# Inadequate Privacy: The Necessity of HIPAA Reform in a Post-*Dobbs* World

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## INTRODUCTION[1]

After a year and a half of fertility treatments, the Zurawskis, a young couple in Texas, were overjoyed to learn they were having a baby.[2] But, eighteen weeks into her pregnancy, Amanda Zurawski's water broke.[3] As a result, Amanda's body began expelling a significant amount of amniotic fluid, and her cervix began to dilate fully twenty-two weeks before term.[4] The Zurawskis were told that their baby, a daughter they had named Willow, would inevitably die and that no medical intervention could save her.[5] However, although Amanda was at high risk for a life-threatening infection due to her water breaking, Willow still had a heartbeat.[6] Under Texas state law, doctors were unable to terminate the already failing pregnancy, even to save Amanda's life.[7]

For Amanda, the doctors' hesitancy resulted in them sending her home to watch for signs of infection and only returning for termination or inducement when she was so ill that her life would be considered "at risk."[8]

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1. For clarity and readability, I will primarily refer to those who receive abortions using gendered terms for women, i.e., women, mother, female (when discussing clinical attributes), etc. Efforts will be made to use gender-neutral language when possible to fully encompass all those impacted by the implications of *Dobbs.* When gendered language is necessary for the sake of clarity and brevity, please know that I intend to, at the very least, implicitly include all those of different identities in this discussion.

2. Elizabeth Cohen & John Bonifield, *Texas Woman Almost Dies Because She Couldn't Get an Abortion*, CNN (Nov. 16, 2022), https://www.cnn.com/2022/11/16/health/abortion-texas-sepsis/index.html [https://perma.cc/9Z2K-RYWU].

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* Notably, the law in Texas also prevented the doctors from inducing Amanda, i.e., using medicine to cause Amanda to go into labor as this would be considered a termination as well. *Id.*

8. *Id.*

Because this process could take anywhere from hours to weeks, the Zurawskis chose to stay at home rather than travel to another state as the nearest sanctuary state where Amanda could receive an abortion was at least an eight-hour drive away.[9] If Amanda had developed sepsis in those few hours, she would have died before reaching the other state.

Three days after her water broke, Amanda became severely ill, becoming too weak to even walk on her own.[10] At that time, doctors felt it was legally safe to terminate her pregnancy.[11] But, twelve hours after they terminated Amanda's pregnancy, Amanda developed symptoms of sepsis that refused to respond to antibiotics or a blood transfusion, and her family feared that she would die.[12] Although doctors ultimately saved her via an IV near her heart, Amanda's uterus was severely scarred from the infection, leaving her potentially without the ability to ever conceive again.[13]

Amanda's story is the consequence of restrictive abortion laws that prevent medical providers from acting swiftly in response to a patient's miscarriage or ectopic pregnancy. The current law in Texas amounts to a near-total ban on abortions, holding that "[a] person may not knowingly perform, induce, or attempt an abortion."[14] The law provides a limited exception when the mother "has a life-threatening physical condition aggravated, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function."[15] However, in all other cases, the individual performing an abortion can face severe penalties, including loss of medical license, civil penalties of $100,000 or more, and criminal penalties of up to life in prison.[16] The unclear exception and steep penalties, if misinterpreted, may make medical providers wary of providing any medical treatment that could constitute an abortion.

Amanda's story is not unique, and without more legal guardrails to protect these women and medical providers, her story will likely become

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9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* On March 6, 2023, the Center for Reproductive Rights filed a lawsuit against the state of Texas with Amanda Zurawski as the named plaintiff. Zurawski v. State of Texas, CTR. FOR REPROD. RTS. (Mar. 6, 2023), https://reproductiverights.org/case/zurawski-v-texas-abortion-emergency-exceptions/zurawski-v-texas/ [https://perma.cc/B474-RY68]. The lawsuit is on behalf of five women, including Amanda, who were denied abortion care even while facing severe pregnancy complications, in addition to two OB-GYNs who were unable to provide proper care due to Texas's restrictive abortion laws. *Id.*

14. H.R. 1280, 87th Leg., Reg. Sess. (Tex. 2021) (enacted).

15. *Id.*

16. *Id.*; Cohen & Bonifield, *supra* note 2.

more and more common.[17] This trend is especially alarming considering that around 26% of all pregnancies will end in miscarriage.[18] For women like Amanda and many others who will become pregnant in the future, miscarriages or complications associated with self-induced abortions could present life-threatening risks if providers are legally blocked from intervening due to confusing legal exceptions and the threat of legal consequences if authorities discover a violation. These potential threats, which may prevent medical providers from acting in their patients' best interests, could be reduced if the protected health information (PHI) associated with the treatment of miscarriages was better protected.

The Health Information Portability and Accountability Act (HIPAA), as it is currently understood, fails to adequately protect PHI associated with these treatments from the many exceptions included in the Act. Specifically, by failing to adequately protect PHI, law enforcement may access information that *could* indicate a self-induced abortion, which is now illegal in many states due to the overturning of *Roe v. Wade* by *Dobbs v. Jackson*. Furthermore, such access may discourage physicians from treating incomplete miscarriages or ectopic pregnancies if the fetus still has a heartbeat or if the mother's health has not sufficiently declined. If PHI is adequately protected for patients seeking treatment for a miscarriage, ectopic pregnancy, or even self-induced abortions, that information would no longer be available through any loophole. This bar against nonconsensual disclosure would protect those individuals from legal harm and allow them to retain their privacy while empowering physicians to act and treat quickly in these cases.

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17. *See, e.g.*, Elizabeth Cohen & Danielle Herman, *Ohio's New Abortion Law Forces Doctor to Fight to Protect Her Patient's Life*, CNN (Sept. 22, 2022), https://www.cnn.com/2022/09/22/health/ohio-abortion-patient-doctor/index.html [https://perma.cc/Y8KR-EGKQ]; Elizabeth Cohen & Danielle Herman, *Why a Woman's Doctor Warned Her Not to Get Pregnant in Texas*, CNN (Sept. 10, 2022), https://www.cnn.com/2022/09/09/health/abortion-restrictions-texas/index.html [https://perma.cc/C8Y4-FLGS]; Elizabeth Cohen, Danielle Herman & John Bonifield, *In Some States, Doctors Weigh 'Ruinous' Litigation Against Proper Care for Women Who Have Miscarriages*, CNN (July 20, 2022), https://www.cnn.com/2022/07/20/health/doctors-weigh-litigation-miscarriage-care/index.html [https://perma.cc/4FLP-64PU]; Rachel Sharp, *Woman Left to Bleed for 10 Days from Incomplete Miscarriage After Being Turned Away by Hospital Post-*Roe, INDEPENDENT (July 17, 2022), https://www.independent.co.uk/news/world/americas/wisconsin-miscarriage-roe-v-wade-abortion-b2125168.html [https://perma.cc/J8NS-TTA7].

18. Carla Dugas & Valori H. Slane, *Miscarriage*, NAT'L LIBR. MED. (June 27, 2022), https://www.ncbi.nlm.nih.gov/books/NBK532992/ [https://perma.cc/S82H-VRBL]. Additionally, "about 1 pregnancy in 100 at 20 weeks of pregnancy and later is affected by stillbirth" which is "the death of a baby before or during delivery" and commonly used to define pregnancy loss "at 20 weeks of pregnancy and later." *Pregnancy and Infant Loss*, CDC (Sept. 30, 2022), https://www.cdc.gov/ncbddd/stillbirth/features/pregnancy-infant-loss.html [https://perma.cc/S79X-KMF4].

In order for PHI to be adequately protected in these cases, HIPAA must be reformed. Due to the "closed-circuit" nature of administrative rulemaking and reform, this avenue provides the most expedient and perhaps effective means of instituting protections for abortion providers and pregnant people alike that would apply federally. In the wake of *Dobbs*, it is imperative that the Department of Health and Human Services amend HIPAA to prevent *any disclosure exceptions* for reproductive healthcare.

Part I of this Comment will provide an overview of HIPAA and the legal impacts of *Dobbs*. Part II will discuss the anticipatory response to the impacts of *Dobbs* on PHI by addressing the response from (1) the states, (2) the Biden Administration, and (3) the medical field. Part III will discuss the loopholes that exist in HIPAA and further address the potential impacts on individuals and the medical field if reform does not occur. Finally, Part IV will argue that the reform of HIPAA is the best avenue for protecting PHI related to reproductive healthcare.

