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SECRECY AND TRANSPARENCY IN SUBSTANTIVE DUE PROCESS LITIGATION

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ABSTRACT

A few years before the recomposed Court rejected abortion rights in Dobbs, it sustained several healthcare providers' challenge to Louisiana abortion restrictions in June Medical. History will remember that 5–4 decision mostly as one of the last major cases to interpret and apply the Casey framework.

But in the little-noticed background of the June Medical litigation, a significant dispute over sealed court records boiled over. On one side, plaintiff–physicians sought anonymity and confidentiality in light of potential threats to their physical safety and patient privacy. On the other side, Louisiana asserted the public's longstanding right to access court records and its own right to include information from June Medical companion cases in its Supreme Court briefing. Ultimately, the Fifth Circuit agreed with Louisiana, vacating the sealing order.

June Medical evokes a larger dispute simmering in federal and state courts over public access to litigation information. Modern commerce and contemporary life generate an unprecedented volume of data. American civil discovery provides litigants with tools to discover and collect much of it. And courts have long recognized the public's First Amendment and common law rights to inspect and copy public court files. Moreover, the internet and advent of electronic filing have transformed once obscure paper court files into easily accessible databases.

Proponents of expanded sealing and secrecy contend that this status quo threatens litigants' privacy and intellectual property. Proponents of more transparency posit that public access to the evidence underlying court action is essential to the integrity and proper functioning of the judiciary, as well as to public health and safety.

This Article examines a largely unexplored angle of this debate: How should courts treat the unique privacy interests of litigants asserting substantive due process claims in the context of the public's right to access litigation information? Part II explains the public's court-access rights. Part III first considers whether forced identity revelation might infringe substantive due process rights. After concluding that infringement is possible but recognizing that courts will often avoid the constitutional

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privacy questions posed by these scenarios, Part III goes on to consider the use and effects of sub-constitutional privacy and access principles in rights cases where parties seek to proceed pseudonymously.

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I. INTRODUCTION

A few years before the recomposed Court rejected abortion rights in *Dobbs*, it sustained several healthcare providers’ challenge to Louisiana abortion restrictions in *June Medical*.¹ History will remember that 5–4 decision mostly as one of the last major cases to interpret and apply the *Casey* framework.

But in the little-noticed background of the *June Medical* litigation, a significant dispute over sealed court records boiled over.² On one side, plaintiff–physicians sought anonymity and confidentiality in light of potential threats to their physical safety and patient privacy.³ On the other side, Louisiana asserted the public’s longstanding right to access court records and its own right to include information from *June Medical* companion cases in its Supreme Court briefing.⁴ Ultimately, the Fifth Circuit agreed with Louisiana, vacating the sealing order.⁵

The case involved a Louisiana statute that required , e.g., that doctors performing abortions be board certified.⁶ Several providers challenged the statute and sought “Doe” status to proceed pseudonymously.⁷ The district court granted the request and entered a broad stipulated protective order.⁸ The order shielded from public view discovery information “about the Plaintiffs . . . that could jeopardize the privacy of the staff, physicians, patients, and others associated with Plaintiffs” along with disciplinary investigations and actions by the Louisiana Department of Health.⁹

As is common in civil litigation, some protected discovery information—while first residing in the hands of parties and attorneys—ultimately made its way into the district court’s files.¹⁰ The providers moved to seal, and the trial court entered three broad sealing orders.¹¹ These orders sealed or redacted filings that included publicly available information.¹² This information included a grand jury report that was available as a book on amazon.com, the content of which was made into a movie, public

1. *See June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2113 (2020) (holding that Louisiana abortion statute was unconstitutional), *abrogated by Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228 (2022) (holding that there is no constitutional right to abortion).

2. *See June Med. Servs., L.L.C. v. Phillips*, 22 F.4th 512, 515 (5th Cir. 2022) (considering challenge to district court sealing orders in abortion litigation).

3. *See id.*

4. *See id.* at 516–17.

5. *See id.* at 521–22.

6. *See id.* at 515.

7. *See id.*

8. *See id.*

9. *See id.*

10. *See id.* at 515–16.

11. *See id.* at 515–18.

12. *See id.* at 516.

disciplinary orders, an arrest report from a public website, articles from the popular press, court records publicly available on Pacer, public court orders, excerpts from a book, and records publicly available from state agency websites.¹³

Sometime after, Louisiana challenged all three of the bulk sealing orders in the district court.¹⁴ The court effectively denied the challenge, keeping some documents sealed entirely and ordering others redacted.¹⁵

Louisiana appealed, and the Fifth Circuit reversed.¹⁶ The court authored a resounding affirmation of public-access rights, observing that “the public’s right of access to judicial records is a fundamental element of the rule of law” and that “[t]his right serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness.”¹⁷ With respect to the *June Medical* documents, the court went on:

In the context of publicly available documents, those *already* belong to the people, and a judge cannot seal public documents merely because a party seeks to add them to the judicial record. We require information that would normally be private to become public by entering the judicial record. How perverse it would be to say that what was once public must become private—simply because it was placed in the courts that belong to the public. We will abide no such absurdity.¹⁸

On a quick read, *June Medical* seems largely to apply straightforward court-access principles: courts should not seal information that is already public and should apply a higher standard than “good cause” when sealing filed materials.¹⁹ But a closer look at the case reveals a much more complicated dynamic and several significant unanswered questions.

13. *See id.* at 516–19.

14. *See id.* at 518. When the Supreme Court granted certiorari in related *June Medical* litigation, the state sought limited relief from the protective order to submit relevant information to the Supreme Court. *See id.* at 517. The district court denied relief, and the Fifth Circuit ultimately declined to reverse the decision, writing that the “question of what documents, if any, the Supreme Court should consider . . . is not for us to resolve. That decision is within the purview and prerogative of the Court.” *June Med. Servs., L.L.C. v. Gee*, 788 F. App’x 280, 281 (5th Cir. 2019).

15. *See Phillips*, 22 F.4th at 518.

16. *See id.* at 515.

17. *See id.* at 519 (internal quotations omitted).

18. *See id.* at 520 (internal citations omitted).

19. *See id.* at 521; *see also, e.g., Le v. Exeter Fin. Corp.*, 990 F.3d 410, 417 (5th Cir. 2021) (“At the discovery stage, when parties are exchanging information, a stipulated protective order under Rule 26(c) may well be proper. Party-agreed secrecy has its place—for example, honoring legitimate privacy interests and facilitating the efficient exchange of information. But at the adjudicative stage, when materials enter the court record, the standard for shielding records from public view is far more arduous.”); Wash. Post

First, *June Medical* raises significant unanswered questions about the interaction between public-access doctrines and fundamental rights cases. The common law and First Amendment rights of access guarantee access to court records absent “compelling reasons” to seal them.²⁰ At the same time, the Court has held that litigants asserting then-existent substantive due process rights (abortion) must be allowed to proceed in court with a reasonable degree of anonymity.²¹ Though *Dobbs* has surely changed the landscape since that holding, the logic underlying it raises a profound question: Does the forced disclosure of identifying information when someone seeks to assert a fundamental right infringe the right itself?²² How would such an infringement interact with the public’s access rights, which emanate, in part, from the Constitution?²³

Second, the district court’s sealing orders happened in the context of pseudonymous litigation.²⁴ Following the district court’s initial grant of anonymity, the parties – including Louisiana – jointly proposed and stipulated to a protective order, which included a statement that anticipated discovery information “could jeopardize the privacy of the staff, physicians, patients, and others associated with [the clinic] and other parties and non-parties” to the litigation.²⁵

As the case progressed, Louisiana attempted to file and unseal materials that would, according to the providers, undermine the pseudonym order. Indeed, the providers characterized these efforts as a “campaign to undermine [the pseudonym and protective] orders, using discovery disputes as an occasion to place dozens of protected documents and other information onto the district court docket.”²⁶

The Fifth Circuit’s unequivocal statement that “a judge cannot seal public documents merely because a party seeks to add them to the judicial record” raises several important questions: May a court seal (or otherwise protect) information that, while “public” in some sense, has not been publicly connected to a particular Doe litigant? May a court consider the effect of

v. Robinson, 935 F.2d 282, 292 (D.C. Cir. 1991) (holding that “the government did not demonstrate a compelling interest to justify sealing” where content of materials was publicly known).

20. See, e.g., *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597–98 (1978) (recognizing the common law right of public access); see also *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 141 (2d Cir. 2016) (“The presumption of access to judicial records is secured by two independent sources: the First Amendment and the common law.”).

21. See, e.g., *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 513 (1990) (considering whether judicial bypass of abortion restrictions targeting minors took “reasonable steps to prevent the public from learning of the minor’s identity”).

22. See *infra* Section III.A.

23. See *infra* Section III.A.iii.

24. See *June Med. Servs., L.L.C. v. Phillips*, 22 F.4th 512, 515 (5th Cir. 2022).

25. See Appellee’s Brief, at 4, *June Med. Servs., L.L.C. v. Phillips*, 22 F.4th 512 (5th Cir. 2022) (No. 16-CV-444), 2021 WL 2483655 (citing Record on Appeal at 909–10).

26. See *id.* at 5.

aggregating information connected to a Doe litigant in a court file when deciding to seal court information? If not, is pseudonymous litigation effectively dead?²⁷

The remainder of this article attempts to address these largely unexplored questions. Part II explains the public's court access rights. Part III first considers whether forced identity revelation might infringe substantive due process rights. After concluding that infringement is possible but recognizing that courts will often avoid the constitutional privacy questions posed by these scenarios, Part III goes on to consider the use and effects of sub-constitutional privacy and access principles in rights cases where parties seek to proceed pseudonymously.

II. THE PUBLIC'S HISTORIC AND CONTEMPORARY COURT ACCESS RIGHTS

The public's right to access court proceedings has ancient origins and in recent decades has taken firm hold in American courts. The correlative contemporary right to inspect and copy court records emanates from both the common law and First Amendment.

A. *The Common Law Right of Public Access*

The common law right to attend court proceedings and inspect court records predates the Constitution and colonies, emerging in England, perhaps as early as the 14th century.²⁸ In the 17th century, Lord Coke observed that “for all Causes ought to be heard, ordered, and determined before the Judges of the King's Courts *openly* in the King's Courts, wither all persons may resort.”²⁹ With regard to court records, Coke wrote they should be “so kept but that any subject may for his necessary use and benefit have access thereunto, which was the ancient law of England.”³⁰ As opposed to later

27. *See infra* Section III.B.iii.

28. *See, e.g.*, William Ollie Key, Jr., *The Common Law Right to Inspect and Copy Judicial Records: In Camera or on Camera*, 16 GA. L. REV. 659, 661 (1982) (summarizing the history of public court access rights). *But cf.* Rory B. O'Sullivan & Catherine Connell, *Reconsidering the History of Open Courts in the Digital Age*, 39 SEATTLE U. L. REV. 1281, 1283 (2016) (contending that the pre-constitutional history of public access rights to courts is overstated).

29. 2 EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 103 (6th ed. 1681) (emphasis added); *see also* Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 565 n.6 (1980); *Le v. Exeter Fin. Corp.*, 990 F.3d 410, 418 (5th Cir. 2021).

30. 2 E. COKE, REPORTS pt. 3, at vi-vii (n.p.n.d.); *see also* Key, *supra* note 28, at 662.

