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Privacy in Discovery After Dobbs

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ABSTRACT

Modern discovery in civil courts has been criticized for its overbreadth and expense, leading to a series of changes in the Federal Rules of Civil Procedure focused on proportionality. At the same time, there has been increasing interest in privacy in civil discovery, given the rise in litigants' requests for broad production of social media, cell phone data, and wearable technology. Aside from other compelling reasons to establish privacy bounds for discovery, there are two developments, both deriving from the Supreme Court's recent decision in Dobbs, that make this issue crucial. First, by overruling Roe v. Wade, Dobbs deals a blow to the constitutional right to privacy, which protects against unfettered discovery. Second, with legislatures across the country rushing to criminalize abortion, women and those who support them face threats that discovery will be used to uncover evidence that they have violated those laws.

This article argues that (1) the constitutional right to privacy against compelled disclosure of personal information survives Dobbs. While Roe did provide precedent for privacy protection in discovery, Dobbs does not implicate the privacy interest in shielding from disclosure information concerning intimate matters. (2) In addition, other Supreme Court precedent supports the right to privacy against disclosure of intimate information, including reproductive matters. (3) Third, the right to privacy is protected by reference to other federal legislation and public policy, including FOIA and HIPAA protections. (4) Finally, state constitutional privacy, privileges and case law are not implicated by the Supreme Court decision in Dobbs, and provide protection in state law cases. Together, these principles give courts strong precedent to use their discretion to deny requests for discovery of information whose relevance is outweighed by privacy interests.

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I. INTRODUCTION

The public response to the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*[1] included the recognition that a great amount of information about reproduction was being collected and stored, and that such information could now be a threat. All over social media, women were admonished to delete their period tracking apps and other reproductive health data.[2] People were warned that offers to help women seeking abortion could violate laws like that in Texas criminalizing the aiding and abetting of an abortion.[3] Google announced it would voluntarily delete location information for visits to abortion clinics and other sensitive locations.[4] The reactions were not irrational—indeed, Facebook messages were used in a recent case in Nebraska to pursue prosecution of a teenager for having an abortion.[5] Even before *Dobbs*, prosecutors used text messages about ordering pharmacy pills as evidence of feticide and neglect of a child in Indiana, and they used internet search history for terms like "buy abortion pills" and "misoprostol abortion pill" to prosecute a woman who experienced

[1] *Dobbs v. Jackson Women's Health Org.*, 213 L. Ed. 2d 545, 142 S. Ct. 2228, (2022).

[2] Liz Wolfe, *Should Women Delete Their Period Apps in the Wake of Dobbs?*, Reason Foundation, (June 29, 2022, 9:45 AM), https://reason.com/2022/06/29/should-women-delete-their-period-tracker-apps-in-the-wake-of-dobbs/; Sara Morrison, *Should I delete my period app? And other post-Roe privacy questions*., Vox Media, (July 6, 2022, 12:50 PM), https://www.vox.com/recode/2022/7/6/23196809/period-apps-roe-dobbs-data-privacy-abortion.

[3] *Id.*

[4] Jannette Wilder, *Google Will Delete Location History for Sensitive Visits*, Healthcare Innovation, (July 12, 2022), https://www.hcinnovationgroup.com/cybersecurity/privacy-security/news/21273863/google-will-delete-location-history-for-sensitive-visits.

[5] Jason Koebler & Anna Merlan, *This is the Data Fecebook Gave Police to Prosecute a Teenager for Abortion*, Vice, (August 9, 2022, 2:44 PM), https://www.vice.com/en/article/n7zevd/this-is-the-data-facebook-gave-police-to-prosecute-a-teenager-for-abortion.

a stillbirth in Mississippi.[6] Some current anti-abortion bills do go so far as to criminalize giving a person information about an abortion.[7]

While much of the discussion has surrounded the use of data in criminal prosecutions, there is also a consequence for civil discovery, where broad requests for data have included social media posts, cell phone information, location tracking, Fitbit data, and other sources of highly sensitive information.[8] Material sought in discovery could provide ammunition in civil litigation and chill access to the courts.[9] It is therefore more important than ever that courts limit discovery requests and grant protective orders where privacy interests are implicated.

II. POST-*DOBBS* LANDSCAPE FOR DISCOVERY

The Supreme Court's decision in *Dobbs* paved the way for state legislatures across the country to criminalize abortion, rendering information about reproductive health as potentially incriminating. This section describes post-*Dobbs* legislation and why it matters to civil discovery. It then describes some common sources of civil discovery that can reveal private information like that involving reproductive health.

A. Post-*Dobbs* Legislation

There are three primary ways that *Dobbs* has implicated state anti-abortion laws in overturning *Roe v. Wade*.[10] First, old laws on the

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[6] Safia Samee Ali, *Prosecutors in states where abortion is now illegal could begin building criminal cases against providers*, NBC News, (June 24, 2022, 7:17 PM), https://www.nbcnews.com/news/us-news/prosecutors-states-abortion-now-illegal-begin-prosecute-abortion-provi-rcna35268.

[7] Cat Zakrzweski, *South Carolina bill outlaws websites that tell how to get an abortion,* The Washington Post, (July 22, 2022, 5:27 PM), https://www.washingtonpost.com/technology/2022/07/22/south-carolina-bill-abortion-websites/; S. 1373, 124th Gen. Assemb. (S.C. 2022) (making it illegal to provide information by telephone, internet or other mode of communication about how to obtain an abortion, knowing that the information will be used or is reasonably likely to be used for an abortion)

[8] S. 1373, 124th Gen. Assemb. (S.C. 2022) § 44-41-930(A).

[9] *Id.* at §44-41-930(B).

[10] *Roe v. Wade*, 410 U.S. 113 L. Ed. 2d 147 (1973).

books are being revived now that they are no longer unconstitutional.[11] An Arizona law that predates its own statehood was found enforceable by a state court in September.[12] Wisconsin's 1849 ban on abortion remains unclear, but that uncertainty itself affects abortion providers.[13] A nineteenth-century West Virginia abortion ban[14] and a 1931 Michigan ban[15] have been enjoined, for now.

Second, "trigger laws" which were enacted based on the possibility of *Roe*'s overturning are now in effect.[16] Abortion is now banned with no exceptions for rape or incest in Alabama, Arkansas, Kentucky, Louisiana, Missouri, South Dakota, Tennessee, Texas, and Wisconsin.[17] Mississippi bans abortion with exceptions for rape but not incest.[18] Ohio and Georgia have banned abortion after six weeks of pregnancy, though in Ohio, a judge has blocked the ban indefinitely, while Florida bans abortion after 15 weeks.[19] Arizona, Iowa, North

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[11] Bill Keveny, *After Roe v. Wade, abortion bans from the 1800s became legal matters in these states*, USA Today, (Oct. 1, 2022, 12:50 PM), https://www.usatoday.com/story/news/nation/2022/10/01/abortion-laws-1800-s-became-legal-issue-after-supreme-court-ruling/10454537002/.

[12] Stacey Barchenger & Ray Stern, *Arizona's 1864 law banning abortion in most circumstances in effect, judge rules*, USA TODAY (Sept. 23, 2022), https://www.usatoday.com/story/news/local/arizona/2022/09/23/arizona-ban-on-nearly-all-abortions-in-effect-judge-rules/8075792001/.

[13] Bill Keveney, *After Roe v. Wade, abortion bans from the 1800s became legal matters in these states*, USA TODAY (Oct. 1, 2022, 7:00 AM), https://www.usatoday.com/story/news/nation/2022/10/01/abortion-laws-1800-s-became-legal-issue-after-supreme-court-ruling/10454537002/.

[14] Nate Raymond, *West Virginia judge blocks pre-Roe v. Wade abortion ban*, REUTERS (July 18, 2022, 3:57 PM), https://www.reuters.com/world/us/west-virginia-judge-blocks-pre-roe-v-wade-abortion-ban-2022-07-18/.

[15] Veronica Stracqualursi, *Michigan judge rules state's 1931 abortion ban unconstitutional*, CNN (Sept. 7, 2022, 4:58 PM),https://www.cnn.com/2022/09/07/politics/michigan-1931-abortion-law-unconstitutional/index.html.

[16] *See* Alison Durkee, *As 3 More Abortion Trigger Bans Take Effect, Here's Where Laws Are Being Enforced – And Where They've Been Blocked*, FORBES (Aug. 25, 2022, 11:25 AM), https://www.forbes.com/sites/alisondurkee/2022/08/25/as-3-more-abortion-trigger-bans-take-effect-heres-where-laws-are-being-enforced---and-where-theyve-been-blocked/?sh=4145c99356f3.

[17] Allison McCann et al., *Tracking the States Where Abortion is Now Banned*, N.Y. TIMES, https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html (Jan. 6, 2023, 10:30 AM).

[18] *Id.*

[19] *Id.*

Dakota, Montana, South Carolina, West Virginia, and Wyoming have passed bans that have been blocked in court:.[20] In addition, a recent amendment to Michigan's state constitution has prevented the enforcement of an abortion ban.[21]

Third, freed of *Roe*'s restrictions, legislatures are drafting new laws that are often stricter than the trigger laws.[22] The legislation varies as to gestational limit, as to exceptions, and as to scope, with some states providing for private civil enforcement, and some outlawing not only performing abortions but also giving information about them.

Texas provides an example of all three types of laws. That state originally banned abortion in 1857, and the law remained on the books, unenforced after *Roe v. Wade*, which itself was a Texas case.[23] In anticipation of the Supreme Court reversal of *Roe*, Texas passed a trigger law, the "Human Life Protection Act of 2021," which went into effect on August 25, 2022. That law criminalizes performing, inducing or attempting an abortion unless the pregnant patient is facing "a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced."[24] The prohibited conduct includes performing or inducing an abortion or aiding and abetting the performance or inducement of an abortion, "including paying for or reimbursing the costs of an abortion through insurance or otherwise."[25] A violation is a felony punishable by up to life in prison (in addition to civil penalties of not less than $100,000. The law may be enforced through a private civil lawsuit by a "claimant" (who has been compared to a bounty hunter). It provides for injunctive relief, statutory damages of $10,000 for each violation, and attorneys fees and costs.[26] Some in Texas are not satisfied

[20] *Id.*

[21] *Id.*

[22] Many of the trigger laws were "Heartbeat" laws, limiting abortion after about 6 weeks. After Dobbs, some state legislatures seek to go further, banning abortion from conception.

[23] 1856 Tex. Crim. Stat. 531-36.; *see* Eleanor Klibanoff*, Not 1925: Texas' Law Banning Abortion Dates to Before the Civil War*, TEXAS TRIBUNE (Aug. 17, 2022 1PM), https://www.texastribune.org/2022/08/17/texas-abortion-law-history/.

[24] H.B. 1280, 87th Leg., Reg. Sess. (Tex. 2021).

[25] S.B. 8, 87th Leg., Reg. Sess. (Tex. 2021).

[26] *Id.*

with that law, and are pushing for even greater restrictions on abortion, no matter the age of the fetus, and incentives for individuals to sue anyone who assists in an abortion, including the option to sue out-of-state organizations that mail abortion-inducing drugs directly to Texas patients.[27]

South Carolina is considering a bill – based on model legislation from the anti-abortion group National Right to Life – that would punish not only the procedure of abortion, but also sharing information about abortion. [28] The bill states that a person aids or abets an unlawful abortion by "providing information to a pregnant woman, or someone seeking information on behalf of a pregnant woman, by telephone, internet, or any other mode of communication regarding self-administered abortions or the means to obtain an abortion, knowing that the information will be used, or is reasonably likely to be used, for an abortion" or by "hosting or maintaining an internet website, providing access to an internet website, or providing an internet service purposefully directed to a pregnant woman who is a resident of this State that provides information on how to obtain an abortion, knowing that the information will be used, or is reasonably likely to be used for an abortion."[29]

Abortion remains legal in Alaska, California, Connecticut, Hawaii, Illinois, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, New York, Oregon, Vermont, and Washington, with some limits after viability.[30] In some of those states, legislatures are passing bills prohibiting other states from attempting to prosecute people who travel into their state for the purpose of obtaining an abortion. California has enacted laws protecting abortion data privacy by preventing out-of-state law enforcement officers investigating abortions from executing search warrants on California-based companies,[31] and prohibiting healthcare providers from releasing

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[27] *See* Michael Mooney, *Advocacy Group Wants to Expand Texas Abortion Law*, AXIOS (Aug. 19, 2022), https://www.axios.com/local/dallas/2022/08/19/advocacy-group-wants-to-expand-texas-abortion-law.

