

# WHEN STUDENTS TEST POSITIVE, THEIR PRIVACY FAILS: THE UNCONSTITUTIONALITY OF SOUTH CAROLINA’S HIV/AIDS REPORTING REQUIREMENT

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## I. INTRODUCTION

Crystal Hilton hated school.<sup>1</sup> The other kids teased and taunted her; they spread rumors behind her back and ridiculed her to her face.<sup>2</sup> Crystal

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1. See Crystal Hilton, *Living with HIV and Conquering It*, in *THE TIE THAT BINDS: SOUTH CAROLINA AT THE CROSS ROADS: HIV/AIDS AMONG CHILDREN AND YOUTH* 12, 14 (McLendon et al. eds., 2008), available at <http://www.schivaidsCouncil.org/files/TTBJan08G.pdf> (explaining the mockery, social exclusion, and embarrassment Hilton experienced as an HIV-positive student in South Carolina).

2. See *id.* at 12 (describing how friends excluded her upon discovering her HIV status).

struggled to explain the abuse to her grandmother, asking,

[H]ow could I tell her that I cried myself to sleep . . . that I hated going to school? How could I tell her that the students were tormenting and teasing me because of my illness? How could I tell her that I hated what I saw in the mirror? How could I tell her the HIV was ruining my life?<sup>3</sup>

Crystal is not your classic bully victim.<sup>4</sup> Children and adults at Crystal's South Carolina high school targeted her because she is HIV-positive.<sup>5</sup> In 2003, the school expelled Crystal, and both Crystal and her grandmother suspect that fear of HIV drove the decision, not a legitimate rationale.<sup>6</sup>

Crystal's experience is not unique. HIV-positive school children throughout the United States report instances of stigmatization and harassment when people at their schools discover their HIV status.<sup>7</sup> However, Crystal's rights as a public school student in South Carolina differ from the rights of HIV-positive students in other states.<sup>8</sup> South Carolina law requires the state Department of Health and Environmental Control ("DHEC") to report the identities of HIV-positive public school students to certain school officials.<sup>9</sup> In South Carolina, Crystal and her family do not decide whether to disclose her status to people at her school—the state decides for them.<sup>10</sup>

This Comment argues that South Carolina's reporting requirement violates HIV-positive students' constitutional right to privacy.<sup>11</sup> Courts should hold that the right to privacy in personal matters encompasses the

3. *See id.* at 13-14 (explaining that Hilton's shame made it difficult to disclose the social and psychological effects of the abuse).

4. *See* REBECCA C. JONES, *LIVING WITH HIV/AIDS: STUDENTS TELL THEIR STORIES OF STIGMA, COURAGE, AND RESILIENCE* 36 (2006) (noting the complexity of the social issues faced by HIV-positive students).

5. *See* Hilton, *supra* note 1, at 13 (describing how stigmatization by teenagers and adults at her school "almost destroyed" her).

6. *See id.* (explaining that Hilton never returned to a different school after being expelled because she feared that she would again encounter constant harassment due to her HIV status).

7. *See generally* JONES, *supra* note 4, at 2-32 (recalling the personal stories of nine students who reported disparate treatment in their schools as a result of their HIV-positive status).

8. *See* Staff of Volume 13, *State Statutes Dealing with HIV and AIDS: A Comprehensive State-by-State Summary (2004 Edition)*, 13 L. & SEXUALITY 1, 468-70 (2004).

9. *See* S.C. CODE ANN. § 44-29-135(e) (2008) (requiring the DHEC to notify the superintendent and school nurse at the students' schools if a student tests positive for Human Immunodeficiency Virus ("HIV") or Acquired Immune Deficiency Syndrome ("AIDS")).

10. *See id.* (mandating that the identities of all students who test positive for HIV/AIDS be reported to school officials, regardless of whether the student consents to the disclosure).

11. *See infra* Part III.C (arguing that the privacy interest in HIV status outweighs the state public health interest in mandatory disclosure).

right to non-disclosure of one's HIV status, and that one's status as a public school student does not dilute this right.<sup>12</sup> South Carolina should also recognize that the requirement impedes HIV prevention policy by discouraging students from receiving HIV tests and undermining the use of universal precautions in public schools.<sup>13</sup>

Part II of this Comment discusses HIV/AIDS and its impact on adolescents, South Carolina's reporting requirement, and the development of privacy jurisprudence.<sup>14</sup> Part III argues that the HIV status reporting requirement violates the right to non-disclosure of one's HIV status that is encompassed by the constitutional right to privacy in personal matters.<sup>15</sup> Part IV concludes that South Carolina must eliminate the reporting requirement in order to protect students' privacy rights and achieve the state's public health goals.<sup>16</sup>