American practice, English practice required a person seeking to access court records to demonstrate a proprietary or other particularized need to do so.³¹

The right to public trial—civil and criminal—was present in Colonial charters, and some early state constitutions included public trial rights.³² The Sixth Amendment included a criminal defendant’s right to a “public” trial.³³ And as the use of written court records and evidence continued to expand in the 19th and 20th centuries, courts recognized and applied a common law right to access them.³⁴

In 1978, the Supreme Court recognized the public’s common law right to inspect and copy court records in *Nixon v. Warner Communications, Inc.*³⁵ As part of the Watergate investigation, prosecutors obtained some of Nixon’s White House recordings by subpoena.³⁶ In a related criminal trial, twenty-two hours of the tapes were played for the jury.³⁷ The press was present in the courtroom while the tapes were played and they were provided transcripts of their contents.³⁸ Several broadcasters filed a motion and sought permission to copy and broadcast the audio recordings; Nixon intervened to oppose.³⁹ After the district court denied the broadcaster’s request (citing potential prejudice to criminal defendants who had ongoing appeals), the D.C. Circuit reversed, holding that the common law privilege to inspect and copy judicial records trumped Nixon’s opposition.⁴⁰

The Supreme Court observed that, “[i]t is clear that the courts of this country recognize a general right to inspect and copy public records and

31. See, e.g., *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978) (“In contrast to the English practice . . . American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit.”). *But cf.* Key, *supra* note 28, at 666 (“All persons enjoyed the right although only persons with evidentiary or proprietary interests in the court records could enforce their right if it were wrongfully denied.”).

32. See, e.g., *Richmond Newspapers, Inc.*, 448 U.S. at 567 (1980) (recounting various public access provisions and practices in colonial America); see also O’Sullivan & Connell, *supra* note 28, at 1289 (acknowledging that “West New Jersey, however, in its Charter, did explicitly mention that trials, both civil and criminal, were to be public”).

33. See U.S. CONST. amend. VI; see also LEVINE ET AL., 1 NEWSGATHERING AND THE LAW § 2.02 (2022) (“At common law, however, in both England and in the United States, criminal and civil trials were generally open to the press and public. State constitutions and statutes contain provisions guaranteeing public trials, and the Sixth Amendment explicitly guarantees a public trial as well.”).

34. See, e.g., *Craig v. Harney*, 331 U.S. 367, 374 (1947) (“A trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt.”); *Nixon*, 435 U.S. at 597 (recognizing the common law right to access court records).

35. *Nixon*, 435 U.S. at 597.

36. See *id.* at 592–93.

37. See *id.* at 594.

38. See *id.*

39. See *id.*

40. See *id.* at 596.

documents, including judicial records and documents.”⁴¹ This common law presumption is justified by “the citizen’s desire to keep a watchful eye on the workings of public agencies . . . and in a newspaper publisher’s intention to publish information concerning the operation of government.”⁴²

The Court went on, however, to observe that the public’s right of access is “not absolute.”⁴³ “Every court has supervisory power over its own records and files.”⁴⁴ Courts may deny access “where court files have become a vehicle for improper purposes.”⁴⁵ Cataloguing some of those improper purposes, the Court noted that access rights may yield when court records are “used to gratify private spite or promote public scandal through the publication of the painful and sometimes disgusting details of a divorce case.”⁴⁶ Additionally, courts may refuse “to permit their files to serve as reservoirs of libelous statements for press consumption.”⁴⁷ And courts should protect business information that, if released, would harm a “litigant’s competitive standing.”⁴⁸ Declining to identify the precise scope and contours of the common law right, the Court observed that allowing or denying access is a matter of trial court discretion.

Nixon argued that allowing the press to copy the tapes would undermine his property interest in the sound of his own voice, invade his privacy, encroach on executive privilege, and improperly facilitate commercialization of trial exhibits.⁴⁹ The broadcasters contended that publishing the aural content would add to the public’s understanding of critically important information about the government.⁵⁰

Ultimately, the Court deferred to Congress. The Presidential Recordings Act prescribed a process for reviewing, processing, and releasing the Watergate materials, including the tapes admitted as trial exhibits. Based on the Act, the Court held that “[t]he presence of an alternative means of public access tips the scales in favor of denying release.”⁵¹

The press also argued that the First Amendment required release of the tapes, insisting that the right to gather information was implicit in the right

41. *Id.* at 597 (citations omitted).

42. *See id.* at 597–98 (citations omitted).

43. *Id.* at 598.

44. *Id.*

45. *Id.*

46. *See id.* (internal quotations omitted).

47. *Id.*

48. *Id.*

49. *See id.* at 600–02.

50. *See id.* at 602–03.

51. *Id.* at 606. The broadcasters also contended that the 1st Amendment Press Clause and the 6th Amendment guarantee of a public trial compelled the district court to allow them to copy the tapes. *See id.* at 608–09. The Supreme Court rejected both arguments—the press had “access” to the tapes, including transcripts, by attending court proceedings. *See id.* at 609. With respect to the Sixth Amendment, the Court observed that the defendant had a public trial—“one of the most publicized in history.” *Id.* at 610.

to speak about it. The court avoided the question by finding that the content of the tapes was public and had been broadcast widely.⁵²

B. The First Amendment Right of Public Access

A few years later, however, the court returned to the public access question and held for the first time that the First Amendment provided the press and public the right to attend criminal trials.⁵³ In *Richmond Newspapers, Inc. v. Virginia*, a state trial court, at the request of the defendant and with agreement of the prosecutor, closed the courtroom to everyone but witnesses when they testified.⁵⁴ Chief Justice Burger, writing for a three-judge plurality, noted that while the Sixth Amendment did not guarantee the public's (as opposed to the criminal defendant's) right to attend criminal proceedings, the Court had never before considered the First Amendment access question.⁵⁵

Burger began by examining the history of public trials at English common law and the colonies. "From this unbroken, uncontradicted history, supported by reasons as valid today as in centuries past, we are bound to conclude that a presumption of openness inheres in the very nature of a criminal trial under our system of justice."⁵⁶

The First Amendment makes no mention of a right of public access or a right to gather information. Burger wrote, however, that these rights (at least in the context of a criminal trial) are implicit in the speech and press clauses: "The explicit, guaranteed rights to speak and to publish concerning what takes place at a trial would lose much meaning if access to observe that trial could . . . be foreclosed arbitrarily."⁵⁷

Examining the closure order at issue, the Court reversed, with Burger observing that the trial court's interests in a fair trial could be accomplished by less restrictive means than closing the courtroom.⁵⁸ The fractured opinions in the case, however, left lower courts with little guidance on how and when the First Amendment access right applied.

A majority of the Court ultimately adopted the view that the First Amendment implicitly guaranteed public access in the criminal-trial context and held that the right encompassed other criminal proceedings in succeeding

52. *See id.* at 608–09; *see also* David S. Ardia, *Court Transparency and the First Amendment*, 38 CARDOZO L. REV. 835, 849 (2017) (noting that the *Nixon* Court "appeared to leave open the possibility that the First Amendment might be implicated if the government refused to provide any public access to the White House tape recordings").

53. For an excellent study of the development and contemporary applications of First Amendment court-access rights, *see* Ardia, *supra* note 52.

54. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 559–60 (1980).

55. *See id.* at 563–64.

56. *See id.* at 573–74.

57. *See id.* at 576–77.

58. *See id.* at 580–81.

years.⁵⁹ But the Court has never announced a First Amendment right to access civil proceedings, though lower courts have.⁶⁰

The Court did take up an important access question in the civil context a few years after *Richmond Newspapers*. In *Seattle Times Co. v. Rhinehart*, the Court considered whether the First Amendment provided a right to disseminate unfiled discovery information in a civil case.⁶¹ A religious leader sued the *Seattle Times* for defamation, and the newspaper sought to publish information it obtained about the religious leader and his organization during discovery. The trial court entered a protective order forbidding dissemination of the information. Justice Powell, writing for the Court, noted that “[a] litigant has no First Amendment right of access to information made available only for purposes of trying his suit.”⁶² According to the Court, depositions and interrogatories were traditionally not public and the information that arises in civil discovery “may be unrelated, or only tangentially related, to the underlying cause of action.”⁶³ Thus, “restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information.”⁶⁴

Because the newspaper already had the information in its possession through discovery, the Court went on to analyze whether the trial court order was a prior restraint or otherwise violated the First Amendment rights of the speaker (the newspaper). In a somewhat muddled analysis, the opinion first found that the order was not a prior restraint, then went on to apply intermediate scrutiny, before ultimately deferring to Federal Rule of Civil Procedure 26(c)’s “good cause” standard for protective orders.⁶⁵

The newspaper, Justice Powell wrote, had the information as a matter of “legislative grace” via the discovery rules and, thus, the trial court could enter an order restricting dissemination of the same information.⁶⁶ Accordingly, the Court held that where “a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of

59. *See, e.g.*, *Press-Enter. Co. v. Superior Ct. of Cal. (Press-Enterprise I)*, 464 U.S. 501, 503 (1984) (voir dire); *Press-Enter. Co. v. Superior Ct. of Cal. (Press-Enterprise II)*, 478 U.S. 1, 3–4 (1986) (preliminary hearing); *see also* *Ardia*, *supra* note 52, at 854–55.

60. *See infra* Section II.C (discussing cases that have held a First Amendment right to access extends to civil proceedings).

61. *See* *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 22 (1984).

62. *Id.* at 32.

63. *Id.* at 33.

64. *Id.*; *cf. also* Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 CORNELL L. REV. 1, 12–13 (1983) (“[P]retrial discovery usually takes place in law offices or on other private property. . . . According to the Federal Rules, then, the public has neither the opportunity nor the right to observe discovery.”).

65. *See* *Seattle Times Co.*, 467 U.S. at 36–37; *see also generally* Dustin B. Benham, *Dirty Secrets: The First Amendment in Protective-Order Litigation*, 35 CARDOZO L. REV. 1781 (2014) (examining the First Amendment implications of *Seattle Times*).

66. *Seattle Times*, 467 U.S. at 32.

pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment.”⁶⁷

While the rights of speakers to *disseminate* discovery information remain unclear after *Seattle Times*, what is clear is that the public and press have no First Amendment right to *access* unfiled discovery information. But what about other civil proceedings and processes? Lower courts continue to struggle with the question.

Part of this struggle flows from the Supreme Court’s last foray into public access rights in the criminal context. A few years after *Seattle Times*, in a case now known as *Press-Enterprise II*, the Court reviewed a magistrate’s decision to close a forty-one-day preliminary hearing in a high-profile murder case.⁶⁸ After the hearing, the trial court refused to release a transcript and sealed the hearing, despite the state joining with the press to have the materials released to the public.

Writing for the Court, Chief Justice Burger announced the two-part “experience and logic” test for determining whether the First Amendment presumption of access applies. First, the Court considered “whether the place and process have historically been open to the press and general public” (the “experience” prong).⁶⁹ Second, the court “considered whether public access plays a significant positive role in the functioning of the particular process in question” (the “logic” prong).⁷⁰ If public access “passes these tests of experience and logic, a qualified First Amendment right of public access attaches.”⁷¹ When the First Amendment right of public access attaches to a proceeding, court orders closing or sealing the proceeding or related records must satisfy strict scrutiny.⁷²

C. *Contemporary Understandings of Public Access Rights in Civil Proceedings*

Beginning with *Nixon* and concluding with *Press-Enterprise II*, the Supreme Court left lower courts with two overlapping presumptions of openness emanating from the common law and the First Amendment.⁷³ The

67. *See id.* at 37.

68. *Press-Enterprise II*, 478 U.S. 1, 3–4 (1986).

69. *Id.* at 8.

70. *Id.*

71. *Id.* at 9.

