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## Keep Your Friends Close and Your Medical Records Closer: Defining the Extent to Which a Constitutional Right to Informational Privacy Protects Medical Records

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**KEEP YOUR FRIENDS CLOSE AND YOUR  
MEDICAL RECORDS CLOSER: DEFINING THE  
EXTENT TO WHICH A CONSTITUTIONAL RIGHT  
TO INFORMATIONAL PRIVACY PROTECTS  
MEDICAL RECORDS**

LAUREN NEWMAN, GEORGIA STATE UNIVERSITY COLLEGE OF LAW, J.D. 2019

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## INTRODUCTION

Traditionally, an individual's personal records were beyond the government's grasp absent a showing of probable cause.<sup>1</sup> The legal standards that protected them "evolved in a world where such records were almost universally in the actual possession of the individual."<sup>2</sup> However, with today's ever-expanding use of technology<sup>3</sup> and the ease with which highly intimate and sensitive information may be acquired and compiled,<sup>4</sup> that world no longer exists.<sup>5</sup> Instead, the magnitude of information sharing in the digital age has led to private, personal records not feeling very private at all.

In an attempt to safeguard health information, Congress enacted the Health Insurance Portability and Accountability Act (HIPAA) in 1996.<sup>6</sup> Specifically, the HIPAA Privacy Rule prohibits the "inappropriate use and disclosure of [health] information."<sup>7</sup> Notably absent, however, is a private right of action.<sup>8</sup> Thus, an "individual whose information is improperly used or disclosed, according to HIPAA, has no recourse" despite the "irreversible emotional and financial harm" caused by privacy violations.<sup>9</sup> In an attempt to provide a remedy to victims of sensitive data breaches, some state courts have allowed HIPAA to inform the applicable standard of

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<sup>1</sup> THE PRIVACY PROTECTION STUDY COMMISSION, PERSONAL PRIVACY IN AN INFORMATION SOCIETY 347 (July 1977).

<sup>2</sup> *Id.*

<sup>3</sup> Will Thomas DeVries, *Protecting Privacy in the Digital Age*, 18 BERKELEY TECH. L.J. 283, 302 (2003) ("While digital technology can save money and allow life-saving medical information to be instantly sent between hospitals and doctors, the same technology also heightens the possibility of mistake or misuse.") Devin W. Ness, *Information Overload: Why Omnipresent Technology and the Rise of Big Data Shouldn't Spell the End for Privacy as We Know It*, 31 CARDOZO ARTS & ENT. L.J. 925, 926 ("[T]he rapid development of information technology in the twentieth and early twenty-first centuries has had a massive impact on most people's daily lives, especially in regard to personal communications, access to information, and information transport and storage.")

<sup>4</sup> GRANT S. MCCLELLAN, THE RIGHT TO PRIVACY 164–65 (1976) (recognizing two trends which have made it easy for medical records—at one point secure and privately stored in doctors' offices or hospitals—to be taken out and forwarded without consent: "the great surge in computer technology" and "the growth of 'third party' involvement in health matters" such as insurance or the Medical Information Bureau)

<sup>5</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 193 (1890) ("Later there came a recognition of a man's spiritual nature, of his feelings and his intellect. Gradually the scope of these legal rights broadened . . . and the term 'property' has grown to comprise every form of possession—intangible, as well as tangible.")

<sup>6</sup> 24 C.F.R. § 164.303 (1996).

<sup>7</sup> Austin Rutherford, *Byrne: Closing the Gap Between HIPAA and Patient Privacy*, 53 SAN DIEGO L. REV. 201, 202 (2016).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

care in negligence cases.<sup>10</sup> Other states have enacted legislation to regulate the “privacy, confidentiality, security, use, and disclosure of information.”<sup>11</sup>

Despite these preliminary steps, the primary focus has been on private data breaches, leaving breaches in the U.S. public sector without “the attention [they] deserve[.]”<sup>12</sup> Like hospitals, doctors’ offices, and pharmacies, the government holds large volumes of sensitive data.<sup>13</sup> Unlike privately held data, however, the government obtains this information through “coercive or unbargained-for” means.<sup>14</sup> Specifically, they obtain it through either: (1) requiring disclosures by law “(e.g. tax returns, the census, law enforcement);” or (2) “in connection with an activity for which there is no realistic alternative source or supplier (e.g. licensing or benefits).”<sup>15</sup> A number of states have employed the former method to require medical facilities to disclose personal health information when it furthers a state interest.<sup>16</sup> For example, Georgia—in response to the current opioid epidemic—passed House Bill 249 in 2017, requiring prescribers to enter patients’ prescription information for Schedule II, III, IV, and V controlled substances in a Prescription Drug Monitoring Program (PDMP).<sup>17</sup> The PDMP, which falls under the purview of the Georgia Department of Public Health, gives providers the ability to review patients’ history of filled prescriptions over the last two years.<sup>18</sup>

But what if the PDMP gets hacked? Or what if a Department of Public Health employee leaves his work laptop on the bus? The individuals who were prescribed certain controlled substances would have their private data in the public domain. They would “suffer torment, anxiety, and financial and emotional stress wondering if and when this information will be used against them.”<sup>19</sup> Hackers may even be able to “open credit cards, take out loans, [or] fraudulently obtain tax returns.”<sup>20</sup> Yet, these patients can’t sue under HIPAA. Moreover, they likely cannot sue under state law as state and

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<sup>10</sup> See, e.g., *Byrne v. Avery Ctr. for Obstetrics & Gynecology, P.C.*, 102 A.3d 32, 42 (Conn. 2014) (“HIPAA regulations may well inform the applicable standard of care in certain circumstances.”).

<sup>11</sup> Jean O’Connor & Gene Matthews, *Informational Privacy, Public Health, and State Laws*, 101 AM. J. PUBLIC HEALTH (Oct. 2011).

<sup>12</sup> A. Michael Froomkin, *Government Data Breaches*, 24 BERKELEY TECH. L.J. 1019, 1020 (June 2009).

<sup>13</sup> *Id.* at 1022 (“Governments hold a wide variety of data.”).

<sup>14</sup> *Id.* at 1019–20.

<sup>15</sup> *Id.* at 1025.

<sup>16</sup> WILLIAM H. ROACH JR., *MEDICAL RECORDS AND THE LAW* 131 (2d ed. 1994) (discussing state statutes requiring disclosure of patient health information dealing with controlled drug prescriptions and occupational diseases); see, e.g., MASS. ANN. LAWS CH. 94C § 9(d) (1993).

<sup>17</sup> J. Patrick O’Neil, *Important Message from the Commissioner*, GA. DEP’T OF PUBLIC HEALTH (Oct. 18, 2017), [https://dph.georgia.gov/sites/dph.georgia.gov/files/related\\_files/document/DrONeal\\_PDMP\\_Deadline\\_Letter.pdf](https://dph.georgia.gov/sites/dph.georgia.gov/files/related_files/document/DrONeal_PDMP_Deadline_Letter.pdf).

<sup>18</sup> *Prescription Drug Monitoring Program*, GA. DEPT’ OF PUBLIC HEALTH (Aug. 23, 2018), <https://dph.georgia.gov/pdmp>.

<sup>19</sup> Rutherford, *supra* note 7, at 202.

<sup>20</sup> *Id.*

federal governments enjoy sovereign immunity.<sup>21</sup> The government is shielded from liability, unless and until state or federal legislatures abrogate that immunity for state privacy claims.<sup>22</sup> Fortunately for these individuals, however, this immunity does not protect the government from all claims.<sup>23</sup> An individual whose information has been improperly acquired or disseminated by a governmental actor may still look to two sources for agency liability: the Federal Privacy Act<sup>24</sup> or the Constitution.<sup>25</sup> Due to the shortcomings of the Privacy Act and the Supreme Court's "restrict[ion] on the ability of individuals to recover damages for a violation of the Act,"<sup>26</sup> this Article primarily focuses on the constitutional right to informational privacy.<sup>27</sup>

While the Constitution does not explicitly provide a right to privacy,<sup>28</sup> a number of Supreme Court decisions have recognized that the right may exist.<sup>29</sup> In an attempt to clarify its scope, the Court in *Whalen v. Roe* declared that there are two types of privacy interests: "security of personal information and autonomy in making important decisions."<sup>30</sup> Although the Supreme Court has confronted decisional privacy many times,<sup>31</sup> the contours of the right to informational privacy continue to

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<sup>21</sup> Froomkin, *supra* note 12, at 1028.

<sup>22</sup> See, e.g., *Clark v. Barnard*, 108 U.S. 436, 447 (1883) ("The immunity from suit belonging to a State, which is respected and protected by the Constitution within the limits of the judicial power of the United States, is a personal privilege which it may waive at pleasure.").

<sup>23</sup> *Id.*

<sup>24</sup> 5 U.S.C. § 552a (2016). The Privacy Act is "the most ambitious piece of federal legislation in the domain of informational privacy," and "the most comprehensive law that regulates the processing and dissemination of information that the government collects about individuals." Lior Jacob Strahilevitz, *Reunifying Privacy Law*, 98 CALIF. L. REV. 2007, 2024 (2010).

<sup>25</sup> Caleb Seeley, *Once More Unto the Breach: The Constitutional Right to Informational Privacy and the Privacy Act*, N.Y.U. L. REV. 1335, 1358 (Nov. 2016).

<sup>26</sup> *Id.* at 1358 ("[T]he Court's narrow interpretation of 'actual damages' in the Privacy Act in *FAA v. Cooper* restricted the ability of individuals to recover damages for a violation of the Act.").

<sup>27</sup> Helen L. Gilbert, *Minors' Constitutional Right to Informational Privacy*, 74 U. CHI. L. REV. 1374, 1375 (2007).

