

Sharing is not Always Caring: Protecting Reproductive Health Data with a Certified Health IT Segmentation Requirement

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I. INTRODUCTION

Dr. Michelle Gomez, a California primary care and abortion doctor, became alarmed when she received a notification through her office's Electronic Health Record (EHR) system.¹ She saw that a patient who traveled to her from Texas, where abortion is illegal, had returned home and sought care for bleeding.² Gomez viewed the information from her patient's intake and eventual referral to an OBGYN in Texas.³ It then occurred to Gomez that if she, in California, could view her patient's information in Texas, any clinician, billing person, or social worker accessing her patient's record could find that she and her patient violated Texas law.⁴ Any of these people who viewed her patient's record could report her and her patient's actions to Texas authorities who could then charge both of them with criminal and civil penalties.⁵

This situation is a result of *Dobbs v. Jackson Women's Health Organization*, where the Supreme Court decided that the right to abortion is not constitutionally protected.⁶ Since then, 17 states have enacted laws banning physicians from performing abortions and patients from receiving abortions in the state's bounds.⁷ And one of these 17 states, Texas, enacted laws to criminalize patients who travel outside the state to receive an abortion.⁸ Overall, the number of patients who travel out of state for an abortion to double from 2019 to 2023 because of these abortion bans.⁹ In turn, 1 in 5 abortion patients must now travel out of their state for care.¹⁰

While 22 states have enacted laws that shield abortion patients from possible criminal penalties from other states, patients in states with abortion bans have reported that they will not seek out of state reproductive care because they fear that clinicians in their home state could see their abortion

1. *Health Information Hearing on A.B. 352 Before the Assemb. Standing Comm. on Health*, 2023 Leg., (Ca. 2023-2024) [hereinafter *Statement of Michelle Gomez*] (statement of Michelle Gomez).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. Ivette Gomez et al., *10 Things to Know About Abortion Access Since the Dobbs Decision*, KAISER FAM. FOUND. (Jun. 20, 2024), <https://www.kff.org/policy-watch/10-things-to-know-about-abortion-access-since-the-dobbs-decision/> [<https://perma.cc/T279-TT4E>].

7. *Interactive Map: U.S. Abortion Policies and Access After Roe*, GUTTMACHER (Nov. 13, 2023) [<https://perma.cc/8W3W-F7QA>].

8. TEX. HEALTH & SAFETY CODE ANN. §170A.005 (West 2023).

9. Molly Cook Escobar et al. *171,000 Traveled for Abortion Last Year. See Where They Went.*, NY TIMES. (Jun. 13, 2024) [<https://perma.cc/NQ8G-N6C2>].

10. *Id.*

record.¹¹ Thus, this inter-state data sharing has created a chilling effect on abortion access.¹²

The Office of the National Coordinator for Health IT/Assistant Secretary of Health IT (from here on out referred to as ASTP) enacted programs and regulations to increase EHR interoperability, or EHRs ability to share data.¹³ These initiatives and industry advancements have improved EHR interoperability, allowing clinicians to provide more consistent and accurate patient treatment.¹⁴

However, the aforementioned chilling-effect arises because EHRs cannot consistently keep just a patient's abortion data private.¹⁵ Most medical providers have two options when sharing patient health information: to share a patients' entire health data record or share none of a patient's health information.¹⁶ Medical providers cannot choose to share just some of a patient's health information.¹⁷ Thus, clinicians need a middle ground: sharing segmented patient information.¹⁸

EHRs can separate patient's health data from their record through a process called data segmentation.¹⁹ Most EHRs cannot segment data, but they do have the capacity to allow for data separation by adhering to ASTP's recommended standards.²⁰ Despite EHR's technological capability to segment data, developers insist that EHR technology cannot perform this function.²¹

11. *Shield Laws for Reproductive and Gender-Affirming Health Care: A State Law Guide*, UCLA LAW (Dec. 2025), <https://law.ucla.edu/academics/centers/center-reproductive-health-law-and-policy/shield-laws-reproductive-and-gender-affirming-health-care-state-law-guide> [<https://perma.cc/54LK-YSB3>]; *Health Information Hearing on A.B. 352 Before the S. Standing Comm. on Health*, 2023 Leg., (Ca. 2023-2024) [hereinafter *Statement of Pana Lassi*] (statement of Pana Lassi).

12. *Statement of Michelle Gomez, supra* note 1; Letter from The Ctr. for Reproductive Rts. to Micky Tripathi, Nat'l Coordinator for Health Info. Tech. (June 16, 2023) [hereinafter *Center for Reproductive Rights*].

13. See Julia Adler-Milstein et al., *A Survey of Health Information Exchange in Advance of a Nationwide Connectivity Framework*, 40 HEALTH AFFAIRS 736, 737 (2021), <https://doi.org/10.1377/hlthaff.2020.01497>.

14. Peter Pronovost et al., *Procuring Interoperability: Achieving High-Quality, Connected, And Person-Centered Care*, NAT'L ACADS. OF MED. 9 (2018) ("Interoperability leads to increased efficiency, lower costs, and better quality of care through four primary drivers: reducing adverse events because of safety interlocks (\$1.9 billion); reducing redundant testing (\$1.5 billion); reducing clinician time spent manually entering information (\$12 billion); and shortening length of stay through more timely transmission of critical information such as lab results (\$18 billion).").

15. *Statement of Pana Lassi, supra* note 11.

16. *Id.*

17. See Mark A. Rothstein & Stacey A. Tovino, *Privacy Risks of Interoperable Electronic Health Records: Segmentation of Sensitive Information Will Help*, 47 J. L., MED. & ETHICS 476, 771-77 (2019); Adela Grando et al., *Pilot Evaluation of Sensitive Data Segmentation for Privacy*, INT'L J. MED. INFORMATICS 514, 515 (2020).

18. See Rothstein & Tovino, *supra* note 17.

19. *Id.*

20. See Grando et al., *supra* note 17.

21. Letter from HIMSS Elec. Health Rec. Ass'n to Mark Ghaly, Sec'y, Ca. Health & Hum. Servs. Agency (Feb. 21, 2024).

Abortion providers and advocates support an EHR segmentation function.²² Per the National Abortion Federation's standards, abortion providers should take all reasonable precautions to protect patient's confidentiality.²³ However, providers can only protect abortion data as much as EHR technology permits.²⁴ In turn, national organizations such as Planned Parenthood and the Center for Reproductive Rights have called for a segmentation standard.²⁵

With no national requirement, states have taken the lead on requiring EHR segmentation.²⁶ In 2023, California and Maryland passed laws to require EHRs to keep a patient's reproductive health information separate from the rest of their record.²⁷ While these laws are an important step to protecting patient data, these varying standards require developers to develop multiple segmentation programs.²⁸

This Note argues that ASTP should require Certified EHRs to segment reproductive health data. When out-of-state abortion patients know that EHRs will not share their data, they will feel more confident that authorities in their home state will not charge them for obtaining an abortion. In turn, patients will feel more inclined to travel out of state to obtain the abortion procedures they need.

First, this Note will offer an overview of federal and state actions that aim to protect reproductive health information post *Dobbs*. Then, this Note will discuss the landscape of EHR technology and interoperability. Next, this Note will discuss how a certified Health IT reproductive health segmentation requirement will make out-of-state patient's more willing to get the abortion services they need. This section will also address how this proposal considers previous patient, clinician, and EHR developer concerns. Finally, this Note will discuss further federal and state action needed, to require clinicians to use the EHR segmentation technology.