[28] S. 1373, 124th Gen. Assemb. (S.C. 2022) § 44-41-860(B).

[29] *Id.*

[30] McCann, *supra* note 17.

[31] Assem. B. 1242, 2022 Leg., Reg. Sess. (Cal. 2022).

information about individuals seeking abortions in response to a subpoena or other out-of-state request.[32]

There is still much to be seen in terms of the legal ramifications of *Dobbs*. A senator has introduced federal legislation banning abortion after fifteen weeks.[33] Some abortion opponents are pushing for "fetal personhood."[34] If a fetus has rights beginning at conception, there is the potential for regulations or criminal laws covering any number of actions taken by a pregnant person that could be seen as harmful to the fetus.

B. The Implications for Civil Discovery

While the legislation banning abortion is primarily criminal in nature, there are effects of that legislation in the civil discovery context as well. It has long been the case that litigants use discovery as a tool to seek early settlement or dismissal of a case because of the onerous or embarrassing nature of the information sought to be disclosed in the case. Modern technology increases the chance that discovery will reveal private matters, including reproductive health.

1. Allegations of Mental or Physical Injury

In many cases, a plaintiff who seeks damages based on mental or physical injury is deemed to have "placed in issue" a wide range of information that would go to that person's mental or physical state. For example, in *St. John v. Napolitano*, a government employee brought suit alleging discrimination on the basis of his age and national origin.[35] The defendant moved to compel discovery of nine years of the employee's "medical, psychiatric, psychological or counseling reports of any kind," along with any documents related to such treatment and interrogatories

[32] Assem. B. 2091, 2022 Leg. Reg. Sess. (Cal. 2022).

[33] Kelsey Snell, *GOP Sen. Lindsay Graham Introduces 15-Week Abortion Ban in the Senate*, NPR (Sep. 13, 2022, 1:49PM), https://www.npr.org/2022/09/13/1122700975/gop-sen-lindsey-graham-introduces-15-week-abortion-ban-in-the-senate.

[34] *See* Benson v. McKee, 273 A.3d 121, 131(2022), cert denied, 143 S. Ct. 309 (2022) (rejecting the argument that unborn persons have standing to challenge Rhode Island's abortion law).

[35] St. John v. Napolitano, 274 F.R.D. 12 (D.D.C. 2011).

identifying any treatment providers.[36] Its theory of relevance was that "the records may reveal some alternative explanation for the emotional distress the plaintiff allegedly suffered."[37] In finding that "at least some of the plaintiff's medical history is relevant here,"[38] the District Court of the District of Columbia noted that other courts in the district had found that similar Title VII plaintiffs' medical records were relevant.[39]

In *Spoljaric v. Savarese*, the plaintiff sued for injuries sustained in a motor vehicle accident, including "impairment of ability to enjoy leisure time activities" and "quality of life."[40] The defendant requested discovery including all data from the plaintiff's Fitbit device and all photographs posted by the plaintiff to social media platforms after the accident.[41] While the court denied some of the requested discovery, it directed the production of "photographs depicting plaintiff in social, recreational or physical activities after the date of the accident" from the non-"dating site" social media platforms.[42] The plaintiff also provided extensive records from his gym.[43]

Finally, in *Appler v. Mead Johnson & Co.*, a plaintiff sued her employer alleging a number of federal violations and intentional infliction of emotional distress arising out of her termination, which she said was based on her sleep disorder.[44] She claimed "garden-variety emotional distress as opposed to severe and ongoing emotional distress."[45] The defendant sought broad social media content, including a download of her complete Facebook profile.[46] The court cited numerous other cases granting production of social media content to provide evidence of mental and emotional health, and found that even

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[36] *Id.* at 15.

[37] *Id.* at 16.

[38] *Id.*

[39] *See also* Sandoval v. Am. Bldg.Maint. Indus., 267 F.R.D. 257, 269 2007) (allowing discovery of Title VII sexual harassment plaintiffs' medical and mental health records "that reflect mental health issues *and the manifestations of those mental health issues*")

[40] Spolijaric v. Savarese, 121 N.Y.S. 3d 531 (Sup. Ct. 2020).

[41] *Id.* at 1.

[42] *Id.* at 2.

[43] *Id.*

[44] Appler v. Mead Johnson & Co., LLC, No. 3:14-CV-166-RLY-WGH, 2015 WL 5615038 (S.D. Ind. Sept. 24, 2015)

[45] *Id.* at *1.

[46] *Id.*

more production was reasonable here to reveal the times she was active online and not unable to work.[47] The court did find some categories of the profile to be too low in relevance to overcome the plaintiff's privacy interests, including Facial Recognition Data, Family and Religious Views.[48]

2. Sexual Harassment Claims

Another context where discovery requests implicate privacy include sexual harassment claims, where defendants seek information from plaintiffs as to their sexual activity with other people. Those defendants argue that the information is relevant to impeachment or to allegations of emotional distress. In *Coates v. Mystic Blue Cruises*,[49] a plaintiff alleged her supervisor sexually harassed her. Defendants sought discovery of online social media communications between the plaintiff and other male employees, arguing the discovery was relevant to the plaintiff's claims and to impeachment.[50] The magistrate judge ordered the plaintiff to produce Facebook messages which reveal intimate conversations between her and certain male employees, and the plaintiff objected based in part on Federal Rule of Evidence 412.[51] On appeal, the district court ordered protection of the messages with redactions.[52]

Similarly, in *Howard v. Historic Tours of America*,[53] female employees who sued for sexual harassment by their male co-workers and supervisors faced discovery requests regarding "their personal or sexual relationships with their co-workers other than those they charge harassed them."[54] The defendants argued that the information was relevant because "they have the right to present evidence to the fact finder of the plaintiffs' voluntary sexual affair with co-workers other than the named employees so that the jury can determine whether the named employees reasonably believed that their sexual advances were

[47] *Id.* at *5.
[48] *Id.* at *6.
[49] No. 11 C 1986, 2012 WL 3860036 (N.D. Ill. Aug. 9, 2012).
[50] *Id.* at *1.
[51] *Id.* at *1–2.
[52] *Id.* at *2.
[53] 177 F.R.D. 48 (D.D.C. 1997).
[54] *Id.* at 48.

welcome."[55] Here, the court denied the defendants' motion to compel, finding the discovery inadmissible under Rule 412 and distinguishing other cases cited by defendants that did not "address the issue of the disproportionality between the alleged conduct the defendants' male employees and the evidence of 'sexually provocative' conduct by the plaintiffs sought in discovery."[56]

3. Inadvertent Disclosure

In addition, where private medical or otherwise intimate information resides in the same location as non-protected information, there is always the risk of inadvertent disclosure. In the high profile Alex Jones defamation case, his lawyers inadvertently produced to his opponents text messages they had requested but also medical, psychological, and other files, even including a naked photograph of his wife.[57] In another case of mistaken disclosure, a criminal warrant was recently leaked in a case involving Apple.[58] The warrant should have been filed on Pacer under seal, but was fully viewable. A similar error occurred recently when the confidential Privilege Review Team Report prepared by the Department of Justice in its case against Donald Trump was filed under seal but was not kept from public view.[59] Human error

[55] *Id.* at 51.

[56] *Id.* at n.2.

[57] Ramon Antonio Vargas, *Alex Jones sent nude photo of wife to Roger Stone, Sandy Hook lawyer reveals,* THE GUARDIAN (Aug. 9, 2022, 10:16 EDT), https://www.theguardian.com/us-news/2022/aug/09/alex-jones-nude-photo-wife-roger-stone; Debra Cassens Weiss, *'Probably the worst day of my legal career,' says lawyer for Infowars founder in testimony on mistaken revelations,* ABAJOURNAL (Aug. 29, 2022, 11:20 CDT), https://www.abajournal.com/news/article/probably-the-worst-day-of-my-legal-career-lawyer-for-infowars-founder-testifies-on-mistaken-revelations?utm_medium=email&utm_source=salesforce_574799&sc_sid=05369411&utm_campaign=weekly_email&promo=&utm_content=&additional4=&additional5=&sfmc_j=574799&sfmc_s=136306763&sfmc_l=1527&sfmc_jb=1034&sfmc_mid=100027443&sfmc_u=16788277.

[58] Ralph Losey, *Examining a Leaked Criminal Warrant for Apple iCloud Data in a High Profile Case – Part One*, EDRM BLOG (June 14, 2022), https://edrm.net/2022/06/examining-a-leaked-criminal-warrant-for-apple-icloud-data-in-a-high-profile-case-part-one/.

[59] Ralph Losey, *DOJ's Confidential Report Leaked in Trump v. U.S.*, E-DISCOVERY TEAM (October 5, 2022), https://e-discoveryteam.com/2022/10/05/dojs-confidential-report-leaked-in-trump-v-u-s/.

cannot be overlooked in considering the protections imposed on discovery. Courts have recognized that even deidentified data is at risk for revealing personal information.[60]

4. Chilling Effect on Litigation

Requests for personal information, or the possibility of such requests, can very well chill a plaintiff's access to the courts. The Supreme Court in *Seattle Times v. Rhinehart* recognized the potential for "abuse that can attend the coerced production of information" as discovery may be used for improper purposes:

> Because of the liberality of pretrial discovery permitted by Rule 26(b)(1), it is necessary for the trial court to have the authority to issue protective orders conferred by Rule 26(c). It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties . . . There is an opportunity, therefore, for litigants to obtain – incidentally or purposefully – information that not only is irrelevant but if publicly released could be damaging to reputation and privacy.[61]

The Court also noted the possibility that litigation can be chilled as, "rather than expose themselves to unwanted publicity, individuals may well forgo the pursuit of their just claims . . . resulting in frustration of a right as valuable as that of speech itself."[62]

> In *Gordon v. T.G.R. Logistics, Inc.*, the plaintiff brought suit for injuries arising out of an automobile dispute, seeking damages for traumatic brain injury, posttraumatic stress

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[60] See Cnty. of Los Angeles v. Super. Ct., 65 Cal. App. 5th 621, 648–652 (Ct. App. 2021) (discussing privacy rights of patients in deidentified data, including the possibility of reidentification); Pac. Radiation Oncology, LLC v. Queen's Med. Ctr., 138 Hawai'i 14 (2016) (state constitution protects individuals from production of their medical information even when de-identified).

[61] 467 U.S. 20, 34–35 (1984).

[62] *Id.* at n. 22 (quoting Rhinehart v. Seattle Times Co., 654 P.2d 673, 689 (Wash. 1982)).