72. *Cf. id.*; *see also Press-Enterprise I*, 464 U.S. 501, 510 (1984) (“The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.”).

73. *See, e.g., Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 141 (2d Cir. 2016) (“The presumption of access to judicial records is secured by two independent sources: [T]he First Amendment and the common law.”).

overlapping nature of these rights has created inconsistency in practice.⁷⁴ Depending on the circuit and context, some courts apply the First Amendment, others apply the common law.⁷⁵ And in some cases, courts apply both.⁷⁶

Nixon and *Press-Enterprise II* were criminal cases, and the Court has never explicitly extended the presumption of access to civil cases. But virtually every jurisdiction agrees that the presumption applies to at least some civil proceedings and papers, though courts disagree as to the scope of the right.⁷⁷

This disagreement is due in part to disparate application of the experience and logic test (and other court-created tests) in particular civil contexts.⁷⁸ Some trendlines have emerged.

Courts generally agree that the presumption of access applies to civil trial proceedings and records.⁷⁹ This agreement flows from a general tendency of courts to apply the presumption to merits proceedings and the materials underpinning them. Merits proceedings are central to the courts' exercise of Article III power and, correspondingly, the public's right to police

74. *See, e.g.,* Ardia, *supra* note 52, at 858–72 (detailing “inconsistency and uncertainty” in the application of First Amendment presumption to various proceedings and records).

75. *See, e.g.,* *Le v. Exeter Fin. Corp.*, 990 F.3d 410, 417 (5th Cir. 2021) (applying common law presumption of access); *Courthouse News Serv. v. Planet*, 947 F.3d 581, 585 (9th Cir. 2020) (applying First Amendment presumption).

76. *See, e.g.,* *Bernstein*, 814 F.3d at 141 (applying the First Amendment and common law presumptions).

77. *Cf.* Ardia, *supra* note 52, at 857 (“[L]ower courts frequently do find a First Amendment right of access. . . . The chaotic state of the law on public access is particularly evident in cases involving access to civil proceedings and in disputes over the sealing of court records”); *see also, e.g.,* *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1099–100 (9th Cir. 2016) (describing varying circuit approaches to applying presumption of openness to materials filed in civil cases).

78. *See e.g.,* Ardia, *supra* note 52, at 858 (“[J]udges often disagree about the relative importance of the test’s two prongs and about whether particular types of court proceedings and records satisfy one or both of the prongs”).

79. *See, e.g.,* 1 NEWSGATHERING AND THE LAW § 6.01 (“Courts also often recognize a presumption of public access to the documents generated in civil litigation, grounded in the common law or in the First Amendment.”). Courts and legislatures have also adopted a variety of rules and statutes governing public access to court documents. *See, e.g.,* IND. ADMIN. CODE § 5-14-3-5.5; DEL. SUPER. CT. R. CIV. P. 5(G); MICH. CT. R. 8.119(F); N.M. R. 1-079; TEX. R. CIV. P. 76a. So far, aside from Rule 5.2 (pertaining to, e.g., redactions of certain sensitive information) there is no Federal Rule of Civil Procedure governing sealing. In this vacuum, district courts have created a variety of disparate local rules. *See, e.g.,* W.D.N.C. CIV. R. 6.1 (governing sealing in civil cases); E.D. VA. ADM. R. 5 (also governing sealing in civil cases); D. VT. R. 5.2 (same); D. COLO. CIV. R. 7.2 (same); W.D. TEX. CIV. R. 5.2 (same). Several federal civil rules have been proposed to govern sealing, including some currently pending before the Civil Rules Advisory Committee. *See, e.g.,* Letter from Eugene Volokh to the Advisory Committee on Civil Rules, August 7, 2020; Letter from Abraham, Abdo, and Manes to the Advisory Committee on Civil Rules, September 3, 2021.

court integrity and legitimacy.⁸⁰ Along these lines, but via differing tests, courts have applied the presumption to summary judgment records and other merits-related processes.⁸¹ Courts have also recognized a right to access civil complaints and docket sheets.⁸²

Many courts, however, have declined to extend the presumption to “non-merits” proceedings, like discovery hearings and motions.⁸³ They reason that these processes are only tangentially related to the merits of the case, are not traditionally open to the public, and do not materially benefit from public scrutiny. While there are significant questions about the truth and wisdom of these conclusions in particular circumstances,⁸⁴ many courts have been denied public access to discovery-dispute-related filings. Combined with the Court’s holding in *Seattle Times* that the public has no right to access *unfiled* discovery and Rule 26(c)’s low burden for civil protective orders, discovery is often closed to the public.

80. *See, e.g.*, *Le v. Exeter Fin. Corp.*, 990 F.3d 410, 417 (5th Cir. 2021) (“Providing public access to judicial records is the duty and responsibility of the Judicial Branch. Why is this important? Because accessibility enhances legitimacy, the assurance that things are on the level. Article III courts are independent, and it is particularly *because* they are independent that the access presumption is so vital—it gives the federal judiciary a measure of accountability,” in turn giving the public “confidence in the administration of justice.”) (internal quotations omitted).

81. *See, e.g.*, *Brown v. Maxwell*, 929 F.3d 41, 47 (2d Cir. 2019) (“It is well-settled that documents submitted to a court for its consideration in a summary judgment motion are—as a matter of law—judicial documents to which a strong presumption of access attaches, under both the common law and the First Amendment.”) (internal quotations omitted); *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 121 (2d Cir. 2006) (“Our precedents indicate that documents submitted to a court for its consideration in a summary judgment motion are—as a matter of law—judicial documents to which a strong presumption of access attaches, under both the common law and the First Amendment.”). *But see, e.g.*, *Cincinnati Gas & Elec. Co. v. Gen. Elec. Co.*, 854 F.2d 900, 904–05 (6th Cir. 1988) (no First Amendment right to access summary jury trial proceeding, the purpose of which is to facilitate settlement).

82. *See, e.g.*, *Courthouse News Serv. v. Planet*, 947 F.3d 581, 585 (9th Cir. 2020) (“[W]e conclude that the press has a qualified right of timely access to newly filed civil nonconfidential complaints that attaches when the complaint is filed.”); *Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 96 (2d Cir. 2004) (“We therefore hold that docket sheets enjoy a presumption of openness and that the public and the media possess a qualified First Amendment right to inspect them.”).

83. *See, e.g.*, *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003) (“[W]e carved out an exception to the presumption of access. . . . We held that “when a party attaches a sealed discovery document to a *nondispositive* motion, the usual presumption of the public’s right of access is rebutted.”), *modified by*, *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1097–99 (9th Cir. 2016) (rejecting dispositive-non-dispositive distinction and instead determining that “public access will turn on whether the motion is more than tangentially related to the merits of a case”).

84. *Cf.* Dustin B. Benham, *Foundational and Contemporary Court Confidentiality*, 86 MO. L. REV. 211, 255 (2021) (“Discovery rulings are so central to contemporary litigation that they can end cases or force them to settle.”).

When the discovery stage and merits stage come together in motion practice, however, the presumption of access plays a significant role.⁸⁵ For example, imagine that a protective order has kept discovery information in a case confidential. Perhaps the parties have even filed some of the materials in connection with discovery disputes under seal (e.g., fights over the discoverability of additional information or the applicability of privilege or perhaps the propriety of the protective order itself). Up to this point, the public and press have minimal access rights. Then, as the case approaches trial, dispositive motion practice begins. One or both parties attach the confidential discovery to a summary judgment motion or response. Sometimes the parties may seek to seal the motion, response, or exhibits in whole or part. At this stage, many courts apply the presumption of access to allow public access to the previously confidential discovery and refuse to seal (or seal only for “compelling” reasons).⁸⁶

This structure creates a distinct set of incentives and common behaviors among litigants. For one thing, the confidential discovery information itself becomes a commodity, valuable for more than just its power to impact merits decisions.⁸⁷ Indeed, a litigant who has produced embarrassing or proprietary information to an adversary has strong non-merits incentives (e.g., preventing reputational harm) to keep it secret. In many cases, the adversary holding the information likewise has an incentive to keep the information secret: trading its value to the other party for money or some other favorable outcome in a confidential settlement agreement.⁸⁸

The incentives to leverage secrecy pushes parties toward agreed discovery confidentiality early in the case. Many judges accept these protective-order agreements without much scrutiny.⁸⁹ But the structure also gives parties substantial power to unilaterally disclose previously secret

85. *See, e.g., Le*, 990 F.3d at 418–19 (“In our view, courts should be ungenerous with their discretion to seal judicial records, which plays out in two legal standards relevant here. The first standard, requiring only ‘good cause,’ applies to protective orders sealing documents produced in discovery. The second standard, a stricter balancing test, applies once a document is filed on the public record—when a document becomes a judicial record.”) (internal quotations omitted).

86. Of course, the order of this process may be reversed or accelerated in some proceedings, like those seeking injunctive relief. *See, e.g., Ctr. for Auto Safety*, 809 F.3d at 1095–96 (considering sealing in the context of preliminary injunction).

87. *Cf., e.g.,* Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 878–80 (2007) (discussing incentives underpinning secret settlement, including reputation harm); *cf. also* Dustin B. Benham, *Tangled Incentives: Proportionality and the Market for Reputation Harm*, 90 TEMP. L. REV. 427, 434–41 (2018) (exploring incentives in civil discovery).

88. *See, e.g.,* Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?*, 30 HOFSTRA L. REV. 783, 802–03 (2002) (noting that the ability to sell discovery confidentiality at settlement may encourage litigation).

89. *See, e.g.,* Seth Katsuya Endo, *Contracting for Confidential Discovery*, 53 U.C. DAVIS L. REV. 1249, 1277 (2020) (studying case set in federal civil courts and finding that set “also illustrates courts’ tendency to approve proposed stipulated protective orders. Out of the 100 proposed orders, only five were denied.”).

discovery information by selecting it for attachment to merits filings (or admitting it as an exhibit at a hearing). By attaching discovery information to a merits filing, the party that selected it as an exhibit effectively makes the decision—without court involvement—about what discovery information is entitled to public scrutiny.

Of course, there are limits on, and counterbalances to, this power. The court can, for compelling reasons, seal even merits information.⁹⁰ And courts retain the power to strike filings or attachments to those filings in certain circumstances.⁹¹ The party about whom information is to be revealed in a filing might be able to settle the case, essentially paying to avoid an embarrassing revelation. Moreover, there is always the practical reality that the press and public may now be knowledgeable about (or all that interested in) a potentially embarrassing filing, though this “practical obscurity” is declining with the rise of the internet and social media.⁹² Like other civil cases, these structures and incentives play a role in substantive due process litigation, as discussed more fully below in Section III.B.ii.

III. PUBLIC ACCESS TO COURT RECORDS IN SUBSTANTIVE DUE PROCESS LITIGATION

Public access and privacy are often in tension in substantive due process litigation. This is largely a function of the private nature of some rights encompassing family, sex, medical autonomy, and reproduction. The Court,

90. The burden to seal documents entitled to the presumption of openness may vary based on whether the First Amendment or common-law presumption of access applies. Where the First Amendment applies, parties seeking to seal must satisfy strict scrutiny (though courts apply varying tests and even engage in outright balancing). In at least some jurisdictions, parties may overcome the common law presumption of access with a lesser showing. In sum, this area of sealing practice is a muddled mess. *Cf. Ardia, supra* note 52, at 880 (“The lower courts appear to be hopelessly confused as to when the experience and logic test applies outside of the narrow confines of criminal trials and trial-like proceedings. Moreover, the test itself is too indeterminate to provide courts with meaningful guidance in resolving public access claims. As a result, many courts either engage in an unstructured balancing test that discounts the benefits of public access or they simply default to the common-law test for access.”).