<sup>28</sup> *Roe v. Wade*, 410 U.S. 113, 152 (1973) ("The Constitution does not explicitly mention any right of privacy."); Seeley, *supra* note 25, at 1359 ("The Constitution does not explicitly mention a right to privacy.")

<sup>29</sup> *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (recognizing a fundamental "right to be free . . . from unwanted governmental intrusions into one's privacy"); *Terry v. Ohio*, 392 U.S. 1, 8–9 (1968); *Katz v. United States*, 389 U.S. 347, 350 (1967) (recognizing that the Fourth Amendment "protects individual privacy against certain kinds of governmental intrusion."); *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965) (Goldberg, J. concurring); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

<sup>30</sup> *Whalen v. Roe*, 429 U.S. 589, 605 (1977); see also Gilbert, *supra* note 27, at 1375.

<sup>31</sup> See, e.g., *Eisenstadt v. Baird*, 405 U.S. 438, 453–54 (2007) (addressing decisional privacy with contraception); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (addressing decisional privacy with marriage); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (addressing decisional privacy with family relationships); *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942)

elude courts.<sup>32</sup> In fact, the Supreme Court has yet to expressly extend the right to privacy to informational privacy despite confronting the issue twice since *Whalen*.<sup>33</sup> Despite the Court's restraint to rule on the existence of the right, every circuit court with the exception of the D.C. Circuit<sup>34</sup> has interpreted *Whalen* as establishing such a right to informational privacy.<sup>35</sup> Although these courts unanimously refuse to extend the right absolutely, each court varies as to what medical information it protects.<sup>36</sup>

The following Article discusses the extent to which the constitutional right to informational privacy protects medical data from improper acquisition or dissemination by state agents.<sup>37</sup> Part I provides background on *Whalen v. Roe*, the Supreme Court case that has been understood to establish the right to informational privacy.<sup>38</sup> Part I also discusses the variations across the circuit courts as to what

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(addressing decisional privacy with procreation); *Pierce v. Society of Sisters*, 268 U.S. 510, 535 (1925) (addressing decisional privacy with child rearing).

<sup>32</sup> Gilbert, *supra* note 27, at 1375.

<sup>33</sup> *NASA v. Nelson*, 562 U.S. 134, 138 (2011) (“We assume, without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* [*v. Roe*, 429 U.S. 589 (1977)] and *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425 (1977)].”); *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 457 (1977) (referring to a constitutional “interest in avoiding disclosure.”); *Whalen*, 429 U.S. at 605 (recognizing that in some circumstances, the duty to avoid unwarranted disclosures of private data “arguably has its roots in the Constitution.”); Christopher R. Smith, *Somebody’s Watching Me: Protecting Patient Privacy in Prescription Health Information*, 36 VT. L. REV. 951, 953 (2012) (“*Whalen* was the Supreme Court’s last examination of the constitutional right to privacy within the context of PHI, and it left unanswered the question of whether or not patients have a right to privacy in . . . PHI.”); Gilbert, *supra* note 27, at 1375.

<sup>34</sup> *American Federation of Govt. Employees v. HUD*, 118 F.3d 786, 791 (D.C. Cir. 1997).

<sup>35</sup> *Powell v. Schriver*, 175 F.3d 107, 111 (2d Cir. 1999) (“[T]here exists in the United States Constitution a right to privacy protecting “the individual interest in avoiding disclosure of personal matters”); *Doe v. Southeastern Pa. Transp. Auth. (SEPTA)*, 72 F.3d 1133, 1138 (3d Cir. 1995) (“The district court, therefore, committed no error in its holding that there is a constitutional right to privacy in one’s prescription records.”); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (“[w]e therefore hold that Doe possesses a constitutional right to confidentiality under *Whalen* in his HIV status.”); *see also* ELLEN ALDERMAN & CAROLINE KENNEDY (SMALL CAPS?), *THE RIGHT TO PRIVACY* 142 (1995) (“The Supreme Court has not addressed the issue again, but following *Whalen*, a number of lower federal courts recognized a privacy interest in confidential medical information, including medical records. They also began to fashion a framework by which to balance an individual’s privacy rights against the government’s need for access to and disclosure of some personal information.”); Seeley, *supra* note 25, at 935, 1365 (“Nine circuits recognize a constitutional right to privacy in personal information, health or otherwise.”).

<sup>36</sup> *Matson v. Bd. of Educ. Of City Sch. Dist. Of N.Y.*, 631 F.3d 57, 69 (2d Cir. 2011) (affirming trial court’s finding that teacher did not enjoy constitutionally-protected privacy right as to her fibromyalgia); *SEPTA*, 72 F.3d at 1138 (“While individuals have a legitimate expectation of privacy in their prescription purchase of controlled substances, such right must be weighed against the state’s interest in monitoring the use of dangerously addictive drugs”); Smith, *supra* note 33, at 953 (noting that “the question of the scope of the constitutional right to privacy in one’s medical information is largely unresolved”).

<sup>37</sup> Smith, *supra* note 33, at 953.

<sup>38</sup> *See infra* Part I.

medical information is afforded protection by the right.<sup>39</sup> Part II analyzes the well-established approaches adopted by the Second and Third Circuits as they present opposing interpretations of *Whalen*, one wholly protecting medical information and the other protecting scarcely any.<sup>40</sup> Finally, Part III explains why the Supreme Court and courts that have yet to adopt a uniform approach should follow the Third Circuit and constitutionally protect all medical information from improper government acquisition or dissemination.<sup>41</sup> Part III also argues for an amendment to the Privacy Act to provide individuals whose medical conditions are not afforded protection under the Constitution an alternative remedy.<sup>42</sup>

## I. THE EVOLUTION OF THE CONSTITUTIONAL RIGHT TO INFORMATIONAL PRIVACY

In 1977, the Supreme Court arguably recognized a constitutional right to informational privacy, though it refused to expand its holding beyond the facts of the case.<sup>43</sup> In *Whalen v. Roe*, the state of New York responded to the concern that drugs were being diverted into unlawful channels by enacting a statute that required doctors to disclose to the state information regarding patients being prescribed certain drugs with a high potential for abuse.<sup>44</sup> These disclosures would include information such as the patient's name, address, and age.<sup>45</sup> In its opinion, the majority delineated two kinds of privacy interests: the "interest in avoiding disclosure of personal matters" and "the interest in independence in making certain kinds of important decisions."<sup>46</sup> The privacy interest dealing with the nondisclosure of medical records falls within the first category.<sup>47</sup> Ultimately, the Court held that the patient-identification requirement in the New York statute was insufficient to "constitute an invasion of any right or liberty protected by the [Constitution]."<sup>48</sup> It reasoned that the requirement was furthering a

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<sup>39</sup> See *infra* Part I.

<sup>40</sup> See *infra* Part II.

<sup>41</sup> See *infra* Part III.

<sup>42</sup> See *infra* Part III.

<sup>43</sup> *Whalen v. Roe*, 429 U.S. 589, 605–06 (1977) (recognizing in "some circumstances" the duty to avoid "unwarranted disclosures" of personal information in computerized data banks or government files "arguably has its roots in the Constitution").

<sup>44</sup> *Id.* at 589.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 599–600; see also *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) ("[W]e know that [the constitutional protection of the right to privacy] extends to two types of privacy interests" and "[t]he privacy interest asserted in [medical records] case[s] falls within the first category referred to in *Whalen*, the right not to have an individual's private affairs made public by the government.").

<sup>47</sup> *Westinghouse*, 638 F.2d at 577 ("The privacy interest asserted in this case [privacy in medical records] 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.").

<sup>48</sup> *Whalen*, 429 U.S. at 603–04; see also ALDERMAN & KENNEDY, *supra* note 35 at 141–42 ("Although the New York law was upheld, *Whalen* was considered a milestone in the fight for

legitimate state interest and that disclosure of medical information can be “an essential part of modern medical practice even when the disclosure may reflect unfavorably on the character of the patient.”<sup>49</sup>

In his concurring opinion, Justice Brennan argued that despite the majority’s holding, future technological developments would ultimately require additional restrictions as such developments may vastly increase the potential for abuse of easily accessible computerized information.<sup>50</sup> Forty years and countless technological advances later,<sup>51</sup> the scope of constitutional restrictions on informational privacy remains unclear.<sup>52</sup> Circuit and district courts interpreting *Whalen* unanimously permit acquisition and disclosure of medical information when the government’s interest in propagating the information outweighs the individual’s interest in keeping the information private.<sup>53</sup> However, most courts do not even reach this balancing test if they determine the information is not of a constitutionally protected dimension.<sup>54</sup> This conclusion begs the question: what medical information is constitutionally protected?

The Second Circuit extends the constitutional right to privacy to serious, fatal conditions and profound psychiatric conditions that impart on their victims

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privacy. The recognition of a constitutionally protected interest in certain personal information was important, as was the recognition of the vulnerability of information in the electronic era.”).

<sup>49</sup> *Whalen*, 429 U.S. at 602 (“disclosures of private medical information to doctors, to hospital personnel, to insurance companies, and to public health agencies”); *see also* McCLELLAN, *supra* note 4, at 162 (“Hippocrates’ ‘holy secrets,’ traditionally guarded by doctor and patient, are now often noised about and with some peculiar results. The medical examination room is getting crowded. You think you are talking to your doctor, but insurance companies, lawyers, future educators or employers, researchers—even credit bureaus—may be listening in.”).

<sup>50</sup> *Whalen*, 429 U.S. at 603–04 (Brennan, J. concurring) (“What is more troubling about this scheme, however, is the central computer storage of the data thus collected.”).

<sup>51</sup> Jim Atherton, *Development of the Electronic Health Record*, 13 *AMA J. OF ETHICS* 186, 188 (“Since the 1980s, more concerted efforts have been made to increase use of EHR.”).

