



**The Network**  
for Public Health Law

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# **Final HIPAA Rule to Support Reproductive Health Care Privacy: Impacts for Public Health**

**May 9, 2024**

## Moderator



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## Panelists



**Stephen Murphy, J.D.**, Acting Director, Network for Public Health Law, Mid States Region, is a public health attorney focusing on public health data access and data sharing to advance health equity. Prior to coming to the Network, Stephen was an attorney for the Chicago Department of Public Health (CDPH) concentrating on public health data privacy and public health law. He is licensed to practice law in California and Illinois.



**Charles Curran, J.D.**, Deputy Director, Network for Public Health Law, Mid-States Region. At the Network, Chuck focuses on public health data law and policy, including intergovernmental exchange.



**Joanna S. Suder, J.D.**, , Senior Attorney, Reproductive Health, Network for Public Health Law, is a public health attorney focusing on reproductive and sexual health. Before joining the Network, Joanna was a Deputy Attorney General for the State of Delaware, representing the Delaware Division of Public Health and leading the Health Law Unit for the State.



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# Setting the Stage: How did we get here?

## 1972-Present

Joanna Suder, Senior Attorney

## Roe v. Wade (1972)

### Supreme Court Holding:

- » **Due Process Clause of the Fourteenth Amendment implicitly includes a fundamental “right to privacy” that encompasses a pregnant person’s choice to have an abortion.**
- » **The right was not absolute but balanced against the government’s interests in protecting the health of pregnant people and protecting “the potentiality of human life.”**

**Set up nearly five decades of a right to abortion protected by the federal constitution.**

# Dobbs (Health Officer, Mississippi v. Jackson Women's Health Organization, June 2022

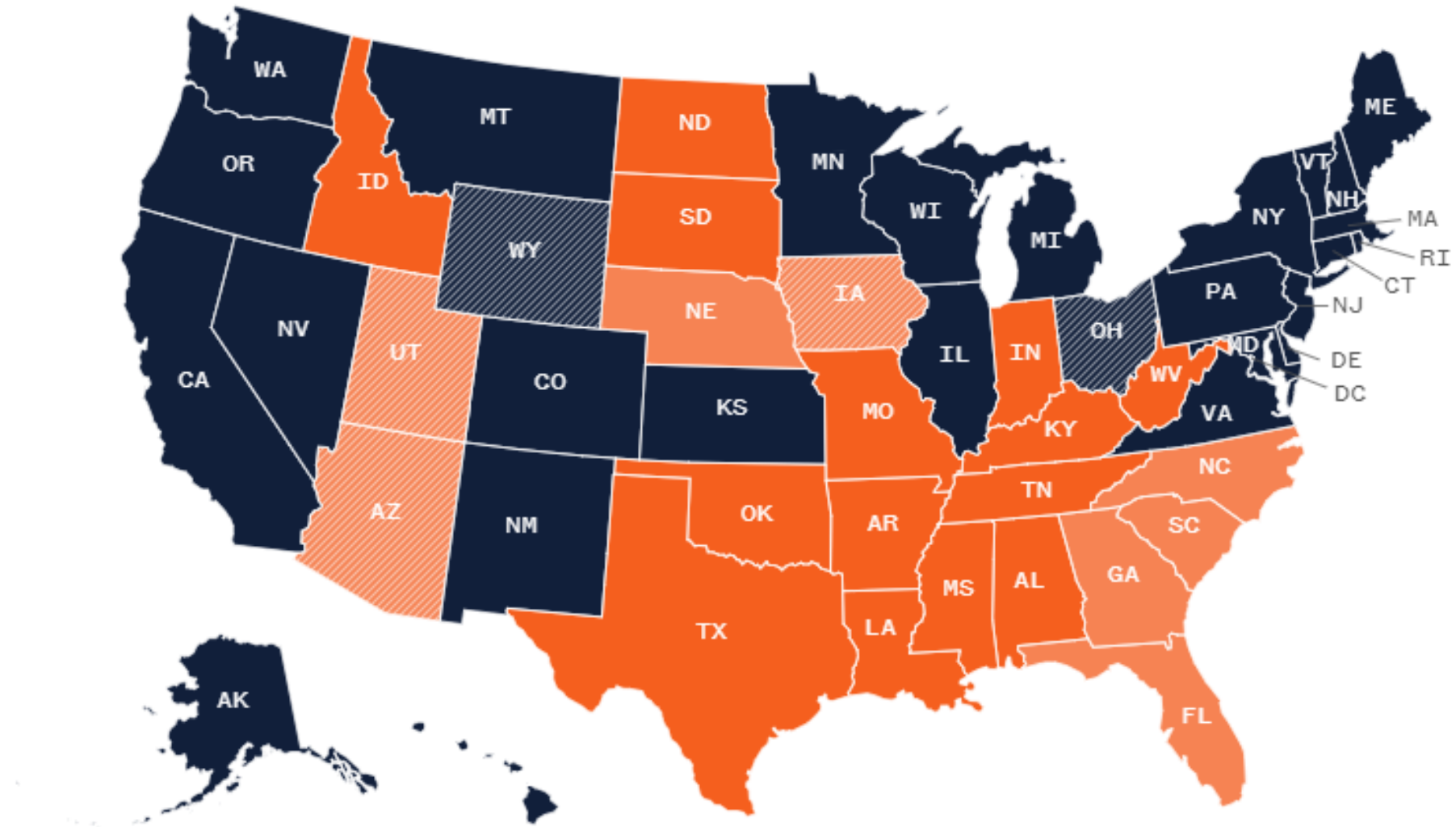
## Facts:

- » Mississippi passed 15-week abortion ban with exceptions for medical emergency and severe fetal abnormality in clear violation of *Roe*.

## Supreme Court Holding:

- » The federal constitution does not confer a right to abortion, overturning *Roe*.
- » Return the issue of abortion to the states.

Legal and/or protected
  Restricted
  Banned and/or unavailable
  Restriction pending





**The Washington Post**  
*Democracy Dies in Darkness*

## Doctor says she shouldn't have to turn over patients' abortion records

 By [Kim Bellware](#)

November 19, 2022 at 9:27 p.m. EST

**The Washington Post**  
*Democracy Dies in Darkness*

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## Pharmacies share medical data with police without a warrant, inquiry finds

The revelation could shape the debate over Americans' health privacy as states move to criminalize abortion and drugs related to reproductive health



By [Drew Harwell](#)

December 12, 2023 at 7:00 a.m. EST

## Judge denies emergency motion to block Indiana AG from accessing medical records in investigation of abortion services provided to 10-year-old



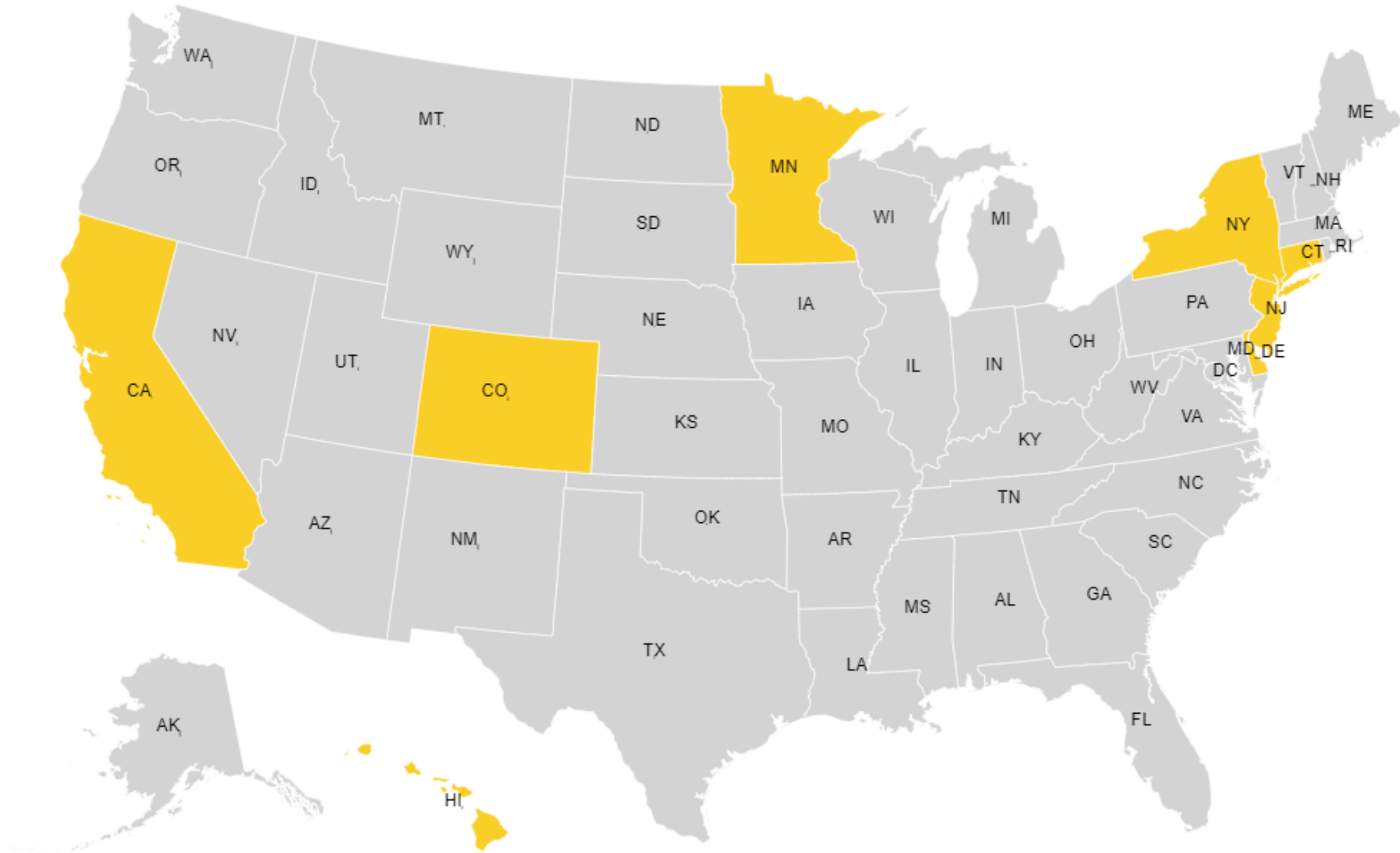
By [Artemis Moshtaghian](#), CNN

Updated 10:54 PM EST, Sun December 4, 2022

## Vanderbilt turns over transgender patient records to state in attorney general probe

[Melissa Brown](#) and [Kelly Puente](#) Nashville Tennessean

Published 1:12 p.m. CT June 20, 2023 | Updated 2:00 p.m. CT June 21, 2023



Source: Center for Public Health Law Research



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MARCH 07, 2024

# FACT SHEET: Biden-Harris Administration Continues the Fight for Reproductive Freedom



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# White House Task Force on Reproductive Healthcare: Safeguarding Privacy and Sensitive Health Information

- **Take Action Against Illegal Use and Sharing of Sensitive Health Information (FTC Enforcement Actions)**
- **Help Consumers Protect Their Personal Data (FCC Guidance)**
- **Protect Students' Health Information (DOE Guidance on FERPA)**
- **Safeguard Patients' Electronic Health Information (HHS Guidance)**
- **Strengthen Reproductive Health Privacy under HIPAA**