91. *See* FED. R. CIV. P. 12(f); *see also* *Brown v. Maxwell*, 929 F.3d 41, 51–52 (2d Cir. 2019) (“Because such rejected or stricken material is not relevant to the performance of the judicial function it would not be considered a judicial document and would enjoy no presumption of public access.”) (internal quotations omitted).

92. *Cf. David S. Ardia, Privacy and Court Records: Online Access and the Loss of Practical Obscurity*, 2017 U. ILL. L. REV. 1385, 1387 (2017) (“The need to travel to the courthouse, identify the relevant case, locate the specific record, and copy the material made the information in court records difficult to access and share with others. But this obscurity is rapidly diminishing as courts adopt online record systems that allow the public to search and download records without ever having to set foot in a courthouse.”).

for its part, has never directly addressed the tension, and lower courts have varying approaches.⁹³

That said, could a court’s refusal to provide adequate anonymity to a person asserting certain substantive due process rights infringe that same right? In situations where the answer is “no,” how might courts best employ sub-constitutional principles to protect justified anonymity? This Part takes each question in turn.

A. *Identification as Rights Infringement*

The Court has observed that failing to provide anonymity in litigation for persons asserting substantive-due-process rights may infringe the underlying right they seek to assert.⁹⁴ In the context of parental-consent-and-notification statutes, the Court repeatedly observed that judicial-bypass procedures should provide for litigant anonymity. Again, in the abortion context, the Court struck a statute that required physicians to report information that would implicitly identify patients.⁹⁵ Though *Dobbs* eliminated the right to abortion, the Court’s analysis in these cases is instructive.

i. *Litigant Anonymity in Judicial-Bypass Cases*

The Supreme Court has invalidated abortion statutes that require minors to obtain consent from one or both parents with insufficient judicial-bypass provisions.⁹⁶ In *Bellotti v. Baird*, the plurality opinion, authored by Justice Powell, noted that any judicial bypass of parental consent provisions must “be completed with anonymity.”⁹⁷ Then, in sustaining another parental consent statute in *Planned Parenthood Association of Kansas City, Missouri, Inc. v. Ashcroft*, Justice Powell concurred that the statute provided adequate judicial-bypass anonymity where it “allow[ed] the minor to use her initials on the petition.”⁹⁸

93. *Cf., e.g.*, Eugene Volokh, *The Law of Pseudonymous Litigation*, 73 HASTINGS L.J. 1353, 1405 (2022) (“Courts also sometimes allow pseudonymity to prevent disclosure of people’s sensitive and highly personal private information that creates a risk of social stigma. But I stress the “sometimes”: The cases are sharply split about what matters can indeed justify pseudonymity.”) (internal quotations omitted).

94. *See, e.g.*, *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 512 (1990) (parental-notification-statute’s judicial-bypass “procedure must insure the minor’s anonymity”).

95. *See Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 766 (1986) (“The decision to terminate a pregnancy is an intensely private one that must be protected in a way that assures anonymity.”).

96. *See Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976); *Bellotti v. Baird*, 443 U.S. 622 (1979).

97. *Bellotti*, 443 U.S. at 644.

98. *Planned Parenthood Ass’n of Kan. City, Mo., Inc. v. Ashcroft*, 462 U.S. 476, 491 n.16 (1983).

Later, in *Ohio v. Akron Center for Reproductive Health*, the Court evaluated the adequacy of a judicial-bypass procedure for a parental notification statute.⁹⁹ The statute provided that the juvenile court “shall not notify the parents” of the minor that “she is pregnant or that she wants to have an abortion.”¹⁰⁰ Moreover, the statute required that “[e]ach hearing . . . shall be conducted in a manner that will preserve the anonymity of the complainant.”¹⁰¹ And “the complaint and all other papers and records” in the bypass proceeding “shall be kept confidential and are not public records.”¹⁰² The statute went on to require anonymity on appeal, and another state law made it a criminal offense to disclose information that did not comprise public records.¹⁰³

Still, those challenging the law contended that it did not guarantee anonymity because, e.g., the minor (absent hiring counsel) would be required to sign the complaint, specify the names of at least one of her parents, and court employees might illegally leak information from court files. In rejecting these arguments, the Court made several important observations. First, the Court did “not find complete anonymity critical.”¹⁰⁴ The statute at issue took “reasonable steps to prevent the public from learning of the minor’s identity.”¹⁰⁵ Second, the statute required the potentially revelatory information “for administrative purposes, not for public disclosure.”¹⁰⁶

At least one lower court held that judicial-bypass statutes that do not adequately ensure anonymity of the minor seeking an abortion violate the Constitution. In *Planned Parenthood Association of Atlanta, Inc. v. Harris*, a district court considered the constitutionality of a Georgia parental-notification and judicial-bypass statute.¹⁰⁷ The law at issue required a minor to either notify one parent of their intention to get an abortion or petition the juvenile court for a bypass of that requirement.¹⁰⁸

The statute did have provisions for some anonymity when minors sought judicial bypass to obtain an abortion but, according to the court, those provisions did “not go far enough.”¹⁰⁹ When read in conjunction with the

99. *Akron Ctr. for Reprod. Health*, 497 U.S. at 510.

100. *See id.* at 512.

101. *See id.*

102. *Id.*

103. *See id.*

104. *Id.* at 513.

105. *See id.*

106. *See id.*; *see also, e.g.*, *Hodgson v. Minnesota*, 497 U.S. 417, 427 (1990) (sustaining two-parent notification with judicial-bypass procedure that provides that “the bypass procedure shall be confidential”); *Lambert v. Wickund*, 520 U.S. 292, 294 (1997) (per curiam) (upholding bypass provision in parental notice statute where statute specified “the minor’s identity remains anonymous, and the proceedings and related documents are kept confidential”).

107. *See Planned Parenthood Ass’n of Atlanta, Inc. v. Harris*, 670 F. Supp. 971 (N.D. Ga. 1987).

108. *See id.* at 974–75.

109. *Id.* at 992.

applicable juvenile court rules, the bypass procedure would require minors seeking abortions to sign their full name to the petition. The court rules also required the minor to include her social security number and date of birth in the petition, information that was also required in the court's order in the proceeding.¹¹⁰

The specificity of this information would directly identify the minor seeking an abortion. Indeed, the Georgia juvenile court rules had no specific provision for sealing the information or otherwise assuring confidential record keeping.¹¹¹ Accordingly, the district court found that the statute and rules “fail[ed] to assure constitutionally adequate anonymity.”¹¹²

The parental consent/notification cases imply that, in at least some contexts, statutes and court practices that fail to take “reasonable steps to prevent the public” from learning the identity of someone seeking to vindicate certain substantive due process rights are unconstitutional.¹¹³ Does this also imply that a court decision not to protect a person's anonymity by sealing identifying information in such cases violates the Constitution? How would this framework square with the public's First Amendment right to access the very same information? Before turning to these questions, a quick look at a related context—mandatory reporting of patient medical information—is in order.

ii. *Anonymity in Mandatory Reporting Cases*

In *Thornburgh v. American College of Obstetricians & Gynecologists*, several plaintiffs challenged a Pennsylvania law requiring physicians to obtain “informed consent” from patients before performing abortions.¹¹⁴ The challenged law, among other mandates, also required physicians to report to the state a host of data about each abortion performed.¹¹⁵ Although the statute did not “specifically require the reporting of the woman's name, the amount of information about her and the circumstances under which she had an abortion are so detailed that identification is likely. Identification is the obvious purpose of these extreme reporting requirements.”¹¹⁶ The court also found that, despite seemingly contrary language in the statute, the mandatory reports would be available for public inspection and copying.¹¹⁷

In a 5–4 decision rejecting these requirements, Justice Blackmun, writing for the Court, observed that “[t]he decision to terminate a pregnancy is an intensely private one that must be protected in a way that assures

110. *See id.* at 991.

111. *See id.* at 992.

112. *See id.*

113. *See Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 513 (1990).

114. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 750–51 (1986).

115. *See id.* at 765–66.

116. *Id.* at 766–67.

117. *Id.* at 765.

anonymity.”¹¹⁸ In this way, the extensive reporting requirements of the Pennsylvania law went well beyond the reporting requirements that the Court upheld more than a decade before in *Planned Parenthood of Central Missouri v. Danforth*.¹¹⁹ The law in *Danforth* required reporting of a more modest scope of information, and the Court sustained it, writing that “recordkeeping and reporting requirements that are reasonably directed to the preservation of maternal health and that properly respect a patient’s confidentiality and privacy are permissible.”¹²⁰

Distinguishing *Danforth*, the *Thornburgh* Court went on to hold: “Pennsylvania’s reporting requirements raise the specter of public exposure and harassment of women who choose to exercise their personal, intensely private, right, with their physician, to end a pregnancy. Thus, they pose an unacceptable danger of deterring the exercise of that right, and must be invalidated.”¹²¹

Six years later, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court upheld most of an amended Pennsylvania reporting requirement.¹²² The amended law required doctors to report much of the same information as the reporting law the Court struck in *Thornburgh*. Without mentioning *Thornburgh* in its analysis, the Court (after cataloguing the detailed information required in each abortion report) noted that “[i]n all events, the identity of each woman who has had an abortion remains confidential” under the amended law.¹²³ Thus, it appears that, at the time *Casey* was decided, *Thornburgh*’s central holding on reporting requirements remained the law: A woman could not be forced to publicly reveal information that would make “identification likely” to obtain an abortion.¹²⁴

iii. *Infringement by Identification in Contemporary Context*

At the threshold, whether unsealing or refusing to seal litigation information infringes a fundamental right depends upon the nature of the right being asserted, the degree of anonymity provided (or not) by the relevant court practice, and other circumstances.¹²⁵ Much has changed since

118. *Id.* at 766.

119. *See Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976).

120. *Id.* at 80.

121. *Thornburgh*, 476 U.S. at 767–68; *see also Bellotti v. Baird*, 443 U.S. 622, 655 (1979) (“It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties.”).

122. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 766–67 (1992).

123. *Id.* at 900.

124. *See Thornburgh*, 476 U.S. at 750–51.

125. Might the Constitution provide an independent, fundamental right to keep certain information private? The Court has also twice considered and rejected challenges to laws that compelled individuals to reveal private or personal information to the government. *See Whalen v. Roe*, 429 U.S. 589 (1977); *NASA v. Nelson*, 562 U.S. 134 (2001). In *Whalen*, a New York law required physicians to submit patient-

the judicial-bypass and mandatory-reporting cases that arose in the abortion context, most prominently the *Dobbs* decision.¹²⁶ Justice Alito claimed that the case’s holding did not affect the remaining constitutional rights.¹²⁷ But Justice Thomas conspicuously concurred that, based on *Dobb*’s reasoning, he would abolish substantive due process in whole.¹²⁸

Given this backdrop, right-leaning state legislatures and some lower courts are sure to continue to venture into the area. Indeed, state abortion bans with insufficient protections for the health and safety of women are already the target of major litigation.¹²⁹ And with states free to choose their own path on abortion restrictions, commentators predict widespread interjurisdictional wrangling.¹³⁰ At least one federal court has already issued an opinion limiting minors’ contraception access.¹³¹ Other courts are

prescription information for certain drugs with a potential for abuse to a state database. *Whalen*, 429 U.S. at 591–92. The challengers contended that the statute infringed on constitutional privacy rights, including those emanating from the 14th Amendment. *Id.* at 599. In rejecting the challenge, the Court did not rule out the existence of such rights: “We are not unaware of the threat to privacy implicit in the accumulation of vast amounts of personal information in computerized data banks or other massive government files. . . . The right to collect and use such data for public purposes is typically accompanied by a concomitant statutory or regulatory duty to avoid unwarranted disclosures. Recognizing that in some circumstances that duty arguably has its roots in the Constitution.” *Id.* at 605. In *NASA v. Nelson*, the Court again rejected a Constitutional privacy challenge. *NASA*, 562 U.S. at 138. Several contractors had objected to required forms that made them reveal drug-use history before working on federal projects. While finding that the government had sufficient interests to justify the requirements and had taken appropriate precautions to safeguard the information, the Court “assum[ed], without deciding, that the Constitution protects a privacy right of the sort mentioned in *Whalen* . . .” *Id.* at 138. *But see id.* at 160 (“A federal constitutional right to ‘informational privacy’ does not exist.”) (Scalia, J., concurring).