<sup>52</sup> *See Westinghouse*, 638 F.2d at 578 (“Although the full measure of the constitutional protection of the right to privacy has not yet been delineated . . . ”); Philip Kurland, *The Private I*, *THE UNIV. OF CHICAGO MAG.* 7, 8 (1976) (“The concept of a constitutional right of privacy still remains largely undefined.”).

<sup>53</sup> *SEPTA*, 72 F.3d at 1138 (“As with many individual rights, the right of privacy in one’s prescription drug records must be balanced against important competing interests.”); *Doe*, 15 F.3d at 269 (“[T]he city’s interest in disseminating information concerning conciliation agreements must be ‘substantial’ and must be balanced against Doe’s right to confidentiality.”); *Westinghouse*, 638 F.2d at 578 (“In recognition that the right of an individual to control access to her or his medical history is not absolute, courts and legislatures have determined that public health or other public concerns may support access to facts an individual might otherwise choose to withhold.”).

<sup>54</sup> *Lee v. City of Columbus, Ohio*, 636 F.3d 245, 260 (6th Cir. 2008) (“Only after a fundamental right is identified should the court proceed to the next step of the analysis—the balancing of the government’s interest in disseminating the information against the individual’s interest in keeping the information private.”); *Ortlieb v. Howery*, 74 F. App’x 853, 857 (10th Cir. 2003) (refusing to consider whether the government’s interest outweighed the plaintiff’s right to privacy where plaintiff had no right to privacy in her x-rays).



“discrimination and intolerance.”<sup>55</sup> In *Doe v. City of New York*, the court found that individuals infected with HIV “clearly possess[] a constitutional right to privacy regarding their condition” given its seriousness and fatality.<sup>56</sup> The court further reasoned that an individual’s revelation that he has HIV “potentially exposes [him] not to understanding or compassion but to discrimination and intolerance, further necessitating the extension of the right to confidentiality.”<sup>57</sup>

Based on the reasoning laid out in *Doe*, the Second Circuit extended the constitutional right to privacy to transsexualism in *Powell v. Schriver*.<sup>58</sup> The court focused on transsexualism’s “excruciatingly private and intimate nature,” its status as a “profound psychiatric disorder,” and its vulnerability to discrimination and intolerance.<sup>59</sup> However, in *Matson v. Board of Education Of City School Dist. of New York*, the Second Circuit declined to extend the right it so established in *Doe* and *Powell* to patients with fibromyalgia.<sup>60</sup> The Court reasoned that fibromyalgia, however serious, is neither fatal nor a profound psychiatric disorder.<sup>61</sup>

The Third Circuit protects “those [rights of privacy] which are ‘fundamental’ or ‘implicit in the concept of ordered liberty.’”<sup>62</sup> In *United States v. Westinghouse Electric Corporation*, the court held that medical records containing “results of routine testing, such as X-rays, blood tests, pulmonary function tests, [and] hearing and visual tests” are unquestionably “well within the ambit of materials entitled to privacy protection.”<sup>63</sup> The court again protected medical records, specifically records of prescription medications, in *Doe v. Southeastern Pennsylvania Transportation Authority (SEPTA)*.<sup>64</sup> Thus, despite imposing what may seem a fairly stringent

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<sup>55</sup> *Matson*, 631 F.2d at 65–69 (emphasis omitted) (finding that “although fibromyalgia is a serious medical condition, it does not carry with it the sort of opprobrium that confers upon those who suffer from it a constitutional right of privacy as to that medical condition”); *Powell*, 175 F.3d at 111 (concluding the reasoning in *Doe* “compels the conclusion that the Constitution does indeed protect the right to maintain the confidentiality of one’s transsexualism”); *Doe*, 15 F.3d at 267 (finding plaintiff possessed a confidential right to confidentiality under *Whalen* in his HIV status).

<sup>56</sup> *Doe*, 15 F.3d at 266.

<sup>57</sup> *Id.* at 267; see also JUDITH WAGNER DECEW, IN PURSUIT OF PRIVACY: LAW, ETHICS, AND THE RISE OF TECHNOLOGY 130 (1997) (“Disclosure of [medical] information . . . can be not only embarrassing but can lead to discrimination, loss of employment, and financial loss.”).

<sup>58</sup> *Powell*, 175 F.3d at 112 (Like the HIV status discussed in *Doe*, “transsexualism is the unusual condition that is likely to provoke both an intense desire to preserve one’s medical confidentiality, as well as hostility and intolerance from others.”).

<sup>59</sup> *Powell*, 175 F.3d at 111.

<sup>60</sup> *Matson*, 631 F.2d at 64–65 (explaining that “[a] general medical determination or acknowledgment that a disease is serious does not give rise *ipso facto* to a constitutionally-protected privacy right”).

<sup>61</sup> *Id.* (noting that despite being characterized by “fatigue and muscular soreness and tenderness”, fibromyalgia is only debilitating in certain instances).

<sup>62</sup> *SEPTA*, 72 F.3d at 1137 (citing *Paul v. Davis*, 424 U.S. 693, 713 (1976)).

<sup>63</sup> *Westinghouse*, 638 F.2d at 577.

<sup>64</sup> *SEPTA*, 72 F.3d at 1140.

standard, requiring the plaintiff's right to nondisclosure of her information be "fundamental" or "implicit in the concept of liberty," the Third Circuit seems to broadly consider the nondisclosure of all medical information to be of such a fundamental nature to warrant its protection.

With arguably the narrowest interpretation of *Whalen*, the Sixth Circuit "developed and applied a different approach to assessing information privacy claims" than its sister circuits.<sup>65</sup> The court, like the Third Circuit, only extends a right to privacy to interests that can be deemed "fundamental or implicit in the concept of ordered liberty."<sup>66</sup> However unlike the Third Circuit, the Sixth Circuit is yet to "confront[] circumstances involving the disclosure of medical records" that are "tantamount to the breach of a 'fundamental liberty interest' under the Constitution."<sup>67</sup> Instead it has ruled that the disclosure of medical records,<sup>68</sup> DNA profiles,<sup>69</sup> psychotherapy records,<sup>70</sup> and one's status as HIV positive<sup>71</sup> do not rise to the level of a breach of a right recognized as fundamental under the Constitution. The Sixth Circuit has only recognized constitutionally protected informational-privacy interest twice: (1) where the release of personal information could lead to bodily harm;<sup>72</sup> and (2) where the information released was of a sexual, personal, and humiliating nature.<sup>73</sup>

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<sup>65</sup> *Lambert v. Hartman*, 517 F.3d 433, 442 (6th Cir. 2008); *see also Lee*, 636 F.3d at 261 ("This court, in contrast to some of our sister circuits, 'has narrowly construed the holdings of *Whalen* and *Nixon* to extend the right to information privacy only to interests that implicate a fundamental liberty interest.'"); *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 574 (6th Cir. 2002) ("Since *DeSanti*, this Court has not strayed from its holding, and continues to evaluate privacy claims based on whether the interest sought to be protected is a fundamental interest or an interest implicit in the concept of ordered liberty.").

<sup>66</sup> *Bloch v. Ribar*, 156 F.3d 673, 683 (6th Cir. 1998) (quoting *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981)).

<sup>67</sup> *Lee*, 636 F.3d at 261.

<sup>68</sup> *Summe v. Kenton Cnty. Clerk's Office*, 604 F.3d 257, 270–71 (6th Cir. 2010); *Jarvis v. Wellman*, 52 F.3d 125, 126 (6th Cir. 1995) (prison officials' disclosure of rape victim's medical records to an inmate "does not rise to the level of a breach of a right recognized as 'fundamental' under the Constitution"); *Gen. Motors Corp. v. Dir. of Nat'l Inst. For Occupational Safety and Health*, 636 F.2d 163, 165–66 (6th Cir. 1980) (enforcing a subpoena for the production of employees' medical records finding no intrusion upon protected privacy interests).

<sup>69</sup> *Wilson v. Collins*, 517 F.3d 421, 428–29 (6th Cir. 2008) (finding plaintiff did not have a fundamental privacy interest in information contained in his DNA profile).

<sup>70</sup> *In re Zuniga*, 714 F.2d 632, 641 (6th Cir. 1983) (affirming enforcement of a subpoena issued by a grand jury, commanding psychotherapists to produce patient information).

<sup>71</sup> *Doe v. Lockwood*, No. 95-3499, 1996 WL 367046, at \*6 (6th Cir. June 27, 1996); *Doe v. Wiggington*, 21 F.3d 733, 740 (6th Cir. 1994).

<sup>72</sup> *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1069–70 (6th Cir. 1998) (holding that disclosure of officers' personal information placed them and their families at substantial risk of serious bodily harm and thus encroached upon their "fundamental rights to privacy and personal security under the Due Process Clause of the Fourteenth Amendment").

<sup>73</sup> *Bloch*, 156 F.3d at 683 (concluding that rape victims have a fundamental right of privacy as to the intimate details of their rapes reasoning "such basic matters as contraception, abortion,

Thus, despite using the exact same test—or perhaps more appropriately, the exact same verbiage of a test—to determine whether information is constitutionally protected, the Sixth and Third Circuits have vastly different interpretations of what is “fundamental” or “implicit in the concept of ordered liberty.”<sup>74</sup>

The Tenth Circuit protects information when “the party asserting the right has a legitimate expectation of privacy” in the information.<sup>75</sup> In considering whether someone’s expectation of privacy in a medical condition is reasonable, the court examines the personal nature of the condition and only extends protection to highly personal or sensitive data.<sup>76</sup> Under this approach, the Tenth Circuit has extended the right to privacy to HIV,<sup>77</sup> prescription drug records,<sup>78</sup> and medical records.<sup>79</sup> However, it has refused to protect X-rays, reasoning that they contain no information of a sensitive or intimate nature about which an individual could form a legitimate expectation of privacy; it is plainly obvious when someone has a broken limb to anyone who witnessed the accident or sees her cast.<sup>80</sup> Thus, while Tenth Circuit decisions claim to protect only information of the utmost sensitive nature, in practice, the Tenth Circuit considers most medical information sensitive and thus private enough to warrant protection.<sup>81</sup> The only information the Tenth Circuit appears to

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marriage, and family life are protected by the constitution from unwarranted government intrusion.”).