> disorder, anxiety and depression. The defendants sought the plaintiff's complete Facebook account history. While acknowledging the defendants' interest in discovery regarding the claims and damages, including information which reveals the plaintiff is lying or exaggerating her injuries, the court noted as well that much of the discovery requested could reveal information that is "extremely personal and embarrassing."[63] The court also recognized the "substantial risk that the fear of humiliation and embarrassment will dissuade injured plaintiffs from seeking recovery for legitimate damages or abandon legitimate claims."[64]

In an analogous context, employees who sue their employers for violation of laws like the federal Fair Labor Standards Act face requests by those employers for immigration information, despite its limited relevance. Courts have denied such requests based in part on the chilling effect such disclosure could have on employees seeking to vindicate their rights. In *Guillen v. B.J.C.R. L.L.C.*, a former employee brought suit for discrimination and hostile work environment, in addition to state law claims, alleging a pattern of sexual harassment and assault, including rape.[65] She alleged that the defendants threatened her with deportation to Mexico should she say anything about the abuse.[66] The defendants moved to compel production of the plaintiff's immigration records, arguing relevance to her credibility and motivation to fabricate her allegations.[67] While agreeing that some of the records were discoverable, the court denied the brought requests that would include birth certificates, tax returns, medical records and bills related to minor children, and other information related to third parties. Citing several other similar cases, the court found that "requiring disclosure of these documents would surely have an intimidating or in terrorem effect on individuals outside this litigation, and would discourage them from raising these claims in the future."[68]

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[63] Gordon v. T.G.R. Logistics, Inc., 321 F.R.D. 401 (D. Wyo. 2017).
[64] *Id.* at 403–404.
[65] Guillen v. B.J.C.R., LLC, 341 F.R.D. 61, 63 (D. Nev. 2022). 3
[66] *Id.*
[67] *Id.* at 62.
[68] *Id.* at 71.

Similarly, in *Rengifo v. Erevos Enter.*, the plaintiff fought the production of his immigration status and social security number to his former employers in the context of his FLSA and New York Labor Law claims.[69] The defendants argued the discovery was relevant to Rengifo's credibility. The court rejected the discovery based on the "in terrorem effect of inquiring into a party's immigration status and authorization to work in this country when irrelevant to any material claim because it presents a danger of intimidation that would inhibit plaintiffs in pursuing their rights."[70] Even a confidentiality agreement would not "abate the chilling effect of such disclosure" or the "danger of destroying the cause of action."[71]

All of this makes it crucial that courts protect against discovery requests that implicate reproductive health and sexual history.

C. Sources of Discovery Implicating Reproductive Privacy

The types of discovery common in litigation today are broader in scope than ever. A single 16 gigabyte device may hold can hold approximately 10240 images, 3840 MP3 files, 300,000 pages of Word documents, or 5120 minutes of video, all on a number of subjects including work life, personal life, health, leisure, and family.[72] This section discusses some of the common subjects of modern discovery.

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[69] Rengifo v. Erevos Enters., 2007 U.S. Dist. LEXIS 19928 at *1 (S.D.N.Y. Mar. 20, 2007)

[70] Id. at *5.

[71] Id. at *3. See also Sandoval v. American Building Main. Indus., 267 F.R.D. 257, 277 (D. Minn. 2007) ("This Court finds that the minimal bearing that using multiple social security numbers may have on plaintiffs' credibility does not outweigh the chilling effect it would have on them as victims of sexual harassment from coming forward to assert their claims."); Ferrer v. Limpiex Cleaning Serv., 2020 WL 1545734, No. 3:19-cv-00940 (JCH) *2 (D. Conn. Apr. 1, 2020) (prohibiting questions about plaintiff's immigration status because of the potential chilling effect that disclosure on employees seeking to enforce their rights).

[72] Nick Bieberich, *What USB Flash Drive Capacity Do You Really Need?* MEMORY SUPPLIERS (May 21, 2019), https://www.memorysuppliers.com/blogs/memory-suppliers-blog/what-usb-flash-drive-capacity-do-you-really-need.

1. Cell Phones

Discovery of cell phone information is commonplace now in all types of litigation. The information contained on cell phones is immense, with the average 16-gigabyte phone able to hold "millions of pages of text, thousands of pictures, or hundreds of videos."[73] As noted by the United States Supreme Court in *Riley v. California*, cell phones "are in fact minicomputers that also happen to have the capacity to be used as a telephone," and also function as "cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers."[74] This data implicates all sorts of privacy interests, including location data, which can reveal trips to doctors' offices and "other potentially revealing locales."[75] A cell phone may reveal Internet search and browsing history, information that "can reveal [a person's] location, interests, purchases, employment status, sexual orientation, financial challenges, medical conditions, and more."[76] There is also a wealth of applications ("apps") on a cell phone which "offer a range of tools for managing detailed information about all aspects of a person's life,"[77] including an array of fertility and period tracking apps.[78] Even when the app may claim to protect privacy, data can be accessed and used to identify an individual.[79] In sum, cell phones implicate "vast quantities of personal information,"[80] including reproductive health information.

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[73] *Id.*

[74] 573 U.S. 373, 393 (2014).

[75] Carpenter v. United States, 138 S. Ct. 2206, 2218 (2018).

[76] Henson v. Turn, Inc., Case No. 15-cv-01497-JSW (LG), 2018 WL 5281629 *4 (N.D. Ca. Oct. 22) (citations omitted).

[77] *Riley*, 573 U.S. at 396.

[78] *See* Aziz Huq and Rebecca Wexler, *Digital Privacy for Reproductive Choice in the Post-Roe Era*, forthcoming __ N.Y. L. REV. __*11 (2023) (noting that period tracking apps "gather information on menstrual cycles, moods, fetal movements and more.").

[79] *See* Sara Morrison, *This Outed Priest's Story is a Warning for Everyone About the Need for Data Privacy Laws*, RECODE BY VOX (July 21, 2021), https://www.vox.com/recode/22587248/grindr-app-location-data-outed-priest-jeffrey-burrill-pillar-data-harvesting.

[80] *Riley*, 573 U.S. at 386.

2. Social Media

Discovery of information posted on social media has also become commonplace. Social media use has grown from 5% of American adult users in 2005 to 72% in 2021.[81] Despite its name, social media includes many features that limit the reach of the information shared, such as private messaging, private groups, etc. Prosecutors in Nebraska made headlines when they subpoenaed direct messages from Facebook and used those messages to prosecute a teenager for self-inducing an abortion. Social media sites also include specific groups whose membership is itself sensitive information. For example, pregnancy-related groups on Facebook include "PREGNANCY" (85k members), "tips to prevent unwanted pregnancy" (4.2k members), "Miscarriage and Pregnancy Loss Support" (21k members), "Teenage pregnancy" (21k members), and "Termination of Pregnancy for Medical Reasons" (1.3k members).[82] There are also groups related to sexual orientation, sexually-transmitted diseases, and victims of sexual abuse, all of which can convey highly personal information simply by virtue of membership.

3. Fitbits and Other Smart Trackers

Third, the rise in the use of personal activity devices[83] has created a new category of discovery.[84] Information from such devices is

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[81] EXPERTS SAY THE 'NEW NORMAL' IN 2025 WILL BE FAR MORE TECH-DRIVEN, PRESENTING MORE BIG CHALLENGES
Pew Research Center (Feb. 18, 2021), https://www.pewresearch.org/internet/fact-sheet/social-media/.

[82] Pregnancy-Related Facebook Groups, FACEBOOK, facebook.com (search "pregnancy" and follow "Groups" hyperlink).

[83] Variously described as smart trackers, personal activity trackers, or "wearables," these devices all use biometric technology and sensors to records their wearer's activity. Scott Peppet describes the array of wearable sensors from electronic pedometers to sensor-laden clothing. Scott R. Peppet, *Regulating the Internet of Things: First Steps Toward Managing Discrimination, Privacy, Security and Consent*, 93 TEX. L. REV. 85, 101–02 (2014). The devices can track not only steps but sleep, heart rate, breathing patterns, skin temperature and types of athletic activity. *Id.*

[84] *See* Mark Gerano, *Using Data from Wearable Devices in Litigation*, JD SUPRA (Feb. 19, 2020), https://www.jdsupra.com/legalnews/using-data-from-wearable-devices-in-88425/ ("One does not have to look far to find examples of situations where such data could be useful to attorneys litigating a case. For instance, location data from a wearable could be used to prove when employees arrive at or

now a regular part of form interrogatories and document requests.[85] Fitbit, for example, allows a user to track menstrual cycles and symptoms. The Fitbit app can reveal reproductive health information,[86] even unintentionally.[87] The mobile health apps market is projected to hit $105.9 billion by 2030, and includes wearables and apps that follow

leave work. Health and exercise data from a wearable could be used to show that a personal injury plaintiff is not as severely injured as the plaintiff suggests."); Clint Cowan Jr., *Wearable Technology Discovery in Personal Injury Cases: How Data From a Plaintiff's Wrist Can Make a Difference In The Courtroom*, ABA J. (Feb. 19, 2017), https://3epjwm3sm3iv250i67219jho-wpengine.netdna-ssl.com/wp-content/uploads/2017/07/Wearable-Technology-Discovery-In-Personal-Injury-Cases.pdf ("The use of fitness tracker data in personal injury litigation is obvious: A plaintiff claiming injury could have his claim undermined by Fitbit® data showing that he ran his customary four-mile jog, even after his alleged back injury. The wearable device compiles an extensive track record of objective data entries that can be used to undermine a claimant's case."); Bryan C. Garcia, *Big Data on the Open Road: How the Amended Rules of Civil Procedure Will Affect Transportation Industry ESI Discovery in Federal Courts,* 58 No. 12 DRI for the Defense, 23 (Dec. 2016) ("[T]he defense lawyer should investigate whether a driver wore a biometric recording device, particularly when the driver's health is potentially an issue.").

[85] *See* Michael W. Rabb, *A 'Black Box' for the Human Body*, S.C. YOUNG LAW. MAG., https://www.gwblawfirm.com/news_commentary/a-black-box-for-the-human-body/

(advocating "sending written discovery requests seeking detailed information on any wearable devices used or in use as well as the production of data from those devices"); Meghan A. Rigney, *"Steps" for Discovery: Subpoenaing Wearable Technology Data*, ABA PRACTICE POINTS (May 14, 2019), https://www.americanbar.org/groups/litigation/committees/products-liability/practice/2019/steps-for-discovery-subpoenaing-wearable-technology-data/ ("Litigators need to be mindful that these [wearable health monitors] can also serve as a powerful discovery tool that should not be overlooked.")

[86] *Menstrual health and pregnancy*, FITBIT CMTY., (Sept. 14, 2020, 10:43 AM), https://community.fitbit.com/t5/Menstrual-Health-Tracking/Menstrual-health-and-pregnancy/td-p/4282935 ("Currently, you can use female health tracking in the Fitbit app to help predict periods, see your estimated fertile window, and more.").

[87] See Mary Brophy Marcus, *Fitbit fitness tracker detects woman's pregnancy*, CBS NEWS (Feb. 9, 2016, 11:42 AM), https://www.cbsnews.com/news/fitbit-fitness-tracker-tells-woman-shes-pregnant/ ("When a man turned to an online forum for answers about his wife's seemingly faulty Fitbit fitness tracker, he learned he was in for more than a product replacement. He posted a note on Reddit recently asking if anyone knew why his wife's heartbeat readings might be so high [and was told she might be pregnant].").

fertility cycles, schedule doctors' appointments, and fill birth control prescriptions.[88]

4. Other Discovery From the Internet of Things

Finally, wearables like Fitbit are only one category of the immense market known as the Internet of Things (IoT).[89] Researchers estimate that there are over seven billion connected IoT devices around the globe, with that number expected to grow to over 25 billion devices by 2030.[90] The number of IoT devices surpassed non-IoT devices in 2020.[91] The global pandemic increased interest in telemedicine, the practice of using connected devices to remotely monitor patients in their homes.[92] The "Internet of Medical Things" or "healthcare IoT" includes devices with sensors for patient health monitoring, tracking patient medication orders and the location of patients admitted to hospitals.[93] There is also a growing "flying Internet of Things" with drones in wide use for surveillance, exploration, and delivery tasks.[94] Such information is capable of tracking not only changes in women's health but also

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[88] *mHealth Apps Market Size Woth $105.9 Billion by 2030,* GRANDVIEW RSCH. (Jan. 2022), https://www.grandviewresearch.com/press-release/global-mhealth-app-market.