126. *See Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242 (2022) (“We hold that *Roe* and *Casey* must be overruled. The Constitution makes no reference to abortion, and no such right is implicitly protected by any constitutional provision, including the one on which the defenders of *Roe* and *Casey* now chiefly rely—the Due Process Clause of the Fourteenth Amendment.”).

127. *See id.* at 2277–78 (“And to ensure that our decision is not misunderstood or mischaracterized, we emphasize that our decision concerns the constitutional right to abortion and no other right. Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.”).

128. *See id.* at 2301 (“As I have previously explained, substantive due process is an oxymoron that lacks any basis in the Constitution.”) (Thomas, J., concurring) (internal quotations omitted).

129. *See* Kate Zernike, *Five Women Sue Texas Over the State’s Abortion Ban*, N.Y. TIMES (Mar. 6, 2023), <https://www.nytimes.com/2023/03/06/us/texas-abortion-ban-suit.html?searchResultPosition=1>.

130. *See, e.g.*, David S. Cohen et al., *The New Abortion Battleground*, 123 COLUM. L. REV. 1, 2–3 (2023) (“In a post-*Roe* country, states will attempt to impose their local abortion policies as widely as possible, even across state lines, and will battle one another over these choices; at the same time, the federal government may intervene to thwart state attempts to control abortion law. In other words, the interjurisdictional abortion wars are coming.”).

131. *See Deanda v. Becerra*, No. 2:20-CV-092, 2022 WL 17572093, at *17 (N.D. Tex. Dec. 8, 2022) (holding that “the right of parents to consent to the use of contraceptives is deeply rooted in this Nation’s history and tradition”).

deciding whether federal regulation preempts state attempts to regulate abortion medications.¹³² And a definitional fight about what is contraception vs. abortion medication is underway.¹³³ Moreover, some states could target gay rights by limiting marriage or even criminalizing private gay sex.¹³⁴ Courts will likely see increased litigation involving each of these (and additional) areas.

Nature of the Underlying Right: Some fundamental rights imply a correlative right to exercise them privately, and some do not. To begin, consider the likely remaining abortion-rights battlefield. One front is litigation over whether state-court constitutions guarantee the right to abortion.¹³⁵ Another front is litigation pertaining to the scope and adequacy of life-and-health exceptions to abortion bans.¹³⁶ Yet another is litigation over abortion medication.¹³⁷ And as some states will surely seek to impose extra-jurisdictional abortion restrictions on residents and non-residents alike, upcoming battles will focus on the reach of one state’s power to penalize extraterritorial conduct.¹³⁸

132. See Ian Lopez & Celine Castronuovo, *Generic Abortion Pill Maker Sues to Overturn West Virginia Ban*, BLOOMBERG L., (Jan. 25, 2023, 8:27 AM), <https://www.bloomberglaw.com/product/blaw/bloomberglawnews/health-law-and-business/BNA%2000000185-e92b-dd2a-ab8d-fd6f29f40001?bwid=00000185-e92b-dd2a-ab8d-fd6f29f40001>.

133. See Tanya Lewis, *How Abortion Medications Differ from Plan B and Other Emergency Contraceptives*, SCI. AM., (July 1, 2022), <https://www.scientificamerican.com/article/how-abortion-medications-differ-from-plan-b-and-other-emergency-contraceptives/> (“Despite the fact that the morning-after pills do not terminate an existing pregnancy, clinics in some states may falsely interpret abortion restrictions as banning emergency contraceptives, too.”).

134. See Debra Cassens Weiss, *State Officials Cite Dobbs as Reason to Support Anti-Sodomy Law, Transgender-Treatment Ban*, ABA J. (July 1, 2022, 10:17 AM), <https://www.abajournal.com/news/article/state-officials-cite-dobbs-as-reason-to-support-sodomy-law-in-texas-transgender-ban-in-alabama>.

135. See Alice Clapman, *Abortion Cases Take Originalism Debate to the States*, BRENNAN CTR. FOR JUST., (Jan. 10, 2023, 10:17 AM), <https://www.brennancenter.org/our-work/analysis-opinion/abortion-cases-take-originalism-debate-states> (reporting that in recent months “two state supreme courts issued consequential but opposite decisions on abortion rights under their state constitutions. The South Carolina Supreme Court struck down its state’s six-week abortion ban, while the Idaho Supreme Court upheld a near-total ban on abortion”).

136. See Zernike, *supra* note 129.

137. See, e.g., cf. also Allison McCann & Amy Schoenfeld Walker, *Where Restrictions on Abortion Pills Could Matter Most in the U.S.*, N.Y. TIMES (Mar. 2, 2023), <https://www.nytimes.com/interactive/2023/03/02/us/abortion-pill-lawsuit-mifepristone.html> (“A judge is poised to rule in a case that seeks to revoke the approval of the most common, safe and effective abortion pill regimen, with the potential for consequences to be felt in every state.”).

138. See, e.g., Cohen, *supra* note 130, at 2–3; see also Alice Miranda Ollstein & Megan Messerly, *Missouri Wants to Stop Out-of-State Abortions. Other States Could Follow*, POLITICO (Mar. 19, 2022, 7:00 AM), <https://www.politico.com/news/2022/03/19/travel-abortion-law-missouri-00018539> (“The

State constitutions that recognize a fundamental right to abortion imply a right to obtain an abortion privately.¹³⁹ Abortion procedures are, and have been, intensely private.¹⁴⁰ In the case of medication abortion, consultations occur privately in medical facilities or privately via virtual communication. Likewise, to the extent the federal constitution still protects the right to lifesaving abortion care (to save the life or protect the health of the mother), the right is usually exercised in similarly private circumstances.

What about the right to contraception? While Justice Alito’s opinion promised that *Dobbs*’ holding did not affect the right, at least one lower federal court recently held that a federally-funded program that provides birth control to minors violates the *parents*’ right to raise and make medical decisions for their children.¹⁴¹ Like abortion, a right to contraception implies the right to make contraceptive decisions and utilize contraceptives privately.¹⁴²

Dobbs is also likely to spur some states to limit gay rights, including the right to consensual gay sex. Texas Attorney General Ken Paxton reportedly told the media that he is “willing and able” to defend the state’s sodomy laws in the U.S. Supreme Court.¹⁴³ Sex occurs in private, and the right to engage in consensual gay sex (and potentially outlawed aspects of straight sex) necessarily implies the right to exercise the right privately.¹⁴⁴

States are also seeking to limit or eliminate transgender rights, arguing that the rights are not deeply rooted in the nation’s history and traditions. Depending on the specific circumstances, transitioning may involve both public and private elements, and the nature and details of specific medical

first-of-its-kind proposal would allow private citizens to sue anyone who helps a Missouri resident have an abortion—from the out-of-state physician who performs the procedure to whoever helps transport a person across state lines to a clinic, a major escalation in the national conservative push to restrict access to the procedure.”).

139. See, e.g., *Planned Parenthood S. Atl. v. State*, 882 S.E.2d 770, 774 (S.C. 2023) (“We hold that the decision to terminate a pregnancy rests upon the utmost personal and private considerations imaginable, and implicates a woman’s right to privacy.”).

140. See, e.g., *Bellotti v. Baird*, 443 U.S. 622, 655 (1979) (“It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties.”) (Stevens, J., concurring).

141. See *Deanda v. Becerra*, No. 2:20-CV-092-Z, 2022 WL 17572093, at *17 (N.D. Tex. Dec. 8, 2022).

142. Cf., e.g., *Griswold v. Connecticut*, 381 U.S. 479, 485–86 (1965) (“Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.”).

143. See Timothy Bella, *Texas AG Says He’d Defend Sodomy Law if Supreme Court Revisits Ruling*, WASH. POST (June 29, 2022, 2:02 PM), <https://www.washingtonpost.com/politics/2022/06/29/texas-sodomy-supreme-court-lawrence-paxton-lgbtq/>.

144. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 567 (2003) (statute criminalizing sodomy “touch[ed] upon the most private human conduct, sexual behavior, and in the most private of places, the home. The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals”).

treatments are private.¹⁴⁵ To the extent that federal or state constitutions guarantee transgender rights as a part of medical decision making or bodily autonomy, the rights likely imply private exercise.

But not all fundamental rights imply a right to private exercise. Take another frontier in the abortion-rights fight: the right to travel.¹⁴⁶ Some argue that the right to interstate travel limits the power of states to apply abortion restrictions extraterritorially.¹⁴⁷ Some disagree.¹⁴⁸ Whatever the ultimate outcome in these cases, the nature of travel rights is somewhat different than sexual and medical rights. Travel occurs publicly and does not imply a right to private exercise (though state law in one state may protect the privacy of those engaging in conduct proscribed in another state).

Likewise, both gay and straight marriage involves both public declaration and state recognition.¹⁴⁹ And although marriage undoubtedly involves private conduct beyond the state's purview, the fundamental right to marry is public and does not imply a right to secretly marry.

Courts have no constitutional obligation to protect the identities of persons asserting rights to engage in public conduct, although the common law or other rules may give courts latitude to do so (as discussed more fully below). On the other hand, courts may have constitutional obligations to protect the identities of persons asserting inherently private rights.

Degree of Anonymity Protection: In *Ohio v. Akron Center for Reproductive Health*, the Court did not require “complete anonymity” for those participating in court proceedings to vindicate a privately exercised right.¹⁵⁰ Instead, the Court found that the statutory court procedures at issue took “reasonable steps to prevent the public from learning” the right holder's identity.¹⁵¹ In *Thornburgh*, the Court held that a mandatory-reporting law was impermissible, even though it did not directly lead to identification,

145. See, e.g., *Meriwether v. Trs. of Shawnee State Univ.*, No. 1:18-CV-753, 2019 WL 2392958, at *3 (S.D. Ohio Jan. 30, 2019) (“Doe’s identity as a transgender woman is a matter of the utmost intimacy.”) (internal quotations omitted).

146. See Cohen, *supra* note 130, at 2–3.

147. See, e.g., Seth F. Kreimer, *The Law of Choice and Choice of Law: Abortion, the Right to Travel, and Extraterritorial Regulation in American Federalism*, 67 N.Y.U. L. REV. 451, 463 (1992) (“American citizens may be subject to different moral agendas in different locations. This is the essence of American federalism. But federalism does not entail a moral Balkanization, in which competing moral agendas seek without restraint to conquer foreign territories; it should not be a system in which citizens carry home-state law with them as they travel, like escaped prisoners dragging a ball and chain.”).

148. See, e.g., Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism*, 150 U. PA. L. REV. 855, 896 (2002) (“Home States indeed have a presumptive power to regulate their citizens’ out-of-state activities to avoid travel-evasion. Such extraterritorial powers are wholly consistent with contemporary due process doctrine.”).