<sup>74</sup> *SEPTA*, 72 F.3d at 1138 (“When the underlying claim is one of invasion of privacy, the complaint must be ‘limited to those [rights of privacy] which are “fundamental” or “implicit in the concept of ordered liberty.”’) (quoting *Davis*, 424 U.S. at 713); *Lee*, 636 F.3d at 260 (“A plaintiff alleging a violation of her right to informational privacy must therefore demonstrate ‘that the interest at take relates to “those personal rights that can be deemed fundamental or implicit in the concept of ordered liberty.”’) (quoting *DeSanti*, 653 F.2d at 1090).

<sup>75</sup> *Ortlieb*, 74 F. App’x at 856; *see also* *Mangels v. Pena*, 789 F.2d 836, 839 (10<sup>th</sup> Cir. 1986) (“The Due Process Clause directly protects fundamental aspects of personal privacy against intrusion by the State. One aspect of this substantive due process arises from the individual interest in avoiding disclosure of personal matters. Due process thus implies an assurance of confidentiality with respect to certain forms of personal information possessed by the state.”).

<sup>76</sup> *Ortlieb*, 74 Fed. App’x at 857 (citing *Flanagan v. Munger*, 890 F.2d 1557, 1570 (10<sup>th</sup> Cir. 1989)) (“[To] determin[e] whether information . . . is of such a highly personal or sensitive nature that it falls within the zone of confidentiality . . . the court must consider, (1) if the party asserting the right has a legitimate expectation of privacy, (2) if disclosure serves a compelling state interest, and (3) if disclosure can be made in the least intrusive manner.”).

<sup>77</sup> *A.L.A. v. West Valley City*, 26 F.3d 989, 990 (10<sup>th</sup> Cir. 1994) (“There is no dispute that confidential medical information is entitled to constitutional privacy.”).

<sup>78</sup> *Douglas v. Dobbs*, 419 F.3d 1097, 1102 (10<sup>th</sup> Cir. 2005) (establishing that plaintiff had a constitutional right to privacy in her prescription drug records as an individual using prescription drugs has a reasonable expectation of such information remaining private).

<sup>79</sup> *Lankford v. City of Hobart*, 27 F.3d 477, 479-80 (10<sup>th</sup> Cir. 1994) (There is “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.”).

<sup>80</sup> *Ortlieb*, 74 Fed. App’x at 857 (“[T]here was nothing confidential about the fact that Ms. Ortlieb had a severely broken leg.”).

<sup>81</sup> *Lankford*, 27 F.3d at 479–80.

exclude from constitutional protection are those conditions discernable to the naked eye.<sup>82</sup>

This brief overview of the relevant case law evinces the inconsistency with which the circuit courts extend the constitutional right to informational privacy in the healthcare arena. Medical records, for example, are “well within the ambit of materials entitled privacy protection” in the Third<sup>83</sup> and the Tenth Circuits,<sup>84</sup> whereas the Sixth Circuit refuses to categorically protect them.<sup>85</sup> Routine testing and X-rays are similarly protected in the Third Circuit<sup>86</sup> but not in the Tenth Circuit.<sup>87</sup> An individual’s HIV status is constitutionally protected in the Second and Third Circuits but not in the Sixth Circuit.<sup>88</sup> With such sharp divergence in the circuit courts’ interpretations of what information is constitutionally protected under *Whalen*, individuals seeking to prevent disclosure of the same medical condition face conflicting outcomes entirely depending on where they live.

## II. TO PROTECT OR NOT TO PROTECT: THE SECOND CIRCUIT VS. THE THIRD CIRCUIT

Until the Supreme Court adopts a uniform approach, courts with little to no precedent must look to those courts that have sufficiently addressed the issue of informational privacy for guidance.<sup>89</sup> This analysis focuses on the approaches adopted by the Second and Third Circuits as these courts present robust case law and opposing views on what medical information is protected under the Constitution.

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<sup>82</sup> *Ortlieb*, 74 Fed. App’x at 857.

<sup>83</sup> *Westinghouse*, 638 F.2d at 578.

<sup>84</sup> *Lankford*, 27 F.3d at 479-80 (There is “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.”).

<sup>85</sup> *Lee*, 636 F.3d at 261.

<sup>86</sup> *Westinghouse*, 638 F.2d at 578.

<sup>87</sup> *Ortlieb*, 74 Fed. App’x at 857 (finding x-rays were not intimate or personal enough for the plaintiff to possibly “form a legitimate or reasonable expectation of privacy”).

<sup>88</sup> *SEPTA*, 72 F.3d at 1138; *Doe*, 15 F.2d at 267 (“We therefore hold that Doe possesses a constitutional right to confidentiality under *Whalen* in his HIV status”); *but see Wiggington*, 21 F.3d at 740 (finding inmate possessed no constitutionally right to privacy in his HIV status).

<sup>89</sup> Paul Nordeman, *The Vanishing Right to Privacy: A Critique of the Second Circuit’s Approach to Medical Confidentiality in Matson v. Board of Education*, 22 TEMP. POL. & CIV. RTS. L. REV. 225, 234 (2011) (“As courts continue to confront matters implicating individuals’ privacy rights about personal medical information, they will look to previous decisions for guidance.”).

*A. The Second Circuit's Limited Protection Approach*

The Second Circuit imposes one of the most stringent standards of the circuit courts and only extends the right to privacy to serious, fatal medical conditions and profound psychiatric disorders. It additionally requires that the condition “bring about public opprobrium.”<sup>90</sup> Thus, in considering whether a constitutional right to privacy attaches to various medical conditions, the Second Circuit proceeds on a case-by-case basis that will “necessarily include certain medical conditions [and] exclude others.”<sup>91</sup> Under this approach, the Second Circuit has extended the right to privacy to HIV,<sup>92</sup> transsexualism,<sup>93</sup> and a person’s psychiatric health and substance-abuse history.<sup>94</sup> A district court has also extended the right to privacy to sickle cell anemia.<sup>95</sup> Other courts in the Second Circuit have refused, however, to extend the right to less serious conditions.<sup>96</sup> This bar, higher than those imposed by the Third and Tenth Circuits, forces plaintiffs to prove their ailment is of such an embarrassing and serious degree in order to receive constitutional protection.<sup>97</sup> While this threshold may disincentive plaintiffs from bringing claims to redress the disclosure of less significant conditions, it imposes a number of difficulties in terms of its enforcement.

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<sup>90</sup> *Id.* at 66; Nordeman, *supra* note 89, at 234 (“The Matson Court . . . considered both the seriousness of Dorrit Matson’s condition and the amount of discrimination she was likely to face because of her fibromyalgia.”); see DeVries, *supra* note 3, at 302 (“Having the world learn about one’s Prozac prescription can be embarrassing; having the world learn about one’s HIV-positive status can be life-shattering.”).

<sup>91</sup> *Matson*, 631 F.3d at 67.

<sup>92</sup> *Doe*, 15 F.3d at 267.

<sup>93</sup> *Powell*, 175 F.3d at 111; Nordeman, *supra* notes 89, at 231 (“The Second Circuit had previously given that designation only to HIV and transsexualism.”).

<sup>94</sup> *O’Connor v. Pierson*, 426 F.3d 187, 201-02 (2d Cir. 2005) (“Medical information in general, and information about a person’s psychiatric health and substance-abuse history in particular, is information of the most intimate kind.”).

<sup>95</sup> *Fleming v. State Univ. of N.Y.*, 502 F. Supp. 2d 324, 342-45 (2d. Cir. 2007); Nordeman, *supra* notes 89, at 231.

<sup>96</sup> *Matson*, 631 F.3d at 67 (refusing to extend the right of privacy to fibromyalgia); *Watson v. Wright*, 08-CV-62, 2010 WL 55932, at \*1 (N.D.N.Y. Jan. 5, 2010) (“This [c]ourt finds no basis in *Powell* and its progeny for holding that, in a prison setting, plaintiff’s Hepatitis C condition is the type of condition that gives rise to constitutional protection under *Powell*.”); *Rush v. Artuz*, No. 00 Civ. 3436, 2004 WL 1770064, at \*12 (S.D.N.Y. Aug. 6, 2004) (“First, plaintiff’s wrist injury and his stomach problems cannot be classified as ‘personal matters of a sensitive nature’ and second, due to his use of a splint, plaintiff’s wrist injury was clearly visible to all those around him.”).

<sup>97</sup> *Matson*, 631 F.3d at 67 (denying constitutional protection to a disease the court did not believe to be serious enough of subject to any intolerance or discrimination).

## 1. “Serious” and “Embarrassing” are Ambiguous Terms

First, “serious” and “embarrassing” are ambiguous. In the Second Circuit, whether the condition is embarrassing enough to warrant protection is an objective question, is largely defined by the views of society.<sup>98</sup> If the court does not believe a disease is attributed to socially repugnant conduct or does not “view[] [the disease] as directly associated with any disease which might conceivably be characterized as loathsome,” it will refuse to find a right to privacy in the condition and the plaintiff’s subjective humiliation would be immaterial.<sup>99</sup> The court in *Matson* rested its determination that fibromyalgia lacked this sort of social opprobrium on the wide availability of a drug therapy and its being regularly advertised alongside other therapies for conditions the court considered not serious.<sup>100</sup> However, the Second Circuit fails to consider the variations in embarrassment thresholds among individuals and societies.<sup>101</sup> What constitutes sensitive medical information varies from one person to another, one religion to another, and one culture to another.<sup>102</sup> Different views may arise “from individual patients’ sensitivities or embarrassment thresholds” or from differences in religious or cultural beliefs.<sup>103</sup> Thus, whether the Second Circuit finds medical information constitutionally protected effectively hinges on who is on the jury and in what town they live.