## I. HIPAA & *DOBBS*: AN OVERVIEW

### *A. The Health Insurance Portability and Accountability Act of 1996*

In 1996, Congress enacted significant health privacy legislation in the form of the Health Insurance Portability and Accountability Act (HIPAA), the purpose of which was "to assure that individuals' health information is properly protected while allowing the flow of health information needed to provide and promote high quality health care and to protect the public's health and well being."[19] HIPAA, as enacted, required the Secretary of the Department of Health and Human Services (HHS) to promulgate privacy regulations pertinent to HIPAA if Congress failed to enact privacy legislation within three years of its passage.[20] Because Congress did not, HHS developed the regulatory form of HIPAA, the Privacy Rule, which it then published at the end of 2000.[21] Later on, in 2002, HHS proposed and ultimately published modifications to the Privacy Rule.[22]

19. Office for Civil Rights, *Summary of the HIPAA Privacy Rule*, DEP'T HEALTH & HUM. SERVS. (Sept. 15, 2022), https://www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html [https://perma.cc/X9TX-QZ37]; 45 C.F.R. §§ 160, 164.

20. Office for Civil Rights, *supra* note 19.

21. *Id.* HHS additionally developed a second regulatory form of HIPAA – the Security Rule, published in 2003, which created national standards for the privacy and security of electronic protected health information. Office for Civil Rights, *Summary of the HIPAA Security Rule*, DEP'T HEALTH & HUM. SERVS. (Oct. 19, 2022), https://www.hhs.gov/hipaa/for-professionals/security/laws-regulations/index.html [https://perma.cc/4ZWG-35PC]. The Security Rule will not be discussed in this Comment.

22. Office for Civil Rights, *supra* note 19.

The Privacy Rule created certain standards regarding the use and disclosure of individuals' health information, or "protected health information" (PHI), by any "covered entities."[23] It also created certain "standards for individuals' privacy rights to understand and control how their health information is used."[24] More specifically, the Rule "protects all 'individually identifiable health information' held or transmitted by a covered entity or its business associate, in any form or media."[25] Although such protection appears quite sweeping in nature, the Rule allows certain exceptions that permit the disclosure of PHI even without the patient's consent. Such exceptions broadly allow for this disclosure for the following purposes or situations:

> (1) To the Individual (unless required for access or accounting of disclosures); (2) Treatment, Payment, and Health Care Operations; (3) Opportunity to Agree or Object; (4) Incident to an otherwise permitted use and disclosure; (5) Public Interest and Benefit Activities; and (6) Limited Data Set for the purposes of research, public health or health care operations. [However, c]overed entities may rely on professional ethics and best judgments in deciding which of these permissive uses and disclosures to make.[26]

For the purposes discussed here, the most important of those exceptions is the one made for Public Interest and Benefit Activities, specifically for disclosures required by law and for law enforcement purposes.[27]

For law enforcement purposes, covered entities may disclose PHI: (1) as required by law; (2) to identify or locate a person of interest; (3) in response to a law enforcement official's request for information about a victim or suspected victim of a crime; (4) to alert law enforcement of a person's death if suspected to be caused by criminal activity; (5) when it believes that PHI is evidence of a crime that occurred on its premises; and (6) "by a covered health care provider in a medical emergency not occurring on its premises, when necessary to inform law enforcement

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23. *Id.* "Covered entities" include any organizations subject to the Privacy Rule, including but not limited to, health plans, health care clearinghouses, and any health care provider who transmits health information in electronic form in connection with transactions for which the Secretary of HHS has adopted standards under HIPAA. *Id.*

24. *Id.*

25. *Id.* "Individually identifiable health information" includes any information, including demographic data, that relates to health conditions, health care, or payment for healthcare and "that identifies the individual or for which there is a reasonable basis to believe it can be used to identify the individual." *Id.*

26. *Id.*

27. Specifically, "[c]overed entities may use and disclose protected health information without individual authorization as required by law (including by statute, regulation, or court orders)." *Id.*

about the commission and nature of a crime, the location of the crime or crime victims, and the perpetrator of the crime."[28]

Although these exceptions are arguably reasonable, they nevertheless present a significant opportunity for confusion, misinterpretation, and even abuse by the authorities due to the flexibility and broadness they may permit. This certainly appears to be the case in the wake of *Dobbs v. Jackson Women's Health Organization*, which effectively allowed states to create a new class of criminals and victims by optionally criminalizing conduct intimately tied to healthcare.

### *B.* Dobbs v. Jackson Women's Health Organization

On June 24, 2022, the Supreme Court overturned nearly fifty years of precedent in its holding in *Dobbs v. Jackson Women's Health Organization.*[29] Writing for the Court, Justice Alito stated that the issue of abortion must be returned "to the people's elected representatives."[30] In doing so, the Court returned the issue of abortion to the states, allowing each state to enact its own legislation regarding the regulation of abortion. Prior to *Dobbs*, abortion was a legally protected right under the holdings of *Roe v. Wade* and *Planned Parenthood v. Casey*.[31]

#### 1. Precedent

Under *Roe v. Wade*, criminal abortion statutes were generally found to be in violation of the Fourteenth Amendment's Due Process Clause.[32] The Court held that:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.
>
> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.
>
> (c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in

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28. *Id.*; 45 C.F.R. § 164.512(f).
29. Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022).
30. *Id.* at 2243.
31. Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).
32. *Roe*, 410 U.S. at 164.

> appropriate medical judgment, for the preservation of the life or health of the mother.[33]

Furthermore, Justice Blackmun, writing for the Court, specifically stated that "[u]p to [the point of viability], the abortion decision in all its aspects is inherently, and primarily, a medical decision, and basic responsibility for it must rest with the physician."[34]

This holding was later distinguished in *Casey*, in which the Court held that "the essential holding of *Roe v. Wade* should be retained and once again reaffirmed" but added that states could regulate abortion to protect their interest in potential life so long as those regulations did not introduce an undue burden on abortion seekers.[35] The Court specifically stated that "[a]n undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability."[36]

### 2. New Law

However, in the wake of *Dobbs*, such protections have ceased to exist. The opinion opened the door for state bans that criminalize abortion with penalties for the abortion provider, mother, or both.[37] In its opinion, the Court stated that "*Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision."[38] Using Justice Scalia's dissent from *Casey*, the Court reasoned that "[t]he permissibility of abortion, and the limitations, upon it, are to be resolved like most important questions in our democracy: by citizens trying to persuade one another and then voting."[39]

In doing so, *Dobbs* effectively allows states to pass any limitation on abortion that they would like, as no protection for abortion now exists federally. In the most severe case, *Dobbs* would allow states to completely ban abortion, including when necessary to save the mother's life. However, due to the gray area that exists around abortions, miscarriages, and ectopic pregnancies, any law limiting abortion is a potential threat to the treatment of both miscarriages and ectopic pregnancies.

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33. *Id.* at 164–65.
34. *Id.* at 166.
35. *Casey*, 505 U.S. at 846, 878.
36. *Id.* at 878.
37. *After* Roe *Fell: Abortion Laws by State*, CTR. FOR REPROD. RTS., https://reproductiverights.org/maps/abortion-laws-by-state/ [https://perma.cc/WX98-6VCE].
38. Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228, 2242 (2022).
39. *Id.* at 2243 (quoting *Casey*, 505 U.S. at 979 (Scalia, J., concurring in judgment in part and dissenting in part)).

## II. THE ANTICIPATORY RESPONSE TO THE IMPACTS OF *DOBBS* ON PHI

In response to *Dobbs*, institutions throughout the United States prepared for the onslaught of new restrictions on abortion and harm to those seeking reproductive healthcare. The criminalization of abortion creates the potential for a different interpretation of what constitutes PHI in relation to abortions or even miscarriages.[40] In a nutshell, if abortion is criminalized, this may open up the applicability of HIPAA exceptions for statutory and law enforcement purposes.