22. Health Gorilla, Privacy Value Sets and Sensitive Data Management Webinar, YouTube (May 15, 2024), <https://www.youtube.com/watch?v=p9YYn8K1-6k> [<https://perma.cc/3UHX-29NH>].

23. NAT'L ABORTION FED'N, CLINICAL POLICY GUIDELINES FOR ABORTION CARE 5 (2024).

24. *Id.*

25. *Center for Reproductive Rights*, *supra* note 12; Health Gorilla, *supra* note 22.

26. *Statement of Pana Lassi*, *supra* note 11; *See generally* MD. DEP'T OF FIN., POLICY NOTE: SB 786, 2023 Sess. (2023).

27. *Id.*; *Cal. Civ. Code* §§56.101, 56.208 (West 2024).

28. *Statement of Pana Lassi*, *supra* note 11; *See generally* Letter from HIMISS Elec. Health Rec. Ass'n to Ben Steffen, Exec. Dir. Md. Health Care Comm'n, and Jordan Green, Dir., Off. of Regul. and Pol'y Coordination (Feb. 12, 2024).

II. BACKGROUND

A. Overview of State and Federal Action Post *Dobbs*

1. Agency Action to Protect Reproductive Data Post *Dobbs*

Post *Dobbs*, the Department of Health and Human Services (HHS) amended the Health Insurance Portability and Accountability (HIPAA) Privacy Rule to protect patient's reproductive data.²⁹

The HIPAA Privacy Rule allows individuals to access and determine which medical providers can view their health information.³⁰ However, even under this protective rule, a HIPAA covered entity can disclose a patient's health information for treatment, payment, health care operation, or law enforcement purposes without the patient's authorization.³¹ This means that billing departments, medical records departments, and other clinicians who have access to a patient's records could see their medical history.³² For example, a radiologist and a referring physician can send a patient's health information to one another without the patient's approval.³³ While this rule helps clinicians share patient information easily and in turn provide comprehensive care, patients are not always aware of all the clinicians or employees that view their medical information.³⁴

To alleviate some of these privacy concerns, HHS enacted the HIPAA Rule to Support Reproductive Health Care Privacy.³⁵ This rule provides an exception to the HIPAA Privacy Rule: abortion clinicians in abortion-protective state do not have to disclose abortion data to authorities in an abortion-criminalizing state.³⁶ Also, if a clinician must disclose abortion information to an entity in an abortion criminalizing state for treatment, payment, or operation purpose, the receiving entity cannot report this

29. *HIPAA Privacy Rule Final Rule to Support Reproductive Health Care Privacy: Fact Sheet*, U.S. DEP'T OF HEALTH AND HUM. SERVS., <https://www.hhs.gov/hipaa/for-professionals/special-topics/reproductive-health/final-rule-fact-sheet/index.html> [https://perma.cc/M2KF-SGAY] (last visited Nov. 18, 2024).

30. *Summary of the HIPAA Privacy Rule*, U.S. DEP'T OF HEALTH AND HUM. SERVS., www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html [https://perma.cc/Y4YK-94XP] (last visited Nov. 18, 2024).

31. *Id.*

32. *Statement of Michelle Gomez, supra* note 1.

33. *See id.*

34. *See id.*

35. *HIPAA Privacy Rule Final Rule to Support Reproductive Health Care Privacy: Fact Sheet*, U.S. DEP'T OF HEALTH AND HUM. SERVS., <https://www.hhs.gov/hipaa/for-professionals/special-topics/reproductive-health/final-rule-fact-sheet/index.html> [https://perma.cc/M2KF-SGAY] (last visited Nov. 18, 2024).

36. *Id.* This rule also requires HIPAA covered entities to get "attestations prior to using or disclosing PHI that could be related to reproductive care for certain purposes." This rule does not apply if the abortion was not lawful or there is strong evidence to suggest it was not lawful.

procedure to state authorities under the HIPAA Rule to Support Reproductive Health Care Privacy.³⁷

However, HIPAA Rule to Support Reproductive Health Care Privacy is no longer in effect.³⁸ In *Purl v. United States Department of Health and Human Services*, a federal district court in Texas found that the Department of Health and Human Services did not have the authority to enact this regulation because, “HHS regulations cannot preempt a contrary state law with ‘more stringent’ health-information protection requirements.”³⁹ According to the Northern District of Texas, the fact that HIPAA Rule to Support Reproductive Health Care Privacy “preempts contrary state law” because the HIPAA Rule allows clinicians to not report abortion information while Texas state law that requires reporting.⁴⁰ Following *Purl*, the federal government can no longer hold entities liable for disclosing a patient’s reproductive health information in cooperation with a criminal or civil investigation.⁴¹

Still, the Assistant Secretary of Technology and Policy (ASTP) rules to enhance reproductive health protection remain in effect.⁴² In December 2024, ASTP finalized the Protecting Care Access Exception to Information Blocking, which permits entities to keep patient’s reproductive health private without risking information blocking charges.⁴³ The Protecting Care Access Exception (PCA) states that an actor can limit sharing Electronic Health Information (EHI) to reduce the risk of exposing patients or healthcare workers to legal action based on their administering, seeking, or obtaining reproductive health care.⁴⁴ ASTP provides three main justifications for this exception: (1) if a patient thinks that sharing their history will put themselves

37. *Id.*; see also TEX. HEALTH & SAFETY CODE ANN. §170A.002 (West 2023). While entities may be required to report an out-of-state abortion under state law, HIPAA preempts state law.

38. *Purl v. United States Dep’t of Health & Hum. Servs.* F. Supp. 3d 284 (N.D. Tex. 2025).

39. *Id.* at 297.

40. See *id.*

41. See *Purl*, *supra* note 38.

42. 45 C.F.R. §§ 171.102, 171.202, 171.204, 171.206.

43. *Information Blocking Exceptions*, THE OFF. OF THE NAT’L COORDINATOR FOR HEALTH INFO. TECH. (July 2024), healthit.gov/sites/default/files/page/2024-07/HTI2ProposedRuleInformationBlockingExceptionsFactsheet508.pdf [<https://perma.cc/B34B-CKHS>]; *INFORMATION BLOCKING*, ASSISTANT SEC’Y FOR TECH. POL’Y, <https://www.healthit.gov/topic/information-blocking> [<https://perma.cc/UQV3-DBXK>] (last accessed Jan. 8, 2015). The Office of the Inspector General (OIG) can charge an fine an entity up to \$1 million per violation if standards, health IT developers of certified Health IT, entities offering certified Health IT, Health Information Exchanges (HIEs), and Health Information Networks (HINs) act in ways that they know, or reasonably know, will interfere with the exchange of health information. An entity does not have disclose information is sharing information would: violate state law, violate federal agency action, or clinicians cannot share the information without also sharing health information the patient does not want to disclose.

