC) respectfully submits the following comments regarding our concerns with the proposed rule “HIPAA Privacy Rule To Support Reproductive Health Care Privacy.”

The ERLC is the public policy and ethics entity for the SBC, which has over 13 million members in roughly 50,000 churches and congregations in the United States. We are charged by the SBC with addressing public policy affecting such issues as religious liberty, marriage and family, the sanctity of human life, and human dignity.

The stated intention of this NPRM is to “modify existing standards permitting uses and disclosures of protected health information (PHI) by limiting uses and disclosures of PHI for certain purposes where the use or disclosure of information is about reproductive health care that is lawful under the circumstances in which such health care is provided.” The agency claims that due to the decision in *Dobbs v. Jackson Women's Health Organization*, it is “more likely than before that individuals' PHI may be disclosed in ways that cause harm to the interests that HIPAA seeks to protect.”

The ERLC is concerned that the NPRM conflates abortion, which ends the life of a preborn child, with health care for women.

The ERLC affirms that God created every person—male and female—in His own image endowed with equal value and dignity. We also affirm that every life is worthy of protection. Life begins at conception and abortion denies precious human lives both personhood and protection. The Bible is clear that every person is made in the image of God – including the preborn – and his knowledge of these lives even precedes the creative act of conception (Jeremiah 1:5; Psalm 139:13). Every human being, no matter their stage of development, abilities, or circumstances of their conception, bears God’s image and has, therefore, been given immeasurable value.



Abortion denies the preborn child their inherent human rights, given to them by God and memorialized in documents like the U.S. Constitution and the United Nations Universal Declaration of Human Rights. The latter states, “Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.”¹

The ERLC also affirms the inherent value and dignity of women. We recognize that women need access to high quality healthcare, including care for reproductive health and pregnancy.

Yet, we reject the premise that abortion is health care. Health care preserves human life while abortion ends it. To conflate the two is unjust to both the preborn children whose life the procedure ends, and the dignity and health of the mothers who carry the lives in their wombs.

Protecting vulnerable life should be a top priority of any just government. Government’s basic duty is to protect human life from bodily harm and provide justice for victims of violence. Abortion robs a child of their most basic right – the right to live, and thus has no place in discussions of healthcare.

The ERLC is also concerned with the NPRM’s attempt to change the term “person” which is currently defined as “natural person, trust or estate, partnership, corporation, professional association or corporation, or other entity, public or private,” to specify that a natural person means “a human being who is born alive.”

As previously stated, human life begins at conception. It is at the moment of conception that the person has inherent dignity and has a life worthy of protection from violence. The Department’s decision to render an entire class of human beings unprotected under the law is tantamount to eliminating legal protections and recognition for other classes of human beings based on age or development.

Additionally, the ERLC is concerned that the NPRM is in conflict with the ruling in *Dobbs v. Jackson Women’s Health Organization*.

The Supreme Court held in *Dobbs* that a presumption of legitimacy should be given to state laws. It held that “the Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion” and thus “returns that authority to the people and their elected representatives.”² By allowing federal employees to interpret state laws and give the presumption of invalidity of entire categories of state laws, the NPRM is in direct conflict with this ruling. The Department’s directive allows federal bureaucrats to be both the judge and jury for how to interpret state law and to make decisions on when such laws should be followed or not.

¹ United Nations. *Universal declaration of human rights*. <https://www.un.org/en/about-us/universal-declaration-of-human-rights>

² *Dobbs v. Jackson Women's Health Organization*, 597 U.S. ___ (2022)



Finally, the ERLC is deeply concerned that the Department’s proposed rule will enable abusers to perpetrate violence towards women and children without accountability.

Generally, HIPAA allows for the disclosure of PHI to a personal representative of the patient unless the covered entity has a reasonable belief that the patient is being abused, neglected or subject to domestic violence or the disclosure is not in the best interest of the patient. However, the NPRM eliminates these exceptions saying that they “do not apply where the primary basis for the covered entity’s belief is the facilitation or provision of reproductive health care by such person for and at the request of the individual.”

This is very disturbing. Abusers may now have access to the private health information of those they are abusing.

This new provision flies in the face of clear Congressional intent in the text of HIPAA, which reads “Nothing in this part shall be construed to invalidate or limit the authority, power, or procedures established under any law providing for the reporting of disease or injury, child abuse...”³ And yet it seems that under the NPRM, if a minor arrives at a clinic for an abortion with their abuser acting as their personal representative, the provider could no longer make the mandatory report to state child protection entities if the evidence for the abuse is discovered in the course of that visit, *and* the provider would still be compelled to give the protected health information to the abuser, thus robbing an innocent preborn child of their right to live *and* protecting an abuser.

HIPAA, in statute, clearly allows for the reporting of abuse. This new rule would interfere with clear congressional intent. In addition to depriving a preborn child of their right to life, criminal activity, such as incest, statutory rape, or trafficking, is often discovered during an abortion. The NPRM competes with mandatory child abuse reporting laws found in most states. Providers will be forced to choose between complying with the new terms of the NPRM or following their mandate to report suspected child abuse. This will undoubtedly have a significant chilling effect on reports of abuse. Relatedly, investigators will no longer be given access to the vital information they need to investigate sexual abuse allegations if the evidence is connected to any “reproductive health care,” as it so often is.

The lives and well-being of vulnerable women and children are not expendable for the sake of the Department’s political agenda surrounding abortion. These survivors of abuse deserve full protection of the law and every possible measure must be allowed to ensure their safety.

Contrary to the claims by the department that post-*Dobbs* it is “more likely than before that individuals' PHI may be disclosed in ways that cause harm to the interests that HIPAA seeks to protect,” it is actually the text of the NPRM that will render harm to individuals in ways that HIPAA was intended to prevent.

³ Health Insurance Portability and Accountability Act, 42 U.S.C. § 1320d-7 (1996)



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The language of the NPRM is far too broad, complex and confusing. It is at odds with both Congressional intent, existing federal and state laws and Supreme Court precedent. For all of these reasons, the ERLC requests that the Department repeal its proposed rule, leaving in place the safeguards found in the original statute.

Thank you for the opportunity to comment.

Respectfully submitted,

Frederick Brent Leatherwood
President
Ethics & Religious Liberty Commission
of the Southern Baptist Convention