# Overview of the Final Rule

**Stephen Murphy, Acting Director- Mid States Region Office**

## Overview of Final Rule

- **Prohibition on use and disclosure of PHI for:**
  - **prosecution or investigation merely for seeking, obtaining, providing or facilitating repro care or**
  - **IDing someone for same**
- **Attestation requirement for certain permitted uses and disclosures**
- **Definitions of person, public health and reproductive health care**
- **Clarifications around victims of abuse, neglect and domestic violence**
- **Purpose based limitations – not new category of sensitive PHI**

# Overview of Final Rule

## General prohibition

### CEs and BAs may not use or disclose PHI:

- (1) To conduct a criminal, civil, or administrative investigation into any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care,
- (2) To impose criminal, civil, or administrative liability on any person for the mere act of seeking, obtaining, providing, or facilitating reproductive health care, or
- (3) To identify any person for any purpose described above

**45 CFR 164.502(a)(5)**

# Overview of Final Rule

**Prohibition of certain disclosures to investigate or prosecute reproductive care:**

» **Applicability**

» **Only where relevant activity is in connection with person seeking, obtaining, providing or facilitating repro health care and CE/BA has reasonably determined (one or more of following):**

- The reproductive health care is lawful under the law of the state in which such health care is provided under the circumstances in which it is provided.
- The reproductive health care is protected, required, or authorized by Federal law, including the United States Constitution, under the circumstances in which such health care is provided, regardless of the state in which it is provided.
- Presumption applies.



# Overview of Final Rule

## Prohibition of uses and disclosures to investigate or prosecute reproductive care:

### » **Presumption**

Repro care provided by someone other than CE presumed lawful unless , CE or BA has:

- » (1) Actual knowledge that the reproductive health care was not lawful under the circumstances in which it was provided.
- » (2) Factual information supplied by the requester that demonstrates a substantial factual basis that the reproductive health care was not lawful under the specific circumstances in which it was provided. (45 CFR 164.502)

# Overview of Final Rule

## Uses and Disclosures Requiring Valid Attestation

- » **CEs/BAs may not use/disclose PHI potentially related to repro care without attestation**

- Health oversight 512(d)

- Judicial and administration proceedings 512(e)

- Law enforcement 512(f)

- Coroners and medical examiners 512(g)(1)

- » **Attestation verifies not prohibited use or disclosure for repro investigation/prosecution**

**45 CFR 164.509**

## Overview of Final Rule

### Clarifications re disclosures about victims of abuse, neglect, or domestic violence

- » **Where CE may refuse to treat someone as personal representative of individual if reasonable belief individual victim of domestic violence/abuse/neglect by such person or could endanger individual**
  - Reasonable belief can't be based on provision or facilitation of repro care (164.509)
- » **Permitted uses and disclosures about victim of abuse, neglect or domestic violence do not permit disclosures when sole basis of report is provision or facilitation of repro care (164.512(c))**

# Definitions

## Person (160.103)

### » **Natural person**

"Meaning a human being who is born alive"

Relevant to uses and disclosures to avert serious and imminent threat to person or public

## Reproductive health care (160.103)

### » **Health care that affects the health of an individual in all matters relating to the reproductive system and to its functions and processes**

# Public Health Under the New Rule

**Charles Curran, Deputy Director- Mid States Region Office**

# Final Rule Discussion of Public Health Reporting

HIPAA generally supersedes contrary state law (§ 1178(a)). But § 1178(b) excepts from preemption laws for the “*reporting of disease or injury, child abuse, birth, or death, public health surveillance, or public health investigation or intervention.*”

HHS discusses its interpretation of the limited meaning of vital statistics reporting:

- HHS “*has long understood ‘disease or injury’ to narrowly refer to diagnosable health conditions reported for limited purposes . . . .*” (p. 32,999)
- “[S]tate laws requiring the use or disclosure of PHI for the purpose of investigating or imposing liability on a person for the mere act of seeking, obtaining, providing, or facilitating health care, or identifying a person for such activities, are subject to HIPAA’s general preemption provision. Similarly, the Privacy’s Rule’s public health provisions that permit disclosure of PHI for the reporting of disease or injury, birth or death do not include permission to use or disclose PHI for the purpose of investigating or imposing liability on a person for the mere act of seeking, obtaining, providing or facilitating health care activities, or identifying a person for such activities.” (p. 33,000)