Whether a condition is serious is likewise unclear.<sup>104</sup> This confusion is evidenced by the Second Circuit’s own inability to develop a consistent definition of “serious.” In *Doe*, the court held that the need for constitutional protection, while near its apex when a person suffers from HIV, would be recognized for *any* serious medical condition.<sup>105</sup> In *Powell*, the Second Circuit similarly found that one’s transsexualism—like HIV—is a matter “in which the privacy interest is at or near its ‘zenith.’”<sup>106</sup> However, in *Matson*, the court held that serious, fibromyalgia did not reach the bar set in *Doe* and *Powell* and adopted a stricter approach “based almost

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<sup>98</sup> *Id.* at 66.

<sup>99</sup> See *Golub v. Enquirer/Star Group, Inc.*, 89 N.Y.2d 1074, 1077 (1997) (holding that cancer was not societally viewed as “loathsome”).

<sup>100</sup> *Matson*, 631 F.3d at 67; see also Nordeman, *supra* notes 89, at 246 (listing “high cholesterol, frequent urination, osteoporosis, and acid reflux” as conditions with therapies advertised alongside Lyrica).

<sup>101</sup> HEIDI TRANBERG & JEM RASHBASS, *MEDICAL RECORDS USE AND ABUSE* 62 (2014).

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> Nordeman, *supra* note 89, at 248 (“The term ‘serious,’ for example, which has already been shown to invite a number of different interpretations, needs more clarity if it is to be effectively used.”).

<sup>105</sup> *Doe*, 15 F.2d at 267 (“Clearly, an individual’s choice to inform others that she has contracted . . . a fatal, incurable disease is one that she should normally be allowed to make for herself. This would be true for any serious medical condition, but is especially true with regard to those infected with HIV.”) (emphasis added).

<sup>106</sup> *Matson*, 631 F.3d at 67 (Straub, J. dissenting).

exclusively on factual comparisons of fibromyalgia to HIV and transsexualism.”<sup>107</sup> The Second Circuit reasoned that fibromyalgia was debilitating only in certain instances and was neither fatal like the condition in *Doe* nor profoundly psychiatric like the one in *Powell*.<sup>108</sup> In one ruling, the Second Circuit transformed its zenith of seriousness to a threshold.<sup>109</sup>

Other definitions of “serious” as related to medical conditions similarly add to the confusion. The Family Medical Leave Act (“FMLA”) defines a serious health condition as “an illness, injury, impairment, or physical or mental condition that involves: (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider.”<sup>110</sup> The Department of Labor has promulgated regulations similarly defining “serious health conditions requiring continuing treatment.”<sup>111</sup> The Committee on Serious and Complex Medical Conditions published a list of criteria to be used to determine whether a medical condition is serious and complex, including: conditions that are life threatening, cause significant pain or discomfort, require frequent monitoring, or affect multiple organ systems.<sup>112</sup> While both the FMLA and Committee on Serious and Complex Medical Conditions either expressly consider or have been interpreted to consider conditions such as asthma and arthritis to be serious,<sup>113</sup> those suffering from either would unlikely be afforded protection in the Second Circuit as neither condition is fatal like HIV nor profoundly psychiatric like transsexualism.<sup>114</sup>

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<sup>107</sup> *Id.* (“Fibromyalgia, however serious, is neither alleged to be fatal, as we recognized the HIV condition to be in *Doe* nor is it a ‘profound psychiatric disorder’ as we noted in *Powell*); see Nordeman, *supra* notes 89, at 234 (“Despite having already admitted the serious nature of fibromyalgia, the court paradoxically devoted the bulk of its opinion to undermining the seriousness of the disease.”).

<sup>108</sup> *Matson*, 631 F.3d at 65; see also Nordeman, *supra* note 89, at 234 (“[T]he majority compounded much of the dicta from *Doe* and *Powell* into a set of requirements that could only be met by conditions matching the severity, both physical and mental, of HIV and transsexualism.”).

<sup>109</sup> *Matson*, 631 F.3d at 65.

<sup>110</sup> 29 U.S.C. § 2611 (2009); *FMLA: Serious Health Condition: How do I know if an Employee’s Medical Absence Qualifies for FMLA Leave? What is Considered a Serious Health Condition?*, SOCIETY FOR HUMAN RESOURCE MANAGEMENT (Feb. 16, 2016), <https://www.shrm.org/resourcesandtools/toolsandsamples/hrqa/pages/howemployeemedicalabsencequalifiesforfmlaleave.aspx> (listing examples including chronic conditions that require periodic visits to a provider, incapacity for pregnancy or prenatal care, permanent or long-term conditions, Alzheimer’s, cancer, severe arthritis, and strokes).

<sup>111</sup> 29 C.F.R. § 825.115 (2013).

<sup>112</sup> CAROLE A. CHRAVALA & STEVEN SHARFSTEIN, DEFINITION OF SERIOUS AND COMPLEX MEDICAL CONDITIONS 19 (1999).

<sup>113</sup> 29 C.F.R. § 825.115 (2013); CHRAVALA & SHARFSTEIN, *supra* note 112, at 19.

<sup>114</sup> *Matson*, 631 F.3d at 67 (“Fibromyalgia, however serious, is neither alleged to be fatal, as we recognized the HIV condition to be in *Doe* nor is it a ‘profound psychiatric disorder’ as we noted in *Powell*).

## 2. “Serious” and “Embarrassing” are Subject to Evolve

To make matters even more complicated, a serious condition “may be serious and complex for *some* patients at *some* points during the course of their disease or disability” but not at all times or forever.<sup>115</sup> An ailment that at one point was severe in nature and surely fatal may over time become quite curable with enough research and funding.<sup>116</sup> And, as medical conditions become more curable with more widely available drug therapies, advertisements for such drug therapies may appear alongside those for conditions the court had previously considered not serious.<sup>117</sup> With enough treatment and enough advertising, over time the loathsome and negative stigmas surrounding these conditions may disappear altogether.<sup>118</sup> Thus, while the Second Circuit has limited precedent guiding their decisions as to what conditions are “serious” or “embarrassing,” advances in medicine and technology will inevitably make this precedent unreliable and in constant flux.

## 3. Jurors and Judges are Not Equipped to Determine the Seriousness of a Condition

Finally, without a more precise definition of serious or factors to guide such a determination, the Second Circuit is relying on jurors and judges, likely with little to no medical background, to determine on a case-by-case basis whether an individual’s condition is serious.<sup>119</sup> While the Supreme Court has made it clear that judges have a duty to serve as evidentiary gatekeepers with respect to scientific evidence, this duty does not come without support.<sup>120</sup> Rather, judges are guided by a clear list of factors—known as the *Daubert* factors—to help them determine the evidence’s reliability and ultimate admissibility.<sup>121</sup> Thus, if judges have a duty to serve as gatekeepers tasked

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<sup>115</sup> CHRAVALA & SHARFSTEIN, *supra* note 112, at 19.

<sup>116</sup> See Hasina Samji, et al., *Closing the Gap: Increases in Life Expectancy among Treated HIV-Positive Individuals in the United States and Canada*, 8 PLOS ONE e81355 (Dec. 18, 2013).

<sup>117</sup> Erica Kaufman West, The Problem with “Not an Actual Patient,” OUTWARD (Jan. 7, 2016), [http://www.slate.com/blogs/outward/2016/01/07/\\_not\\_an\\_actual\\_patient\\_how\\_hiv\\_drug\\_ads\\_reinforce\\_aids\\_stigma.html](http://www.slate.com/blogs/outward/2016/01/07/_not_an_actual_patient_how_hiv_drug_ads_reinforce_aids_stigma.html).

<sup>118</sup> Robert Preidt, *Life Expectancy with HIV Nears Normal with Treatment*, CBS NEWS (May 11, 2017), <https://www.cbsnews.com/news/life-expectancy-with-hiv-nears-normal-with-treatment>.

<sup>119</sup> See Nordeman, *supra* note 89, at 241 (noting that whether the condition was serious is “left to the imagination of judges” in the Second Circuit).

<sup>120</sup> See generally *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 592 (1993); Stephen Breyer, *Science in the Courtroom*, 4 ISSUES IN SCIENCE AND TECH. (2000), <http://issues.org/16-4/breyer/>.

<sup>121</sup> *Daubert* establishes the Daubert Standard, under which the factors that may be considered in determining whether an expert’s methodology is valid are: “(1) whether the theory or technique in question can be and has been tested; (2) whether it has been subjected to peer review and publication; (3) its known or potential error rate; (4) the existence and maintenance of standards controlling its operation; and (5) whether it has attracted widespread



with determining whether conditions fall within a category of information protected by the Constitution, they should have more than the word “serious” to guide them.<sup>122</sup> Consider a hypothetical individual who has recently been diagnosed with diabetes. She is terrified of needles and knows several people who have succumbed to the disease. She is struggling to cope with her changed circumstances. Now consider an individual who has had diabetes his whole life. He thinks little of his condition, and quite frankly, has not known life without it. Now imagine that these two individuals are judges sitting on different courts. The first judge may consider diabetes quite serious.<sup>123</sup> The second, however, would surely not find that his diabetes rises to the level of a constitutionally protected ailment established by Second Circuit precedent.<sup>124</sup> To allow judges or jurors to determine whether a condition is serious, without any definition or guidance beyond precedent limited to very few specific conditions, is to allow medically untrained triers of fact to rely on their own experiences or biases to determine whether an individual has a constitutionally protected condition.