### *A. The States' Responses: Specific Legislation That Criminalizes Abortion*

As of December 2022, thirty-four states have laws that place at least some restrictions on abortion, of which twelve currently have near-total abortion bans in effect.[41] Two other states stopped providing abortions entirely due to the lack of clarity surrounding the law and the closure of abortion clinics.[42] In these fourteen states alone, 17.8 million women of reproductive age can no longer access abortion care.[43] Additionally, seven states introduced or enforced gestational age bans, including ones that banned abortion after six weeks into a pregnancy.[44] These bans and limits force women to travel out of state or self-manage their own abortion, both of which may violate state law.

For example, the ban currently in effect in Tennessee, the Tennessee Human Life Protection Act, is a "near-total abortion ban" that criminalizes

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40. For the purposes of this discussion, "miscarriage(s)" and "spontaneous abortion(s)" will be used interchangeably. Both mean the same thing; however, miscarriage is more of a colloquial term while spontaneous abortion is more medically accurate. *Miscarriage*, CLEVELAND CLINIC (July 19, 2022), https://my.clevelandclinic.org/health/diseases/9688-miscarriage [https://perma.cc/N9FP-GHG5].

41. *State Policy Trends 2022: In a Devastating Year, US Supreme Court's Decision to Overturn* Roe *Leads to Bans, Confusion and Chaos*, GUTTMACHER INST. (Dec. 19, 2022), https://www.guttmacher.org/2022/12/state-policy-trends-2022-devastating-year-us-supreme-courts-decision-overturn-roe-leads [https://perma.cc/EQK9-N2GM]. The twelve states with a near-total abortion ban in effect include Alabama, Arkansas, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Oklahoma, South Dakota, Tennessee, Texas, and West Virginia. *Id.* The remaining twenty-two states with at least some restrictions on abortion include (from least to most restrictive) Delaware, Michigan, Minnesota, Montana, Nevada, New Hampshire, Rhode Island, Virginia, and Wyoming (which place minimal restrictions on abortion, such as parental consent for minors and bans after fetal viability); Florida, Kansas, Indiana, Iowa, Nebraska, North Carolina, North Dakota, Ohio, Pennsylvania, South Carolina, Utah, and Wisconsin (which place restrictive limitations on abortion, such as bans after fifteen weeks, requirements that medication abortions be provided in person only, and regulations which place heavy burdens on abortion clinics); and Arizona and Georgia (which place very restrictive limitations on abortion, such as bans after six weeks). *Id.*

42. *Id.*

43. *Id.* This number only accounts for women of reproductive age, as the available data does not account for transgender and gender-nonconforming individuals. *Id.*

44. *Id.*

all abortion, only providing an exception for a licensed physician when "necessary to prevent the death of the pregnant woman or to prevent serious risk of substantial and irreversible impairment of a major bodily function" as an affirmative defense that must be proved by a preponderance of the evidence.[45] This exception is further limited by an included clause that requires that the provider only terminate the pregnancy "in such a way that 'provides the best opportunity for the unborn child to survive.'"[46]

In contrast, many other states reactively passed protective measures for abortion, with more abortion protections being enacted in 2022 than any other previous year.[47] These laws either provided funding for abortion; protected safe access to clinics; increased confidentiality for abortion providers; or acted as "shield laws" that protect against criminal investigations of providers and patients who may have been involved in an abortion.[48] Finally, voters in six states passed or rejected ballot initiatives related to abortion access, ultimately protecting abortion access in all those states.[49]

Regardless of these efforts, the ultimate impact of *Dobbs* on state legislation is severe. Generally, 58% of women of reproductive age live in states hostile to abortion rights.[50] Thus, these restrictions may harm the lives and well-being of 40 million people in the United States alone.[51] Furthermore, any restrictions that limit abortion beyond fifteen weeks gestation will likely have significant consequences, as 54,000 to 63,000 abortions occur after fifteen weeks of pregnancy every year.[52] Unfortunately, these impacts are likely to impact poor women of color the most since 75% of U.S. abortion patients live in poor or low-income households, and 61% are people of color.[53]

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45. Jessica Winter, *The* Dobbs *Decision Has Unleashed Legal Chaos for Doctors and Patients*, NEW YORKER (July 2, 2022), https://www.newyorker.com/news/news-desk/the-dobbs-decision-has-unleashed-legal-chaos-for-doctors-and-patients [https://perma.cc/Z9AB-HFWW] (quoting S.R. 1257, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019) (enacted)). Notably, this standard is higher than that required for a self-defense claim which places the burden of proof on the State to disprove the claim. *Id.*

46. *Id.* (quoting S.R. 1257, 111th Gen. Assemb., Reg. Sess. (Tenn. 2019) (enacted)).

47. *State Policy Trends 2022*, *supra* note 41.

48. *Id.*

49. *Id.*

50. Roe v. Wade *Overturned: Our Latest Resources*, GUTTMACHER INST. (2022), https://www.guttmacher.org/abortion-rights-supreme-court [https://perma.cc/K89C-UB9P].

51. *Id.*

52. *Id.*

53. *U.S. Abortion Patients*, GUTTMACHER INST. (May 9, 2016), https://www.guttmacher.org/infographic/2016/us-abortion-patients [https://perma.cc/B5JB-RPGC].

### *B. The Biden Administration's Response: HIPAA Clarification*

#### 1. Initial Response

As an immediate response to *Dobbs*, President Biden and HHS Secretary Xavier Becerra "called on HHS agencies to take action to protect access to sexual and reproductive health care, including abortion, pregnancy complications, and other related care."[54] In this call, Secretary Becerra expressed that he would direct the Office for Civil Rights within HHS to both guarantee privacy for patients seeking reproductive health care as well as their providers and further consider additional ways to protect access to reproductive health care.[55]

In response to this urging and the lack of clarity and confusion surrounding what now constitutes PHI in states where abortion is criminalized, the Biden Administration and HHS released information clarifying what information is protected and what may be disclosed.[56] Although HHS stated that HIPAA "supports [access to abortions] by giving individuals confidence that their [PHI], including information relating to abortion and other sexual and reproductive health care, will be kept private," the Privacy Rule is still unlikely to provide sufficient protection for PHI related to abortion care.[57]

HHS routinely emphasized that for disclosures required by law, disclosures for law enforcement purposes, and disclosures to avert a serious threat to health or safety, the Privacy Rule "permits but does not require" a covered entity to disclose PHI in most cases.[58] It further elaborated that providers concerned about obligations to disclose PHI "concerning abortion or other reproductive health care should seek legal advice regarding their responsibilities under other federal and state laws."[59] Most of the offered guidance seems to seek to offer platitudes and approach the risk of reporting *when permissible* as one of low significance;

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54. Press Release, Dep't of Health & Hum. Serv., HHS Issues Guidance to Protect Patient Privacy in Wake of Supreme Court Decision on *Roe* (June 29, 2022), https://www.hhs.gov/about/news/2022/06/29/hhs-issues-guidance-to-protect-patient-privacy-in-wake-of-supreme-court-decision-on-roe.html [https://perma.cc/Y97T-SXTN].

55. Xavier Becerra, Secretary, Dep't of Health & Hum. Serv., Remarks at the Press Conference in Response to President Biden's Directive Following Overturning of *Roe v. Wade* (June 28, 2022), https://www.hhs.gov/about/news/2022/06/28/remarks-by-secretary-xavier-becerra-at-the-press-conference-in-response-to-president-bidens-directive-following-overturning-of-roe-v-wade.html [https://perma.cc/9LVJ-PVU7].

56. Office for Civil Rights, *HIPAA Privacy Rule and Disclosures of Information Relating to Reproductive Health Care*, U.S. DEP'T HEALTH & HUM. SERVS. (June 29, 2022), https://www.hhs.gov/hipaa/for-professionals/privacy/guidance/phi-reproductive-health/index.html [https://perma.cc/YPH4-D95R].