[89] The term "Internet of Things" is attributed to the technologist Kevin Ashton, who in 1998 referred to the addition of "radio-frequency identification and sensors to everyday objects" as the creation of "an Internet of Things." Andrew Guthrie Ferguson, *The Internet of Things and the Fourth Amendment of Effects*, 104 CAL. L. REV. 805, 813–17 (2016) (discussing the history of the Internet of Things from the use of RFID tags to wireless sensor networks to cellular, Wi-Fi and other data networks) (citing Kevin Ashton, That 'Internet of Things' Thing, RFID J. (June 22, 2009), http://www.rfidjournal.com/articles/view?4986)

[90] Josh Howarth, *80+ Amazing IoT Statistics (2023-2030)*, Exploding Topics (Nov. 28, 2022), https://explodingtopics.com/blog/iot-stats.

[91] *Id.*

[92] *See* Samad Mehrdad et al., Perspective: *Wearable Internet of Medical Things for Remote Tracking of Symptoms, Prediction of Health Anomalies, Implementation of Preventative Measures, and Control of Virus Spread During the Era of COVID-19*, 8 FRONTIERS (2021) 1, 1.

[93] Alex DelVecchio, *IoMT (Internet of Medical Things) or healthcare IoT*, TECHTARGET (Aug. 2015), https://www.techtarget.com/iotagenda/definition/IoMT-Internet-of-Medical-Things.

[94] Janna Anderson et al., *Experts Say the 'New Normal' in 2025 Will Be Far More Tech-Driven, Presenting More Big Challenges*, PEW RESEARCH CENTER (Feb. 18, 2021), https://www.pewresearch.org/internet/2021/02/18/experts-say-the-new-normal-in-2025-will-be-far-more-tech-driven-presenting-more-big-challenges/.

delivery from certain companies providing contraception, abortion pills, or other reproductive health products.

The wide use of cell phones, social media, and wearable trackers – along with their ability to reveal the most intimate and personal facts about a person – makes them attractive sources of discovery for litigants. Privacy protection against unnecessary or overbroad discovery is essential.

III. FEDERAL PRIVACY PROTECTION AGAINST DISCOVERY

A. Rule 26

The civil discovery rules are not dependent upon any "reasonable expectation of privacy."[95] There is explicit protection for privileged communications, and for attorney work product, subsets of a general right to privacy. In addition, federal courts recognize that privacy interests are implicated in the scope of discovery under Rule 26(b), and that courts should protect privacy interests as part of their issuance of protective orders under Rule 26(c).[96]

In *Seattle Times Co. v. Rhinehart*,[97] the Supreme Court considered a First Amendment challenge to a protective order issued by a Washington state court that prevented the defendant newspaper from publicly sharing discovery it obtained about the plaintiff and his religious organization. Noting that Washington's discovery rules were modeled on the Federal Rules of Civil Procedure, the Court discussed those Rules as they relate to a litigant's concern for the privacy of information sought.[98] The Court's decision stated:

The Rules do not differentiate between information that is private or intimate and that to which no privacy interests attach. Under the Rules, the only express limitations are that the information sought is

[95] *See* United States v. Bell, 217 F.R.D. 335, 343 (M.D. Pa. 2003) (rejecting a Fourth Amendment argument against compelled disclosure, noting that "[t]here is no 'right of privacy' privilege against discovery in civil cases").
[96] *Seattle Times Co.*, 467 U.S. at 34–35. *See* Allyson Haynes Stuart, A Right to Privacy for Modern Discovery, 29 Geo. Mason L. Rev. 675, 702 (2022).
[97] *Id.* at .
[98] *Id.* at 29–30.

not privileged,and is relevant to the subject matter of the pending action. Thus, the Rules often allow extensive intrusion into the affairs of both litigants and third parties.[99]

Because of that intrusion, and in light of "the liberality of pretrial discovery" under the Rules, trial courts need authority under Rule 26(c) to issue protective orders.[100] Otherwise, discovery has "a significant potential for abuse" that "is not limited to matters of delay and expense" but that "also may seriously implicate privacy interests of litigants and third parties."[101] The government has a substantial interest in preventing abuse of the discovery system through litigants' public release of information that "could be damaging to reputation and privacy."[102]

In particular, federal courts have developed balancing tests under Rule 26(c) in deciding whether to order discovery when requests implicate intimacy or medical issues.[103] Where discovery does implicate privacy, it will only be granted where there is compelling need and no less intrusive means to obtain the discovery elsewhere.[104] To overcome

[99] *Id.* at 30.

[100] *Id.* at 34.

[101] *Id.* at 34–35.

[102] *Id.* at 35.

[103] Battle v. D.C., 303 F.R.D. 172, 173–74 (D.D.C. 2014) (balancing plaintiff's need for discovery against defendant's valid privacy concerns regarding intimate photograph); St. John v. Napolitano, 274 F.R.D. 12, 16 (D.D.C. 2011) (limiting disclosure of medical records in employment discrimination case, where burden and harm to privacy interests significantly outweighed any marginal relevance for majority of time period sought); Keith H. v. Long Beach Unified Sch. Dist., 228 F.R.D. 652, 657 (C.D. Cal. 2005) ("Resolution of a privacy objection . . . requires a balancing of the need for the information sought against the privacy right asserted.")

[104] See Aliotti v. Vessel Senora, 217 F.R.D. 496, 497–98 (N.D. Cal. 2003) (while the plaintiff's income tax returns "are clearly relevant under Fed.R.Civ.P. 26(b)(1) in order to properly assess lost earnings, maintenance, and cure, Defendant has not met its burden of establishing a compelling need" based on the existence of "less intrusive means by which Defendant can obtain the needed information which have not been exhausted"); Cooper v. Hallgarten & Co., 34 F.R.D. 482, 483-84 (S.D.N.Y. 1964) (requiring heightened showing of relevance and compelling need for production of tax returns).

privacy interests, some courts require that the discovery be "clearly" relevant,[105] or that it go to the "heart of the case."[106]

On the other hand, courts often deny discovery where the requested information merely goes to impeachment.[107] The 1970 advisory committee note to Rule 26, referring to "broad powers [of] the courts to regulate or prevent discovery," noted that "the courts have in appropriate circumstances protected materials that are primarily of an impeaching character."[108]

In balancing privacy against the need for discovery, courts have also been persuaded by policy represented in the Federal Rules of Evidence ("FRE"). In *Bottomly v. Leucadia Nat.*,[109] the court denied

[105] New York Stock Exchange v. Sloan, 22 Fed. R. Serv. 2d 500, No. 71CV2912, 1976 WL 169086 at *5 (S.D.N.Y. Oct. 21, 1976). (denying disclosure of employee records where party seeking them "failed to make the requisite showing of clear relevancy").

[106] Robinson v. Magovern, 83 F.R.D. 79, 91 (W.D. Pa. 1979) (while the documents sought deserve protection, "the subject matter of the discovery goes to the heart of the issues in this case"); Richards of Rockford, Inc. v. Pac Gas & Elec. Co., 71 F.R.D. 388 (N.D. Cal. 1976) (finding plaintiff's interest in discovery of confidential employee interviews outweighed by public interest in confidentiality, noting one factor in balancing between discovery and non-disclosure to be "whether the information sought goes to the heart of the claim"); Sneirson v. Chemical Bank, 108 F.R.D. 159 (D. Del. 1985) (no right to privacy against bank records in case where they went to the very heart of the subject matter of the case); Stabilus, Div. of Fitchtel & Sachs Indus. v. Haynsworth, Baldwin, Johnson & Greaves, P.A., 144 F.R.D. 258, 267 (E.D. Pa. 1992) (declining discovery request for employment records where they were "not relevant to the main issue of the action").

[107] *See* Mulligan v. Provident Life & Accident Ins. Co., 271 F.R.D. 584, 594 (E.D. Tenn. 2011) (where employee performance reviews are sought "as evidence of employee credibility, training or qualifications," courts are less likely to allow discovery than if there is an allegation of historical bias); Aliotti v. Vessel Senora, 217 F.R.D. 496, 497–98 (N.D. Cal. 2003) (rejecting the argument that the defendant was entitled to the plaintiff's tax returns for impeachment purposes, noting that courts have protected against discovery of "materials that are primarily of an impeaching character") (quoting Fed.R.Civ.P. 26(b) 1970 amendment adv. comm. n.); Hedenburg v. Aramark Am. Food. Servs., No. C06-5267RBL, 2007 WL 162716, at *2 (W.D. Wash. Jan. 17, 2007) (declining to allow search of plaintiff's computer, noting "Defendant is hoping blindly to find something useful in its impeachment of the plaintiff."); Coyne v. Houss, 584 F. Supp. 1105, 1106 (E.D.N.Y. 1984) (impeachment materials discoverable but limited as going to collateral issues only).

[108] Fed. R. Civ. P. 26 adv. comm. n.

[109] 163 F.R.D. 617, 620 (D. Utah 1995).

discovery from a sexual harassment plaintiff where the request went to the plaintiff's character under FRE 404[110] and would violate the prohibition on admission of evidence of victims' sexual history under FRE 412.[111] The court found that the Rules of Evidence "are directly pertinent as to what matter is calculated to lead to admissible evidence," and that, under Rule 404, "matter that is not related to causation and extent of damage, but which merely goes to plaintiff's character is outside of proper bounds of discovery."[112] Other courts have also limited discovery requests that would violate the restriction on use of evidence of other sexual relations embodied in FRE 412.[113] While the rule is one of admission of evidence, the advisory committee note refers as well to discovery implications:

> The procedures set forth in subdivision (c) do not apply to discovery of a victim's past sexual conduct or predisposition in civil cases, which will continue to be governed by Fed.R.Civ.P. 26. In order not to undermine the rationale of Rule 412, however, courts should enter appropriate orders pursuant to Fed.R.Civ.P. 26(c) to protect the victim against unwarranted inquiries and to ensure confidentiality.[114]

As Judge Facciola noted in *Howard*,

> The logic behind the note is self-evident: one of the purposes of Fed.R.Evid. 412 was to reduce the inhibition women felt about pressing complaints concerning sex harassment because of the shame and embarrassment of opening the door to an inquiry into the victim's sexual history. This shame and embarrassment . . . exists equally at the discovery stage as at trial and is not relieved by knowledge that the information is merely sealed from public viewing.[115]

[110] Fed. R. Evid. 404.
[111] Fed. R. Evid. 412.
[112] *Bottomly*, 163 F.R.D. at 619 –20.
[113] Coates v. Mystic Blue Cruises Inc., No. 11 C 1986, 2012 WL 3860036, *1 (N.D. Ill. Aug. 9, 2012).
[114] Fed. R. Evid. 412 adv. comm. n.
[115] 177 F.R.D. at 51.

Finally, many courts provide special protection when discovery requests implicate the privacy of third parties.[116] So even when a plaintiff's rights in her sexual history are outweighed by the defendant's right to discovery, the court may limit that discovery to protect the identity of third-party sexual partners.[117]

For substantive support for privacy rights under the Rules, federal courts have cited Supreme Court case law interpretating the Constitution as well as federal legislation and public policy, as discussed below.

B. The Implied Constitutional Right to Privacy

Supreme Court precedent supports the right to privacy against the disclosure of intimate information including reproductive matters, particularly in the context of technology. This right is grounded in due process and the First Amendment, as well as analogous Fourth Amendment jurisprudence. While one precedent has been reversed by the Supreme Court, others remain.