44. 45 C.F.R. §§ 171.102, 160.103 (defining reproductive health as health care that “affects the health of an individual in all matters relating to the reproductive system and to its functions and processes.”).

or providers at legal risk, they will be less willing to share their real health history or conditions; (2) without this candor, health care providers cannot provide care that will best help patients; and (3) a health provider's belief they can adequately protect their patient's health information can "erode the mutual trust" between physicians and patients that leads to better health care outcomes.⁴⁵

2. State Action to Criminalize Abortion Post Dobbs

Some states have passed laws criminalizing patients who travel to another state for an abortion and the clinician who provides abortion services.⁴⁶ For example, in Texas, abortion is only legal when the pregnant person's life is in danger or the pregnant person faces "substantial impairment of a majorly bodily function."⁴⁷ Patients who travel to another state for an abortion procedure can be subject to penalties of up to 99 years in prison and civil penalties of up to \$100,000 in fines.⁴⁸ Abortion clinicians providing services to Texas abortion patients are subject to these same penalties as well as the loss of their medical license.⁴⁹ Similarly, both Idaho and Tennessee adopted an abortion trafficking ban, criminalizing adults who travel out of state to obtain an abortion for a minor.⁵⁰ Adults convicted under these laws can face up to 11 months and up to 5 years respectively in prison.⁵¹

3. State Actions to Protect Reproductive Data Post Dobbs

In response to some state's abortion bans, 18 states have enacted abortion protection laws called interstate shield laws.⁵² These laws prohibit health care facilities from sharing patient's medical records with states

45. *Id.*

46. See *Texas*, CTR. FOR REPRODUCTIVE RTS., reproductiverights.org/maps/state/texas/ [<https://perma.cc/6YC5-2QNL>] (last visited Nov 19, 2024). Since abortion is now a crime in Texas, other criminal laws such as solicitation, aiding, attempt, and conspiracy can apply to abortion.

47. TEX. HEALTH & SAFETY CODE ANN. §170A.002 (West 2023).

48. TEX. HEALTH & SAFETY CODE ANN. §170A.005 (West 2023).

49. *Id.*

50. Geoff Mulvihill, *Things to know about efforts to block people from crossing state lines for abortion*, ASSOCIATED PRESS (Nov. 10, 2023, 4:49 PM), <https://apnews.com/article/abortion-texas-idaho-alabama-state-lines-trafficking-d314933f3f7db93858561a0c6ad0b188> [<https://perma.cc/WA9R-YG3E>]. This includes taking the minor out of state or obtaining abortion pills out of state. *Idaho*, CTR. FOR REPRODUCTIVE RTS., <https://reproductiverights.org/maps/abortion-laws-by-state/idaho/> [<https://perma.cc/PA7F-8974>] (last visited Nov 19, 2024); Melissa Brown & Angle Latham, *Tennessee lawmaker, Nashville lawyer sue over 'abortion trafficking law*, THE TENNESSEAN (Jun. 24, 2024, 1:25 PM), www.tennessean.com/story/news/health/2024/06/24/tennessee-abortion-trafficking-lawsuit/74197839007/ [<https://perma.cc/W3K6-JDZJ>].

51. Anita Wadhvani, *Tennessee Senate passes bill making it a crime to aid a minor seeking an abortion, Tennessee Lookout* (Apr. 11, 2024, 5:00 AM) *Idaho governor signs ban on 'abortion trafficking'*, Associated Press, (Apr. 6, 2023 1:48 PM)

52. David S. Cohen Et Al. *Abortion Shield Laws*, NEJM Evid. Mar. 28, 2023, <https://reproductiverights.org/resources/interstate-shield-laws/> [<https://perma.cc/NK5M-K6WM>].

looking to impose criminal or civil liability on abortion patients or providers.⁵³ However, even with these protective laws, clinicians still share health information with other medical providers in abortion-criminalizing states, who could then report any illegal reproductive care to their state's authorities.⁵⁴

Federal courts will soon discern shield law's constitutionality.⁵⁵ After a patient in Texas took abortion medication sent to her by a New York doctor, she went to a hospital to receive treatment for a complication.⁵⁶ The patient's friend found her abortion medications and reported her abortion to the Texas authorities.⁵⁷ Texas then sued this doctor for violating their state's law.⁵⁸ However, since New York law protects abortion doctors from out of state abortion liability, federal courts must decide if New York's shield law unconstitutionally limits Texas's law.⁵⁹

A similar case took place in Louisiana.⁶⁰ After a patient took abortion pills sent to her by this same New York doctor, she went to the hospital after experiencing a medical emergency.⁶¹ At the hospital, a police officer learned about her pill intake and began an investigation into the doctor who prescribed pills to the patient.⁶² Louisiana put a warrant out to arrest the doctor, the governor of New York said she will not turn the doctor over to Louisiana.⁶³

California and Maryland have further advanced interstate shield laws by requiring EHRs and clinicians to segment patient's abortion health records.⁶⁴ In 2023, California passed a set of laws which prevents providers or vendors from disclosing patient's reproductive health data with entities outside of California.⁶⁵ EHR developers who operate in California must create EHRs with the capabilities to segregate and protect medical information related to gender affirming care, contraception, abortion, and abortion-related

53. *Id.*

54. *Id.*; *Statement of Michelle Gomez, supra* note 1. Clinicians can share data across state lines through a multi-state information exchange or an information request.

55. Sean Murphy et al., *Texas' abortion pill lawsuit against New York doctor marks new challenge to interstate telemedicine*, ASSOCIATED PRESS (Dec. 13, 2024), apnews.com/article/abortion-pills-lawsuit-shield-laws-texas-telemedicine-74c9b7d5c3c152e4c8f199b29132daec [hereinafter *Texas suit against New York*] [<https://perma.cc/B63A-VCAG>].

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Louisiana issues arrest warrant for New York doctor indicted for prescribing abortion pill*, CNN (Feb. 1, 2025, 3:02 PM), www.cnn.com/2025/02/01/us/louisiana-abortion-ny-doctor-arrest-warrant/index.html [hereinafter *Louisiana issues arrest warrant*] [<https://perma.cc/KXC5-4977>].

61. *Id.*

62. *Id.*

63. *Id.*

64. S.B. 786, 2023 Gen. Assemb., 43rd Sess. (Md. 2023); A.B. 352, 2023 State Assemb., Reg. Sess. (Ca. 2023).

65. A.B. 352, 2023 State Assemb., Reg. Sess. (Ca. 2023).

services.⁶⁶ Clinicians are required to use this technology to segment reproductive health data⁶⁷.

EHR Developers opposed this law, claiming they could not create technology to comply with these regulations.⁶⁸ The Electronic Health Record Association (EHRA), an organization representing 29 EHR companies in the United States, explained that they cannot comply with this law since California does not provide any definitions or codes specifying which data are reproductive health data.⁶⁹ Without knowing which data this regulation impacts, developers cannot develop codes, or data categories to comply with these regulations.⁷⁰ In turn, EHRs may overly or inconsistently restrict health information.⁷¹ The EHRA recommends that California defines all terms, clarifies which medical information would require this restriction (ex. results, medications), and provides specific value sets to outline which information should be restricted.⁷²

However, in May 2024 Health Gorilla, an EHR company, published value sets for the health information covered by the CA Law.⁷³ These codes help EHRs develop labels for which medical conditions, treatments, and descriptions clinicians must segment under California law.⁷⁴

Similarly, Maryland enacted a law which prohibits Health Information Exchanges (HIEs) and Electronic Health Networks (EHNs) from disclosing data related to abortion care and other reproductive health services without patient pre-authorization.⁷⁵ Under this law, the Secretary has the authority to label medical information sensitive, meaning the secretary can change which information can be blocked.⁷⁶ Additionally, developers have to flag and segment sensitive data written in free text boxes.⁷⁷ Unlike California's law, Maryland provides specific codes to tell EHR vendors which information should be sensitive.⁷⁸ Once the information is labeled sensitive, medical providers must ask for patient consent to share the information.⁷⁹

The EHRA claims that this segmentation requirement is infeasible.⁸⁰ Developers argue that even if they could develop a segmentation function, it

66. *Id.*

67. *Id.*

68. Letter from HIMSS Elec. Health Rec. Ass'n to Mark Ghaly, Sec'y, Ca. Health & Hum. Servs. Agency (Feb. 21, 2024).

69. *See id.*

70. *Id.*

71. *Id.*

72. *Id.* at 2.