57. *Id.*

58. *Id.*

59. *Id.*

however, it does offer one brief acknowledgment that "the threat of prosecution may result in negative health outcomes by deterring women from seeking needed care."[60]

While the Biden Administration's response certainly sought to provide comfort to providers and patients, it may have been too hopeful in its outlook. Only five days after the overturning of *Roe*, HHS optimistically stated that *generally,* state laws do not require reporting of self-induced abortions; state fetal homicide laws *generally* do not penalize the individual; and based on this analysis, it is unlikely that the Privacy Rules exceptions regarding child abuse would apply regarding reproductive health.[61]

### 2. Finally, Some Rulemaking

However, the Biden Administration has begun taking more significant steps toward comprehensive protection of PHI related to reproductive health. On April 17, 2023, about ten months post-*Dobbs*, the Biden Administration finally published proposed rulemaking in the Federal Register related to altering the HIPAA Privacy Rule.[62] The proposed rules would clarify the definition of "person" to exclude "a fertilized egg, embryo, or fetus" and prohibit disclosure of PHI related to reproductive healthcare in states where that healthcare is legal, in addition to other changes to the Privacy Rule.[63]

While this proposed rulemaking, if enacted, does fill some of the holes that were previously opened by *Dobbs*, it still does not go far enough because it only applies in situations where abortion or abortion-like-treatment is legal or otherwise explicitly authorized.[64] Thus, it will likely fail to protect individuals who seek miscarriage and ectopic pregnancy treatment in states where abortion is illegal and federal rules, such as the Emergency Medical Treatment and Labor Act (EMTALA), are

60. *Id.* (quoting Brief Amici Curiae, American College of Obstetricians and Gynecologists, et al. at 32, Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022)).

61. *Id.* 45 CFR 164.512(b)(1)(ii) is one of the many exceptions of the Privacy Rule and specifically permits the disclosure of PHI to a "public health authority or other government authority authorized by law to receive reports of child abuse or neglect." *But cf.* Michele Goodwin, *How the Criminalization of Pregnancy Robs Women of Reproductive Autonomy*, 47 HASTINGS CTR. REP. 19, 19–20 (2017) (discussing the way in which child abuse and feticide law have been used to criminally charge women for their conduct during pregnancy).

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

63. *Id.* at 23523.

64. *See* Office for Civil Rights, *HIPAA Privacy Rule Notice of Proposed Rulemaking to Support Reproductive Health Care Privacy Fact Sheet*, U.S. DEP'T HEALTH & HUM. SERVS. (Apr. 25, 2023), https://www.hhs.gov/hipaa/for-professionals/regulatory-initiatives/hipaa-reproductive-health-fact-sheet/index.html [https://perma.cc/MQ76-3DNQ].

insufficient to explicitly authorize it. This is particularly an issue in Texas, where women may be unable to travel to an abortion sanctuary state in time to receive care due to geographic limitations. Furthermore, the gap in the proposed rulemaking around states with abortion bans will likely impact low-income women the most as they are more likely to be unable to travel to an abortion sanctuary state due to a lack of resources. For rulemaking of this type to be adequate and to allow medical providers to provide expedient and proper reproductive healthcare, any proposed rule *must* include explicit protections that apply to states where abortion is illegal as well.

### *C. Congress' Response: Failed Legislation & Reform*

After the draft opinion for *Dobbs* was leaked in May of 2022, democrats in Congress attempted and failed to pass legislation protecting abortion access under the Women's Health Protection Act (WHPA).[65] After failing to pass in the 117th Congress, the WHPA was reintroduced in the House in March 2023.[66] Although members of Congress proposed other abortion protection legislation in 2022, albeit with fewer protections than the WHPA, no vote was taken during that session of Congress.[67] The most prominent alternative to the original WHPA, the Reproductive Choice Act, allowed states to impose restrictions, such as parental notification, and included other exceptions compared to the WHPA.[68] Despite the lack of legislative action on the part of Congress, by the fall of 2022 some legislators began making calls to strengthen HIPAA in response to *Dobbs*. Additionally, as evidenced by the reintroduction of the WHPA, efforts to pass comprehensive legislation to protect abortion rights are ongoing.

In September 2022, three months after HHS released its clarifying guidance on HIPAA, thirty senators called on HHS to alter the language in HIPAA so that it broadly prohibited providers from sharing reproductive PHI without a patient's explicit consent, even in cases of

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65. Deepa Shivaram, *A Bill to Codify Abortion Protections Fails in the Senate*, NPR (May 11, 2022), https://www.npr.org/2022/05/11/1097980529/senate-to-vote-on-a-bill-that-codifies-abortion-protections-but-it-will-likely-f [https://perma.cc/89KR-RNPR].

66. Women's Health Protection Act of 2023, H.R. 12, 118th Cong. (2023).

67. *Id.* Senators Susan Collins (R-ME) and Lisa Murkowski (R-AK) introduced a similar bill in February 2022 which would protect abortion rights federally. *Senators Collins and Murkowski Introduce Bill to Codify Supreme Court Decisions on Reproductive Rights:* Roe v. Wade *and* Planned Parenthood v. Casey, SUSAN COLLINS (Feb. 28, 2022), https://www.collins.senate.gov/newsroom/senators-collins-and-murkowski-introduce-bill-to-codify-supreme-court-decisions-on-reproductive-rights_roe-v-wade-and-planned-parenthood-v-casey [https://perma.cc/KYK8-S8RG].

68. Reproductive Choice Act, S. 3713, 117th Cong. (2022).

requests from law enforcement or in relation to legal proceedings.[69] Per the Senate Committee on Health, Education, Labor, and Pensions (HELP), this push from the senators is in response to state legislators and prosecutors seeking "to enforce . . . abortion bans by investigating women and doctors for seeking and providing abortion care."[70] HELP specifically requested that HHS "update the HIPAA Privacy Rule to broadly restrict regulated entities from sharing individuals' reproductive health information without explicit consent, particularly for law enforcement, civil, or criminal proceedings premised on the provision of abortion care," in addition to strengthening enforcement of HIPAA protections; providing additional education to providers regarding their HIPAA obligations; and working to ensure that patients understand their rights.[71]

At this time, neither HHS nor Secretary Becerra has responded to these requests specifically, although HHS recently published proposed changes to HIPAA that are partially aligned with the requests of HELP.[72] Additionally, like HELP, more legislators have begun taking steps towards attempting to strengthen privacy protections where possible.[73]

### *D. The Medical Field's Response: A State of Confusion*

#### 1. Overview

By and large, *Dobbs* thrust most of the medical community into a state of uncertainty regarding what procedures are legal; what information is protected; and when a provider may intervene to save a pregnant person who is miscarrying but whose fetus may still have a heartbeat.[74] While the legal implications of when and if medical intervention is permissible are significant, all of the issues of medical uncertainty facing the medical field

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69. Press Release, U.S. Senate Comm. on Health, Educ., Lab. & Pensions, Murray Leads 29 Senators in Urging Biden Admin to Strengthen Privacy Protections for Women Seeking Reproductive Health Care (Sept. 13, 2022), https://www.help.senate.gov/chair/newsroom/press/murray-leads-29-senators-in-urging-biden-admin-to-strengthen-privacy-protections-for-women-seeking-reproductive-health-care [https://perma.cc/7MTN-JR7T].

70. *Id.*

71. *Id.* (quoting Letter from Senators, to Secretary Xavier Becerra (Sept. 13, 2022), https://www.vanhollen.senate.gov/download/letter-from-senator-murray-et-al-to-secretary-becerra-re-hipaa-protections-for-reproductive-health-information-220913 [https://perma.cc/MB7L-HZLB]).

72. *See generally* HIPAA Privacy Rule to Support Reproductive Health Care Privacy, *supra* note 62.

73. *See, e.g.*, Press Release, Wash. State, Off. of the Att'y Gen., AG Ferguson, Rep. Slatter, Sen. Dhingra Propose Legislation to Protect Washingtonians' Health Data (Oct. 21, 2022), https://www.atg.wa.gov/news/news-releases/ag-ferguson-rep-slatter-sen-dhingra-propose-legislation-protect-washingtonians [https://perma.cc/8RF3-WQF7]. Although this legislative effort does not address HIPAA (as a federal regulation), it does address increasing data privacy protections as they specifically relate to reproductive health. *Id.*

74. Winter, *supra* note 45.

resulting from *Dobbs* are intimately tied to the question of privacy. The American Medical Association (AMA) expressed that:

> Physicians are committed to protecting . . . patients' privacy—a crucial element for honest health discussions. Yet . . . personal health information is no longer private. With the Supreme Court ruling in *Dobbs v. Jackson Women's Health Organization*, the lack of privacy raises many questions that could put patients and physicians in legal peril. That medical information was previously being siphoned off and monetized was always a concern. Now, it's a legal threat as zealous prosecutors can track patients and access their medical records to determine what medical services were provided. The Supreme Court has created chaos in health care with its irresponsible decision. [We are] working with regulators to protect the patient-physician relationship in the face of so much uncertainty.[75]

Unfortunately, unlike in other fields, uncertainty in the medical field can result in severely negative consequences, such as death. With *Dobbs*, questions regarding the availability and privacy of reproductive health care add a new layer of criminal (and civil) liability if a patient seeks and is granted an abortion.

