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

Re: Comments on the Proposed Rule “HIPAA Privacy Rule to Support Reproductive Health Care Privacy,” RIN No. 0945–AA20 / Docket No. HHS-OCR-2023-0006

Dear Office for Civil Rights:

The Center for Constitutional Rights (“CCR”) is a national, not-for-profit legal, educational, and advocacy organization dedicated to protecting and advancing rights guaranteed by the United States Constitution, federal statutes, and local and international law. Since our founding in 1966, we have litigated landmark civil rights and human rights cases before the U.S. Supreme Court and other tribunals concerning government overreach and discriminatory state policies, including policies that restrict access to abortion and other forms of reproductive healthcare.

CCR writes today in our capacity as civil rights leaders concerning the Department of Health and Human Services’ (“HHS”) proposed rule entitled “Health Insurance Portability and Accountability Act Privacy Rule to Support Reproductive Health Care Privacy,” RIN No. 0945–AA20, published in the Federal Register on April 17, 2023.¹

The Proposed Rule takes important steps to protect vulnerable patients and healthcare providers who are increasingly threatened under state laws that criminalize access to abortion, gender-affirming care, and other forms of gender-related and reproductive healthcare.² The Proposed Rule prohibits disclosure of protected health information (“PHI”) related to reproductive

¹ HIPAA Privacy Rule to Support Reproductive Health Care Privacy, 88 Fed. Reg. 23506 (Apr. 17, 2023) (to be codified at 45 C.F.R. pts. 160, 164) [hereinafter “Proposed Rule”].

² See generally, e.g., *Interactive Map: US Abortion Policies and Access After Roe*, GUTTMACHER INST. (June 13, 2023), <https://states.guttmacher.org/policies/dc/abortion-policies>; *Map: Attacks on Gender Affirming Care by State*, HUM. RTS. CAMPAIGN (June 1, 2023), <https://www.hrc.org/resources/attacks-on-gender-affirming-care-by-state-map>.

healthcare that was lawfully obtained or provided for use in criminal, civil, or administrative investigations or proceedings. By so limiting disclosure, the Proposed Rule will help ensure vulnerable populations can access accurate and high-quality healthcare with less fear of investigation and criminalization; promote trust and open communication between patients and healthcare providers; and protect individuals' privacy rights. However, HHS should further clarify the scope of the disclosure limitations to explicitly safeguard PHI related to self-managed abortions and gender-affirming care.

I. CCR Commends HHS for Taking Important Steps to Protect Patients and Healthcare Providers from the Dangerous Effects of State Laws Criminalizing Reproductive and Gender-Related Healthcare.

The U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), catalyzed a flood of state legislation to criminalize, ban, and restrict access to reproductive and gender-related healthcare, including abortion, contraceptives, and gender-affirming care for transgender youth.³ The increasing criminalization of reproductive care puts millions of people, particularly people who can become pregnant and LGBTQIA+ individuals, in precarious and life-threatening positions, whether from the denial of safe and essential healthcare, stigma, discrimination, or civil or criminal prosecution. For example, abortion bans and restrictions put millions of individuals at risk,⁴ particularly those who are Black, Indigenous, and/or other people of color—building on a long history of denigration, control, and racial violence toward Black, Brown, and Indigenous people in the United States.⁵ States are also targeting transgender, non-binary, and gender non-conforming youth—and in certain instances, adults as well—by, among other actions, banning or restricting access to gender-affirming care.⁶

Against this backdrop, the Proposed Rule will help protect vulnerable individuals from the increasing risk of discrimination and prosecution for accessing or attempting to access reproductive healthcare. The Proposed Rule will also help maintain trust and open communication between patients and healthcare providers, ensuring patients can receive accurate diagnoses, make informed healthcare decisions, and receive essential and potentially life-saving care.

³ See generally *State Legislation Tracker*, GUTTMACHER INST. (May 15, 2023), <https://www.guttmacher.org/state-legislation-tracker>; *Map: Attacks on Gender Affirming Care by State*, *supra* note 2.

⁴ See, e.g., Amanda Jean Stevenson, Leslie Root & Jane Menken, *The maternal mortality consequences of losing abortion access*, SOCARXIV 2 (June 29, 2022), <https://osf.io/preprints/socarxiv/7g29k>; Eugene Declercq et al., *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>; see also Press Release, U.N. Off. of the High Comm'r for Hum. Rts., United States: Abortion bans put millions of women and girls at risk, UN experts say (June 2, 2023), <https://www.ohchr.org/en/press-releases/2023/06/united-states-abortion-bans-put-millions-women-and-girls-risk-un-experts-say>.

⁵ See Katy Backes Kozhimannil, Asha Hassan & Rachel R. Hardeman, *Abortion Access as a Racial Justice Issue*, 387 NEW ENG. J. MED. 1537 (2022), <https://www.nejm.org/doi/full/10.1056/NEJMp2209737>.

⁶ See *Map: Attacks on Gender Affirming Care by State*, *supra* note 2; *2023 anti-trans bills tracker*, TRANS LEGIS. TRACKER, <https://translegislation.com/> (last visited June 15, 2023).