73. Health Gorilla, *supra* note, 22.

74. *Id.*

75. *Id.*

76. *Implementation Guidance: Electronic Health Network*, MD. HEALTH CARE COMM'N (May 22, 2024) [<https://perma.cc/KUS7-M92Q>].

77. *Center for Reproductive Rights*, *supra* note 12; Health Gorilla, *supra* note 22; A.B. 352, 2023 State Assemb., Reg. Sess. (Ca. 2023).

78. *See Statement of Pana Lassi*, *supra* note 11; MD. DEPT. OF FIN., POLICY NOTE: SB 786, 2023 Sess., at 4 (2023).

79. *Center for Reproductive Rights*, *supra* note 12; Health Gorilla, *supra* note 22; A.B. 352, 2023 State Assemb., Reg. Sess. (Ca. 2023).

80. Letter from Himiss Electronic Health Record Association, *supra* note 28.

would be impossible for EHRs to discern untagged data in a free text box.⁸¹ An in-depth explanation of tagged data will follow below.

B. Overview of ASTP's Health IT Interoperability Regulations and Programs

1. Data Segmentation Allows EHRs to only share some of a Patient's Health Record

Data Segmentation occurs when data is separated from the patient's record.⁸² Segmentation does not refer to one specific method of dividing data: depending on the EHR's setup, the data can be separated entirely from the record or filtered out when the record is shared.⁸³ ASTP has considered requiring Certified EHRs to have a manual segmentation function.⁸⁴ Further discussion of Certified Health IT will follow below. In 2023, ASTP proposed that certified health IT developers must allow patients to decide which of their data clinicians can access.⁸⁵ Ultimately, ASTP did not publish this requirement in the final rule.⁸⁶

For EHRs to segment data, EHRs must be interoperable or able to exchange information and utilize the exchanged information in its own system.⁸⁷ When EHRs understand the information they receive, they can adequately separate the information based on law or the patient's request.⁸⁸ The following section will discuss how ASTP has addressed challenges to EHR interoperability.

81. *Id.*

82. Melissa Goldstein, *Data Segmentation in Electronic Health Information Exchange: Policy Considerations and Analysis*, GW SCHOOL OF PUBLIC HEALTH, Sept. 29, 2010, at 47, 49.

83. *See generally id.*

84. Health Data, Technology, and Interoperability: Patient Engagement, Information Sharing, and Public Health Interoperability, 89 Fed. Reg. 1800 (proposed Jan 9, 2024) (to be codified at 45 C.F.R. 170,171). The proposed HTI-1 rule only required did not mandate how EHRs must segment data.

85. *Id.* The proposed HTI-1 rule only required did not mandate how EHRs must segment data.

86. 45 C.F.R. § 170, 171.

87. Goldstein at 9, *supra* note 82; Miriam Reisman, *EHRs: The Challenge of Making Electronic Data Usable and Interoperable* PHARMACY & THERAPEUTICS 572, 573 (Sept. 2017); NCVHS. *Letter to the Secretary of Health and Human Services re: Individual Control of Sensitive Health Information via the Nationwide Health Information Network for Purposes of Treatment* (Feb. 2008) <http://www.ncvhs.hhs.gov/080220lt.pdf>. NCVHS suggests that systems allow option sequestering of certain categories.

88. *Id.*

2. ASTP's Health IT Certification Program Provides Standards to Enhance EHR interoperability

For interoperability to occur, EHRs must use the same language and structure to divide their data.⁸⁹ However, when developers first created EHRs, they each used different terms and ways to organize data, making interoperability impossible.⁹⁰

In turn, Congress established ASTP to encourage developers to create interoperable and secure EHRs.⁹¹ With authority from Congress, ASTP enacted regulations which outline security and interoperability criteria EHR vendors must meet to obtain a Health IT Certification.⁹² EHRs can choose to obtain a general certification by meeting many of ASTP's requirements or can obtain a certification for a specific requirement.⁹³

Clinicians are encouraged to use Certified Health IT by the Center for Medicaid and Medicare Services (CMS).⁹⁴ CMS requires clinicians to use Certified Health IT to receive full funding.⁹⁵ While ASTP establishes the criteria for a categorical health IT Certification, CMS decides which of

89. Goldstein, *supra* note 82.

90. Goldstein, *supra* note 82; Redox, *Understanding Healthcare Interoperability Standards*, YOUTUBE, <https://www.youtube.com/watch?v=XqXpJ3pbvMo> [<https://perma.cc/C2YA-ACLV>].

91. *Promoting Innovation and Competitiveness*, THE WHITE HOUSE, https://georgewbush-whitehouse.archives.gov/infocus/technology/economic_policy200404/chap3.html [<https://perma.cc/K8MZ-W2M4>] (last accessed Apr. 4, 2025). George W. Bush signed an executive order creating a National Health Information Technology Coordinator within the Department of Health and Human Services (HHS) to ensure patients can access their data and communication between EHR systems is private and secure. Pub. L. No. 111-5, §§ 13001-13424, 123 Stat. 115, 228-279 (2009). This rule established ASTP and gave them the authority to create continuity in EHR communication and build a framework for EHRs to communicate with one another.

92. 21st Century Cures Act, Pub. L. No. 114-255, § 13101, 130 Stat. 1033 (2016). Congress required ASTP to create a Health IT Certification program, which would develop standards to develop greater EHR interoperability between hospitals, laboratories, and physicians' offices.

93. *Regulation FAQs* THE OFF. FOR THE NAT'L COORDINATOR FOR HEALTH INFO. TECH., <https://www.healthit.gov/faq/08-question-09-10-008-2-0> <https://www.healthit.gov/sites/default/files/understanding-certified-health-it-2.pdf> [<https://perma.cc/75GJ-VRBS>]; *Understanding Certified Health IT*, The Office For The Nat'L Coordinator For Health Information Technology, <https://www.healthit.gov/sites/default/files/understanding-certified-health-it-2.pdf>. Certification groups include privacy and security, patient engagement, care coordination, electronic exchange, health IT design and performance, public health, clinical quality management, and clinical processes.

94. *Centers for Medicare & Medicaid Services (CMS) EHR Incentive Program Measures*, ASSISTANT SEC'Y FOR TECH. POL'Y, [HTTPS://HEALTHIT.GOV/DATA/DATASETS/CENTERS-MEDICARE-MEDICOID-SERVICES-CMS-EHR-INCENTIVE-PROGRAM-MEASURES/](https://healthit.gov/data/datasets/centers-medicare-medicoid-services-cms-ehr-incentive-program-measures/) [<https://perma.cc/3H76-JKVL>]. If clinicians do not use Certified Health IT, CMS can give them 1% less funding and fines up to \$43,720.

95. *Id.* Clinicians must also show that they are using the technology in a way that positively affects their patient's care.