The issue here is that in the medical field, an abortion does not necessarily mean an elective abortion.[76] Clinically, abortions and miscarriages are typically treated the same, as providers will use the same procedures and medications for both.[77] After *Dobbs*, this overlap in treatment and the penalties for violating any abortion ban has caused "some providers to delay or deny medical care when a patient has a miscarriage."[78]

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75. Press Release, Jack Resneck Jr., President, Am. Med. Ass'n, AMA Welcomes HHS Privacy Guidance in Wake of Dobbs Decision (June 30, 2022), https://www.ama-assn.org/press-center/press-releases/ama-welcomes-hhs-privacy-guidance-wake-dobbs-decision [https://perma.cc/PQ3N-RJMW].

76. For the purposes of this discussion, an elective abortion is one in which a pregnant person makes a voluntary decision to abort a pregnancy. In the medical field, elective abortions are also referred to a "induced abortions" or "therapeutic abortions." Deirdre Kay, *Abortion vs. Miscarriage: Decoding Reproductive Health Care Terminology Post-*Roe, SCARY MOMMY (Aug. 24, 2022), https://www.scarymommy.com/lifestyle/abortion-vs-miscarriage [https://perma.cc/G8YG-JFDC]. In contrast, miscarriages, as described previously are often referred to as "spontaneous abortions" because the body of the pregnant person is effectively aborting the pregnancy. *Id.* Finally, a miscarriage that occurs after twenty weeks of gestational age is referred to as a "stillbirth," "fetal death," or "intrauterine fetal demise." *Id.*

77. Sydney Halleman, Delilah Alvarado, Shaun Lucas & Jasmine Ye Han, *'I don't feel safe.' Abortion Bans Add New Uncertainty to Fertility Treatment*, HEALTHCAREDIVE (Oct. 24, 2022), https://www.healthcaredive.com/news/ivf-roe-v-wade-abortion-bans-fertility-treatments-i-dont-feel-safe/634540/ [https://perma.cc/BE7U-VXUY].

78. *Id.*

Not only do the two treatments overlap, but they both virtually look the same, even in a clinical setting.[79] Even in 2022, there is no empirical way to determine whether some expelled pregnancies are miscarriages or medically induced[80] abortions.[81] Both typically present themselves with symptoms such as cramping, bleeding, and "the eventual passing of the products of conception."[82]

### 2. Miscarriage, abortion, and ectopic pregnancies

Miscarriage is incredibly common, potentially occurring in up to 25% of all *known* pregnancies, though some estimates are as high as 50% across all pregnancies.[83] Although the majority of miscarriages clear by themselves,[84] in some cases, a miscarriage can be incomplete,[85] thereby necessitating[86] medical intervention, often through the same methods used to induce an elective abortion.[87] However, it appears that many providers

79. Jody Ravida, *My Miscarriage Looked Like an Abortion. Today, I Would Be a Suspect*, WASH. POST (June 28, 2022), https://www.washingtonpost.com/outlook/2022/06/28/miscarriage-dobbs-roe-abortion/ [https://perma.cc/P2SG-3GQ7].

80. In this context meaning an abortion induced by prescription medication. Typically, medication abortions are provided via a two-drug regimen with mifepristone and misoprostol, which is used in about half of the legal abortions in the United States. Claire C. Miller & Margot Sanger-Katz, *What Is Mifepristone and How Is It Used?*, N.Y. TIMES (Apr. 21, 2023), https://www.nytimes.com/2023/04/21/us/mifepristone-explainer.html [https://perma.cc/X4RH-9LET]. However, mifepristone is under fire due to lawsuits and legislative bans that threaten to prevent its use. *See, e.g.*, David W. Chen & Pam Belluck, *Wyoming Becomes First State to Outlaw the Use of Pills for Abortion*, N.Y. TIMES (Mar. 17, 2023), https://www.nytimes.com/2023/03/17/us/wyoming-abortion-pills-ban.html?campaign_id=9&emc=edit_nn_20230319&instance_id=88118&nl=the-morning®i_id=171644250&segment_id=128199&te=1&user_id=25e9b7b3936c067e81487c0522c1e9bb [https://perma.cc/PD76-4S9E].

81. *Ravida*, *supra* note 79.

82. *Id.*

83. Linda Searing, *Up to 1 in 4 Known Pregnancies May End in Miscarriage*, WASH. POST (Aug. 2, 2022), https://www.washingtonpost.com/health/2022/08/02/miscarriage-risk-pregnancy/ [https://perma.cc/TKF5-KPHM]. However, this number varies between different studies and sources. *See, e.g.*, Dugas & Slane, *supra* note 18.

84. In this case a miscarriage clearing by itself refers to all the fetal and placental tissues evacuating the body completely. *Miscarriage*, MAYO CLINIC (Oct. 16, 2021), https://www.mayoclinic.org/diseases-conditions/pregnancy-loss-miscarriage/diagnosis-treatment/drc-20354304 [https://perma.cc/9YJF-LU37].

85. An incomplete miscarriage occurs when the fetal and placental tissues "are not completely expelled from the uterus." Ellen W. Clayton, Peter J. Embí & Bradley A. Malin, *Dobbs and the Future of Health Data Privacy for Patients and Healthcare Organizations*, 30 J. AM. MED. INFORMATICS ASS'N 155, 156 (2022).

86. "Removing the remains of the failed pregnancy is often essential to protect the health and life of the woman." *Id.*

87. The most common methods of providing an abortion are medication abortions (typically with mifepristone and misoprostol), and surgical abortions (often with a dilation & curettage procedure, also called a D&C). *Medical Abortion*, U.C. S.F. HEALTH, https://www.ucsfhealth.org/treatments/medical-abortion [https://perma.cc/DQP9-DKT9]; *Surgical Abortion (First Trimester)*, UCLA HEALTH, https://www.uclahealth.org/medical-services/obgyn/family-planning/patient-resources/surgical-

hesitate to provide such care in the wake of *Dobbs* due to the risk of being implicated in what could appear to be an illegal abortion.[88] Furthermore, "women who miscarry increasingly report that clinicians suspect them of seeking or having attempted abortions, further compounding their stress, which if documented in the [electronic health record system] could expose them to condemnation and [both them and] their providers to criminal prosecution."[89]

The same issues that arise regarding the treatment of miscarriages can also occur in relation to ectopic pregnancies. Ectopic pregnancies occur in about 2% of all pregnancies but account for around 10% of pregnancy-related mortality as the most common cause of death in the first trimester.[90] Though a heartbeat can be detected with an ectopic pregnancy, there is no chance of viability for the embryo.[91] In the case of an ectopic pregnancy, delay in treatment can be fatal, with "[m]isdiagnoses or a delay in treatment account[ing] for nearly half of the deaths associated with ectopic pregnancy."[92] Abortion bans, such as those that ban abortions once a heartbeat is detected, create confusion for medical providers around when ectopic pregnancies can be legally treated.[93]

Although the common procedures for treating an ectopic pregnancy do differ from common abortion procedures, like those used in abortions and miscarriage treatment, the treatment still requires the termination of the pregnancy.[94] When language in states' abortion statutes limits *when* providers can intervene regarding medically necessary abortions,

abortion-first-trimester [https://perma.cc/WC2V-Z4PV]. These procedures are virtually the same as first trimester miscarriage treatments. *See* Dugas & Slane, *supra* note 18. However, for both late-term abortions after the first trimester and second trimester miscarriages, patients are typically treated with surgical evacuations (dilation and evacuation, or D&E), though miscarriage treatment may include labor induction instead. *See Understanding Second Trimester Miscarriage*, U.C. DAVIS HEALTH, https://health.ucdavis.edu/obgyn/services/family-planning/trimester_loss.html [https://perma.cc/97KS-TUUR]; *Surgical Abortion (Second Trimester)*, U.C. S.F. HEALTH, https://www.ucsfhealth.org/treatments/surgical-abortion-second-trimester [https://perma.cc/XG78-FPYX].