149. See, e.g., *Obergefell v. Hodges*, 576 U.S. 644, 669 (2015) (“Marriage . . . has long been a great public institution, giving character to our whole civil polity.”).

150. See *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 513 (1990).

151. See *id.*

where “the amount of information . . . [is] so detailed that identification is likely.”¹⁵² Read together, these cases imply that a rights infringement may occur where a court’s failure to take reasonable steps to prevent identification makes identification likely. This might include a court’s outright refusal to take steps to protect justified anonymity. It could also include half-measures that make indirect identification “likely.” Imagine, for example, a judge grants a pseudonymity order but then refuses to redact the pseudonymous party’s name from publicly available motions in the file.

But in the current public and internet information context, there may be many scenarios where the court takes reasonable steps to protect a right holder’s anonymity (making identification unlikely) but where the public, with enough motivation and effort, are able to identify the person. As discussed in more detail below, true anonymity is hard to come by in the internet era. In this context, many, if not most, pseudonymous litigants enjoy what Professor Volokh has termed “penetrable pseudonymity.”¹⁵³

Even imperfect anonymity does, however, grant a degree of protection to a right holder, perhaps enough breathing room to exercise the right with a constitutionally appropriate degree of privacy. Courts assessing whether imperfect anonymity is sufficient must consider whether the steps the court takes to protect the right holder are “reasonable” and, if those steps are insufficient, whether identification is “likely.”

Purpose of the Practice at Issue: The purpose of the court rule or practice at issue matters. In the abortion context, some “reporting requirements” over the years were thinly veiled pretext for abortion deterrence. The Supreme Court considered the purposes of these measures when deciding to invalidate them. For example, the judicial-bypass procedure upheld in *Ohio v. Akron Center for Reproductive Health* required submission of information for “administrative purposes, not for public disclosure.”¹⁵⁴ By contrast, the Court wrote that “identification is the obvious purpose of these extreme reporting requirements” struck in *Thornburgh*.¹⁵⁵ The court practices at issue here stem from various rules of civil procedure or court-created procedures, and though some would outright identify right holders and have pernicious effect, most were adopted for purposes unrelated to deterring the private exercise of substantive-due-process rights. That said, particular applications of the rules could flow from deterrent purposes, including in-litigation actions by state litigants.

Anonymity of Third Parties Asserting the Rights of Others: On whose behalf is the right to anonymity being asserted? In the abortion context, for example, doctors or physicians often litigate on behalf of their

152. *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 766–67 (1986).

153. See Volokh, *supra* note 93, at 1374.

154. See *Akron Ctr. for Reprod. Health*, 497 U.S. at 513.

155. *Thornburgh*, 476 U.S. at 766–67.

patients.¹⁵⁶ While their patients may indeed have constitutional privacy interests at stake, doctors and clinics often hold themselves out publicly as performing abortions and likely have no constitutional right to proceed privately in court (though there may well be good reason to protect physician identities using other means, as discussed below). This is particularly true where, as in most cases, revealing the identity of the third-party (like a doctor or clinic) does not identify the right holder.

Nature of the Proceeding: The nature of the proceeding will speak to the possibility of infringing rights by identity revelation. One posture is that a person, not yet known to the state, seeks to exercise a protected right by enjoining state law (assume the underlying right implies a right to private exercise).¹⁵⁷ In such an instance, the state and public will potentially learn the person's identity only because the person chose to litigate against the state. And if this person, or others who might seek to enjoin unlawful state action, are chilled by being outed in court, the system suffers. Thus, an otherwise anonymous person seeking to enjoin unlawful state action that infringes a private-exercise right should enjoy maximum protection, so long as other circumstances support anonymity.

On the other end of the spectrum, imagine that a state investigates putatively illegal conduct on its own, identifies a person, and brings a criminal charge. In defense, the right holder asserts that the state statute infringes a right that implies private exercise.¹⁵⁸ These circumstances are different from the previous scenario in several important ways. First, the person is known to the state independent of, and before, litigation commences. Second, the state commences the litigation without the choice of, or participation by, the target litigant. Third, whatever private-exercise rights may be at issue, the identities of indicted criminal defendants have long been public.¹⁵⁹ Fourth, the litigant is incentivized to assert the unconstitutionality of the state law to avoid conviction, despite being identified. Thus, defending a criminal charge seems not to imply a right to do so privately, even when the defense is based on alleged infringement of an otherwise private right.

A new posture to consider (that may lie between the previous two) arises when state law creates a private right of action that might infringe an existing

156. *See, e.g.*, June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2118 (2020) (“We have long permitted abortion providers to invoke the rights of their actual or potential patients in challenges to abortion-related regulations.”); *cf. also* Curtis A. Bradley & Ernest A. Young, *Unpacking Third-Party Standing*, 131 YALE L.J. 1, 5 (2021); Erika Nassirinia, *Third Party Standing and Abortion Providers: The Hidden Dangers of June Medical Services*, 16 NW. J. L. & SOC. POL’Y 214 (2021).

157. *Cf., e.g.*, Roe v. Wade, 410 U.S. 113, 120 (1973).

158. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 563 (2003) (defendant criminally charged with sodomy responds with constitutional defenses).

159. *See, e.g.*, United States v. Wares, 689 F. App’x 719, 724 (3d Cir. 2017) (“A defendant’s right to the use of a pseudonym should only be granted in unusual or exceptional cases”) (internal quotations omitted); *see also* Volokh, *supra* note 93, at 1460 (“Pseudonymous prosecutions of adults are highly disfavored.”).

fundamental right. Take for instance Senate Bill 8 in Texas.¹⁶⁰ The law authorizes “any person” to bring a civil action against those performing, inducing, aiding, or abetting an abortion.¹⁶¹ The Supreme Court declined to enjoin the law and then decided *Dobbs*. But imagine litigation over the scope of the statute’s “medical emergency” exception.¹⁶²

A private individual brings a civil suit against a doctor, claiming the doctor provided an abortion. The doctor responds that the abortion was justified as a medical emergency.¹⁶³ Would the targeted provider defendant be constitutionally entitled to proceed anonymously? For the reasons discussed above, probably not. Whatever constitutional protection the patient has to private lifesaving or other emergent medical treatment, the provider likely has no independent constitutional right to remain anonymous to the extent identifying the provider does not identify the patient (though a provider may be entitled to sub-constitutional anonymity).

Like the criminal context, some features of a civil enforcement action weigh against the possibility of infringement by identity revelation. For one thing, the right holder (or a third-party asserting the right of another) has already been identified by at least one private party, cutting against anonymity claims.¹⁶⁴ Additionally, like the criminal context, right holders (or relevant third parties) would often not be chilled from challenging the statute in this posture because the defendant is incentivized to defend the case.

Whatever the particular context, courts should consider how the right holders came to be known and whether denying anonymity would chill the healthy exercise of legal challenges.

Other Circumstances Relevant to Infringement: In determining whether refusing to seal a litigant’s identity amounts to an infringement, courts should also consider whether the person’s identity and engagement in the underlying constitutionally protected conduct is already public. To the extent it is, less harm may flow from litigating about the same conduct publicly and court refusal to allow anonymity may not amount to infringement.¹⁶⁵ That said (and as discussed more fully below), being

160. See TEX. HEALTH & SAFETY CODE § 171.208 (2021).

161. See *id.*

162. See *id.* § 171.205.

163. Cf. Eleanor Klibanoff, *Texas State Court Throws Out Lawsuit Against Doctor Who Violated Abortion Law*, TEX. TRIB., <https://www.texastribune.org/2022/12/08/texas-abortion-provider-lawsuit/> (last updated Dec. 8, 2022) (provider sued after intentionally violating S.B. 8).

164. Cf. Eleanor Klibanoff, *Anti-Abortion Lawyers Target Those Funding the Procedure for Potential Lawsuits Under New Texas Law*, TEX. TRIB. (Feb. 23, 2022, 2:00 PM), <https://www.texastribune.org/2022/02/23/texas-abortion-sb8-lawsuits/> (describing private parties’ pursuit of S.B. 8 legal action against identified abortion-fund executives).

165. Cf. *United States v. Vazquez*, 31 F. Supp. 2d 85, 89 (D. Conn. 1998) (noting without reaching the issue that “[t]he court is skeptical of the plaintiffs’ position that a constitutional right to privacy exists where a woman seeking an abortion travels on a public street to enter an abortion clinic”).

identified as a litigant in significant constitutional litigation carries its own risks, and protection may be warranted using sub-constitutional methods.¹⁶⁶

But where a court’s requirement to proceed publicly, or in a way that makes indirect identification likely, infringes a right, does it provide a “compelling” or “exceptional” reason sufficient to overcome the public’s First Amendment and common law rights to access court proceedings and records?¹⁶⁷ The answer is probably, depending on circumstances. The more difficult questions in such a case are whether a sealing order could effectively prevent the harm at all and whether protecting a person’s anonymity justifies the breadth of the particular order.

Indeed, assuming that a court is sealing to serve a compelling interest in avoiding infringement-by-identity-revelation, the First Amendment would require the sealing order be narrowly tailored. This might mean, for example, that the court allows pseudonymity for the right holder but does not seal merits-related information attached to motions or other filings. Of course, as was the case in *June Medical* (and discussed more fully below), pseudonymity may become difficult to maintain if information about the pseudonymous party is aggregated in filings in the case or on the internet. But, since perfect anonymity is not required, in many cases “penetrable” pseudonymity may be sufficient, depending on the likelihood of identification. Courts will have to consider the circumstances surrounding each sealing request to determine whether sealing serves the interest in reasonable anonymity. And in no case should a quest for perfect anonymity be allowed to swallow entire court files—doing so would run afoul of the First Amendment and likely the common-law presumption of access.

B. *The Role of Anonymity and Privacy in Substantive Due Process Litigation*

Most courts avoid constitutional identity-revelation questions altogether, even in cases where parties assert them. Instead, they have employed an ad hoc system—criticized by some as granting secrecy too often—to protect private and sensitive information. Though this system has largely functioned under the public’s radar in these cases, state tactics in *June Medical* may bring the tension between privately exercised rights and public court access to the fore.

i. *Avoiding the Constitutional Question*

166. Another related circumstance that may mitigate any potential identity-revelation infringement is waiver. If someone willingly litigates under their own name in a public court and later decides to seek anonymity, they may have waived a later claim that the court infringed a fundamental right by revealing their identity.

167. See, e.g., *Vazquez*, 31 F. Supp. 2d at 89 (stating that plaintiffs asserting substantive due process privacy rights in litigation “must demonstrate ‘exceptional circumstances’ to overcome this presumption”).

In a telling example, a district court facing a claim that refusing to seal would violate right holders' substantive due process rights avoided the constitutional questions. In *United States v. Vazquez*, a district court considered whether refusing to seal videos showing people entering an abortion clinic violated their rights.¹⁶⁸ In *Vazquez*, the United States and Connecticut brought a civil action under the Freedom of Access to Clinic Entrances Act (FACE) against Carmen Vazquez.¹⁶⁹ The court conducted a bench trial and ultimately found that Vazquez's actions did not violate FACE.¹⁷⁰

At the center of the trial were several videotape exhibits that showed encounters at a women's clinic.¹⁷¹ These encounters involved interactions between protestors, those seeking access to the clinic, and clinic escorts.¹⁷² Additional videos had been exchanged in discovery but were not admitted at trial. Plaintiffs sought to seal the recordings, at least in part because public disclosure would reveal the identity of persons seeking access to the clinic.¹⁷³

The court began its analysis by observing that the presumption of access is particularly strong where a party seeks to seal information relied upon to reach a merits determination.¹⁷⁴ Indeed, the court wrote that "[b]ecause the videotape exhibits were relied on by [the] court to assess whether Vazquez violated FACE, [they] must be afforded the strongest presumption of access." According to the court, the plaintiffs could rebut the presumption, in this context, only by showing "exceptional circumstances."