### B. *The Third Circuit’s More Liberal Approach*

The Third Circuit protects information when a claimant asserts a violation of a right to privacy which is fundamental or implicit in the concept of ordered liberty.<sup>125</sup> This verbiage, taken from the landmark personal privacy case *Roe v. Wade*, has been interpreted by the Supreme Court to include rights relating to marriage,<sup>126</sup> procreation,<sup>127</sup> contraception,<sup>128</sup> family relationships,<sup>129</sup> and child rearing.<sup>130</sup> Thus far, the Third Circuit has considered all medical records and the information therein

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acceptance within a relevant scientific community.” *Daubert Standard*, LEGAL INFORMATION INSTITUTE: CORNELL LAW SCHOOL, [https://www.law.cornell.edu/wex/daubert\\_standard](https://www.law.cornell.edu/wex/daubert_standard); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 592 (1993).

<sup>122</sup> Nordeman, *supra* notes 89, at 241 (“A more definitive rule would be created if the word ‘serious’ were simply replaced with a definition.”).

<sup>123</sup> See, e.g., *Support Community*, AM. DIABETES ASSOC. (Dec. 20, 2016), [https://community.diabetes.org/discuss/viewtopic/1/11097?post\\_id=118184](https://community.diabetes.org/discuss/viewtopic/1/11097?post_id=118184) (“[I’m] new to this whole diabetes thing and [I’m] scared to death.”).

<sup>124</sup> See, e.g., Bridget Montgomery, *Quite Playing the Victim: Why Your Diabetes Shouldn’t Define You*, THE DIABETES COUNCIL (Sept. 4, 2018) (“You just happen to be someone with diabetes, you are not diabetes.”).

<sup>125</sup> *SEPTA*, 72 F.3d at 1137 (citing *Davis*, 424 U.S. at 713).

<sup>126</sup> *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

<sup>127</sup> *Skinner v. Oklahoma*, 316 U.S. 535, 541–42 (1942).

<sup>128</sup> *Eisenstadt v. Baird*, 405 U.S. 438, 453–54 (2007).

<sup>129</sup> *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

<sup>130</sup> *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 535 (1925).

likewise to fall within this scope.<sup>131</sup> Consequently, the circuit has extended the right to informational privacy to medical records,<sup>132</sup> routine testing, X-rays, blood tests, pulmonary function tests, hearing and visual tests,<sup>133</sup> prescription records,<sup>134</sup> pregnancy status,<sup>135</sup> and one's HIV-positive status.<sup>136</sup> This bar, arguably nonexistent and quite obviously lower than the one imposed by the Second Circuit, seems to have been set by the court in *Westinghouse* and followed in subsequent cases ever since.<sup>137</sup> While facially overbroad, the Third Circuit still considers the "type of the record requested, the information it does or might contain, [and] the potential for harm in any subsequent nonconsensual disclosure" when determining whether the state's interest in the information outweighs the individual's interest in nondisclosure.<sup>138</sup>

### 1. Medical Information is Generally Afforded Greater Protection

The court in *Westinghouse* reasoned that medical records are afforded greater protection than other materials in American jurisprudence.<sup>139</sup> For example, the Federal Rules of Civil Procedure "impose a higher burden for discovery of reports of the physical and mental condition of a party or other person than for discovery generally."<sup>140</sup> Under the Freedom of Information Act, medical files are the subject of

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<sup>131</sup> *Westinghouse*, 638 F.2d at 578 ("Information about one's body and state of health is matter which the individual is ordinarily entitled to retain within 'the private enclave where he may lead a private life.'").

<sup>132</sup> *In re Search Warrant (Sealed)*, 810 F.2d 67, 71 (3d. Cir. 1987); *Westinghouse*, 638 F.2d at 577; *see also* *Malleus v. George* 641 F.3d 560, 565 (3d. Cir. 2014) (declining to extend the right to a report investigating improper physical conduct as it did not contain medical information).

<sup>133</sup> *Westinghouse.*, 638 F.2d at 577.

<sup>134</sup> *SEPTA*, 72 F.3d at 1137.

<sup>135</sup> *Gruenke v. Seip*, 225 F.3d 290, 302-03 (3d. Cir. 2000) (holding defendant's disclosure of plaintiff's pregnancy status "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 [the Third Circuit has] previously held is entitled to this very protection.").

<sup>136</sup> *Doe v. Delie*, 257 F.2d 309, 317 (3d Cir. 2001) (granting an inmate a right of privacy in his HIV-positive status).

<sup>137</sup> *See, e.g., Id.* at 317 ("We have long recognized the right to privacy in one's medical information.").

<sup>138</sup> *Westinghouse*, 638 F.2d at 578 ("The factors which should be considered in deciding whether an intrusion into an individual's privacy is justified are the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.").

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* (comparing FED. R. CIV. P. 35 with FED. R. CIV. P. 26(b)); *see also* 8 Wright and Miller, *Federal Practice and Procedure: Civil*, §§ 2237, 2238 (1970).

a specific exemption.<sup>141</sup> This difference in treatment “reflects a recognition that information concerning one’s body has a special character.”<sup>142</sup>

Further, one need only look to the myriad of laws protecting medical records<sup>143</sup> and doctor-patient confidentiality<sup>144</sup> to understand the importance of privacy regarding medical information. Yet these laws do not discriminate and afford protection to only certain conditions; rather, they expressly prohibit disclosure of “*any* medical information.”<sup>145</sup> While they typically focus on healthcare organizations’ duty to maintain confidentiality,<sup>146</sup> the purpose behind these laws should not be ignored when attempting to discern the extent to which state agents should similarly keep information private. The laws exist because the professional duty to keep patients’ medical information confidential is a well-established doctrine<sup>147</sup> based on the idea that health information is “among the most private of information.”<sup>148</sup> If all medical information is protected from disclosure by physicians, permitting disclosure of certain conditions once disseminated to a state agent would frustrate the intent of these laws and doctrines.

## 2. Private and Sensitive are not Synonymous

Additionally, while other circuit courts only find constitutional protection in more serious and sensitive information, the Third Circuit draws an important distinction

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<sup>141</sup> 5 U.S.C. § 552(b)(6) (1976).

<sup>142</sup> *Westinghouse*, 638 F.2d at 577.

<sup>143</sup> EMANUEL HAYT & JONATHAN HAYT, *LEGAL ASPECTS OF MEDICAL RECORDS* 10 (1964) (“In many states, the privacy of the [medical] record is protected by a privileged communications statute.”); *see* O.C.G.A. § 24-12-12 (2013); ARIZ. REV. STAT. ANN. § 12-2292 (2003); MD. CODE ANN., HEALTH-GEN. § 4-302 (2009).

<sup>144</sup> While the Federal Rules of Evidence does not recognize doctor-patient confidentiality, many states have adopted such laws. *See, e.g.*, MICH. COMP. LAWS ANN. § 600.2157 (2010); OR. REV. STAT. ANN. § 40.235 (1988).

<sup>145</sup> O.C.G.A. § 24-12-12 (emphasis added).

<sup>146</sup> 43 C.F.R. § 164.314 (1996); *A GUIDE TO HIPAA SECURITY AND THE LAW* 16-17 (Stephen S. Wu ed., 2007) (“The scope of parties covered by HIPAA may also cause some confusion. HIPAA covers only health plans and health care clearinghouses, organizations that play central roles in the processing of claims transactions, as well as health care providers who transmit any health information in electronic form in connection with one of the standard HIPAA transactions.”).

<sup>147</sup> Rebecca Suarez, *Breaching Doctor-Patient Confidentiality: Confusion Among Physicians About Involuntary Disclosure of Genetic Information*, 21 S. CAL. INTERDISC. L.J. 491, 493 (2012). The Hippocratic Oath, one of the earliest known sets of doctrines for healthcare providers, also addresses confidentiality: “Whatever I may see or learn about people in the course of my work or in my private life which should not be disclosed I will keep to myself and treat in complete confidence . . . ” TONY HOPE, *MEDICAL ETHICS: A VERY SHORT INTRODUCTION* 90 (2004) (quoting the Hippocratic Oath).

<sup>148</sup> DANIEL J. SOLOVE & MARC ROTENBERG, *INFORMATION PRIVACY LAW* 177 (2003).

between private and sensitive information.<sup>149</sup> Medical records, the Third Circuit opines, are still private and thus constitutionally protected even in the absence of sensitive information therein.<sup>150</sup> Thus, while the sensitivity of the information will remain a factor in determining whether the government's interest outweighs the individual's interest in nondisclosure, the Third Circuit removes any hurdle for plaintiffs to clear by considering all medical conditions ipso facto private and worthy of constitutional protection.<sup>151</sup>

To better illustrate this distinction, consider the Fourth Amendment of the Constitution.<sup>152</sup> Under the Fourth Amendment, individuals have the right to be secure, in both their persons and property, against unreasonable searches and seizures.<sup>153</sup> Thus, without consent from the individual, the state agent seeking to search a person's property must have a legitimate interest; entry into a home without just cause "constitutes an unjustified, forcible intrusion that violates the Fourth Amendment."<sup>154</sup> There is no hurdle a plaintiff must clear to show that his property is of a sensitive or important enough caliber in order to be afforded this protection as he is guaranteed this privacy protection by the Constitution. To hold otherwise would be akin to permitting a search and seizure of insignificant, unimportant items in one's home simply because they are not sensitive and thus not private; citizens would be unable to fend off unconstitutional searches of their homes if their homes did not ultimately possess anything of interest.

### III. MEDICAL PRIVACY GOING FORWARD

#### A. *Courts Should Protect All Medical Information*

Until the Supreme Court clarifies what information is protected by the Constitution, courts that have yet to determine what medical information is constitutionally protected should follow the Third Circuit in *Westinghouse* and extend protection to all medical information. Adopting any limitation on what types of medical information are inherently protected by the Constitution would perpetuate inconsistencies across the circuit courts and frustrate a number of public interests.