88. Clayton, Embí & Malin, *supra* note 85, at 156.

89. *Id.*

90. Samantha K. Smith, *There's No Host for an Ectopic Pregnancy*, WASH. POST (Mar. 30, 2017), https://www.washingtonpost.com/news/parenting/wp/2017/03/30/theres-no-host-for-an-ectopic-pregnancy/ [https://perma.cc/6WQP-MHWT].

91. *Id.*

92. *Id.* Even when delayed treatment does not result in death, delayed treatment can give an ectopic pregnancy time to cause the affected fallopian tube to burst, which can result in a loss of fertility. *See id.*

93. *See, e.g.*, *Facts Are Important: Understanding Ectopic Pregnancy*, ACOG, https://www.acog.org/advocacy/facts-are-important/understanding-ectopic-pregnancy [https://perma.cc/69L6-ZW4V].

94. Nuria D. Muñoz & Maria R. Uribe, *How Treatment of Ectopic Pregnancy Fits into Post-*Roe *Medical Care*, POLITIFACT (June 30, 2022), https://www.politifact.com/article/2022/jun/30/how-treatment-ectopic-pregnancy-fits-post-roe-medi/ [https://perma.cc/9PH8-UEN7].

providers may experience confusion and fear, thus delaying treatment.[95] For example, in Texas, some providers delayed treatment of ectopic pregnancies until they ruptured, and one unnamed hospital stopped offering treatment for certain ectopic pregnancies.[96] Similarly, regarding the treatment of miscarriages, some providers wait to see patients until twelve weeks of pregnancy to reduce their likelihood of needing to treat an incomplete or dangerous miscarriage, while others delay treatment until the patient's condition sufficiently worsens.[97] The ultimate result of these providers' caution is that patients are denied timely treatment, a denial that can cause trauma, harm, fear, loss of fertility, and death.

3. Prohibition of best medical practices and trust in the medical field

The abortion laws that cause uncertainty for providers have an additional consequence. By causing providers to fear legal consequences should they treat patients in a way that violates the *language* of the law, providers are unable to provide the best medical practices, thereby harming patients' health and trust in their medical providers. Healthcare professionals, by design, are intended to be "bound by a code of ethics that requires clear understanding of their obligations to patients and the public as well as the provisions of the new laws."[98] However, due to the language of some abortion statutes, a provider's obligation to their patients may conflict with their obligations under the law.

Most prominently, these two interests conflict regarding the common requirement in abortion statutes that "a condition be 'life-threatening to physical health' in order to provide [permissible] abortion care."[99] Modern clinical values "emphasize the need for prevention and disease progression," which cannot be fulfilled if providers are required to wait until a patient's condition meets the standard of being "life-threatening to

95. *See, e.g.*, Caroline Igo, *Are Treatments for Ectopic Pregnancies Affected by the Overturning of* Roe v. Wade*?*, CNET (July 12, 2022), https://www.cnet.com/health/medical/are-treatments-for-ectopic-pregnancies-affected-by-the-overturning-of-roe-v-wade/ [https://perma.cc/KNS7-39J9].

96. Michelle Andrews, *$80,000 and 5 ER Visits: An Ectopic Pregnancy Takes a Toll*, NPR (Oct. 4, 2022), https://www.npr.org/sections/health-shots/2022/10/04/1126594608/ectopic-pregnancy-expensive-new-york [https://perma.cc/RU4X-EL3M].

97. *See, e.g.*, Rosemary Westwood, *Bleeding and in Pain, a Pregnant Woman in Louisiana Couldn't Get Answers*, KHN (Jan. 12, 2023), https://khn.org/news/article/bleeding-and-in-pain-a-pregnant-woman-in-louisiana-couldnt-get-answers/ [https://perma.cc/CK3N-F4XJ]; Frances S. Sellers & Fenit Nirappil, *Confusion Post-*Roe *Spurs Delays, Denials for Some Lifesaving Pregnancy Care*, WASH. POST (July 16, 2022), https://www.washingtonpost.com/health/2022/07/16/abortion-miscarriage-ectopic-pregnancy-care/ [https://perma.cc/79MK-TC4Z].

98. Clayton, Embí & Malin, *supra* note 85, at 156.

99. Jennifer W. Tsai & Hazar Khidir, *Emergency Medical Treatment and Labor Act Is No End-Run Around Abortion Bans*, STAT (Jan. 4, 2023), https://www.statnews.com/2023/01/04/emergency-medical-treatment-labor-act-no-end-run-around-abortion-bans/ [https://perma.cc/5G5D-3MLP].

physical health."[100] The tension between these differing obligations is exacerbated by the fact that abortion laws and regulations do not "provide patients and their doctors guidance on how these arbitrary restrictions can be operationalized in terms of the symptoms patients may experience and the physical signs doctors rely on."[101] The reliance on the law to determine the appropriate clinical symptoms and outcomes for treatment is innately problematic because many lawmakers are ill-equipped to set parameters for circumstances that fall outside their expertise.

The impact of this limiting language is stark. One study of pregnant women at hospitals in Texas found that "rates of 'significant' medical complications were almost twice as high compared to women in similar clinical circumstances residing in states without such abortion laws" due to doctors waiting to treat active miscarriages until the women's conditions became imminently life-threatening.[102] Furthermore, the patients had to wait nine days (on average) for their conditions to *sufficiently* worsen to the point at which doctors could intervene.[103] As a result, 60% of the patients "experience[d] infection, bleeding, admission to intensive care, hospital readmission, or major surgery."[104] If providers could act based on their best judgment and expertise in these cases rather than under the threat of severe legal consequences, patients would likely receive better care, suffer less harm, trust their providers, and likely consume fewer hospital resources.[105]

## IV. THE POTENTIAL IMPACT IF PHI IS NOT PROTECTED

### *A. Broad Impacts*

*Dobbs* brought the looming threat of criminal and civil penalties against physicians, health systems, and patients.[106] In all states that enacted

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100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. This is especially important as providers' actions, taken in an effort to comply with abortion statutes, could potentially be shielded from medical malpractice suits. *See generally Medical Malpractice*, ABA (Sept. 23, 2016), https://www.americanbar.org/groups/public_education/resources/law_issues_for_consumers/everydaylaw0/health_care/personal_injury/medical_malpractice/ [https://perma.cc/8JMP-A7N5]. Therefore, any harms suffered by women due to delayed care may not allow for any legal remedy. Thus, women harmed in such a way would not only be physically harmed but would also be barred from being made legally whole.

106. For example, Texas's law specifically provides that the pregnant person is excluded from criminal penalties; however, it additionally provides that "any person [may] bring a civil action for damages against anyone who helps a woman obtain an abortion." Clayton, Embí & Malin, *supra* note 85, at 155–56.

abortion bans, the statutes penalize abortion providers.[107] Although some states specifically exclude pregnant people from such penalties, many are ambiguous, leaving the door open to liability for the pregnant person as well.[108] Notably, "[p]rosecutors have already sought in some cases to convict women who sought to self-induce abortion, [which suggests] that longstanding practices of prosecuting pregnant women will likely increase."[109]

In cases where physicians or health systems are investigated or intimidated to bring a claim against them or a patient, "the search for evidence of potential legal violations via requests for medical records and related health care information are common."[110] Prior to *Dobbs*, abortion was federally legal and protected, thus preventing any legally valid claim for the disclosure of PHI relating to abortion or miscarriage. However, as abortion bans take effect all over the country, covered entities, including providers, likely will "experience a conflict between their obligations to produce health information when compelled by law and their longstanding obligations to protect physician-patient confidentiality and prevent inappropriate access to [PHI] that could be used to intimidate and prosecute patients and health practitioners."[111]

### *B. HIPAA's Exceptions and the Reporting Loophole*

#### 1. Empowerment of law enforcement to access information

HIPAA provides a significant exception for disclosure of PHI without consent in specific circumstances, such as:

> To report PHI that the covered entity in good faith believes to be evidence of a crime that occurred on the premises of the covered entity[;] To alert law enforcement to the death of the individual, when there is a suspicion that death resulted from criminal conduct[; or] To report PHI to law enforcement when required by law to do so.[112]

107. *Id.* at 155.