1. *Roe v. Wade* and the Constitutional Right to Autonomy

In 1965, in *Griswold v. Connecticut*,[118] the Court struck down a law prohibiting married couples from using contraception, and first recognized the Constitution's "zones of privacy," which include the right of association, the right to be free from unreasonable searches or seizures, among others:

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to

[116] Slate v. Am. Broad. Co., 802 F. Supp. 2d 22, 26-27 (D.D.C. 2011), aff'd 584 F. App'x 2 (D.C. Cir. 2014) (noting that some of the files at issue contained confidential and personal information of unrepresented non-parties); Finkle v. Howard Cnty., No. SAG-13-3236, 2014 WL 6835628 at *2 (D. Md. Dec. 2, 2014) (denying "unfettered 'fishing expedition' into the personal communications of non-party employees").

[117] Allen v. G.D. Searle & Co., 122 F.R.D. 580, 582 (D. Or. 1988).

[118] 381 U.S. 479, 484 (1965).

achieve its goals by means having a maximum destructive impact upon that relationship.[119]

Later cases helped clarify what was included in that "zone of privacy." In *Roe v. Wade*,[120] the Court noted that, while the Constitution does not explicitly mention any right of privacy, such a right does exist and applies to "personal rights that can be deemed fundamental or implicit in the concept of ordered liberty," and "has some extension to activities relating to marriage; procreation; contraception; family relationships; and child rearing and education."[121] This right of privacy, based "in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action," "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[122]

Almost two decades later, the Supreme Court affirmed *Roe*'s essential holding that a woman has a right to choose to obtain an abortion before fetal viability and to obtain it without undue interference from the state, noting that "[i]t is a promise of the Constitution that there is a realm of personal liberty which the government may not enter."[123] That "realm of personal liberty" also protected interracial marriage,[124] access to contraception for unmarried couples,[125] and bodily integrity:[126] "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."[127] This liberty interest was found to extend to same-sex intimacy[128] and to same-sex marriage.[129]

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[119] *Id.*

[120] 410 U.S. 113, 152–53 (1973).

[121] *Id.*

[122] *Id.*

[123] Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833, 847 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

[124] Loving v. Virginia, 388 U.S. 1, 2 (1967).

[125] Eisenstadt v. Baird, 405 U.S. 438 (1972).

[126] *See* Washington v. Harper, 494 U.S. 210, 237 (1990) (Stevens, J., concurring).

[127] *Planned Parenthood*, 505 U.S. at 851.

[128] Lawrence v. Texas, 539 U.S. 558 (2003).

[129] Obergefell v. Hodges, 576 U.S. 644 (2015).

2. *Whalen v. Roe* and the Constitutional Right to Nondisclosure

The other aspect of the constitutional right to privacy protected by the due process clause, referred to as "confidentiality" or "disclosure-based" privacy,[130] protects against compelled disclosure of personal matters. This wing of the privacy right has its roots in *Whalen v. Roe,*[131] where, four years after *Roe v. Wade*, the Supreme Court considered whether a New York act violated constitutionally-protected privacy between doctor and patient. Although the Court found that the disputed act did not constitute a constitutional violation, the Court recognized that the individuals whose information was required to be shared by their doctors had two interests that implicated privacy. They included both "the individual interest in avoiding disclosure of personal matters," and "the interest in independence in making certain kinds of important decisions."[132] The Court noted that these privacy interests implicated "the right of an individual not to have his private affairs made public by the government" and "the right of an individual to be free in action, thought, experience, and belief from governmental compulsion."[133]

That non-disclosure right was again recognized in DOJ v. Reporters Committee for for Free Press., where the Court confirmed that *Whalen's* recognition of a constitutional privacy interest included "keeping personal facts away from the public eye."[134] Just as *Whalen* recognized that a centralized computer file of names and addresses of people obtaining prescription drugs "posed a 'threat to privacy,'" so too did the publication of a person's rap sheet information.[135] This

[130] *See* Whalen v. Roe, 429 U.S. 589, 598–600 (1977) (The cases sometimes characterized as protecting "privacy" have in fact involved at least two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of important decisions.") (citations omitted).

[131] 429 U.S. 589, 600 (1977).

[132] *Id.* Subsequent courts have referred to these as interests in "confidentiality" and in "autonomy." *See* Barry v. City of New York, 712 F.2d 1554, 1558–59 (2d Cir. 1983); Plante v. Gonzalez, 575 F.2d 119, 1128 (5th Cir. 1978).

[133] 429 U.S. 589 at n. 24 (citing Philip B. Kurland, *The Private I*, 7 U. CHI. MAG., 8 (1976).

[134] 489 U.S. 749, 769.

[135] *Id.* at 770–71 ("The privacy interest in a rap sheet is substantial.").

"substantial" privacy interest was implicated by the Constitution in addition to FOIA's privacy exemption.[136]

In the same year that it decided *Whalen*, the Supreme Court in *Nixon v. Administrator of General Services* affirmed a constitutional right to privacy in personal communications.[137] There, the former president challenged a law requiring that he turn over documents and tape recordings accumulated during his terms of office.[138] While affirming the constitutionality of the law, the Court nevertheless recognized that "a very small fraction" of Nixon's papers were in fact private and deserved protection.[139] Those included "extremely private communications between him and, among others, his wife, his daughters, his physician, lawyer and clergyman, and his close friends."[140]

Lower federal courts have applied these cases to protect the privacy of medical information. In *United States v. Westinghouse Elec. Corp.*,[141] the Third Circuit Court of Appeals considered the privacy interests of employees of the defendant in medical records that were the subject of a subpoena issued by the National Institute for Occupational Safety and Health in its study of health hazards at a Westinghouse plant. The court was prescient in its observations about "[p]roliferation in the collection, recording and dissemination of individualized information" and "the threat such activity can pose to one of the most fundamental and cherished rights of American citizenship, falling within the right characterized by Justice Brandeis as 'the right to be let alone.'"[142]

Decades before the rise of the internet and cloud storage, the court noted concerns with government officials' "ability [] to put information technology to uses detrimental to individual privacy," compounded by the spread of data banks "and by the increasing storage in computers of sensitive information relating to the personal lives and

[136] *Id.*
[137] 433 U.S. 425 (1977).
[138] *Id.*
[139] *Id.* at 459.
[140] *Id.* at 459.
[141] 638 F.2d 570 (3rd Cir. 1980).
[142] *Id.* at 576.

activities of private citizens."[143] The court noted that the Supreme Court had recognized two types of privacy interests, avoiding disclosure of personal matters and independence in making certain decisions, and that "[t]he privacy interested asserted in this case falls within the first category referred to in *Whalen v. Roe*, the right not to have an individual's private affairs made public by the government."[144] While "the full measure of the constitutional protection of the right to privacy has not yet been delineated," the court found that "[t]here can be no question that an employee's medical records, which may contain intimate facts of a personal nature, are well within the ambit of materials entitled to privacy protection."[145] Therefore, such an intrusion into an individual's privacy must be justified by the public need for the information.[146]

The Tenth Circuit Court of Appeals has recognized a constitutionally protected right to informational privacy, and that it protects against intrusion into personal sexual matters.[147] In the context of reporting statutes requiring doctors, teachers and other individuals to notify state government when they have reason to suspect a minor has been involved in sexual activity, that court found that minors, like adults, have a right to informational privacy traceable to *Whalen*.[148] Similarly, the Fourth Circuit Court of Appeals has found the informational right to privacy stemming from *Whalen* was implicated by South Carolina's record-keeping requirements for abortion clinics, but found that the statutes assured the patient's confidentiality and did not require unnecessary disclosure.[149]

More recently, the Third Circuit Court of Appeals held that a student stated a claim for violation of privacy when a high school coach required her to take a pregnancy test after he suspected she was

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[143] *Id.*

[144] *Id.* at 577.

[145] *Id.* (noting other contexts in which it has been recognized "that medical records and information stand on a different plane than other relevant material," including in discovery of such materials under Fed.R.Civ.P. 35).

[146] *Id.* at 578.

[147] Eastwood v. Department of Corrections, 846 F.2d 627, 631 (10th Cir. 1988).

[148] Aid for Women v. Foulston, 441 F.3d 1101, 1116 (10th Cir. 2006).

[149] Greenville Women's Clinic v. S.C. DHEC, 317 F.3d 357, 370 (4th Cir. 2002).

pregnant.[150] The student's claim "not only falls squarely within the contours of the recognized right of one to be free from disclosure of personal matters, but also concerns medical information, which we have previously held is entitled to this very protection."[151] The First, Fifth, and Seventh Circuit Court of Appeals have also relied on this Supreme Court case law as recognizing a constitutional right to avoid disclosure of personal information.[152]

Courts rely upon this case law to protect not only privacy rights against discovery of medical records,[153] but also the identity of parties involved in claims about contraception rights,[154] personal information concerning medical, sexual, and contraceptive histories and practices,[155] the identity of participants in medical studies,[156] the identity of blood donors in cases alleging disease from transfusions,[157] the disclosure of

[150] Gruenke v. Seip, 225 F.3d 290 (3rd Cir. 2000).

[151] 225 F.3d at 302–03 (citing Whalen v. Roe, 429 U.S. 589, 599-600 (1977); Westinghouse Elec. Corp., 638 F.2d at 577).

[152] Borucki v. Ryan, 827 F.2d 836, 846 (1st Cir. 1987); Kimberlin v. U.S. Dep't of Just., 788 F.2d 434, 438 (7th Cir. 1986); Fadjo v. Coon, 633 F.2d 1172, 1175 (5th Cir.1981); Plante v. Gonzalez, 575 F.2d 1119, 1134 (5th Cir. 1978).

[153] St. Clair v. Washington, No. C05-341JLR, 2006 WL 8454842 (W.D. Wash. Jan. 30, 2006 ("Notwithstanding the court's decision that [state statutes] do not impose limits on discovery in a federal question case, the court recognizes that disclosure may touch on privacy rights, particularly in the context of medical files."); *In re* Sealed Case (Med. Recs.), 381 F.3d 1205, 1215–16 (D.C. Cir. 2004) (finding that, interests in privacy may call for increased protection when evaluating good case under Rule 26.).

[154] Stormans, Inc. v. Selecky, 251 F.R.D. 573, 576–77 (W.D. Wash. 2008) (ordering protection under Rule 26(c) against identity of pharmacies refusing to sell Plan B).

[155] Farnsworth v. Procter & Gamble Co., 758 F.2d 1545 (11th Cir. 1985) (affirming district court's protective order under Rule 26(c) denying the defendant access to information about participants in health studies, including their medical histories, sexual practices, contraceptive methods, pregnancy histories, and menstrual activity).

[156] *Id*; Johnson by Johnson v. Thompson*,* 971 F.2d 1487, 1497 (10th Cir.1992), *cert. denied,* 507 U.S. 910 (1993) (upholding denial of discovery of names of participants in a medical study due to privacy interests of the individual participants).