The court thus considered whether the "constitutional right to privacy" was such a circumstance.¹⁷⁵ The government contended in response that "plaintiffs [had] a compelling government interest in continued protection of the privacy rights of patients seeking reproductive health care."¹⁷⁶ This interest of third-party clinic patrons (who appeared in the videos) in privately seeking abortion "extends to . . . travel on a public street outside of an abortion clinic."¹⁷⁷ The plaintiffs cited *Thornburgh* in support of their argument.¹⁷⁸

Did *Thornburgh* forbid, by implication, public revelation that someone accessed an abortion clinic via the Court's denial of a sealing request?

168. *Id.* at 86–87.

169. *See id.* at 86.

170. *See id.*

171. *See id.* at 87.

172. *See id.*

173. The plaintiffs did, however, agree that the tapes could be released so long as the faces of the patients were obscured. *See id.* at 88.

174. *See id.*

175. *See id.* at 88–89.

176. *See id.* at 88.

177. *See id.* at 89.

178. *See Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747 (1986); *see also supra* Section III.A.ii. (discussing *Thornburgh*).

Ultimately, the trial court was able to avoid most of the question. *Thornburgh* addressed government-forced revelation of information that would ordinarily be private, between abortion-seeking patient and doctor. By contrast, the *Vazquez* trial court was “skeptical of the plaintiffs' position that a constitutional right to privacy exists where a woman seeking an abortion travels on a public street to enter an abortion clinic.”¹⁷⁹

But the trial court dodged even that question, observing that there was no evidence that the women who appeared in the videos were seeking abortions in the first place.¹⁸⁰ It turned out that the clinic offered a variety of services, and the court found that “the nexus between the right to seek an abortion and the right to do so in a private manner is absent in this case.”¹⁸¹ After considering and rejecting additional common-law privacy arguments, the court unsealed the tapes.¹⁸²

ii. *Courts Employ Sub-Constitutional Tools to Protect Privacy*

Short of finding constitutional infringement, courts still have tools to manage private information in these cases. From almost the inception of abortion rights litigation, some courts have allowed parties asserting the right to proceed pseudonymously.¹⁸³ Others have refused.¹⁸⁴ Courts that do grant anonymity or protect personal information do so along two primary rationales: privacy for patients or personal safety for providers.¹⁸⁵ Courts

179. *See Vazquez*, 31 F. Supp. 2d at 89.

180. *See id.* at 89–90.

181. *See id.* at 89.

182. *See id.* at 92.

183. Ronald G. Shafer, *Who was Jane Roe, and How Did She Transform Abortion Rights?*, WASH. POST (Mar. 5, 2022, 7:00 AM), <https://www.washingtonpost.com/history/2022/05/05/what-is-roe-v-wade/>; *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 685 (11th Cir. 2001) (finding that district court abused its discretion in denying plaintiff’s pseudonymity request where she contended that “the fact that she had an abortion (or three, as the complaint alleges) is information of the utmost intimacy”). *See also*, e.g., Volokh, *supra* note 93, at 1405 (collecting pseudonymity decisions in abortion cases).

184. *See, e.g.*, *Whole Woman’s Health v. Paxton*, No. A-17-CV-690-LY, 2017 WL 11606683, at *2 (W.D. Tex. Aug. 15, 2017) (“[B]alancing the need for Doe to maintain her privacy against the customary and constitutionally embedded presumption of openness in judicial proceedings, the court concludes that the presumption of judicial openness outweighs the need to protect Doe’s privacy should Doe choose to proceed as a plaintiff in this action.”).

185. *See, e.g.*, *Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1334 (M.D. Ala. 2014), as corrected (Oct. 24, 2014), supplemented, 33 F. Supp. 3d 1381 (M.D. Ala. 2014), and amended, No. 2:13CV405-MHT, 2014 WL 5426891 (M.D. Ala. Oct. 24, 2014) (sealing list of pseudonyms for abortion doctors in action challenging Alabama statute and describing a climate of abortion hostility in the state: “In their testimony, discussed at length below, the doctors described their daily fears for their professional livelihoods as well as their personal safety. One of the physicians described being followed and threatened by abortion opponents, and fearing for herself, her spouse, and her children every day that she goes to work in Alabama. Indeed, that fear was driven home to this court even in the conduct of the trial itself: in

have also protected anonymity and private information in gay rights cases,¹⁸⁶ transgender rights cases,¹⁸⁷ and sexual privacy cases.¹⁸⁸ They often do so with the agreement of the parties. For example, in *Dobbs*, a party redacted (apparently pursuant to an agreed protective order) the names of OB-GYNs involved in abortion procedures in a filed deposition.¹⁸⁹ No dispute about the redactions ensued, and the court allowed the filing in the apparent absence of dispute.

iii. *June Medical as a Precursor to Tactical Revelation*

But the Fifth Circuit’s reasoning in *June Medical* may portend a new era. Will states now leverage the presumption of public access to undermine Doe-naming when citizens challenge state law regulating private and sensitive conduct? Will states file and seek revelation of sensitive or embarrassing information not just to advance the merits of the case but also to chill the willingness of litigants? To begin to answer these questions, it will be helpful to consider the litigation information playing field along with the secrecy and transparency incentives of the players in these unique cases.

To understand the current court-records information context, it is important to consider the pre-internet era. Though the Court decided the seminal court-access cases by the mid-1980s, the court-records system—and information systems in general—involved some degree of practical obscurity.¹⁹⁰ Court records were stored on paper in far flung courthouses that housed the courts of many different governments. Obtaining information about an abortion case in South Carolina would involve, at a minimum,

order to protect their identities, the doctors were referred to by pseudonyms throughout the case and would testify in open court only from behind a black curtain.”).

186. *See, e.g.*, *Doe v. Cath. Relief Servs.*, No. CCB-20-1815, 2020 WL 4582711, at *2 (D. Md. Aug. 10, 2020) (finding in gay rights case that by “both the common law and First Amendment standards, any public interest in Doe’s identity is heavily outweighed by Doe’s privacy interest”)

187. *See, e.g.*, *Meriwether v. Trs. of Shawnee State Univ.*, No. 1:18-CV-753, 2019 WL 2392958, at *2 (S.D. Ohio Jan. 30, 2019) (“Several courts, including courts in the Sixth Circuit, have held that an individual’s transgender identity can carry enough of a social stigma to overcome the presumption in favor of disclosure.”) (internal quotations omitted).

188. *See, e.g.*, *Alexander v. Falk*, No. 2:16-cv-02268-MMD-GWF, 2017 WL 3749573, at *6 (D. Nev. Aug. 30, 2017) (pseudonymity granted in defamation case revolving around alleged sexual impropriety); *see also* Volokh, *supra* note 93, at 1406 (collecting cases).

189. *See* Deposition of Dr. Carr-Ellis, Jackson Women’s Health Org. v. *Dobbs*, Docket No. 3:18-cv-00171 (S.D. Miss. Mar 19, 2018), Court Docket, Document 235-8; JOINT MOTION FOR ENTRY OF STIPULATED PROTECTIVE ORDER, Jackson Women’s Health Org. v. *Dobbs*, Docket No. 3:18-cv-00171 (S.D. Miss. Mar 19, 2018), Court Docket, Document 103.

190. *See, e.g.*, *Ardia*, *supra* note 92, at 1396 (2017) (“While court records have long been open to public inspection, the difficulty of actually accessing individual documents made the information in these records practically obscure.”).

making a records request and paying for retrieval and copying.¹⁹¹ It could involve taking a physical trip to South Carolina to obtain access.¹⁹² And how would anyone even know which case might be of interest and which records to request? Media companies with resources developed this information through a network of courthouse beat reporters or other sources. Additionally, newspapers reported basic filed case information (party names, claims, courts).

Litigants wishing to remain anonymous in this system enjoyed the benefits of some degree of de facto confidentiality—unless someone with a printing press or television tower were interested in your case, you were likely to remain unknown, particularly outside your geographic area. On the other hand, litigants who wished to shine light on their adversaries' misconduct or legal transgressions faced an uphill battle. Without media interest, there was virtually no way to publicize a case.

The internet and electronic filing and retrieval changed everything. Now court dockets, complaints, motions, and exhibits are all readily retrievable—for a price. Databases of case information are searchable, aggregable, and subject to data analysis and machine learning.¹⁹³ For a fee (paid to Pacer, a state court e-filing provider, or another service), that same abortion case in South Carolina might be accessed anywhere in the world, as are almost all cases in South Carolina and jurisdictions around the country. How would one know to look for the particular case? Simply search for all cases involving a defendant or search terms of interest. Or identify the case algorithmically or using other machine-learning techniques. At a time when traditional media has reduced resources and footprint in courthouses, ordinary citizens and non-traditional media are able to use these resources to retrieve information on cases of widespread and niche interest. In fact, so much information is available that the avalanche of data creates its own form of obscurity.

191. *Cf. id.* at 1397 (noting that someone seeking access must “commit significant time and effort to locate and access the physical records”).

192. See Amanda Conley et al., *Sustaining Privacy and Open Justice in the Transition to Online Court Records: A Multidisciplinary Inquiry*, 71 MD. L. REV. 772, 820 (2012) (describing an empirical court-record access study to retrieve physical court records).

193. *Cf. id.* at 1398. (“With electronic court records, the information in a court’s files can be searched, sorted, and combined with other information without any need to maintain the record’s connection to a specific case. In other words, users of the information need not know anything about the underlying case or even that the information came from a court record.”). E-filing has also greatly expanded the lifecycle of court files. “The adoption of electronic record systems is also eliminating the effects of the passage of time on the accessibility of court records, which typically would become more obscure over time. Paper records are costly to maintain and court clerks inevitably face difficult choices regarding the preservation of closed case files. The lifecycle for a court record typically involves increasing levels of obscurity as the record moves from a court’s active files to the clerk’s archives and eventually to long-term storage or destruction. Electronic court records are rarely subject to this temporal degradation in access. As a result, records from cases that conclude today will remain just as accessible a decade from now.” *Id.* at 1399.

But this torrent of information also has given rise to solutions in data brokers, social media, niche online audiences, and crowdsourcing.¹⁹⁴ With social media, people in given communities are connected—be it by geography, family, interest groups, or other organizations.

Those engaging in conduct opposed by certain groups likely have heightened sensitivity to information about them making its way into the hands of the opposition. You can imagine that an abortion doctor would be substantially impacted if his home address, gleaned from litigation information, were known to even a few dozen militant anti-abortion activists in geographic proximity.¹⁹⁵ And those activists might have substantial interest in scouring the internet for all case information pertaining to abortion doctors. Crowds now regularly work to solve unknown crimes and identify anonymous actors on the internet, aggregating information, computing power, and problem solving in a way individuals cannot.¹⁹⁶

Against this new backdrop, the players in substantive due process and other fundamental rights litigation have incentives to conceal or reveal information to the public. Some of those incentives pertain to the merits of the case and some of the incentives relate to other interests.