ASTP's criteria EHRs must meet to obtain a general Health IT Certification.⁹⁶ As of 2021, 78% of office-based physicians and 96% of acute care hospitals have adopted an EHR that has a Health IT certification.⁹⁷

The Health IT Certification program promotes EHR interoperability by encouraging EHRs to use the same data language and structure, which in turn, allows EHRs to understand and use the data they send to one another.⁹⁸ By 2026, Certified EHRs must adopt the same data tags, known as United States Core Data for Interoperability (USCDI), and communication program, known as HL7 Clinical Document Architecture (HL7 CDA).⁹⁹ Currently, 425 out of 693 certified EHR systems can tag data under USCDI and separate data in the HL7 CDA format.¹⁰⁰ Here, it must be noted that this communication framework allows clinicians to share data, they cannot choose to only share certain tagged data sections; they still can either share no patient data or all of a patient's data.¹⁰¹

However, a growing number of EHRs are beginning to use HL7 Fast Healthcare Interoperability Resources (FHIR) instead of HL7 CDA to

96. *Standard Version Advancement Process*, ASSISTANT SEC'Y FOR TECH. POL'Y, <https://www.healthit.gov/topic/standards-version-advancement-process-svap> [https://perma.cc/H4L9-T9UB]; CTRS. FOR MEDICARE & MEDICAID SERVS., AN INTRODUCTION TO: MEDICARE EHR INNCENTIVE PROGRAM FOR ELIGIBLE PROFESSIONALS (2014) https://www.cms.gov/regulations-and-guidance/legislation/ehrincentiveprograms/downloads/ehr_medicare_stg1_begguide.pdf [https://perma.cc/Z4SC-XM8V]. Some medical systems prefer to use Certified Health IT because this certification denotes that an EHR will help them comply with HIPAA or communicate with other EHRs effectively.

97. National Trends in Hospital and Physician Adoption of Electronic Health Recprds. Assistant Secretary for Technology and Policy, <https://www.healthit.gov/data/quickstats/national-trends-hospital-and-physician-adoption-electronic-health-records> [https://perma.cc/4F8W-69XT].

98. See Reisman, *supra* note 87; *Understanding USCDI and Data Exchange*, FORESEE MED. (June 9, 2022), <https://www.foreseemed.com/blog/understanding-uscdi-and-data-exchange> [https://perma.cc/HH5W-DSCT]. ASTP published updated UCDI version 4 and USCDI version 5 standards that include additional tags. Recent ASTP Certification rules only require USCDI version 3.

99. II, C-CDA Companion Guide Updates; summary, <https://www.federalregister.gov/documents/2024/01/09/2023-28857/health-data-technology-and-interoperability-certification-program-updates-algorithm-transparency-and-health> Samurai, Data Segmentation for Privacy and Consent, YouTube (May 1, 2024), youtu.be/4xQm-sM9J4o?si=VYEvSEal7IzIzpaim [https://perma.cc/9MFE-WCQ6]; 45 C.F.R. §170.203 (2020); Comparing HL7 vs FHIR Standards to Enhance Interoperability in Healthcare, SPSOFT, (July 5, 2024) [spssoft.com/tech-insights/comparing-hl7-vs-fhir](https://www.spssoft.com/tech-insights/comparing-hl7-vs-fhir) [https://perma.cc/6C8F-RMJ2]. USCDI categories are tags that ASTP has determined are essential for promoting EHR interoperability, label patient data (ex. immunizations, medications, and patient demographics). ASTP published updated UCDI version 4 and USCDI version 5 standards that include additional tags, recent ASTP Certification rules only require USCDI version 3.

100. *Certified Health IT Product List*, ASSISTANT SEC'Y FOR TECH. POL'Y, [chpl.healthit.gov](https://www.healthit.gov) [https://perma.cc/G6RT-AXWJ] (select advanced search; click certification status and select active; select certification criteria and check off 170.315(b)(1), 170.315(b)(7), 170.315(b)(8)).

101. See Grando, *supra* note at 17 at 2.380.

separate data.¹⁰² While not yet required in a rule, ASTP encourages EHR vendors to adopt FHIR because each data point is communicated separately, allowing EHRs to just share an individual data point within a patient's health record.¹⁰³ For example, while under HL7 CDA an EHR registers all the data labeled as immunizations as one entity, under FHIR, an EHR can recognize each individual immunization entry within this data tag.¹⁰⁴

It must be noted that even with these technological advancements, EHRs still cannot sort electronic health information recorded in a free text box.¹⁰⁵ Even when clinicians record different treatments and conditions in one box, an EHR cannot label these terms in the free text box.¹⁰⁶ Clinicians may also prefer to write patient information as free text when there is no tag for a patient's data under USCDI or when they are recording numerous patient conditions.¹⁰⁷

3. EHRs Share Health Information Between States through Health Sharing Information Exchanges, Multi-State Health Networks, and TEFCA

The standardization of Electronic Health Information (EHI) communication allows for regions to establish Health Information Exchanges (HIEs), agreements between health systems to share patient data.¹⁰⁸ Without HIEs, health information is only automatically accessible by clinicians and

102. WESLEY BAKER ET. AL., *A national survey of digital health company experiences with electronic health record application programming interfaces*, National Library of Medicine (Apr. 3 2024) <https://pubmed.ncbi.nlm.nih.gov/38281124/>. "Most companies reported use of the Fast Healthcare Interoperability Resources standard.", ASSISTANT SEC'Y FOR TECH. POL'Y (Jan. 12, 2025), www.healthit.gov/isp/about-fhir-action-plan [<https://perma.cc/4R4Q-XX5B>]; see Steven Posnack & Wes Barker, *The Heat is On: US Caught FHIR in 2019*, ASSISTANT SEC'Y FOR TECH. POL'Y, (July 29, 2021), www.healthit.gov/buzz-blog/health-it/the-heat-is-on-us-caught-fhir-in-2019 [<https://perma.cc/W3LK-DAPV>].

103. *FHIR Use Cases: Breaking Down Digital Health Barriers and Transforming Care*, INTERSYSTEMS, <https://www.intersystems.com/resources/fhir-use-cases-digital-health-barriers-transform-care/> [<https://perma.cc/5CTN-WGK3>].

104. *See id.*

105. Swaminathan Kandaswamy et al., *Clinician Perception on the Use of Free-Text Communication Orders*, 12 APPLIED CLINICAL INFORMATICS 484, 485 (2021).

106. *Id.*

107. *Id.*

108. *For Patients*, CHESAPEAKE INFO. SYS. FOR OUR PATIENTS, www.crisphealth.org/for-patients/ [<https://perma.cc/G3MN-NZG9>]; *Health Information Exchange*, CALIFORNIA DEP'T OF PUB. HEALTH, hie.cdph.ca.gov/ [<https://perma.cc/8JNP-XW8B>]; *Overview*, MARYLAND HEALTH CARE COMM'N, mhcc.maryland.gov/mhcc/pages [<https://perma.cc/KZM4-H7SN>]; *DC HIE*, DEP'T OF HEALTH CARE FIN., dhcf.dc.gov/page/dc-hie [<https://perma.cc/Z4GZ-UFQG>].

employees within the same medical network.¹⁰⁹ However, if patients want to send information to clinicians who are a part of different medical networks, they must send a request each time they want to share their health information.¹¹⁰ To make it easier for patients and clinicians to share health information, regions, states, and counties have created networks for medical providers in the same area to share patient data called Health Information Exchanges (HIEs).¹¹¹ When patients consent to sharing their information with the network, any of their providers can see their health data, as long as they have approval under HIPAA.¹¹²

In 2022, ASTP established the Trusted Exchange Framework and Common Agreement (TEFCA), a framework that encourages data sharing on a national scale.¹¹³ Any clinician whose EHR company agrees to TEFCA's terms can request patient information from another provider in the exchange network.¹¹⁴ So long as a patient agrees to disclose their health information, EHRs receiving the request must share the patient data with the requesting EHR.¹¹⁵

109. [https://pubmed.ncbi.nlm.nih.gov/?term="Holmgren AJ](https://pubmed.ncbi.nlm.nih.gov/?term=)[Author]A JAY HOLMGREN ET AL., *Health Information Exchange: Understanding the Policy Landscape and Future of Data Interoperability* (July, 6 2023), <https://pmc.ncbi.nlm.nih.gov/articles/PMC10751121/>. [<https://perma.cc/28XG-DU2G>]. Health networks are a collection of hospitals, doctor's offices, billing departments, and other medical facilities under the same corporation which all could be in the same state or span across multiple states. Clinicians and employees do not have to receive consent to view patient information for treatment, payment, or healthcare operations.; *St. Christopher's Hospital for Children Launches Electronic Health Record*, TOWER HEALTH (Mar. 4, 2021) <https://towerhealth.org/articles/st-christophers-hospital-children-launches-electronic-health-record> [<https://perma.cc/QDW8-SR2A>]. As medical systems are growing, when they are acquired, they may not use the same EHR system immediately, but they aim to consolidate into one EHR across the system.