**Final Rule doesn’t add definitions for “*disease or injury,*” “*birth*” or “*death*” (p. 32,999)**

[Page references to Final Rule, 89 Fed. Reg. 32,976 (April 26, 2024)]

## New Final Rule Definition of “*Public Health*” (§160.103)

*Public health*, as used in the terms “public health surveillance,” “public health investigation,” and “public health intervention,” means **population-level activities to prevent disease in and promote the health of populations. Such activities include identifying, monitoring, preventing, or mitigating ongoing or prospective threats to the health or safety of a population, which may involve the collection of protected health information.** But such activities do not include those with any of the following purposes:

- (1) To conduct a criminal, civil, or administrative investigation into any person for the mere act of seeking, obtaining, providing, **or facilitating health care.**
- (2) To impose criminal, civil, or administrative liability on any person for the mere act of seeking, obtaining, providing, **or facilitating health care.**
- (3) To identify any person for any of the activities described at paragraphs (1) or (2) of this definition.

## Final Rule Discussion of “Public Health”

Revised “public health” definition *“does not prevent disclosures of PHI by covered entities to public health authorities that have long been permitted under the rule,”* where such activities *“address population health concerns and have generalized public benefit to the health of a population, including activities that involve specific persons.”* (p. 33,001)

[Public health] *“surveillance systems provide the necessary data to examine and potentially develop interventions to improve the public’s health . . . and are not affected by this final rule. U.S. states, territories, and Tribal governments participate in bilateral agreements with the Federal Government to share data on conditions that affect public health. The CDC’s Division of Reproductive Health collects reproductive health data in support of national and state-based population surveillance systems to assess maternal complications, mortality and pregnancy-related disparities, and the numbers and characteristics of individuals who obtain legal induced abortions. This final rule does not affect CDC’s ability to collect this information . . . . Importantly, disclosures to public health authorities permitted by the Privacy Rule are limited to the “minimum necessary” to accomplish the public health purpose. In some cases, regulated entities need disclose only de-identified data to meet the public health purpose.”* (p. 33,002)

*“To the extent mandatory reporting requirements apply to the reporting of PHI to public health authorities for public health purposes, including PHI about reproductive health care, this final rule does not prevent a regulated entity from complying with such mandate.”* (p. 33,021)



## Prohibited purpose in the public health context

*“[P]ublic health surveillance, investigation, and intervention are outside of the scope of activities prohibited by 45 CFR 164.502(a)(5)(iii).” (p. 33,021) HHS “does not require a public health authority to supply an attestation to a covered entity to receive PHI of an individual where that disclosure is intended to prevent disease in or promote the health of populations.” (p. 33,002)*

*However, “while a state might assert that investigating or imposing liability on persons for the mere act of seeking, obtaining, providing, or facilitating health care satisfies the definition of ‘public health,’ their interpretation would not supersede the definition of ‘public health’ in the context of public health surveillance, investigations, or interventions that the Department is adopting under its own Federal statutory authority . . . .” (p. 33,003)*

*“When making disclosures . . . permitted under 45 CFR 164.512, if the public official represents the information requested is the minimum necessary for the stated purpose, regulated entities are permitted, but not required, to rely on that representation, if such reliance is reasonable under the circumstances. Such reliance may not be reasonable where the request appears to be overly broad when compared to the stated purpose of the request (e.g., where a public health authority requests the disclosure of PHI of all individuals who received treatment for uterine bleeding when the stated purpose is to investigate infection control practices by an obstetrician/gynecologist in a state where law enforcement has publicly announced its intention to investigate individuals for traveling out of state to seek or obtain reproductive health care that is lawful under the circumstances in which it is provided).” (p. 33,003)*

# Questions?

Contact Us!

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