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<sup>149</sup> *Westinghouse*, 638 F.2d at 578 ("This material, although private, is not generally regarded as sensitive."); see *Private*, Marriam-Webster (defining private as "intended for or restricted to the use of a particular person"); but see *Sensitive*, Marriam-Webster (defining sensitive as "calling for tact, care, or caution in treatment").

<sup>150</sup> *Westinghouse*, 638 F.2d at 579 (extending a right of privacy to medical records despite a "high degree of sensitivity" therein).

<sup>151</sup> *Id.* at 577 ("There can be no question that . . . medical records . . . are well within the ambit of materials entitled to privacy protection.").

<sup>152</sup> U.S. Const. amend. IV.

<sup>153</sup> *Id.*

<sup>154</sup> *Leon-Velazquez v. State*, 269 Ga. App. 760, 761 (2004).

### 1. Courts Should Incentivize Safeguarding Against Inadvertent Information Disclosures Rather than Excuse Them

First, interpreting the Constitution as protecting all medical information would further society's interest in keeping medical data private. When courts require plaintiffs to prove their medical condition meets some threshold in order to be constitutionally protected, necessarily some conditions are protected and others are not. There are two primary issues with this approach. First, this would allow the government to acquire any non-constitutionally protected medical information despite having no need for it. Second, even if a state agent properly acquired the information, he may inadvertently or recklessly disclose the information and still be immune from suit if, again, the information did not rise to a level of constitutional protection. In courts like the Sixth Circuit that hardly protect any medical information, this approach has led to the blatant publishing of an individual's HIV status in a local newspaper with no repercussion for the government agent responsible nor recourse for the individual whose privacy had been violated.<sup>155</sup>

Instead, courts should interpret the Constitution as protecting all medical data to incentivize safeguarding against improper disclosures. In this day and age, inadvertent and intentional dissemination of medical information is rampant.<sup>156</sup> With the expanding use of electronic medical records<sup>157</sup> and the pervasiveness of data theft, breaches, and improper disclosure,<sup>158</sup> those in possession of intimate information should be incentivized to protect it. By effectively excusing the government for wrongfully disseminating sensitive medical data simply because the information did not rise to the level of Constitutional protection, the government would have less of an incentive to implement safeguards to ensure that its agents were keeping records and the information therein secure.

Relevant case law supports this contention. The court in *Whalen* relied on the New York Health Department's security provisions in the statute and the remote possibility that the employees would fail to maintain proper security of the information to find

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<sup>155</sup> *Lockwood*, 1996 WL 367046, at \*6 (“In fact the first words in the article were John Doe’s first and last names, and his name appeared numerous times throughout the article.”).

<sup>156</sup> Jim Avila & Serena Marshall, *Your Medical Records May Not be Private: ABC News Investigation*, ABC NEWS (Sept. 13, 2012), <http://abcnews.go.com/Health/medical-records-private-abc-news-investigation/story?id=17228986> (“Many of the breaches occur through theft or hacking of a computer that contains medical records, loss of the records or unknown reasons.”).

<sup>157</sup> Richard F. Gillum, *From Papyrus to the Electronic Tablet: A Brief History of the Clinical Medical Record with Lessons for the Digital Age*, 126 AM. J. MED. 853, 856 (Oct. 2013) (noting over 50% of physicians reported using electronic medical records in 2011).

<sup>158</sup> Suanu Bliss Wikina, *What Caused the Breach? An Examination of Use of Information Technology and Health Data Breaches*, PERSPECTIVES IN HEALTH INFORMATION MANAGEMENT (Oct. 1, 2014) (“Data breaches arising from theft, loss, unauthorized access/disclosure, improper disclosure, or hacking incidents involving personal health information continue to increase every year.”); Nicolas Terry, *Health Privacy is Difficult but Not Impossible in a Post-HIPAA Data-Driven World*, 146 CHEST 835, 836 (“Medical data theft has been steadily increasing, with the health-care sector becoming the leading target for cyberattacks in 2013.”).

that no invasion of a constitutional right to privacy had occurred.<sup>159</sup> Additionally, the court in *Westinghouse* considered what safeguards the state had implemented to protect the data in its seven-part balancing test to determine whether the government's interest in the protected information outweighed the individual's interest in nondisclosure.<sup>160</sup> Thus, in order to even first acquire the information, the government agency in *Westinghouse* needed to prove that its "procedures of safekeeping the records . . . represent[ed] sufficiently adequate assurance of non-disclosure."<sup>161</sup>

Federal laws additionally support the idea of safeguarding medical information.<sup>162</sup> When thinking about patient privacy, one of the laws that generally first comes to mind is the Health Insurance Portability and Accountability Act (HIPAA).<sup>163</sup> HIPAA requires all covered entities—any healthcare providers, healthcare clearinghouses, health plans, and insurers—to ensure the confidentiality of protected health information (PHI).<sup>164</sup> HIPAA also requires covered entities that share PHI with business associates to obtain "satisfactory assurances that the business associates will safeguard all PHI."<sup>165</sup> A business associate is a "person or entity that performs certain functions or activities that involve the use or disclosure of protected health information on behalf of, or provides services to, a covered entity."<sup>166</sup> Examples include "legal, accounting, consulting, data aggregation, management, and financial services firms."<sup>167</sup> Business associates are required to use the information only as "permitted and described in the binding agreement with the [covered associate]"<sup>168</sup> in order to protect information that would be PHI as though it were possessed by a covered entity.<sup>169</sup> While historically the HIPAA Privacy Rule only held covered entities liable for compliance failures, the OCR pursued its first action against a business associate in 2016 for failing to impose sufficient policies to protect the PHI.<sup>170</sup> Of note, the OCR seeks penalties for just that: the failure to protect PHI, not the failure to protect *certain* PHI.

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<sup>159</sup> *Whalen*, 429 U.S. at 601 ("There is no support in the record, or in the experience of the two States that New York has emulated, for an assumption that the security provisions of the statute will be administered improperly.").

<sup>160</sup> *Westinghouse*, 638 F.2d at 578 (considering "the adequacy of safeguards to prevent unauthorized disclosure.").

<sup>161</sup> *Id.*

<sup>162</sup> 24 C.F.R. § 164.303 (1996).

<sup>163</sup> John R. Clark, *The Erosion of Privacy*, 34 AIR MED. J. 240, 241 (Sept. 2015).

<sup>164</sup> 24 C.F.R. § 164.303 (1996).

<sup>165</sup> Mark Bryant & Dominic G. Zerbi, *Managing HIPAA Business Associate Compliance Efforts*, 94 J. NAT'L MED. ASSOC. 290, 291 (May 2002).

<sup>166</sup> Carolina Curby-Lucier, *OCR Clarifies Role of a Business Associate Under HIPAA Privacy Rule*, ONRAMP (Jan. 19, 2017), <https://www.onr.com/blog/ocr-clarifies-role-of-a-business-associate-under-hipaa-privacy-rule/>.

<sup>167</sup> *Id.*

<sup>168</sup> Curby-Lucier, *supra* note 166.

<sup>169</sup> Wu, *supra* note 146, at 18–19.

<sup>170</sup> Curby-Lucier, *supra* note 166.

When a governmental body receives health information from a covered entity, it may be considered a business associate, subjecting the body to these federal privacy laws. However, even if the governmental body was not considered a business associate, HIPAA encourages third-party safeguarding to the extent it may do so under statutory authority.<sup>171</sup> Thus, to allow government agencies to disseminate medical information with no recourse would completely frustrate the purpose of HIPAA. Medical information that did not rise to the level of constitutional protection would be highly regulated and highly protected while in the hospital's possession but afforded no protection once sent to a governmental body. Moreover, state agents—possessing the same information as physicians—would be held to a much lower standard than physicians with respect to safeguarding medical information. Surely, if a physician took to the newspapers or social media and disclosed his patients' confidential information in a comparable manner, the public would be in uproar.<sup>172</sup>

A September 2011 report by the Health Research Institute likewise encourages those in possession of medical data to protect it.<sup>173</sup> The report noted that more than half of covered entities surveyed had reported at least one breach in the last two years.<sup>174</sup> To “bridge the gap between situations not specifically addressed under current regulations,” the report proposed a number of strategies.<sup>175</sup> Notably, it recommended that covered entities adopt certain privacy or security controls that business associates must agree to before they are eligible to work with the covered entity. The report additionally recommended that all employees receive better training and education on privacy and that covered entities hold their employees accountable in order to “create a culture of confidentiality where everyone is responsible for adhering to privacy standards.”<sup>176</sup>

The preceding examples are only a few of the cases, laws, and reports that endorse the protection of health data. One need only google “medical privacy” or “keep medical information private” to find numerous other sources calling for the same goal: the safeguarding of medical data. Constitutionally protecting all medical data, as opposed to permitting its disclosure, would be one more strategy to achieve that goal.

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<sup>171</sup> *Has the Secretary Exceeded the HIPAA Statutory Authority by Requiring “Satisfactory Assurances” for Disclosures to Business Associates?*, HEALTH AND HUMAN SERVS. (July 26, 2013), <https://www.hhs.gov/hipaa/for-professionals/faq/232/may-i-notify-parents-before-treating-child/index.html>.

<sup>172</sup> *Alleged Social Media Retaliation by Doctor Breached HIPAA Privacy Rule*, HIPAA J. (Mar. 20, 2017), <https://www.hipaajournal.com/alleged-social-media-retaliation-by-doctor-breached-hipaa-privacy-rule-8735/> (describing punishment faced by physician who posted retaliatory video footage of a patient to social media).