Traditionally, state litigants defending state statutes had fairly straightforward incentives in litigation. The state, often represented by a politically elected or appointed attorney general, wanted to win the merits of the case. This was particularly true if the attorney general's political party disagreed with federal law or agreed with the state statute being attacked.¹⁹⁷ While the public-relations value of litigating and winning surely figured into tactics all along, the reputational and political impact of litigating about important (and often divisive) issues has, by all appearances, grown.¹⁹⁸

194. *See id.* at 1392 (discussing the role of data brokers in aggregating court record information).

195. *Cf. Planned Parenthood Se., Inc. v. Strange*, 33 F. Supp. 3d 1330, 1334 (M.D. Ala. 2014), as corrected (Oct. 24, 2014), supplemented, 33 F. Supp. 3d 1381 (M.D. Ala. 2014), and amended, No. 2:13CV405-MHT, 2014 WL 5426891 (M.D. Ala. Oct. 24, 2014) (describing hostility and safety concerns surrounding abortion doctor identity in Alabama).

196. *Cf., e.g., Wayne A. Logan, Crowdsourcing Crime Control*, 99 TEX. L. REV. 137, 140 (2020).

197. Greg Abbott, when serving as Texas Attorney General, was famously quoted on the campaign trail: “I go into the office, I sue the federal government and I go home.” Sue Owen, *PolitiFact: Counting Abbott's 27 Lawsuits Against Obama Administration*, STATESMAN, <https://www.statesman.com/story/news/2013/05/20/politifact-counting-abbotts-27-lawsuits-against-obama-administration/10008639007/> (last updated Sept. 25, 2018, 8:55 PM).

198. Texas Attorney General Ken Paxton sent a tweet to Joe Biden in 2021: “Congrats, President Biden. On Inauguration Day, I wish our country the best. I promise my fellow Texans and Americans that I will fight against the many unconstitutional and illegal actions that the new administration will take, challenge federal overreach that infringes on Texans’ rights, and serve as a major check against the administration’s lawlessness. Texas First! Law & Order always!” Texas Attorney General Ken Paxton (@TXAG), TWITTER (Jan. 20, 2021, 1:18 PM), https://twitter.com/TXAG/status/1351972335096631300?ref_src=twsrc%5Etfw%7Ctwcamp%5Etweteembed%7Ctwterm%5E1351972335096631300%7Ctwgr%5Ee61e1bd98decddc978acc7b1a9dacfb23d63

Attorney generals in some states gleefully engage in combat against the federal government and others to defend state law or invalidate federal law.

This state of affairs has magnified certain longstanding secrecy incentives and torqued others. First, state officials have an interest in defending and enforcing state law or thwarting politically unpopular federal law. Second, the state winning one case challenging a state statute surely chills other similar litigation. Third, being seen as opposing the “other side” and prevailing has political benefit. Fourth, when the state is suing or sued, it must proceed in public as a named party in almost all circumstances, creating an asymmetry in cases where the party suing is granted pseudonymity.

In these circumstances, the state can enhance the notoriety of the case and impose reputational and practical burdens on its pseudonymous opponents by engaging in identity-revealing litigation tactics. The state might even attempt to impose more burdens on opponents to state law, or third parties they wish to protect, by developing discovery about private or otherwise embarrassing matters, filing them in connection with motions, and then opposing sealing. By increasing an opponent’s reputational cost—or imposing real threats to their safety and well-being—the state gains leverage in the particular litigation and also chills future claims.¹⁹⁹ Moreover, revealing the information provides grist for supporters’ social media and promotional operations, enhancing goodwill toward the state officials responsible for the litigation.

In *June Medical*, Louisiana straightforwardly claimed that it sought to reveal litigation information to vindicate the public’s access rights.²⁰⁰ While no evidence contravenes this motive, the power of pressing to reveal information about the abortion doctors was obvious.²⁰¹

004b%7Ctwcon%5Es1_&ref_url=https%3A%2F%2Fwww.foxnews.com%2Fpolitics%2Ftexas-attorney-general-pledges-fight-biden-admin-illegal-actions; see also Ross Ramsey, *Analysis: Texas and the U.S., Lawyered Up and Ready to Go to Court*, TEX. TRIB. (Sept. 13, 2021, 5:00 AM), <https://www.texastribune.org/2021/09/13/texas-us-lawsuit-abortion/>.

199. Cf. Benham, *supra* note 87, at 445–46 (“[I]magine that Plaintiff requests certain discovery and that the information, if disclosed publicly, would cost Defendant \$500,000 in reputation harm. In this version, the court grants a contested protective order, forbidding dissemination outside of the case. In many jurisdictions, to circumvent the protective order, Plaintiff need only attach it to a dispositive motion or response and cite it in argument. The court could seal such information, but the burden to seal court records is substantial.”).

200. See Appellee’s Brief, at 40, *June Med. Servs., L.L.C. v. Phillips*, 22 F.4th 512 (5th Cir. 2022) (No. 16-cv-444), 2021 WL 2483655 (“Especially here, in a litigation that has generated so much public interest, the need for transparency and access is great. The access right belongs to the public that funds the court system, not the parties.”) (internal quotations omitted).

201. In asking for relief, Louisiana conceded that some of the information that would identify Doe-named doctors should be redacted, if Plaintiffs and one of the Doe-named doctors could justify the redaction. See *id.* at 38–40. The plaintiffs asserted that the district court did not err in the first place by “declining to wholly unseal certain documents that are otherwise available to the public in other contexts, because it

The Fifth Circuit’s reasoning would seem to give latitude to the tactic of aggregating otherwise public information in court files that indirectly identifies a Doe-named litigant or Doe-named third parties. After the information is filed, the filing party opposes (or requests the lifting of) a sealing order because the filed information is already public. Even if the Doe-named persons’ names are redacted from the otherwise public materials, a quick internet search turns up unredacted copies. Thus, pseudonymity in the case becomes easily penetrated.

At the outset, it is important to note what pseudonymity in litigation conceals. At the most basic and practical level, it removes the name of the litigant from the case style, docket, and party-drafted filings. It also allows the Doe-named person to redact their name from depositions and other discovery documents filed in the case.²⁰²

What do these forms of pseudonymity accomplish for the Doe-named litigant? Imagine a case, like *June Medical*, involving an abortion doctor hypothetically named Sarah Smith. When proceeding with a pseudonym, the pleadings might include a reference like, “Plaintiff Jane Doe is a doctor performing abortions” in a given locality. The pseudonymous reference would keep a reader of just that passage from knowing the real identity of the abortion doctor. But in many cases, a plethora of publicly available information on the internet already reveals that Sarah Smith is an abortion doctor.²⁰³ So what are Sarah Smith’s interests in proceeding as Jane Doe in the litigation?

For one, while Sarah Smith may be known as an abortion doctor, pseudonymity keeps the public from knowing that she is an abortion doctor who is also a litigant challenging state abortion restrictions. Additionally, Sarah Smith may have a low profile and little prominence as a local doctor. Being connected to high-stakes rights litigation would expose her and her activities to a much wider, potentially national, audience. Moreover, discovery in the case will likely produce more information about Sarah Smith than is generally known. Pseudonymity would make it more difficult for the public to connect this new, non-public information to Sarah Smith. And litigation will aggregate otherwise disparate information into one convenient court file for Sarah Smith’s ideological opponents to peruse from anywhere with an internet connection. In sum, if Sarah Smith is not allowed to proceed as Jane Doe, she will be publicly connected to high-profile litigation that may involve court filings with substantial information about her and her

found doing so on its docket would reveal nonpublic and sensitive information that would expose certain abortion providers in Louisiana to harassment and potential violence.” *Id.* at 12.

202. *See, e.g.,* Volokh, *supra* note 93, at 1372 (“And sometimes maintaining pseudonymity may require redacting or sealing documents filed in court.”).

203. *See id.* at 1373. This may lead to a phenomenon called “penetrable pseudonymity,” where a litigant or person’s identity may be found with relative ease using the public information in the court document, despite the document containing no reference to their real name. *See id.*

activities.²⁰⁴ If this is the anticipated exposure, rights plaintiffs, like Sarah, will be harder to come by and the state will defend fewer cases.

Courts do have some tools to address these scenarios. As a threshold matter, Doe-naming in high-profile cases may be losing, or may have already lost, its efficacy. In an era of internet crowd-sourced doxxing, pseudonymity, even when coupled with the sealing of identifying information in court filings, is likely not enough to keep many litigants anonymous but could at least make identifying them more difficult.²⁰⁵

The question really boils down to what constitutes narrow tailoring of sealing orders in this context. Does the Doe-named person's interest in not being identified allow courts to seal information that does not directly identify the party by itself but could identify in the aggregate? Or when it, in combination with other publicly available information, identifies? Could the court seal otherwise public information that, when filed in the aggregate, would identify a Doe-named party?

When viewed through this lens, the potential breadth of sealing orders in these cases could become staggering. And while a party's interest in anonymity might be compelling enough to prevent direct identification, it may not support broad sealing of merits information that indirectly identifies. The key is to consider what interest, in the sub-constitutional context, the party seeking anonymity asserts to overcome the access presumptions. Often, the interest asserted is personal safety, embarrassment, reputational harm, generalized "privacy," or some combination.²⁰⁶ Any sealing order should serve the asserted compelling interest and do no more, recognizing that perfect anonymity is becoming impossible.

Courts do have some additional tools, though, to deal with this difficult scenario. As the Court noted in *Nixon* when describing the common-law right of access: "[T]he right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where court files might have become a vehicle for improper purposes."²⁰⁷ Courts should consider the purpose of the party filing the document or information and the purpose of that same party in opposing sealing. In doing so, a court should "insure that its records are not used to gratify private spite or promote public scandal."²⁰⁸

If a court determines that information or materials are being presented for an improper purpose, it may refuse to file the information.²⁰⁹ Courts could also use Rule 12(f) to strike "any redundant, immaterial, impertinent, or scandalous matter" from filings, with or without a request by the affected

204. Even if she's allowed to proceed pseudonymously, there is a substantial chance she is connected to the litigation anyway. See *supra* note 203 (discussing "penetrable" pseudonymity).

205. Cf. Volokh, *supra* note 93, at 1372.

206. Cf. *e.g.*, *id.* at 1397–98.

207. *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978).

208. *Id.* (internal quotations omitted).

209. See *Brown v. Maxwell*, 929 F.3d 41, 47 (2d Cir. 2019).

party.²¹⁰ The presumption of access would not attach to information that is not filed or stricken from the file.²¹¹ Of course, the information might be available elsewhere or (depending on the pseudonym, protective, gag, or other orders in the case) be freely distributed by the party that was not able to file it. Merits-related information filed for merits purposes, on the other hand, would be subject to the presumption of public access in most cases. In some cases, courts might very well refuse to seal this important information even if it incidentally identifies an anonymous party.

IV. CONCLUSION

With a wealth of online and other electronic information, anonymity in litigation, like anonymity in contemporary life, will be hard to come by. Surely there are pernicious effects from this development, but those likely do not justify closing broad swaths of court files to the public. The Court, even before the current era, recognized that protecting a right holder's perfect anonymity was not required but that courts should take reasonable steps to prevent identification.

When one of those reasonable steps is sealing information in public court files, narrow tailoring is critical. It is understandable that courts would be protective of litigants in the most sensitive of cases, but the reflex to protect privacy should not subsume the public's right to access court records and proceedings. At the same time, courts should be wary of, and discourage, litigation tactics that seem aimed at outing otherwise pseudonymous litigants.

210. See FED. R. CIV. P. 12(f).

211. *Maxwell*, 929 F.3d at 51–52 (“Because such rejected or stricken material is not relevant to the performance of the judicial function it would not be considered a judicial document and would enjoy no presumption of public access.”) (internal quotations omitted).