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My Body, My Data: California's Attempt To Protect Reproductive and Fertility Data

Following the Supreme Court's decision in *Dobbs* that there is no constitutional right to an abortion,[1] many became concerned about data collected by fertility and menstrual cycle apps. Specifically, users, privacy experts, and even legislators feared that data collected by these apps “could provide a deep well of evidence for states seeking to track and potentially arrest anyone seeking or receiving an abortion.”[2] Katharine Kemp's analysis of twelve popular fertility apps within the United States and abroad revealed the unsafe data practices of some of these apps.[3] These apps allow users to log information including when they had sex, if they used methods of protection, and whether they had a positive or negative pregnancy test.[4] The vulnerable information amassed on these apps could reveal sensitive information identifying someone whose “regular periods suddenly stop,” for example, or a user taking a morning-after pill.[5] Kemp's study concludes that the apps' privacy practices are riddled with confusion including “pervasive tracking of the [user's] online behavior, without clarity about whether inferences drawn from this will be treated as sensitive information,”[6] and provide “inadequate de-identification of sensitive data shared with other organizations.”[7]

Some states have taken critical legislative action to protect the privacy of those using fertility and menstrual cycle tracking apps.[8] In September 2023, California Governor Gavin Newsom signed Assembly Bill 254, the “Confidentiality of Medical Information Act.”[9] This Act amended § 56.05 and § 56.06 of the Civil Code relating to privacy and prohibited “mobile application[s] . . . designed to maintain medical information” from “intentionally sharing, selling, using for marketing, or otherwise using any medical information . . . for any purpose not necessary to provide healthcare services.”[10] Additionally, the bill expands the definition of medical information to include “reproductive or sexual health information.”[11] Governor Newsom signed this bill into law alongside eight other bills intended to “safeguard access to reproductive healthcare and [ensure California remains] a safe haven state.”[12]

However, legislative efforts to protect sensitive data on menstrual and fertility tracking apps remain stalled at the federal level.[13] Representative Sara Jacobs of California introduced the My Body, My Data Act which “would create a new national standard to protect personal reproductive health data [b]y minimizing the personal reproductive health data that is collected and retained” and prevent the information's disclosure or misuse.[14] This legislation is important because it addresses data privacy concerns relating to the criminalization of abortion.[15] Representative Jacobs and other sponsors of the bill have been seeking “privacy-minded Republicans to co-sponsor the legislation but [have] acknowledged the difficulty in getting bipartisan support.”[16] Proponents of this legislation argue that the My Body, My Data Act encompasses more than just abortions and that this act would protect privacy concerns for “all sexual and reproductive health data.”[17]

While the shield measures enacted by the Confidentiality of Medical Information Act and those intended to be protected by the My Body, My Data Act have not yet “actually proved necessary,” according to Jake Laperruque, deputy director at the Security and Surveillance Project for the Center For Democracy & Technology, “it is certainly just a matter of time before they do [become necessary].”[18]

[1] *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228, 2242 (2022).

- [2] Tonya Riley, *A Year After Dobbs, Federal Privacy Legislation to Protect Abortion Seekers Remains Stalled*, CYBERSCOOP (June 22, 2023), <https://cyberscoop.com/dobbs-privacy-legislation-abortion-congress/>.
- [3] See KATHARINE KEMP, *YOUR BODY, OUR DATA: UNFAIR AND UNSAFE PRIVACY PRACTICES OF POPULAR FERTILITY APPS* (2023).
- [4] *Id.* at 5.
- [5] *Id.*
- [6] *Id.* at 27.
- [7] *Id.*
- [8] Riley, *supra* note 2.
- [9] Press Release. Office of Governor Gavin Newsom, California Expands Access and Protections for Reproductive Health Care (Sept. 27, 2023), <https://www.gov.ca.gov/2023/09/27/california-expands-access-and-protections-for-reproductive-health-care/>.
- [10] LegiScan, *Bill Text: CA AB254 | 2023- 2024 | Regular Session*, <https://legiscan.com/CA/text/AB254/2023>.
- [11] *Id.*
- [12] Office of Governor Gavin Newsom, *supra* note 9.
- [13] Riley, *supra* note 2.
- [14] Congresswoman Sara Jacobs, *My Body, My Data Act of 2022 One-Pager*, available at <https://sarajacobs.house.gov/uploadedfiles/mybodymydataactonepager.pdf>.
- [15] *Id.*
- [16] Riley, *supra* note 2.
- [17] *Id.*
- [18] *Id.*