## II. BACKGROUND

### A. *Adolescents, Stigma and HIV/AIDS in the United States*

As of 2003, HIV/AIDS infected approximately 1.1 million people in the United States, with an estimated 56,300 new HIV infections occurring in 2006.<sup>17</sup> Twenty-five percent of those infected are currently unaware of their positive status.<sup>18</sup>

In August 2008, a study released by the Centers for Disease Control and Prevention ("CDC") and the Journal of the American Medical Association ("JAMA") revealed that the United States' annual HIV infection rate is

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12. *See infra* Part III.A.2 (maintaining that public school student status does not affect the privacy expectation in one's HIV status).

13. *See infra* Part III.C.6 (explaining that youths refrain from accessing HIV tests if they doubt the results' confidentiality).

14. *See infra* Part II (discussing HIV and adolescent issues, the controversy surrounding the reporting requirement, and the emergence of the right to privacy in personal matters).

15. *See infra* Part III (arguing that the right to privacy encompasses a right to non-disclosure of personal information and that HIV-positive students' privacy interest in their HIV status outweighs the state interest in disclosure of status).

16. *See infra* Part IV (concluding that lawmakers or courts must void the requirement because it undermines HIV/AIDS prevention).

17. *See* CTRS. FOR DISEASE CONTROL AND PREVENTION, HIV/AIDS IN THE UNITED STATES 1-2 (Aug. 2008), available at <http://www.cdc.gov/hiv/resources/factsheets/PDF/us.pdf> [hereinafter HIV/AIDS] (reporting that men who have sex with men, African-Americans, and twenty-five to thirty-four year olds experience the most HIV/AIDS diagnoses).

18. *See* CTRS. FOR DISEASE CONTROL AND PREVENTION, ESTIMATES OF NEW HIV INFECTIONS IN THE UNITED STATES 6 (Aug. 2008), available at <http://www.cdc.gov/hiv/topics/surveillance/resources/factsheets/pdf/incidence.pdf> (promoting routine testing to increase awareness and prevent the transmission of HIV).

forty percent higher than previously reported.<sup>19</sup> New testing technology revealed the higher rate, which indicates that the HIV/AIDS epidemic constitutes a greater national crisis than was previously understood.<sup>20</sup> In response to the new data, HIV/AIDS activists and medical professionals have called for drastically increased efforts in prevention, HIV testing, counseling, and outreach to at-risk groups.<sup>21</sup> The CDC specifically champions routine HIV testing as an intrinsic, highly effective tool of a successful HIV prevention program.<sup>22</sup>

Adolescents constitute a critical target group for HIV prevention efforts because young people between the ages of thirteen to twenty-four represented fifteen percent of new HIV infections in 2006.<sup>23</sup> HIV especially threatens this age group due to risk factors particular to youths: early sexual initiation, higher rates of sexually transmitted diseases (“STDs”), substance abuse that leads to high-risk behavior, and decreased awareness of HIV susceptibility and prevention methods.<sup>24</sup> Consequently, the CDC specifically recommends routine HIV testing to prevent the spread of HIV among adolescents.<sup>25</sup>

Adolescent hesitance to undergo HIV testing confounds the CDC’s goal of routine testing.<sup>26</sup> This hesitance stems from adolescents’ fear of

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19. See Marilyn Chase, *CDC Criticized for Delays in Release of AIDS Data: Activists Say Chance Was Lost to Counter Impact of More Cases*, WALL ST. J., Aug. 4, 2008, at A3 (discussing the surprised reaction of the public to the CDC and JAMA study).

20. See Lawrence K. Altman, *H.I.V. Study Finds Rate 40% Higher than Estimated*, N.Y. TIMES, Aug. 3, 2008, at A1 (noting that the new statistics alarm doctors and activists involved in HIV/AIDS prevention because the statistics indicate that prevention efforts have fallen short in curbing the spread of HIV).

21. See Chase, *supra* note 19 (reporting disappointment in the decrease in resources dedicated to prevention initiatives).

22. See BERNARD A. BRANSON ET AL., DEP’T OF HEALTH & HUMAN SERVS., CDC, REVISED RECOMMENDATIONS FOR HIV TESTING OF ADULTS, ADOLESCENTS, AND PREGNANT WOMEN IN HEALTH-CARE SETTINGS 4 (2006), available at <http://www.cdc.gov/mmwr/preview/mmwrhtml/rr5514a1.htm> (explaining that people’s widespread unawareness of their risk for HIV infection necessitates routine, universal testing instead of risk-based testing).