[157] Est. of Hoyle v. Am. Red Cross, 149 F.R.D. 215, 217 (D. Utah 1993) (plaintiff infected with disease during transfusion not entitled to disclosure of blood donor's name because of the "strong interest against intrusion into one's private life"); Rasmussen v. S. Fla. Blood Serv., Inc., 500 So. 2d 533 (Fla. 1987) (privacy interests of blood donors outweighed victim's interest in discovering donors' identities); Watson v. Med. Univ. of S.C., No. 9:88-2844-18, 1991 WL 406979 (D.S.C. Feb. 7, 1991) (while the federal and state constitutions protect a blood donor's interest in privacy, that right may be outweighed by the need for the discovery).

a person's sexually transmitted disease,[158] and a party's sexual history.[159]

3. The Effect of *Dobbs* on Constitutional Privacy

In overruling *Roe* and *Casey*, *Dobbs* dealt a fatal blow to the federal right to abortion. While acknowledging that the Due Process Clause "has been held to guarantee some rights that are not mentioned in the Constitution," the Court stated that "any such right must be 'deeply rooted in this Nation's history and tradition' and 'implicit in the concept of ordered liberty'."[160] The right to abortion "does not fall within this category."[161] The Court's majority decision took pains to say it was limited to abortion and "does not undermine [other Due Process decisions] in any way."[162] However, its reasoning implicates other case law relying on the substantive due process right to privacy discussed above. The dissent expressed it this way:

> The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception. In turn, those rights led, more recently, to rights of same-sex intimacy and marriage. They are all part of the same constitutional fabric, protecting autonomous decision-making over the most personal of life decisions.[163]

Indeed, Justice Thomas' concurrence makes clear his view that those decisions should all fall: "in future cases, we should reconsider all

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[158] Doe v. Borough of Barrington, 729 F. Supp. 376, 382 (D.N.J. 1990) ("Disclosure of a family member's medical condition, especially exposure to or infection with the AIDS virus, is a disclosure of a 'personal matter'" recognized in *Whalen v. Roe*); Woods v. White, 689 F. Supp. 874 (W.D. Wis. 1988).

[159] Allen v. G.D. Searle & Co., 122 F.R.D. 580, 582 (D. Or. 1988).

[160] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022) (quoting Washington v. Glucksberg, 521 U.S. 702, 721 (1997)).

[161] *Id.*

[162] *Id.* at 2258; *see also id.* at 2309 (Kavanaugh, J., concurring in part) ("I emphasize what the Court today states: Overruling *Roe* does *not* mean the overruling of those precedents, and does *not* threaten or cast doubt on those precedents.").

[163] *Id.* at 2319 (Breyer, Sotomayor, and Kagan, JJ., dissenting) (citations omitted).

of this Court's substantive due process precedents, including *Griswold*, *Lawrence*, and *Obergefell*."[164]

Importantly, Justice Alito's majority opinion distinguishes the liberty to *think and say* certain things from the license to *act* in accordance with those beliefs.[165] While *Roe* "found support for a constitutional 'right of personal privacy,'" it "conflated two very different meanings of the term: the right to shield information from disclosure and the right to make and implement important personal decisions without governmental interference."[166] Cases involving only the latter "could have any possible relevance to the abortion issue."[167]

This is not to say that the constitutional right to information privacy is free from threat. On the contrary, in *NASA v. Nelson*, the Court addressed the lawfulness of NASA's requirement that federal contract employees complete a background check that inquired into treatment or counseling for recent illegal-drug use.[168] Employees claimed that the investigation violated their constitutional privacy interest in avoiding disclosure of personal matters.[169] Justice Alito's opinion for the Court stated, "We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* and *Nixon*. We hold, however, that the challenged portions of the Government's background check do not violate this right in the present case."[170] Justice Scalia, in a concurrence joined by Justice Thomas, would not have so assumed. He stated flatly, "A federal constitutional right to 'informational privacy' does not exist."[171] Justice Thomas also concurred, agreeing with Scalia that the constitution does not protect informational privacy: "No provision in the Constitution mentions such a right."[172]

Thus, *Dobbs* most directly threatens the right to privacy in the sense of autonomy and decision-making. It should not threaten the

[164] *Id.* at 2301 (Thomas, J., concurring).
[165] *Id.* at 2257.
[166] *Id.* at 2267.
[167] *Id.*
[168] 131 S. Ct. 746, 751 (2011).
[169] *Id.* (quotations omitted).
[170] *Id.*
[171] *Id.* at 764.
[172] *Id.* at 769.

"right to shield information from disclosure," as explicitly protected, for now, by *Whalen v. Roe* and its progeny.

4. Freedom from Compelled Disclosure of Association: *NAACP v. Alabama* and *Seattle Times v. Rhinehart*

An alternative basis for protecting privacy in discovery traces back to *NAACP v. Alabama*.[173] There, the Supreme Court found a constitutional right to privacy which allowed the National Association for the Advancement of Colored People ("NAACP") to refuse to disclose membership lists.[174] Alabama sought an injunction against the NAACP to prevent it from doing further business in the state, and sought an order requiring the group to produce its membership lists. The state supreme court upheld sanctions against the NAACP for refusing to comply with that order. In reversing those sanctions, the U.S. Supreme Court found that the due process clause protects a litigant from compelled disclosure of membership in an organization pursuant to a state court discovery order:

> It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. . . . Compelled disclosure of membership in an organization engaged in advocacy of particular beliefs is of the same order. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs.[175]

Therefore, the Court held that the NAACP was not required to comply with a discovery order where that order would conflict with its members' rights "to pursue their lawful private interests privately and to associate freely with others in so doing."[176]

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[173] Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson, 357 U.S. 449, 462 (1958).

[174] *Id.* at 460.

[175] *Id.*

[176] *Id.* at 466.

In addition to its important discussion of Rule 26, *Seattle Times Co. v. Rhinehart* also contributed to associational privacy in the course of limiting a newspaper's right to disseminate lists of a religious group's donors and members that had been compelled in discovery. The trial court ordered the group to identify the donors, and it issued a protective order that prohibited public dissemination of the information. [177] The Supreme Court affirmed the protective order against public disclosure, noting the breadth of discovery often allowed in civil court and the necessity for protection against further dissemination:

It is clear from experience that pretrial discovery by depositions and interrogatories has a significant potential for abuse. This abuse is not limited to matters of delay and expense; discovery also may seriously implicate privacy interests of litigants and third parties. The Rules do not distinguish between public and private information. . . . There is an opportunity, therefore, for litigants to obtain – incidentally or purposefully – information that not only is irrelevant but if publicly released could be damaging to reputation and privacy.[178]

Where sensitive information is disclosed in discovery, public dissemination may be limited in the court's discretion.

The Supreme Court recently reaffirmed the First Amendment right to challenge compelled disclosure in *Americans for Prosperity Foundation v. Bonta*.[179] There, the Court upheld the claims of tax-exempt charities in California that the state violated their right to freedom of association by compelling the disclosure of names and addresses of their major donors. The Court quoted *NAACP v. Alabama*, noting that "[i]t is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute as effective a restraint on freedom of association as [other] forms of governmental action."[180] It was irrelevant both that donors would have to disclose such information to the IRS ("disclosure requirements can chill association even if there is no disclosure to the general public") and that some donors might not mind the disclosure to the state (the requirement nevertheless "creates an unnecessary risk of chilling in

[177] 467 U.S. 20 (1984).
[178] *Id.* at 35–36.
[179] 141 S.Ct. 2373, 2389 (2021).
[180] *Id.* at 2382.

violation of the First Amendment").[181] Technology gives the donors even more reason to protect their identities against threats by people with different ideologies:

> Such risks are heightened in the 21st century and seem to grow with each passing year, as 'anyone with access to a computer [can] compile a wealth of information about' anyone else, including such sensitive details as a person's home address or the school attended by his children.[182]

Certainly, information about a person's reproductive health and sexual activity are as sensitive as a home address or school, and forced disclosure may chill a prospective litigant from going to court as much as it would a donation to a charity.

5. Fourth Amendment Case Law On Privacy and Technology

Finally, a strong statement of a right to privacy against compelled disclosure of reproductive information comes from recent Supreme Court cases construing the Fourth Amendment in the context of Global–Positioning–System (GPS) trackers and cell phone search and surveillance. Those cases have had a strong influence on courts' view of civil discovery as to those devices.[183]

In *United States v. Jones*,[184] the Supreme Court found that the attachment of a GPS tracking device to an individual's vehicle constituted a search within the meaning of the Fourth Amendment. A number of justices concurred, but none dissented. Justice Scalia's opinion for the majority declined to decide whether the subsequent use of the GPS device to monitor the vehicle's movements on public streets would alone have violated the Fourth Amendment in the absence of the physical trespass.[185] In her concurrence, Justice Sotomayor made clear

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[181] *Id.*.
[182] *Id.*
[183] Henson v. Turn, Inc., 2018 WL 5281629 (N.D. Cal. 2018); Bakhit v. Safety Marking, Inc., Civ. No. 3:13CV1049, 2014 WL 2916490 (D. Conn. June 26, 2014).
[184] United States v. Jones, 565 U.S. 400, 402 (2012).
[185] *Id.*

that she believed such surveillance to implicate Fourth Amendment concerns given its pervasive nature:

> GPS monitoring generates a precise, comprehensive record of a person's public movements that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations. . . . I would take these attributes of GPS monitoring into account when considering the existence of a reasonable societal expectation of privacy in the sum of one's public movements. I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the government to ascertain, more or less at will, their political and religious beliefs, sexual habits, and so on.[186]

In addition, Justice Sotomayor expressed the view that previous Supreme Court precedent finding an individual has no reasonable expectation of privacy in information voluntarily conveyed to third parties, like bank records, is "ill-suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks."[187] She analogized to the intrusiveness of data concerning the web sites searched by an individual or purchases made online, and stated that "all information voluntarily disclosed to some member of the public for a limited purpose" should not, for that reason alone, be devoid of Fourth Amendment protection.[188]

Two years later, in *Riley v. California*, the Court found that officers' warrantless search of digital information on a suspect's cell phone incident to an arrest was unreasonable under the Fourth Amendment. [189] Again, there was no dissent. In distinguishing the search of a cell phone from a pat-down search for weapons or other personal property necessary to preserve as evidence, Chief Justice Roberts noted how different the cell phone is from any technology that was part of its previous Fourth Amendment jurisprudence and adopted

[186] *Id.* at 415–16.
[187] *Id.* at 417.
[188] *Id.* at 418.
[189] Riley v. California, 573 U.S. 373, 386 (2014).

Justice Sotomayor's reasoning in her *Jones* concurrence.[190] The Court noted that the implications of a cell phone's storage capacity are profound:

> First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.[191]

In addition to the quantity a cell phone is capable of storing, the quality of data that many users' phones contain implicates all sorts of privacy interests. This includes the concerns about GPS technology, Internet search, and browsing history that Justice Sotomayor noted in *Jones*. There is also a wealth of applications ("apps") on a cell phone which "offer a range of tools for managing detailed information about all aspects of a person's life:"

There are over a million apps available in each of the two major app stores; the phrase "there's an app for that" is now part of the popular lexicon. The average smart phone user has installed 33 apps, which together can form a revealing montage of the user's life.[192]

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[190] *Id.* at 385 ("[Modern cell phones, [] are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy. A smart phone of the sort taken from Riley was unheard of ten years ago; a significant majority of American adults now own such phones.").

[191] *Id.* at 394–95.

[192] *Id.*. at 396.