110. See SUMMARY OF THE HIPAA PRIVACY RULE, *supra* note 30. Unless it is for a treatment, payment, or healthcare operation clinicians must obtain patient consent before disclosure

111. See CHESAPEAKE INFO. SYS. FOR OUR PATIENTS, *supra* 108; See *Health Information Exchange*, *supra* 108.

112. See CHESAPEAKE INFO. SYS. FOR OUR PATIENTS, *supra* 108; See SUMMARY OF THE HIPAA PRIVACY RULE, *supra* note 30.

113. TEFCA, ASSISTANT SEC'Y FOR TECH. POL'Y, <https://healthit.gov/policy/tefca/> [<https://perma.cc/Z6J3-XSMR>].

114. *Id.* The request must be for treatment, payment, health care operation, public health, government benefits, or individual access services purposes.

115. *Id.*

4. ASTP uses DS4P Standards to Protect Patient Privacy

While sharing patient data leads to better health outcomes, sharing data that patient's find sensitive can be harmful.¹¹⁶ In turn, ASTP requires communicating EHRs to note when a patient's data is sensitive.¹¹⁷

In 1975, when clinicians relied on paper records, HHS realized that sharing substances abuse history and psychiatric notes could lead to stigmatizing social and legal consequences.¹¹⁸ In turn, HHS added Title 42 Part 2 to the Code of Federal Regulations (CFR).¹¹⁹ This rule requires substance abuse treatment and psychiatric facilities to keep patients' information separate from their other records, to only share this information with patient consent, and to denote to any receiving clinicians if they can redisclose the patient's health information.¹²⁰

Once clinicians began using EHRs, it became difficult for clinicians to keep separate records in order to comply with Part 2.1.¹²¹ Thus, this law inhibited care teams from providing patients coordinated and integrated patient care.¹²² To alleviate clinician's concerns, the Substance Abuse and Mental Health Services Administration (SAMHSA) created Data Segmentation for Privacy (DS4P), a program which is now part of the Certified Health IT requirements.¹²³ DS4P allows clinicians to designate on an EHR if a patient has given consent for their information to be redisclosed.¹²⁴ However, it must be noted that DS4P only labels sensitive information does not separate it from a patient's health record.¹²⁵

116. Dennis McCarty et al., *42 CFR Part 2 and Perceived Impact on Coordination and Integration or Care: A Qualitative Analysis*, 68 PSYCHIATRIC SERV. 245, 245–46 (2017) (disclosing this information can lead individuals to losing employment, housing, and child custody).

117. *Security Tags for Sensitive Information*, ASSISTANT SEC'Y FOR TECH. POL'Y, <https://www.healthit.gov/isp/security-tags-sensitive-information> [<https://perma.cc/2XB4-P6LL>].

118. See McCarty et al., *supra* note 116; *Does HIPAA provide extra protections for mental health information compared with other health information?* U.S. DEP'T OF HEALTH & HUM. SERVS., www.hhs.gov/hipaa/for-professionals/faq/2088/does-hipaa-provide-extra-protections-mental-health-information-compared-other-health.html [<https://perma.cc/FU2P-XM9W>].

119. *HIPAA and Part 2*, U.S. DEP'T OF HEALTH & HUM. SERVS., <https://www.hhs.gov/hipaa/for-professionals/special-topics/hipaa-part-2/index.html> [<https://perma.cc/528V-LEMJ>]. Unless legal authorities are requesting patients' information, facilities must also obtain patients' consent before disclosing their treatment, diagnosis history, or psychiatric notes.

120. *Id.*

121. See Dennis McCarty et al., POL'Y, *supra* note 116 at 2.

122. *Id.*

123. *2015 Edition Final Rule: Data Segmentation for Privacy*, THE OFF. FOR THE NAT'L COORDINATOR HEALTH INFO. TECH. (2015), www.healthit.gov/sites/default/files/2015editionehrcertificationcriteria4p10615.pdf [<https://perma.cc/H6S4-7BPZ>].

124. Sarabu et al., *Shifting into Action: From Data Segmentation to Equitable Interoperability for Adolescents (and Everyone Else)*, 14 APPLIED CLINICAL INFORMATICS 544, 546–47 (2023).

125. See ASSISTANT SEC'Y FOR TECH. POL'Y, *supra* note 113.

III. ANALYSIS

This Note has explained that when patients travel out of state for an abortion, their data could be shared with providers in their home state because (1) many systems now use the same language and format to communicate (2) information sharing networks and multi-state health networks can share patient's health information easily, and (3) national privacy laws do not protect patient's reproductive data in all circumstances. This inter-state data sharing creates a chilling effect on abortion access: when out-of-state abortion patients know that clinicians in their home could see their abortion record, patients are unwilling to get the care they need.

This Note calls for ASTP to require EHR developers to build a segmentation function for reproductive health as part of the Health IT Certification program. Since the proposed regulation only requires the segmentation mechanism, not that clinicians must use it, this proposal does not require clinicians in abortion-criminalizing state to disobey state law.

The following section will first discuss how ASTP has the authority to require a segmentation function under the Health IT Certification program. Then, this section will outline how ASTP should enact a reproductive health USCDI category using the reproductive health definition in the HIPAA Privacy Rule to Protect Reproductive Health Data. Finally, this section will address developer's concerns about segmentation feasibility and additional steps federal and state governments need to take to protect reproductive health data.

A. Federal Reproductive Health Protections Need to be Enhanced

The Texas federal court's decision that invalidated the HIPAA Rule to Support Reproductive Health Care Privacy highlights the need for a federal, technological solution to protecting patients' abortion data. Following *Purl*,

clinicians must follow their state law when sharing patient's abortion information.¹²⁶ Clinicians in states with abortion shield laws still cannot share patient's abortion information with state authorities seeking to impose a civil or criminal penalty.¹²⁷ Thus, the less information that crosses into states without an abortion shield law, the safer patients will be from potential criminal and civil liability for obtaining abortion care.

Still, HTI-3, the Protecting Care Access Exception to Information Blocking remains in place, under this regulation, clinicians can keep patients' reproductive health private and not risk an Information Blocking charge from ASTP.¹²⁸ While the PCA laws helped protect patients seeking reproductive

126. See *Purl*, *supra* note 38.

127. *Id.*

128. 45 C.F.R. §§ 171.102, 171.202, 171.204, 171.206.

health services, it does not incentivize companies to create technology to protect the data from traveling clinicians in other states.

