UCLA School of Law
Center on Reproductive Health, Law, and Policy

# Texas Challenges HIPAA Rules Protecting Patient Health Information

*Amanda Barrow*
*CRHLP Senior Staff Attorney*
*September 2024*

Earlier this month, Texas filed a lawsuit to gain easier access to private and sensitive medical records in order to investigate providers, patients, and others assisting in reproductive and gender-affirming health care the state has criminalized. Texas's complaint challenges two federal rules intended to protect the privacy of patient health information under HIPAA. Texas seeks to block a recently-issued federal rule specifically protecting reproductive health information against post-*Dobbs* threats of investigation and criminalization (the "2024 Privacy Rule"), and asks the court to invalidate a foundational privacy rule that established national standards for the protection of patient health information when issued back in 2000 (the "2000 Privacy Rule").

The HIPAA Privacy Rules are crucial safeguards against the use of medical records to investigate and prosecute people for providing, receiving, or helping people get health care. As Texas alleges in its lawsuit, the HIPAA Privacy Rules have successfully thwarted the state's investigations into reproductive and gender-affirming health care. This lawsuit, which will be shaped by recent Supreme Court decisions undercutting federal agency authority, could render patient health information vulnerable throughout the country.

Below, we discuss the challenged HIPAA Privacy Rules, Texas's legal complaint, key legal issues anticipated in the case, and whether state laws may offer a solution as the future of federal protections grows more uncertain.

## The Challenged HIPAA Privacy Rules

Texas seeks to block not only the 2024 Privacy Rule strengthening protections for reproductive health information, but also the 2000 Privacy Rule, which has served as a baseline for the protection of patient health information for more than 20 years.

Generally, the 2000 Privacy Rule prohibits "covered entities"—health care providers, health plans, or health care clearinghouses (the intermediaries between providers and insurance companies)—from using or sharing a patient's identifiable health information without that individual's authorization other than for treatment, billing, or health care

operations.[1] There are, however, exceptions to this rule, including—as relevant to Texas's lawsuit—that a covered entity may disclose health data to law enforcement officials pursuant to a court order or warrant, a grand jury subpoena, or an administrative subpoena meeting certain conditions.[2]

In the wake of *Dobbs*, concerns about the privacy of reproductive health information grew as states enacted further civil and criminal penalties related to that care. In response, in April 2024, the federal Department of Health & Human Services (HHS) issued the 2024 Privacy Rule, amending HIPAA to strengthen protections for information related to reproductive health care. The 2024 Privacy Rule prohibits covered entities from using or disclosing protected health information where it may be used to investigate or impose liability on a person solely for seeking, obtaining, providing, or facilitating reproductive health care if the health care is lawful under the circumstances in which it is provided.[3] Under this rule, for example, a California provider could not disclose to the Texas Attorney General health information about a patient who traveled to California to receive abortion care if the AG requested that information to investigate or prosecute the patient, or a friend who drove the patient to receive care.

This prohibition on sharing reproductive health information applies where the covered entity reasonably determines that the health care is lawful where it was provided, and there is a presumption that the reproductive health care provided was lawful.[4] To implement the prohibition, a covered entity that receives a request for personal health information potentially related to reproductive health care must obtain a signed statement (an attestation) from the person requesting the information that the use or disclosure is not for a prohibited purpose.[5]

**Texas's Complaint**

On September 4, 2024, Texas sued HHS in federal district court in Texas, alleging that the 2000 and 2024 Privacy Rules violate the Administrative Procedure Act because they exceed HHS's statutory authority under HIPAA, and are not reasonable or reasonably explained. Texas specifically challenges the 2000 Privacy Rule's restrictions related to administrative subpoenas, which would bar a provider from sharing information in response to Texas's administrative subpoena, for example, unless the information is relevant and material to a legitimate law enforcement inquiry, the request is limited in scope, and de-identified information could not reasonably be used. Texas also challenges the 2024 Privacy Rule's prohibitions on disclosure, presumption that reproductive health care is lawful, and attestation requirement. Texas claims the rules have harmed its

[1] 45 C.F.R. § 164.502.
[2] 45 C.F.R. § 164.512(f)(1).
[3] C.F.R. § 164.502(a)(5)(iii)(A).
[4] C.F.R. § 164.502(a)(5)(iii)(B)-(C).
[5] C.F.R. § 164.509.

investigative abilities because covered entities have cited the rules as reasons they cannot comply with Texas's subpoenas.