108. *Id.* In fact, a woman was arrested in South Carolina in 2023 for inducing her own abortion with pills in 2021; she is currently awaiting trial. Poppy Noor, *South Carolina Woman Arrested for Allegedly Using Pills to End Pregnancy*, GUARDIAN (Mar. 3, 2023), https://www.theguardian.com/us-news/2023/mar/03/south-carolina-woman-arrested-abortion-pills [https://perma.cc/86F9-EH8S].

109. Clayton, Embí & Malin, *supra* note 85, at 155.

110. *Id.*

111. *Id.* at 155–56.

112. DEP'T OF HEALTH & HUM. SERVS., HEALTH INSURANCE PROBABILITY AND ACCOUNTABILITY ACT (HIPAA) PRIVACY RULE: A GUIDE FOR LAW ENFORCEMENT 2, https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/special/emergency/final_hipaa_guide_law_enforcement.pdf [https://perma.cc/HR89-KNK4] [hereinafter A GUIDE FOR LAW ENFORCEMENT].

Although there are no clear instances of this exception being used in relation to abortion, the threat remains. Even further, it has had a real impact on the actions of physicians as the fear of civil and criminal penalties (which could only arise from disclosure) causes confusion for providers and may even prevent them from providing care when medically necessary.[113]

Additionally, the lack of action does not indicate that those actions will not occur. Women have already been prosecuted for pregnancy loss or any actions that could threaten their unborn children.[114] In fact, some scholars have described the early twenty-first century as an "era of maternal policing . . . [that inspires and sometimes requires] medical officials to breach confidentiality in the treatment of pregnant women."[115] In the case of one woman, Regina McKnight, prosecutors used a child abuse law to prosecute her for stillbirth as she had taken an illicit drug during her pregnancy.[116] Although the State never proved that the drug was the cause of the stillbirth, McKnight was sentenced to twenty-two years in prison.[117] Like Amanda's story earlier, McKnight's is not unique given that the State has criminally prosecuted numerous women for loss or harm of a pregnancy in the last two decades even when their actions did not result in any real harm to the pregnancy.[118]

If McKnight's story is any example, then it is not hyperbolic to fear that prosecution against women will arise in states that ban abortions. Thus, actions must be taken to prevent criminal prosecution of women attempting to receive abortion care or who miscarry. This is especially important for women of color whose conduct during pregnancy was already disproportionately criminalized pre-*Dobbs* and who will likely suffer the most severe consequences of both criminalization and lack of access to abortion care post-*Dobbs*.

### 2. Mandatory reporting requirements

As a portion of the law enforcement exception, HIPAA permits and requires disclosure when a provider is required by law to do so.[119] In many cases, these laws will take the form of mandatory reporting requirements. At least forty-one states require reporting for injuries from weapons; at

113. Winter, *supra* note 45.

114. *See generally* Goodwin, *supra* note 61. Additionally, the term "unborn children" is used here rather than "fetus" or any other term as many of these cases of prosecution directly relate to the condition of infants and children *post birth*, rather than their condition while still unborn.

115. *Id.* at 19.

116. *Id.* at 20–21.

117. *Id.* at 21.

118. *See generally id.*

119. A GUIDE FOR LAW ENFORCEMENT, *supra* note 112.

least twenty-three require reporting for injuries from crimes; and at least seven states require reporting for domestic violence.[120] However, all fifty states require reporting for child abuse.[121]

For example, in Alabama, drug tests during pregnancy seem to be routinely disclosed to law enforcement under the mandatory reporting exception as healthcare providers are considered "mandatory reporters," and Alabama considers prenatal drug use child abuse.[122] As a result, 500 women have been charged under Alabama's chemical endangerment law since 2006, most based on hospital drug tests provided to law enforcement.[123] Although the United States Supreme Court previously held that nonconsensual drug tests disclosed to law enforcement are prohibited under the Fourth Amendment, disclosure of consensual drug tests may still be permissible.[124] Thus, the door remains open for mandatory reporting of medical treatments that patients have consented to. As it relates to abortion, these treatments could include medical treatment for a miscarriage or ectopic pregnancy.

## IV. REFORM: THE PROPER RESPONSE TO THREATS AGAINST MEDICAL PRIVACY?

### *A. Why Reform?*

#### 1. Lawmaking vs. rulemaking

Administrative reform presents an easier avenue to enact new legal rules and protections as the rulemaking process for agencies is arguably far easier than the lawmaking process for legislators. Whereas legislators must undergo the introduction of a bill, amending of the bill, etc., which is then all dependent on a majority vote in both houses of the bicameral legislature to pass, agencies need only undergo the process of informal rulemaking.

The informal rulemaking process only requires that an agency (1) provide notice in the Federal Register; (2) allow the public to comment on the proposed rule; (3) respond to comments; and (4) publish the final rule

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120. Eileen F. Baker, John C. Moskop, Joel M. Geiderman, Kenneth V. Iserson, Catherine A. Marco, Arthur R. Derse, ACEPT Ethics Committee, *Law Enforcement and Emergency Medicine: An Ethical Analysis*, 68 ANNALS EMERGENCY MED. 599, 605 (2016).

121. *Id.*

122. *Controversial Practice: Hospitals Test New Moms for Drugs, Without Their Explicit Consent*, ADVISORY BD. (Oct. 6, 2015), https://www.advisory.com/daily-briefing/2015/10/06/hospitals-test-new-moms-for-drugs-without-their-explicit-consent [https://perma.cc/9LU8-36CY].

123. *Id.*

124. Ferguson v. City of Charleston, 532 U.S. 67, 85–86 (2001).

in the Federal Register with a concise statement of basis and purpose.[125] Although the rulemaking agency "must consider and respond to significant comments received during the period for public comment," the agency may still publish and implement a rule even if the comments are overwhelmingly against the proposed rule.[126]

Thus, although the process has arguably become more burdensome in the last few years due to an inundation of required paperwork, the rulemaking process may be more effective in today's partisan environment as it does not need to receive support from those who would oppose increased protections for reproductive healthcare and abortion.

### 2. The risk of rulemaking

Like other sources of law, administrative rules and regulations are subject to judicial review. Thus, they may be blocked by any court with proper jurisdiction if deemed unconstitutional or beyond the scope of Congress's intention. If a rule is reviewed by a court, the court will find it unlawful if it is arbitrary and capricious, an abuse of discretion, or otherwise unlawful.[127] More specifically, a court will find a decision to be arbitrary and capricious if the agency "relied on factors which Congress [did not intend] it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to [available] evidence . . . or is so implausible that it could not be [due] to a difference in view or . . . agency expertise."[128]

Despite the risk of this review, agencies are provided with a heightened standard of deference under the *Chevron Doctrine*.[129] The doctrine applies a two-step analysis to challenges of agency actions. First, it considers "whether Congress has spoken directly to the precise question at issue."[130] Then, if the provision is found to be silent or ambiguous, it considers whether the agency proffered a reasonable construction.[131] In

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125. *See generally* OFF. OF THE FED. REG., A GUIDE TO THE RULEMAKING PROCESS, https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf [https://perma.cc/DK6U-HZSS].

126. Perez v. Mortgage Bankers Ass'n, 575 U.S. 92, 96 (2015). *See generally* NRDC v. EPA, 822 F.2d 104 (1987).

127. 5 U.S.C. § 706(2)(A).

128. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

129. *See generally* Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Essentially, the *Chevron* Doctrine is a legal analysis regarding when the court should give deference to an agency's actions. The doctrine sets out that deference is proper where (1) the agency's action is *not unreasonable*, and (2) "Congress ha[s] not spoken directly to the precise issue at question." *Chevron Deference*, CORNELL L. SCH. LEGAL INFO. INST. (July 2022), https://www.law.cornell.edu/wex/chevron_deference [https://perma.cc/3Z4L-EYZW].

130. *See* Fournier v. Sebelius, 718 F.3d 1110, 1118 (2013) (quoting *Chevron*, 467 U.S. at 842).