B. Reproductive Health Data Segmentation Regulations Should Take Place through ASTP Action to Avoid Conflicting State Laws

A national reproductive health data segmentation regulation will create a unified approach to protecting reproductive health information, allowing developers to focus their resources on one solution rather than trying to adapt to multiple standards. With no federal solution to protecting abortion data, states such as Maryland and California have attempted to protect patient reproductive health data using different standards.¹²⁹ In order to meet each state's regulations, developers must split their resources to create two innovative solutions.¹³⁰ Thus, one federal requirement would allow developers to create better protections since they would only have to focus on one solution.

ASTP has the authority and precedent to enact a reproductive health segmentation requirement for certified health IT. A segmentation requirement would build on HHS's historical mission to promote data privacy.¹³¹ Part 2 regulations recognize that redisclosing substance abuse data and psychiatric data could lead to discriminatory legal charges.¹³² A similar landscape is emerging in reproductive health data.¹³³ ASTP added a new requirement to the Health IT Certification process to allow patients to seek medical care without fear their history could lead them to charges.¹³⁴ Here, the reverse is occurring but the same idea remains; patients are afraid to seek a medical procedure so they can continue receiving medical care without fear of prosecution.¹³⁵ Therefore, there is a precedent for ASTP to develop programs that assist patients and clinicians in safeguarding sensitive health data when it could lead to harmful legal consequences.¹³⁶

ASTP has the authority to add a reproductive health segmentation standard to Certified Health IT requirements.¹³⁷ First, the HITECH Act, which allows ASTP to establish regulations for Certified Health IT, makes it possible for ASTP to require Certified Health IT segment reproductive health

129. *Statement of Pana Lassi, supra* note 11; *see also* MD. DEP'T OF FIN., POLICY NOTE, *supra* note 26.

130. *Statement of Pana Lassi, supra* note 11; *see also* MD. DEP'T OF FIN., POLICY NOTE, *supra* note 26.

131. *See* Grando et al., *supra* note 17.

132. *FACT SHEET 42 CFR PART 2 FINAL RULE* US DEPARTMENT OF HEALTH AND HUMAN SERVICES, (Feb. 8, 2024) <https://www.hhs.gov/hipaa/for-professionals/regulatory-initiatives/fact-sheet-42-cfr-part-2-final-rule/index.html> [<https://perma.cc/P2Q9-MY75>].

133. *See Statement of Michelle Gomez, supra* note 1; *See* Grando et al., *supra* note 17.

134. *Statement of Michelle Gomez, supra* note 1.

135. *Id.*; *see HIPAA and Part 2, supra* note 119.

136. *See* generally Grando et al., *supra* note 17.

137. 21st Century Cures Act, Pub. L. No. 114-255 § 13101, 130 Stat. 1033 (2016); *Standard Version Advancement Process, supra* note 96.

data.¹³⁸ Also, the CURES Act further grants ASTP authority to enforce regulations that will enhance Health IT interoperability.¹³⁹ Under HIPAA and Information Blocking regulations, clinicians are not obligated to share information that a patient chooses not to disclose or any information that, if shared, could inadvertently reveal private patient details.¹⁴⁰ However, EHR data segmentation could revolutionize this reality. When EHRs effectively separate patients' confidential data, clinicians can share more patient data that is not sensitive, thereby significantly enhancing interoperability.¹⁴¹

Developers are incentivized to comply with Certified Health IT Standards.¹⁴² In order for clinicians to receive full Medicare funding from CMS, they must utilize Certified Health IT.¹⁴³ Even clinicians who do not get funding from CMS may use Certified Health IT because these EHRs offer tools that help ensure HIPAA compliance, which can provide clinicians with confidence that they are adhering to their legal obligations.¹⁴⁴ Also, clinicians specifically look for EHRs that are certified to interoperability requirements to confirm that an EHR can help them communicate patient records.¹⁴⁵

C. Developers Can Feasibly Comply with the Proposed Rule

While the Electronic Health Record Association (EHRA) argues that segmentation is not feasible for developers to create, this argument fails to consider recent technological developments.¹⁴⁶ The following section will argue that this segmentation requirement builds on the already established ASTP interoperability framework and allows developers to segment data using tools their EHR already uses.

1. The Proposed Rule Builds on Current ASTP Interoperability Framework to Create a Reproductive Health USCDI Tag

ASTP can enact a segmentation requirement because it has already established an interoperability framework using HL7 and United States Core

138. *Standard Version Advancement Process*, *supra* note 96; *Policy*, ASSISTANT SEC'Y FOR TECH. POL'Y, <https://healthit.gov/policy> [<https://perma.cc/F4M5-GAR4>].

139. *The 21st Century Cures Act*, NAT'L INSTS. OF HEALTH, www.nih.gov/research-training/medical-research-initiatives/cures [<https://perma.cc/MHG8-52LW>].

140. Mary Anderlik Majumder & Christi J. Guerrini, *Federal Privacy Protections: Ethical Foundation, Sources of Confusion in Clinical Medicine, and Controversies in Biomedical Research*, 18 AMERICAN MED. ASS'N J. ETHICS 288, 289 (2016); See THE OFF. OF THE NAT'L COORDINATOR FOR HEALTH INFO. TECH., *supra* note 43.

141. See Grando et al., *supra* note 17.

142. See ASSISTANT SEC'Y FOR TECH. POL'Y, *supra* note 96.

143. *Id.*

144. Lisa Eramo, *The importance of certified EHR technology*, THE INTAKE (Mar. 30, 2025), <https://www.tebra.com/theintake/ehr-emr/certified-ehr-technology> [<https://perma.cc/QGH7-EZPW>].

145. *Id.*

146. *Id.*

Data (USCDI) that most certified health IT use.¹⁴⁷ For an EHR to segment data properly, it must know if any data in a patient's record meets the requirement for segmentation including data a clinician input manually and data sent to the EHR.¹⁴⁸ A receiving EHRs can only understand data from a sending EHR if they both organize and label their data the same way.¹⁴⁹

ASTP's EHR interoperability framework does just this by providing a standard for EHR communication.¹⁵⁰ Using USCDI, EHRs label the data using the same vocabulary and under HL7, EHRs organize their data the same.¹⁵¹ Therefore, because this framework standardizes EHR data sharing by providing a uniform labeling language and organizing method, EHRs can discern reproductive health data as long as this data is labeled under USCDI.¹⁵²

Thus, for EHRs to know which data is reproductive health data, ASTP should create a new USCDI category for reproductive health information using the PCA reproductive care definition. The PCA defines reproductive care as healthcare that "affects the health of an individual in all matters relating to the reproductive system and to its functions and processes."¹⁵³ While the EHRA notes that this definition does not provide specific data instances, which makes it hard to discern which data the rule covers, Health Gorilla, an EHR company, created publicly accessible codes to denote which data meets this definition.¹⁵⁴ Thus, ASTP can use these codes to convey to EHR developers which instances the textual definition requires them to segment.

2. The Proposed Rule Does Not Dictate the Manner EHRs must Segment Reproductive Health Data

EHRs use different methods to process health data, leading to various ways in which EHRs can segment data.¹⁵⁵ Some systems might opt to put segmented data in a separate file, while others may choose to filter the data when it's transmitted to other EHRs.¹⁵⁶ The proposed rule accounts for these

147. See generally *United States Core Data for Interoperability (USCDI)*, ASSISTANT SEC'Y FOR TECH. POL'Y, <https://www.healthit.gov/isp/united-states-core-data-interoperability-uscdi> [<https://perma.cc/V2B6-KL5C>]; see SPSoft, *supra* note 99 (referring to both Fast Healthcare Interoperability Resources (FHIR) or Clinical Document Architecture (CDA)).