Indeed, over the last year, the Texas AG's office has initiated multiple investigations of providers outside of Texas, demanding records in connection with their provision of gender-affirming care for minor patients. In one instance, Texas issued a demand to Seattle Children's Hospital in Washington requesting information on Texas residents treated by the hospital. The hospital challenged the demand as violative of HIPAA and its state shield laws, among other issues. Although that case ultimately settled—Texas agreed to withdraw its request in exchange for the hospital's commitment to withdraw its business registration in Texas—we can expect it will not be Texas's last effort to investigate health care provided outside its borders. As Texas claims, the HIPAA Privacy Rules have served as a bulwark against its out-of-state investigations into health care the state has criminalized.

**What to Expect**

This case is still at its earliest stage, and HHS hasn't yet responded to Texas's complaint. We can predict, however, that this case may show the immediate impact of last term's Supreme Court decisions, which upended longstanding rules governing review of federal agency actions.

For decades, the general rule was that lawsuits challenging a federal agency action had to be filed within six years from the date the action was issued. But last term in *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, the Supreme Court held that the six-year deadline to challenge a federal agency's action actually begins to run when the party is allegedly injured by the action, even if that occurs long after the rule is issued. In dissent, Justice Jackson highlighted that, as a result of the Court's decision, "there is effectively no longer any limitations period for lawsuits that challenge agency regulations on their face," and "even the most well-settled agency regulations can be placed on the chopping block," regardless of "how entrenched, heavily relied upon, or central to the functioning of our society a rule is." In Texas's case against HHS, the state may argue its challenge to the 2000 Privacy Rule, brought almost *25 years after the rule was issued*, is timely and permitted under *Corner Post*.

Texas's case may also demonstrate the impact of the Supreme Court's decision in *Loper-Bright Enterprises v. Raimondo*, which overturned *Chevon v. Natural Resources Defence Council* and its 40-year-old rule that when a statute is ambiguous, courts should generally defer to an agency's reasonable interpretation of that law ("*Chevron* deference"). In dissent in *Loper-Bright*, Justice Kagan explained that *Chevron* deference was rooted in an understanding that Congress cannot write perfectly complete regulatory statutes and knows that another actor will need to resolve ambiguities and fill gaps—that actor should be the agency with expertise in the subject matter and accountable to an elected president rather than a court. In Texas's post-*Loper-Bright* case against HHS, the court will not apply *Chevron* deference to HHS's interpretation of HIPAA as providing the basis for the 2000 and 2024 Privacy Rules.

After HHS submits its response to Texas's complaint and the case progresses, we'll learn more. Texas has asked the court to invalidate the 2000 and 2024 Privacy Rules, and prevent HHS from enforcing the rules throughout the country. Regardless of whether Texas or HHS prevails at the district court, an appeal to the Fifth Circuit Court of Appeals is likely.

**State Law Solutions**

Texas's challenge to the HIPAA Privacy Rules will not undermine the numerous state laws that have been enacted post-*Dobbs* that are also intended to protect patients' information related to reproductive health care. Many states have already included protections against the disclosure of medical information in response to out-of-state subpoenas in their shield laws.

It is important to note, however, that federal protections for the privacy of patients' health information like the HIPAA Privacy Rules serve an important role in preventing investigations based on health records that is not easily replaced by state laws. In part, this is because the U.S. healthcare system has widely adopted the use of electronic health records designed to reach outside the original healthcare provider's office and across state borders through health information exchanges (HIE). Providers in states banning abortion and gender-affirming care and providers in states protective of that care often participate in the same HIE.

Under this system, if a patient from a state with a ban—for example, Tennessee—travels to an access state—for example, Connecticut—to receive abortion care and then receives any subsequent medical care when back in Tennessee, the Tennessee provider may potentially access and incorporate the patient's entire medical record (including information on the abortion received in Connecticut) into their own records. In the absence of federal rules, the Tennessee provider may turn information over to law enforcement if subpoenaed or may voluntarily do so, despite Connecticut's shield law barring that. If the privacy of patient health information is left solely to the states, a penetrable patchwork can develop.

In recognition of this issue, some shield laws—in California and Maryland—specifically protect against sharing of health information related to abortion care across state lines through HIEs. Further, California's shield law requires the electronic health record systems to develop procedures to segregate and apply heightened security measures to medical information related to abortion, contraception, and gender-affirming care. Other states may more urgently consider similar measures as the future of federal protections grows more uncertain.

CRHLP will continue to monitor and report on developments in Texas's case against HHS. In the meantime, to learn more about the shield laws, visit our interactive tool.