The criminalization of reproductive care also burdens healthcare providers, community organizations, advocates, and legal organizations—including CCR—that must navigate a rapidly changing and increasingly confusing legal and regulatory landscape. The Proposed Rule will thus also help providers, attorneys, and advocates better assure and serve patients and provide accurate and timely guidance and care.

II. HHS Should Clarify and Expand the Types of Healthcare Protected from Disclosure to Law Enforcement Officials.

Clarity as to the types of healthcare and PHI that the revised Privacy Rule protects is essential to ensuring patients and healthcare providers can continue to obtain and provide care without undue confusion and fear. HHS should clarify and expand the scope of PHI that is protected from disclosure for law enforcement investigations and proceedings as follows:

- First, explicitly state that PHI regarding self-managed abortions is included in the definition of “reproductive healthcare” to be protected from disclosure. Although self-managed abortions are not unlawful in nearly all states, individuals have still been criminally investigated and prosecuted,⁷ evidencing the confusion as to whether PHI about self-managed abortions falls under the scope of the Proposed Rule and the need to explicitly state as such.
- Second, explicitly include healthcare for transgender, non-binary, and gender-nonconforming (“TGNC”) individuals, including gender-affirming healthcare, within the scope of protection from disclosure. Healthcare for TGNC individuals, including gender-affirming care, *is* reproductive healthcare and therefore falls under the Proposed Rule’s high-level definition of “reproductive healthcare” warranting protection.⁸ However, the number of anti-LGBTQIA+ legislative measures introduced this year has more than doubled from last year, with over 500 bills being introduced since the beginning of 2023,⁹

⁷ See LAURA HUSS, FARAH DIAZ-TELLO & GOLEEN SAMARI, *IF/WHEN/HOW, SELF-CARE, CRIMINALIZED: AUGUST 2022 PRELIMINARY FINDINGS 1-2* (2022), <https://www.ifwhenhow.org/resources/self-care-criminalized-preliminary-findings/>.

⁸ The Proposed Rule notes that Congress and government agencies have defined “reproductive healthcare” as “‘care, services, or supplies related to the reproductive health of the individual.’ As with ‘health care,’ ‘reproductive health care’ applies broadly and includes not only reproductive health care and services furnished by a health care provider and supplies furnished in accordance with a prescription, but also care, services, or supplies furnished by other persons and non-prescription supplies purchased in connection with an individual’s reproductive health.” 88 Fed. Reg. 23527. Given that gender-affirming care can include reproductive and fertility services, and that it relates to sexual health care, it can appropriately be understood as a form of reproductive healthcare. See Claire E. Lunde et al., *Beyond the Binary: Sexual and Reproductive Health Considerations for Transgender and Gender Expansive Adolescents*, 3 FRONTIERS REPROD. HEALTH 670919 (2021) (discussing barriers and best practices to sexual and reproductive healthcare for TGNC individuals).

⁹ *2023 anti-trans bills tracker*, *supra* note 6; see also MOVEMENT ADVANCEMENT PROJECT, *LGBTQ POLICY SPOTLIGHT: BANS ON MEDICAL CARE FOR TRANSGENDER PEOPLE* (2023), <https://www.mapresearch.org/file/MAP-2023-Spotlight-Medical-Bans-report.pdf>; Annette Choi, *Record number of anti-LGBTQ bills have been introduced this year*, CNN (Apr. 6, 2023), <https://www.cnn.com/2023/04/06/politics/anti-lgbtq-plus-state-bill-rights-dg/index.html>.

indicating a widespread lack of understanding surrounding LGBTQIA+ issues, particularly in the area of healthcare for TGNC individuals. Over two-thirds of the healthcare-related bills that have been introduced are aimed at blocking transgender youth, and at times even adults, from receiving gender-affirming care.¹⁰ This is an alarming indication of the rampant stigmatization, discrimination, and misconceptions surrounding healthcare for TGNC individuals¹¹ and how vital this care is to saving lives. HHS should take additional steps to protect TGNC individuals by explicitly stating that PHI regarding gender-affirming care and other forms of reproductive healthcare, as broadly defined, for TGNC individuals is encompassed within the scope of the Privacy Rule, thereby protecting an already vulnerable group from further risks when obtaining healthcare. This would also improve confidence in and access to healthcare among TGNC people, a population that has notably limited access to and negative experiences associated with healthcare in general.¹²

- Finally, HHS should consider protecting PHI for *all* forms of lawfully obtained healthcare from disclosure for use in civil, criminal, or administrative investigations or proceedings. Doing so would eliminate any confusion regarding the scope of the Privacy Rule’s disclosure protections and ensure that vulnerable individuals’ privacy rights and the trust between patients and healthcare providers receive the greatest protection from criminalization.

III. Conclusion

CCR respectfully submits the foregoing comments in support of the Proposed Rule and recommendations for HHS to strengthen the Privacy Rule to better protect vulnerable and marginalized populations from the increasing criminalization of reproductive care.

Respectfully submitted,

/s/ Chinyere Ezie

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¹⁰ Choi, *supra* note 9.

¹¹ See generally Alex R. Mills, Kevin Astle & Cheyenne C. Frazier, “Affirming” journey: Narrative review and practice considerations on gender affirming care, 5 J. AM. COLL. CLINICAL PHARMACY 697 (2022).

¹² See, e.g., SANDY E. JAMES ET AL., REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 93 (2017), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

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