148. Health Gorilla, *supra* note 22.

149. See Reisman, *supra* note 87.

150. *Understanding USCDI and Data Exchange*, FORESEE MEDICAL (June 9, 2022), foreseemed.com/blog/understanding-uscdi-and-data-exchange [<https://perma.cc/HH5W-DSC7>].

151. *Id.*; see Reisman, *supra* note 87; see ASSISTANT SEC'Y FOR TECH. POL'Y, *supra* note 96.

152. See FORESEE MEDICAL, *supra* note 150.

153. *Id.*

154. *Id.*; Health Gorilla, *supra* note 22.

155. Electronic Health Record Association, Comment Letter to ONC on the HTI-1 Proposed Rule (June 23, 2023), <https://www.ehra.org/sites/ehra.org/files/EHR%20Association%20Comments%20to%20ONC%20on%20the%20HTI-1%20Proposed%20Rule.pdf>.

156. *Id.*

differences by mandating only a common outcome: EHRs must be able to separate a patient's reproductive health data. In turn, this rule will provide developers with flexibility to meet the segmentation requirement in a manner that best suits their technology.

Additionally, EHR segmentation becomes more manageable as more EHRs update their sharing programs to HL7 FHIR.¹⁵⁷ Using FHIR, an EHR registers each data point separately. Thus, since the data are already separate, EHR developers just need to define that data, so the EHR knows which data not to send. Therefore, as more EHRs use HL7 FHIR standards to send data, segmentation will become even easier for EHR developers to create.

D. This Proposal Rule has Technological and Legal Limits but is Still an Important Step Forward in Reproductive Health Data Protection.

1. This Proposal Does Not Require Clinicians to Segment Reproductive Health Data

This proposal only requires EHRs to have the capability to segment reproductive health data. Since ASTP only has the authority to regulate EHR standards through Health IT Certification, this proposal does not mandate clinicians to segment reproductive health data.¹⁵⁸ For federal and state governments to require clinicians to use this technology, the technology must first exist.

The proposed rule establishes a strong incentive for developers to create segmentation technology. Since clinicians must use Certified EHRs to receive full funding from CMS, EHR developers are incentivized to meet these standards for their customers to use their products. Thus, the proposed rule is an important first step to creating a reproductive health data segmentation requirement for clinicians.

Nonetheless, the proposed rule will strengthen current legal protections for patient's reproductive health information.¹⁵⁹ Patients have the right under the HIPAA Privacy Rule to require clinicians to keep their health information private.¹⁶⁰ When patients make such a demand, clinicians can adhere to this request using their best efforts.¹⁶¹ Therefore, this proposed rule enhances the tools that clinicians use when making their best effort. Under this proposal and HIPAA, if a patient in an abortion-protective state requests for their clinician to keep their reproductive health private, clinicians would have to segment their reproductive health data.¹⁶²

157. See INTERSYSTEMS, *supra* note 103.

158. See THE OFF. FOR THE NAT'L COORDINATOR FOR HEALTH INFO. TECH., *supra* note 93.

159. See U.S. DEP'T OF HEALTH AND HUM. SERVS, *supra* note 29.

160. *Id.*

161. *Id.*

162. *Id.*

Further, even though this proposal will not require clinicians to segment reproductive health information, many clinicians choose to use this function.¹⁶³ According to the National Abortion Federation, abortion providers should take all reasonable precautions to keep abortion information private.¹⁶⁴ In line with this goal, Planned Parenthood and the Center for Reproductive Rights, which represent abortion providers, have advocated for and EHR segmentation function to protect abortion patients and providers.¹⁶⁵ This alignment among abortion advocates highlights that even without a legal requirement, abortion clinicians will likely utilize this segmentation technology to keep patients and clinicians safe.¹⁶⁶ Therefore, while a segmentation requirement for Certified Health IT is not a complete solution to protecting abortion information, it is a crucial first step.¹⁶⁷

2. This Proposal Does Not Require Clinicians to Segment Free Text

EHRs cannot identify and segment words in a value set within free text.¹⁶⁸ However, clinicians can manually segment the whole free text if their notes include information related to reproductive health.¹⁶⁹ Clinicians have a strong incentive to check if a free text contains reproductive health information when they are treating an out-of-state patient since they could face charges if authorities in the patients' home states discover their actions.¹⁷⁰

It is not overly burdensome for clinicians to review free text boxes for reproductive health information because clinicians already must review free text to avoid disclosing confidential patient information. Under the HIPAA Privacy Rule and CFR Part 2, clinicians are legally obligated to ensure to not share sensitive information.¹⁷¹ Specifically, if a patient requests that clinicians keep certain health information private, clinicians must ensure that other providers cannot see the private information on the EHR¹⁷² Also, CFR Part 2

163. The Center for Reproductive Rights, Comment Letter on Proposed Rule Health Data, Technology, and Interoperability: Certification Program Updates, Algorithm Transparency, and Information Sharing 2 (June 16, 2023); Health Gorilla, *supra* note 22; NAT'L ABORTION FED'N, *supra* note 23.

164. NAT'L ABORTION FED'N., *supra* note 23.

165. *Id.*; Center for Reproductive Rights, *supra* note 12; Health Gorilla, *supra* note 22.

166. *Id.*

167. *Id.*

168. Swaminathan Kandaswamy et al., *supra* note 105; see Letter from HIMSS Elec. Health Rec., *supra* note 68.

169. See generally CMS Final Rule: Frequently Asked Questions, 1UPHEALTH, <https://1up.health/resources>

/interoperability-resource-center/cms-final-rule-faqs [https://perma.cc/3T8H-99S6] ([Referring to USCDI v3] "CMS also expressly specified that a payer is only required to share structured documentation that it maintains, but there is no requirement to actually parse through unstructured data in an effort to make it structured.").

170. TEX. HEALTH & SAFETY CODE ANN. §170A.005 (West 2023).

171. See Grando et al., *supra* note 17.

172. *Id.*

mandates that clinicians must obtain patient consent before disclosing information related to substance use treatment or psychiatric notes.¹⁷³

3. Investigative Bodies Could Still Acquire a Patient's Medical Record if They Find Probable Cause.

Segmentation is not a complete solution to protecting out-of-state abortion patient data. Clinicians could still infer that a patient obtained an abortion through the absence of health information on a patient's record. States can still obtain a patient's record if they find probable cause that a patient broke the law.¹⁷⁴

Nonetheless, a reproductive health segmentation requirement will lessen probable cause.¹⁷⁵ While there is a risk a clinician could infer reproductive health information is missing from a patient's record, segmentation makes this data less obvious. Thus, while segmentation may not eliminate probable cause, it will lessen it.

IV. CONCLUSION

As developers have enhanced EHRs data sharing capabilities, they also must continue to develop EHRs data privacy abilities. ASTP must enact a reproductive data segmentation standard in their Health IT Certification requirements. This proposal sets a national standard for EHR's to segment patient's abortion data, an important first step in keeping patient's abortion data private. To fully protect patients' health data, states and federal governments must enact additional requirements to ensure actors use this function.

173. *Id.*

174. See Elizabeth Joh, *Fourth Amendment Rights as Abortion Rights*, N.Y. UNIV. L. REV. (Oct. 24, 2022).

175. Health Gorilla, *supra* note 22.