In sum, the degree to which a search of a cell phone implicates its owner's privacy interests is out of all proportion to that implicated by the search of a physical object,[193] since cell phones "place vast quantities of personal information literally in the hands of individuals."[194]

Most recently, in *Carpenter v. United States*, the Court considered whether the Government's actions in accessing historical cell phone records was merely gathering of data in which the suspects had no reasonable expectation of privacy, or instead constituted a search under the Fourth Amendment. [195] In finding the actions constituted a search, the Court was strongly influenced by the fact that this was not ordinary surveillance of a suspect's movements, or gathering of traditional records provided to a third party, but instead a "comprehensive chronicle of the user's past movements."[196] The nature of the information produced by cell-site location technology is "a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals."[197] Indeed, the information here raised even greater privacy concerns than the GPS monitoring in *Jones* because of the reality of cell phone usage.[198] Individuals "compulsively carry cell phones with them all the time," beyond just public places, into "private residences, doctors' offices, political headquarters, and other potentially revealing locales."[199]

In addition, the Court addressed concerns about the third-party doctrine that were raised in *Jones*.[200] It found that the waiver of privacy protection dictated by *Smith* and *Miller* was not simply a question of whether information was "knowingly shared" with another.[201] Also important is "the nature of particular documents sought" and the

[193] *See id.* at 393 ("Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse.").
[194] *Riley*, 573 U.S. at 386.
[195] 138 S. Ct. 2206 (2018).
[196] *Id.* at 2211.
[197] *Id.* at 2216.
[198] *Id.* at 2218 ("historical cell-site records present even greater privacy concerns than the GPS monitoring of a vehicle we considered in *Jones*.").
[199] *Id.*
[200] 565 U.S. at 417–18 (Sotomayor, J., concurring).
[201] 138 S. Ct. at 2210 (discussing United States v. Miller, 425 U.S. 435 (1976); Smith v. Maryland, 442 U.S. 735 (1979)).

capabilities of the information contained therein.[202] Applying the third-party doctrine here would constitute an extension of that doctrine "to a distinct category of information" that goes beyond the "limited capabilities" of bank checks or telephone call logs:

> [T]his case is not about "using a phone" or a person's movement at a particular time. It is about a detailed chronicle of a person's physical presence compiled every day, every moment, over several years. Such a chronicle implicates privacy concerns far beyond those considered in *Smith* and *Miller*.[203]

The Supreme Court's recent case law thus recognizes that the intrusive, comprehensive nature of data generated by new technology is simply not analogous to paper records.[204] Courts have already applied this concept in the discovery context, protecting against broad examination of cell phones.[205] Other types of discovery should also be viewed through this lens, including social media, health tracker data, and other information from devices connected to the IoT, all of which provide broad access to personal information.

B. Statutory Publication Shelters

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[202] *Id.*

[203] 138 S. Ct. at 2220. In *Carpenter*, four justices dissented. Justice Alito, while "shar[ing] the Court's concern about the effect of new technology on personal privacy," believed that the order here, "the functional equivalent of a subpoena for documents," should be reviewed for reasonableness and not be treated like an "actual search" requiring probable cause. *Id.* at 2247 (Alito, J., concurring) He also disagreed that Carpenter had the right to object to the search of the records, as they were property of third-party cell service providers. *Id.*

[204] Commentators have described this way of viewing privacy as the "mosaic theory," since individual bits of information that may themselves not implicate privacy in the aggregate add up to a comprehensive chronicle of a person's life. *See* Orin Kerr, D.C. Circuit Introduces "Mosaic Theory" of Fourth Amendment, Holds GPS Monitoring a Fourth Amendment Search, Volokh Conspiracy (Aug. 6, 2010, 2:46 PM), http://volokh.com/2010/08/06/d-c-circuit-introduces-mosaic-theory-of-fourth-amendment-holds-gps-monitoring-a-fourth-amendment-search/. *See* Orin Kerr, *The Mosaic Theory of the Fourth Amendment*, 111 Mich. L. Rev. 311, 313, n. 5 (2012).

[205] *See* Henson v. Turn, Inc., No. 15-cv-01497-JSW, 2018 WL 5281629 (N.D. Cal. Oct. 22, 2018); Bakhit v. Safety Marking, Inc., Civ. No. 3:13CV1049, 2014 WL 2916490 (D. Conn. June 26, 2014).

Aside from the Constitution, protection for privacy has evolved from the umbrella of legislative privacy laws, including what many courts refer to as "statutory publication shelters."[206] These ordinarily apply where legislation requires the production of information to the government or to the public, but places limitation on further disclosure or carves out exceptions to public disclosure. Courts deem such legislative determinations of confidentiality to be worthy of privacy protection against discovery.[207] It is possible for such statutes to create privileges.[208] More commonly, they instead give rise to protection to be balanced against the need for the discovery. As the Court of Appeals for the District of Columbia put it:

> [S]tatutory publication shelters may have some application to discovery. These protected interests reflect a congressional judgment that certain delineated categories of documents may contain sensitive data which warrants a more considered and cautious treatment. In the context of discovery of government documents in the course of civil litigation, the courts must accord the proper weight to the policies underlying these statutory protections, and to compare them with the factors supporting discovery in a particular lawsuit.[209]

One such statutory publication shelter is represented by the exceptions to required disclosure under the Freedom of Information Act (FOIA). The statute shines light onto government operations by requiring agencies to provide documents on request, with some important exemptions. An agency need not provide "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy," or "records or

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[206] Friedman v. Bache Halsey Stuart Shields, Inc., 738 F.2d 1336, 1344–45 (D.C. Cir. 1984).

[207] Chamber of Com. of U.S. v. Legal Aid Soc. of Alameda Cnty., 423 U.S. 1309, 1311–12 (1975) (finding a possible privilege against production under Rule 26 based on statutory limitations on disclosure of information obtained by EEOC from general contractors, including affirmative action and compliance reports: "the congressional purpose of confidentiality, protected by criminal sanctions, is not to be lightly circumvented.").

[208] *See* Baldrige v. Shapiro, 455 U.S. 345, 346 (1982) (confidentiality provisions of Census Act constituted a "privilege" within meaning of discovery provisions of Federal Rules of Civil Procedure.).

[209] *Friedman*, 738 F.2d at 1344–45.

information compiled for law enforcement purposes, but only to the extent that the production of such [materials] . . . could reasonably be expected to constitute an unwarranted invasion of personal privacy."[210] FOIA exemptions have been persuasive to courts considering privacy arguments against discovery.[211] Courts also find a public policy of protection from discovery represented by the Privacy Act,[212] which protects against disclosure information prepared for government agencies.[213]

Finally, courts have protected disclosure of medical records based both on Supreme Court precedent for protection of medical privacy[214] but also based on the Health Insurance Privacy Authorization Act (HIPAA). In *St. John v. Napolitano*,[215] an action alleging employment discrimination on the basis of national origin and age and

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[210] Freedom of Information Act, 5 U.S.C. § 552.

[211] See *Friedman,* 738 F.2d at 1344–45 (D.C. Cir. 1984) (in the context of subpoenas directed to the SEC and the Commodity Futures Trading Commission for investigatory files, exemption from disclosure under FOIA does not automatically mean that "the information is privileged within the meaning of Rule 26(b)(1) and thus not discoverable in civil litigation." Instead, the district court may consider such FOIA exceptions "as congressional underscoring of the government's interest in protecting sensitive investigatory information.").

[212] 5 U.S.C.A. § 552a (West) ("No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains [without an applicable exception].").

[213] *Reps. Comm. for Freedom of Press*, 489 U.S. at 767; Adelman v. Brady, No. CIV. A. 89-4714, 1990 WL 39147, at *1–2 (E.D. Pa. Mar. 28, 1990) (In claim based on Age Discrimination and Employment Act, effect of Privacy Act on request from IRS for records of employees was to reflect a public policy of protection: "Thus, as is true with respect to other statutory publication bans, the applicability of the Privacy Act to the materials requested is a relevant factor for the District Court to consider in determining the appropriate scope and manner of discovery in a given case."); Boudreaux v. United States, No. Civ. A. 97-1592, 1999 WL 499911 (E.D. La. July 14, 1999) (ordering the production of documents *in camera* so that the court could determine the legitimacy of its objections "in the considered and cautious manner contemplated by the Privacy Act."); *Laxalt v. McClatchy* 809 F.2d 885, 886 (D.C. Cir. 1987) ("when the District Court considers a request for a Privacy Act order in the discovery context it must consider the use of protective orders and the possibility of *in camera* inspection," and should also consider notifying any affected nonparties).

[214] *See* Section III.A, *supra*.

[215] 274 F.R.D. 12, 16 (D.D.C. 2011).

retaliation, the defendant Department of Homeland Security sought the production of the plaintiff employee's medical records for a nine-year period. The court required disclosure of only a portion of those records having a logical connection to the employee's claims of injury:

> Medical records are likely to contain sensitive personal information, a fact underscored by the existence of statutory confidentiality provisions, like those of the HIPAA Privacy Rule. . . . Accordingly, the plaintiff has demonstrated that the burden of producing such records and the harm to the plaintiff's privacy interests from the disclosure significantly outweighs any marginal relevance for the majority of the time period for which the defendant seeks records.[216]

Other relevant federal statutes that protect against disclosure of information that may implicate reproductive health include the Children's Online Privacy Protection Act;[217] the Family Education Rights and Privacy Act;[218] the Stored Communications Act;[219] and the Genetic Information Nondiscrimination Act.[220] Statutory publication shelters do not ordinarily create privileges against discovery production, but they are strong evidence of congressional intent to protect certain

[216] *See also* E.E.O.C. v. Bos. Mkt. Corp., No. CV 03-4227 LDW WDW, 2004 WL 3327264, at *4 (E.D.N.Y. Dec. 16, 2004) (prohibiting defendant's ex parte communications with the plaintiff's medical doctors which, "while not expressly prohibited by HIPAA, create . . . too great a risk of running afoul of that statute's strong federal policy in favor of protecting the privacy of patient medical records"); Taylor v. Altoona Area Sch. Dist., No. 3:05-CV-350, 2008 WL 11511749, at *2 (W.D. Pa. Oct. 10, 2008) ("While there is no federal common law doctor-patient privilege, medical records still invoke weighty privacy concerns, as evidenced by the federal government's enactment of HIPA regulations; therefore, this Court will balance the privacy concerns of the Defendant with the discovery interests of the Plaintiff.").

[217] 15 U.S.C. §§ 6501 et seq. (protecting personal information from and about children).

[218] 20 U.S.C. § 1232g (protecting educational records).

[219] 18 U.S.C. §§ 2701 et seq. (imposing limits on access to email, voicemail, and text messages once they are no longer in transit).

[220] 110 P.L. 233, 122 Stat. 881 (regulating use of genetic information).

personal or otherwise confidential information.[221] Courts therefore require a stronger showing for the production of such information.[222]

IV. PROTECTION OF REPRODUCTIVE PRIVACY IN STATE COURT DISCOVERY

The decision in *Dobbs* does not implicate the right to privacy guaranteed by many state constitutions, privileges, and case law. In addition, many states are passing or considering legislation that would protect against gathering or disclosure of personal information in response to current threats to privacy.

A. State Constitutional Privacy

Many states have explicit constitutional guarantees of privacy.[223] For example, California's constitution provides that one of its people's "inalienable" rights is "pursuing and obtaining . . . privacy."[224] That provision's "central concern" is to protect "informational privacy."[225] California courts construe their constitution to protect against disclosure of, among other things, sexual information;[226] tenure files and related discussions;[227] and non-party contact information.[228] In *County of Los Angeles v. Superior Court*, multiple counties brought an action against pharmaceutical companies involved in the manufacture and distribution of opioid medications.[229] The companies moved to compel the production of prescription data and

[221] *Laxalt*, 809 F.2d at 888 ("These protected interests reflect a congressional judgment that certain delineated categories of documents may contain sensitive data which warrants a more considered and cautious treatment.") (citations omitted).

[222] *See* Section III.B, *supra*.

[223] States with constitutional rights to privacy include Alaska, Arizona, California, Florida, Hawaii, Illinois, Louisiana, Montana, South Carolina, and Washington. *See* Kevin C. McAdam & John R. Webb, *Privacy: A Common Law and Constitutional Crossroads*, COLO. LAW., June 2011, at 55, n.27.

[224] CAL. CONST. art. I, § 1.

[225] Bd. of Registered Nursing v. Super. Ct., 273 Cal. 59 Cal.App.5th 1011, 1039 (Cal.App. 4 Dist., 2021).

[226] *See* Tien v. Super. Ct., 139 Cal.App.4th 528, 538 (Cal.App. 2 Dist., 2006).