131. *Id.*

this case, the agency is given deference regarding its definition and construction of rules. However, if Congress has spoken directly to the precise issue, the agency may only "give effect to the unambiguously expressed intent of Congress."[132]

Thus, if HHS is to undertake reform of HIPAA, it must take special care to only regulate within the bounds of congressional intent. Otherwise, it may risk a judicial roadblock against its enacted regulations.[133]

#### 3. What to Reform?

##### *a. Limiting disclosures to law enforcement*

To reduce the disclosure of PHI related to the treatment of miscarriages, ectopic pregnancies, and self-induced abortions, the language of HIPAA that allows disclosures to law enforcement, particularly under mandatory reporting requirements, must be amended. As the agency responsible for promulgating rules under HIPAA, HHS would be responsible for undertaking the rulemaking process for any proposed changes.

Currently, HHS has proposed changes to HIPAA for the purpose of protecting patients' reproductive health PHI related to legal procedures.[134] The Notice of Proposed Rulemaking for these changes was published on April 17, 2023, with an effective date of sixty days after publication and a compliance period of 180 days after the effective date.[135] Thus, HHS is actively engaging in amending HIPAA and, if this rule can be any example, any changes to HIPAA to protect abortion access and miscarriage treatment could take less than a year to reach full compliance.

As proposed by the U.S. Senate Committee on Health, Education, Labor & Pensions, the most effective reform would require HHS to amend HIPAA "to broadly restrict regulated entities from sharing individuals' reproductive health information without explicit consent, particularly for law enforcement, civil, or criminal proceedings premised on the provision

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132. *Id.* (quoting *Chevron*, 467 U.S. at 842–43)

133. However, the Supreme Court will be taking on a case that challenges the *Chevron* Doctrine in its 2023–2024 session. Emily Birnbaum, Jennifer A. Dlouhy & Greg Stohr, *Supreme Court Takes on Federal Agency Power with* Chevron *Case*, BLOOMBERG (May 3, 2023), https://www.bloomberg.com/news/articles/2023-05-03/supreme-court-has-power-to-gut-federal-agency-authority-in-chevron-case [https://perma.cc/2GFR-MN89]. If *Chevron* is overruled, amending HIPAA would still be within HHS' power, however, any challenge to it (if picked up by the courts) would likely be subject to a heightened, and therefore more challenging, standard of review. Regardless, due to the explicit purpose of HIPAA to protect patients' privacy, this author is hopeful that even without *Chevron*, any reform would still be viewed as decidedly within the power of HHS.

134. HIPAA Privacy Rule to Support Reproductive Health Care Privacy, *supra* note 62.

135. *Id.*

of abortion care."[136] Such a change should be relatively simple regarding changing the language in the Privacy Rule, specifically in comparison to the recently proposed rule to protect against some disclosures of PHI related to reproductive health.

More specifically, HHS should undergo informal rulemaking in order to change the language in the law enforcement exception to the following:

> A covered entity may use or disclose protected health information, *with the exception of reproductive health information,* without the written authorization of the individual . . . or the opportunity for the individual to agree or object as described . . . in the situations covered by [the exceptions provided in law] . . . . *Reproductive health information may only be used and disclosed with an individual's express authorization*.[137]

Though small, this change would effectively close the loophole that allows for nonconsensual disclosure of PHI related to reproductive healthcare and abortion, including treatment of miscarriages. Furthermore, it could act as a bar against forced disclosure through mandatory reporting requirements. Although this amended change would likely face adversity and outrage from some individuals, HHS is not required to appease those parties and would be able to implement the rule so long as it is reasonable.

Ultimately, this solution is preferable as it prohibits nonconsensual disclosure outright and thus works to prevent criminalization of treatment of reproductive health issues that fall into the "gray area" of requiring an abortion-like procedure in response to a threat to the mother's health. For example, as alleged in *Zurawski v. Texas*, the abortion laws in Texas contain "conflicting language and non-medical terminology," which causes confusion regarding when medical providers can legally render abortion care under medical emergency exceptions.[138] Additionally, because patients would still be empowered to consent to disclosure, it is unlikely that this amendment could work to victimize pregnant people. Due to the immediate need to provide clarity to medical providers so that pregnant people can receive the reproductive health care they need, a rule reform that closes this gap would be the most beneficial.

#### *b. Additional opportunities for reform*

Though likely not as effective or immediately necessary as the primary proposed reform, there are two additional HIPAA reformation

136. U.S. Senate Comm. on Health, Educ., Lab. & Pensions, *supra* note 69.
137. 45 C.F.R. § 164.512 (emphasis added to indicate proposed changes).
138. Zurawski v. State of Texas, *supra* note 13.

opportunities that could strengthen protections to prevent disclosure of reproductive PHI (although they would not prohibit it alone). First, the definition of "covered entities" could be expanded to close the loophole that allows some "healthcare" entities to fall outside of HIPAA. Second, penalties for violations of HIPAA could be heightened by allowing a right of private action.

First, "covered entities," as defined by the Privacy Rule, only include healthcare providers, such as hospitals and doctors; health plans, such as medical insurance companies; healthcare clearinghouses; and the business associates of "covered entities."[139] Notably, it does not include health apps, banks, or payment processors.[140] The lack of coverage regarding health apps is especially troublesome in relation to menstruation trackers or pregnancy-related apps because the information processed on those apps could relate to the termination of pregnancies.[141] Amending the Privacy Rule to include apps that process health information as a covered entity could serve to reduce the disclosure of information recorded in those types of apps.

Second, HIPAA violations are judged on a tiered model, with penalties ranging from $100 per violation to over $50,000 per violation.[142] However, these penalties can only be issued by the HHS' Office for Civil Rights or state attorneys general.[143] Therefore, there is no private right of action for patients whose PHI was wrongfully disclosed. Though creating a private right of action would increase the load on the judicial system, it may make covered entities more wary of improper disclosure. This type of change would be unlikely to result in significant protections against disclosure but could serve to strengthen HIPAA's deterrent nature.[144]

Both options would help reduce the risk of disclosures more broadly. While they would assist in preventing the disclosure of PHI related to reproductive healthcare in states where said healthcare is illegal, a more aggressive rule change is still preferable.

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139. Steve Alder, *What Does HIPAA Cover?*, HIPAA J. (Feb. 21, 2023), https://www.hipaajournal.com/what-does-hipaa-cover/ [https://perma.cc/4XSX-VU83].

140. *Id.*

141. *See, e.g.*, Rina Torchinsky, *How Period Tracking Apps and Data Privacy Fit into a Post-*Roe v. Wade *Climate*, NPR (June 24, 2022), https://www.npr.org/2022/05/10/1097482967/roe-v-wade-supreme-court-abortion-period-apps [https://perma.cc/8ZH3-GN93].

142. *What Are the Penalties for HIPAA Violations?*, HIPAA J. (Mar. 1, 2023), https://www.hipaajournal.com/what-are-the-penalties-for-hipaa-violations-7096/ [https://perma.cc/V9W5-HSV9]. The fines associated with violations are adjusted annually for inflation. *Id.*

143. *Id.*

144. This conclusion is based in part on numerous conversations the author of this Comment had with healthcare providers and employees while she was working in clinical care.

#### 4. Potential impacts of reform

The proposed change may take a while to take full effect, but its introduction and enactment would arguably provide clarity and confidence to many medical providers. Additionally, HHS could apply a 180-day compliance period, which would allow legal protections to take full effect sooner.

For women suffering from miscarriages, ectopic pregnancies, or an incorrectly self-managed abortion, medical providers must be able to act with expediency and in their best judgment. Thus, regulations that protect the disclosure of reproductive health information to law enforcement, as proposed, would provide medical providers with breathing room to make the best choice for their patients.

## CONCLUSION

In the wake of *Dobbs*, it is more necessary than ever that women and medical providers feel adequately protected from legal action against them. Although laws that protect PHI cannot be used to completely empower medical providers to perform *elective* abortion procedures in states where they are illegal, improved protections for PHI related to reproductive health could serve to protect women and providers and would allow providers to intervene in cases involving miscarriages, ectopic pregnancy, or self-induced abortions that would otherwise not be permitted under state law due to the presence of a heartbeat, the severity of the mother's condition, or the suspicion that the mother attempted to end her pregnancy.

If HHS proposes an amendment to the disclosure exception in HIPAA that allows for disclosures without consent in instances related to law enforcement and mandatory reporting, then PHI related to the treatments discussed could only be disclosed with the patient's explicit consent. This is especially important for states where abortion and abortion-like treatments are banned. To protect people who require necessary reproductive health treatment, the proposed amendment is not only important but imperative.