<sup>173</sup> *Report Addresses Identity Theft and Security Breach Strategies for the Health Care Industry*, PULSE (Dec. 2011), <http://socredit.com/wp-content/uploads/2012/01/Dec-2011.pdf>.

<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

## 2. Protecting all Medical Information Simplifies the Courts' Balancing Test

In addition to furthering society's interest in protecting medical information, protecting all medical data simplifies courts' role in determining whether there is a constitutional violation. Currently, most circuit courts must perform two balancing tests. First, they must determine whether the medical condition is of a constitutionally protected dimension, and if it is, then they must determine whether the government has a legitimate interest in the information that outweighs the individual's interest in nondisclosure.<sup>177</sup> By categorically considering medical information protected, courts would only need to perform the latter test. This simplified balancing test would reduce inconsistencies between the circuit courts as to which ailments are constitutionally protected and which are not. No longer could one court extend protection to an individual's HIV status while another permitted its improper disclosure. One's HIV status would be categorically protected as medical information and thus courts would begin straightaway with evaluating the government's interest in the information. While this ruling would seemingly protect anything from an individual's HIV status to his sprained pinky toe, the seriousness of the ailment would still be considered in the second balancing test.<sup>178</sup> The less serious the ailment and the less potential for harm in any subsequent disclosure, the greater the likelihood that the intrusion into an individual's privacy would be justified.<sup>179</sup> Thus, courts like the Second and Sixth Circuits that are reluctant to extend privacy protections to less serious diseases or those not fundamentally private would be assured that the government would still likely be permitted to acquire the information so long as they rightly need it.

## 3. Patients May be Less Forthcoming if They are Unsure Whether Their Information is Protected

Lastly, patients have an expectation that their medical information will remain private.<sup>180</sup> If the courts have thus far been unable to reach a consensus as to what information is protected, the patients whose information risks dissemination must likewise be confused. Permitting baseless acquisition and dissemination of personal

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<sup>177</sup> *Lee*, 636 F.3d at 260 (“Only after a fundamental right is identified should the court proceed to the next step of the analysis—the balancing of the government’s interest in disseminating the information against the individual’s interest in keeping the information private.”); *Ortlieb*, 74 F. App’x at 857 (refusing to consider whether the government’s interest outweighed the plaintiff’s right to privacy where plaintiff had no right to privacy in her x-rays).

<sup>178</sup> *Westinghouse*, 638 F.2d at 578 (“The factors which should be considered in deciding whether an intrusion into an individual’s privacy is justified are the type of record requested, the information it does or might contain, the potential for harm in any subsequent nonconsensual disclosure, the injury from disclosure to the relationship in which the record was generated, the adequacy of safeguards to prevent unauthorized disclosure, the degree of need for access, and whether there is an express statutory mandate, articulated public policy, or other recognizable public interest militating toward access.”); *see also* *SEPTA*, 72 F.3d at 1140 (“*Westinghouse* mandates a consideration of seven different factors.”).

<sup>179</sup> *Westinghouse*, 638 F.2d at 578.

<sup>180</sup> *Avila & Marshall*, *supra* note 156 (“It all screams of privacy—privacy you expect.”).



medical information may deter patients from seeking the care they need or erode trust and candor with medical providers when patients are unsure what portions of their record are susceptible to acquisition or dissemination.<sup>181</sup>

The court in *Whalen* so conceded that “[u]nquestionably, some individuals’ concern for their own privacy may lead them to avoid or to postpone needed medical attention.”<sup>182</sup> A study conducted by the Office of the National Coordinator for Health Information Technology quantified this concern and found that in 2013, 75% of individuals surveyed were very or somewhat concerned with the privacy of their medical information.<sup>183</sup> Roughly 8% admitted to having withheld information from their healthcare providers due to their concerns with the privacy of their medical information.<sup>184</sup> These numbers reflect concerns with the privacy of information stored in electronic medical records, an arena strictly regulated with little confusion as to what is or is not protected from disclosure. Thus, it takes no stretch of the imagination to predict even higher numbers should individuals be made more aware of state agents’ ability in certain jurisdictions to improperly acquire or disclose information with no liability. By considering all medical information protected by the Constitution, courts have the ability to temper people’s concerns over the privacy of their medical information.

*B. Congress Should Amend the Privacy Act to Permit Recovery for Emotional Distress*

Additionally, Congress should amend the Privacy Act to expressly permit recovery for mental or emotional distress when state agents fail to properly handle medical information. Doing so creates an alternative remedy for individuals in the Second and Sixth Circuits who are afforded very little protection under the Constitution due to the courts’ narrow interpretations of what medical conditions are protected under *Whalen*.

The Privacy Act of 1974 was passed in the “wake of the Watergate scandal in order to regulate the treatment of personal information by the federal government.”<sup>185</sup> The Act places a number of limitations on federal agencies’ abilities to “disclose, maintain, collect, and use information.”<sup>186</sup> Specifically, it authorizes individuals to bring a civil action and recover actual damages when an Executive Branch agency intentionally or

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<sup>181</sup> Tasha Glenn & Scott Monteith, *Privacy in the Digital World: Medical and Health Data Outside of HIPAA Protections*, CURRENT PSYCHIATRY REPORTS 493, 493 (Sept. 14, 2014) (“Trust between doctor and patient is fundamental to the practice of medicine. A patient must trust the physician sufficiently to share personal details that may be stressful, embarrassing, or potentially damaging.”).

<sup>182</sup> *Whalen*, 429 U.S. at 602.

<sup>183</sup> *Trends in individuals’ Perceptions regarding Privacy and Security of Medical Records and Exchange of Health Information: 2012–2014*, THE OFFICE OF THE NATIONAL COORDINATOR FOR HEALTH INFORMATION TECH. (Feb. 2016), <https://www.healthit.gov/sites/default/files/briefs/privacy-and-security-trends-data-brief-21616.pdf>.

<sup>184</sup> *Id.*

<sup>185</sup> Seeley, *supra* note 9, at 1365.

<sup>186</sup> *Id.* at 1366.

willfully fails to manage confidential records “in such a way as to have an adverse effect on an individual.”<sup>187</sup> However, the Supreme Court declined to interpret “actual damages” as including damages for mental or emotional distress in *Federal Aviation Administration v. Cooper*.<sup>188</sup> The Court felt the term “actual damages” was ambiguous and held that Congress must have intended that the term mean special damages for proven pecuniary loss because Congress had declined to authorize general damages.<sup>189</sup> The issue with limiting “actual damages” to pecuniary losses is that the “primary, and often only, damages sustained as a result of an invasion of privacy” are mental or emotional distress.<sup>190</sup> Consequently, the Supreme Court “drastically limite[ed] the situations that result in government liability.”<sup>191</sup> Not only must a plaintiff prove the disclosure was *willful*, but she also must have suffered actual damage for which she can be compensated such as physical injury or a job termination. Therefore, plaintiffs who have fallen victim to inadvertent breaches or those who suffered only “torment, anxiety, and . . . emotional stress wondering if and when this information will be used against them” are effectively left with the Constitution as their only option for recourse.<sup>192</sup>

Thus, Congress should amend the Privacy Act to explicitly include damages for mental or emotional distress. While this solution would not necessarily provide recourse for those filing suit for an inadvertent disclosure of medical information, it would provide an alternative remedy for individuals in the Second and Sixth Circuits whose medical information has been intentionally disseminated by the government, even if their information did not rise to a constitutionally protected dimension. Until there is consistency among the circuit courts as to what medical information is constitutionally protected, permitting recovery for emotional distress under the Privacy Act would at least level the playing field for those afforded little ability to sue under the Constitution.

#### CONCLUSION

The increasing use of electronic medical records and the ease with which highly personal data may be wrongfully disseminated, stolen, or victim to breach has brought much needed attention to the issue of informational privacy.<sup>193</sup> While there is extensive legislation and literature discussing the issue of privacy in the doctor-patient

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<sup>187</sup> 5 U.S.C. § 552a(g)(1)(D) (2014).

<sup>188</sup> *Fed. Aviation Admin. v. Cooper*, 566 U.S. 284, 287 (2012).

<sup>189</sup> *Id.* at 286.

<sup>190</sup> *Id.* at 304 (Sotomayer, J. dissenting) (“Consequently, individuals can no longer recover what our precedents and common sense understand to be the primary, and often only, damages sustained as a result of an invasion of privacy, namely mental or emotional distress.”).

<sup>191</sup> Seeley, *supra* note 25, at 1366.

<sup>192</sup> Rutherford, *supra* note 7, at 202.

<sup>193</sup> Seeley, *supra* note 25, at 1355 (“Data breaches occur with increasing regularity, leading some to question if the current statutory and regulatory schemes properly incentivize the maintenance of adequate security measures amongst federal agencies.”).

arena, the extent to which government agencies must protect sensitive medical information under the constitutional right to privacy remains far from settled.<sup>194</sup> The bulk of the confusion arises from an inability among circuit courts to determine which medical conditions are protected under the Constitution.

Until the Supreme Court resolves this circuit split, courts that have not yet adopted a stance as to what medical information is constitutionally protected should follow the Third Circuit and protect all medical information. Considering all medical data protected by the Constitution would not only incentivize government agencies to safeguard the information, but it would temper the public's already present concern with data theft and breach. Additionally, Congress should amend the Privacy Act to expressly permit recovery of damages for emotional or mental distress as these damages are the primary and often only damages suffered from an invasion of privacy. Individuals living in the Second and Sixth Circuits—with narrow interpretations of what medical information is constitutionally protected—are without recourse under the Constitution should their medical conditions not rise to a certain threshold. By amending the Privacy Act to expressly include damages for emotional or mental distress, Congress would be granting these citizens an ability to recover what they would otherwise not have.

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<sup>194</sup> Gilbert, *supra* note 27, at 1375.