[227] *See* Kahn v. Super. Ct., 233 Cal. Rptr. 662, 674 (Cal. App. 6 Dist. 1987).

[228] *See* Williams v. Super. Ct., 398 P.3d 69, 84 (Cal. 2017).

[229] Cnty. of Los Angeles v. Super. Ct., 280 Cal.Rptr.3d 85 (2021).

patient records related to substance abuse treatment.[230] The court found it "well-settled" that a patient has a right to privacy in her medical records that is protected by case law, state and federal statutes.[231] This privacy interest in medical records "may include descriptions of symptoms, family history, diagnoses, test results, and other intimate details concerning treatment."[232] Unauthorized disclosure of such files "can provoke more than just simple humiliation in a fragile personality" since the privacy right "encompasses not only the state of his mind, but also his viscera, detailed complaints of physical ills, and their emotional overtones."[233] This interest is particularly where the patients are non-parties.[234]

Florida's constitution protects every person's "right to be let alone and free from governmental intrusion into the person's private life."[235] This is broader than the right to privacy implied in the federal constitution.[236] The Florida Supreme Court has noted, in the context of discovery, that "[a]lthough the general concept of privacy encompasses an enormously broad and diverse field of personal action and belief, there can be no doubt that the Florida amendment was intended to protect the right to determine whether or not sensitive information about oneself will be disclosed to others."[237] Litigants have successfully argued for the privacy of blood donors' identities,[238] financial records of taxpayers,[239] employee records,[240] and other confidential materials like ethics committee records.[241] If medical records are to be produced,

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[230] *Id*. at 91.

[231] *Id.* at 102.

[232] *Id*. at 102.

[233] *Id.* at 103.

[234] *Id.* at 105 ("[T]he patients whose records are being sought have not taken *any* litigation position that could possibly constitute a waiver of their privacy rights").

[235] FLA. CONST. art. I, § 23.

[236] Berkeley v. Eisen, 699 So.2d 789, 790 (Fla. Dist. Ct. App. 1997).

[237] Rasmussen v. S. Fla. Blood Serv., Inc., 500 So. 2d 533, 536 (Fla. 1987) (footnote omitted).

[238] *See id.* at 535, 537–38.

[239] *See* Higgs v. Kampgrounds of Am., 526 So. 2d 980, 981 (Fla. Dist. Ct. App. 1988).

[240] *See* CAC-Ramsay Health Plans, Inc. v. Johnson, 641 So. 2d 434, 435 (Fla. Dist. Ct. App. 1994).

[241] *See* Dade Cnty. Med. Ass'n v. Hlis, 372 So. 2d 117, 118 (Fla. Dist. Ct. App. 1979).

the court should first review them *in camera* to prevent an undue invasion of privacy.[242]

Hawaii's constitutional right to privacy protects "the right to keep confidential information which is highly personal and intimate"[243] and "affords much greater privacy rights than the federal right to privacy."[244] This protection includes medical information.[245] In *Brende v. Hara*, a tort action arising out of a motor vehicle accident, Hawaii's Supreme Court found a judge's refusal to issue a protective order prohibiting the disclosure outside the litigation of plaintiffs' health information to be a "flagrant and manifest abuse of discretion."[246] Instead, "disclosure outside of the underlying litigation, without petitioners' consent, of petitioners' health information produced in discovery will violate petitioners' constitutional right to informational privacy, and, once the information is disclosed, the potential harm cannot be undone."[247] That privacy right is "absolute" where "the individuals seeking to protect patient medical records, in discovery and beyond, are not parties to the litigation, have not consented to the use of their patient medical records in relation to the [] litigation, and no compelling state interest has been shown."[248] Not even the de-identification of the medical records is adequate to protect such non-parties' rights.[249]

Texas courts recognize privacy rights in discovery based on its state constitution, which protects medical records and personal

[242] Zawistowski v. Gibson, 337 So.3d 901 (Fla. Dist. Ct. App. 2022).

[243] Brende v. Hara, 153 P.3d 1109, 1115 (2007) (internal citations omitted).

[244] Janra Enters. Inc. v. City and Cty. Of Honolulu, 113 P.3d 190, 196 (2005) (internal citations omitted)

[245] *Brende*, 153 P.3d at 1116 (2007) .

[246] *Id.*

[247] *Id*.

[248] Pacific Radiation Oncology, LLC v. Queen's Medical Center, 375 P.3d 1252, 1258 (2016).

[249] *Id*. at 1259.

records.[250] Washington,[251] Alaska,[252] and Montana[253] also protect privacy based on their state constitutions. Many legislatures are considering changes to state constitutional protections for privacy, and so it is important that there are other sources of protection in state courts.

B. Other State Court Protection for Discovery Privacy

In addition to protection based on state constitutional rights to privacy, state courts protect discovery based on common law, privilege, and state legislation. For example, courts in New York protect against disclosure of medical records under the physician-patient privilege, unless that privilege is waived.[254] In balancing the utility of social media information against a party's privacy rights, a New York court "should tailor its order to avoid release of embarrassing material of limited relevancy, especially those of a romantic nature, as would be any photographs posted on [dating] sites."[255] Texas courts are particularly careful in ordering forensic discovery of a party's devices, since the data "may be sensitive for business or personal reasons."[256] Maryland too considers the invasion of privacy from discovery of electronic data, taking care to impose protocols on the extraction of cell phone data, including storage on encrypted hard drives held in a limited access storage room.[257] Tennessee courts protect personnel files and medical

[250] *See In re* Crestcare Nursing & Rehab. Ctr., 222 S.W.3d 68, 72–73 (Tex. App. 2006).

[251] *See* T.S. v. Boy Scouts of Am., 138 P.3d 1053, 1058–59 (Wash. 2006) (holding that a higher showing must be made for discovery that implicates state constitutional right to privacy, although this right is distinguishable from a privilege).

[252] *See* State v. Doe, 378 P.3d 704, 705–06 (Alaska 2016) (concluding that the lower court erred in compelling disclosure of records regarding non-parties without balancing the interest in privacy rights against disclosure in an action against the state's children's services department for negligent placement with foster parent).

[253] *See* City of Bozeman v. McCarthy, 447 P.3d. 1048, 1057 (Mont. 2019) (finding Montana's constitutional right to privacy protects against disclosure of employment personnel records).

[254] *See* Forman v. Henkin, 93 N.E.3d 882, 890 (N.Y. 2018).

[255] Spoljaric v. Savarese, 121 N.Y.S.3d 531 at *2 (Sup. Ct. Suffolk Cty. 2020).

[256] In re Crowder, No. 03-21-00604-CV, 2022 WL 1479474 (Ct. App. Tex. May 11, 2022) (finding the trial court abused its discretion in ordering a forensic examination without sufficient notice, opportunity for hearing, and foundation to justify its scope).

[257] *See* St. Frances Acad. v. Gilman Sch., Inc., No. 1390, Sept. Term, 2022 WL 833371 (Md. Ct. Spec. App. Mar. 21, 2022).

records and require "a compelling showing of relevance because of the privacy interests involved."[258] Illinois recognizes a privilege against disclosure of medical records.[259]

1. Legislation

In response to the Supreme Court's decision in *Dobbs* and the widespread banning of abortion in other states, California passed two laws that limit disclosure of information to entities seeking to enforce those bans. AB 1242 prohibits a court from authorizing wiretaps, pen registers, or other searches for the purpose of investigating or recovering evidence related to abortion violations, and prohibits California corporations that provide electronic communications services from complying with a warrant issued by another state to produce records that would reveal the identity of customers using those services or other data or communications if related to an investigation of abortion. AB 2090 prohibits health care providers from releasing medical information related to an individual seeking or obtaining an abortion in response to a subpoena or request based on another state's efforts to enforce an abortion ban.

Bills have also been introduced in Congress to limit access to sensitive reproductive information.[260] The My Body My Data Act would establish protections for information relating to past, present, or future reproductive surgeries or procedures, and would limit the collection, retention, use or disclosure of personal reproductive or sexual health information without express consent or as strictly necessary to provide a product or service.[261]

The American Bar Association recently adopted a resolution urging governmental bodies to adopt laws that prevent the disclosure of personal reproductive and sexual health information. The resolution urges laws to prohibit data brokers from buying, selling or disclosing such information, and it would require a judicial order before

[258] Johnson v. Nissan N. Am., Inc., 146 S.W.3d 600, 606 (Tenn. Ct. App. 2004).

[259] *See* Nw. Mem'l. Hosp. v. Ashcroft, 362 F.3d 923, 925 (7th Cir. 2004) ("[U]nder Illinois law, even redacted medical records are not to be disclosed in judicial proceedings, with immaterial exceptions.").

[260] H.R.8111, 117thCong. (2022).

[261] *Id.*

government officials or law enforcement officers collect reproductive or sexual health information. The Resolution notes the problem posed by the vast collection of such information:

> [G]overnment agencies and private industry have numerous methods at their disposal for identifying individuals who are seeking reproductive or sexual health information or services. For example, law enforcement use of geofence warrants, keyword search warrants, and automated license plate readers (ALPRs) presents unique threats to personal reproductive and sexual health information. Geofence warrants, submitted to phone carriers or even to app companies that capture geolocation data, can be used to identify anyone who has been in proximity of a certain location, and ALPRs can detect what vehicles pass through which areas. It's not hard to imagine how this might be coupled with state laws that create liability even for the rideshare driver who drives an individual to an abortion clinic. Keyword warrants, submitted to search engines like Google, can be used to determine which users or devices searched for certain terms. These are overly broad searches, and businesses should resist them on that basis.[262]

V. PROPOSALS FOR INCREASED PROTECTION

This Article has articulated existing protection against discovery of reproductive health and other personal information made vulnerable by the *Dobbs* decision. However, such protection should be explicit. First, Rule 26(b)(1) should be amended in order to include privacy as a factor in considering proportionality of discovery requests. Explicit recognition of the value of privacy in addressing the burden of production is necessary to alert litigants as well as courts to its importance.[263]

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[262] AM. BAR. ASS'N., Resolution 809, https://www.americanbar.org/content/dam/aba/directories/policy/annual-2022/809-annual-2022.pdf.

[263] Aziz Huq and Rebecca Wexler make an interesting proposal that federal and state legislatures enact a statutory evidentiary privilege to shield abortion-related data from warrants, subpoenas, court orders and judicial proceedings. *See supra* note 80.

Second, other states should follow California's lead in limiting cooperation in investigations where out of state plaintiffs or investigators seek abortion related evidence. This is concrete, immediate protection in the context of searches for such information.

Finally, Congress should pass legislation protecting the right to informational privacy. Just as the Supreme Court has rejected the constitutional right to privacy as to "important personal decisions," it is likely also to reject a constitutional right to privacy against disclosure of personal matters.[264] Congress should enact legislation that codifies a fundamental right to shield personal information from unnecessary disclosure as recognized in *Whalen* and *Nixon*.

VII. CONCLUSION

The stakes of civil discovery that implicates privacy are higher than ever. At the same time, such data is increasingly collected and retained on cell phones, via social media, and on internet-connected devices. All of this data is fodder for civil discovery, particularly in the context of sexual harassment claims or general allegations of physical or mental injury.

Precedent in both federal and state courts protects against production of discovery that implicates reproductive health except where directly relevant to the issues as stake in the litigation, and even then warrants protective protocols. Those precedents are not affected by *Dobbs*, and courts should be vigilant in their application of Rule 26 and its state equivalents to protect against misuse of the discovery process.

However, additional state and federal protection is necessary. New measures should include amending state and federal versions of Rule 26 to explicitly allow courts to consider privacy in balancing the proportionality of a discovery request, laws protecting against requests for abortion-related information, and laws protecting individuals' right to informational privacy, especially information relating to intimate, highly personal matters.

[264] *See supra* Section III.B.