23. See HIV/AIDS, *supra* note 17, at 2 (reporting that the highest rate of newly diagnosed HIV infection was split between twenty-five to thirty-four year olds and thirty-five to forty-four year olds in 2006).

24. See CTRS. FOR DISEASE CONTROL AND PREVENTION, HIV/AIDS AMONG YOUTH 2-3 (Aug. 2008), available at <http://www.cdc.gov/hiv/resources/factsheets/PDF/youth.pdf> (noting the difficulties in preventing transmission among youth and advocating programs specifically designed to teach young people about the dangers of HIV/AIDS and methods of prevention).

25. See BRANSON ET AL., *supra* note 22, at 7 (revising testing recommendations for adolescents and adults to address the heightened need for prevention and early detection of HIV).

26. See Rhonda Gay Hartman, *AIDS and Adolescents*, 7 J. OF HEALTH CARE L. & POL’Y 280, 285 (2004) (advocating for adolescent consent to disclosure and arguing that the number of reported adolescent HIV cases is artificially low due to testing

indiscreet disclosure of their sexual health information.<sup>27</sup> Adolescents exhibit particular concern for maintaining the confidentiality of their sexual health information because of the stigma surrounding teen pregnancy, abortion, and STDs.<sup>28</sup> Due to this stigma, doubts as to confidentiality prevent adolescents from procuring sexual health care.<sup>29</sup> Ensuring strict confidentiality of HIV test results is therefore essential to implementing the routine testing of adolescents.<sup>30</sup>

The experiences of HIV-positive students legitimate youths' fear of disclosure and subsequent stigmatization.<sup>31</sup> Negative attitudes toward individuals living with HIV/AIDS continue to pervade society and infiltrate school systems.<sup>32</sup> Students who publicly disclose their HIV status risk humiliation and isolation at school.<sup>33</sup> Students who disclose their status to a limited number of school authorities chance indiscreet breaches of confidentiality that expose them to stigmatization.<sup>34</sup> These harsh consequences highlight the immense need for maintaining the confidentiality of adolescents' HIV status.<sup>35</sup>

The Supreme Court recognizes the need to protect individuals with HIV/AIDS from discrimination.<sup>36</sup> Its holding in *Bragdon v. Abbott* extends the Americans with Disabilities Act's ("ADA") definition of "physical

aversion which results, partially, from mandatory, non-consensual disclosures, such as to an adolescent's parents).

27. See *id.* at 289 (contending that doubts as to confidentiality often deter adolescents from accessing health care).

28. See AIDS ALLIANCE FOR CHILDREN, YOUTH & FAMILIES, FINDING HIV-POSITIVE YOUTH AND BRINGING THEM INTO CARE 16 (2005) (arguing that adolescents' awareness of their vulnerability to harassment necessitates strong assurances of confidentiality in providing HIV care).

29. See *id.* (explaining how assurances of confidentiality increase youths' willingness to speak candidly about sexuality).

30. See Hartman, *supra* note 26, at 291 (describing how a lack of privacy protections for adolescents thwarts prevention goals).

31. See, e.g., JONES, *supra* note 4, at 12 (detailing the social repercussions one child with AIDS experienced at school, such as other children running away from him and not wanting to use the water fountain after him).

32. See Anne L. Bryant, *Preface to REBECCA C. JONES, LIVING WITH HIV/AIDS: STUDENTS TELL THEIR STORIES OF STIGMA, COURAGE, AND RESILIENCE* iv, v (2006) (explaining how the parents of HIV-positive students fear for their children's safety at school).

33. See, e.g., JONES, *supra* note 4, at 19-20 (detailing how extreme harassment caused one HIV-positive student to transfer schools).

34. See *id.* at 36 (describing how one mother told her son's status to a school nurse and later heard others gossiping about him).

35. See *id.* (calling on schools to respect students' privacy by keeping student health records confidential).

36. See *Bragdon v. Abbott*, 524 U.S. 624, 655 (1998) (holding that an HIV-positive woman who was denied dental treatment qualified as disabled under the ADA because HIV constitutes a physical impairment that limits the major life activity of reproduction).

impairment” to include HIV infection.<sup>37</sup> The ADA consequently protects people with HIV/AIDS as “disabled” upon a showing that their status limits a major life activity.<sup>38</sup> Unfortunately, an inability to meet this burden operates to exclude many HIV-positive individuals from ADA protection, leaving discrimination against such individuals to continue unchecked post-*Bragdon*.<sup>39</sup>

### B. South Carolina's Reporting Requirement

South Carolina's reporting requirement compels the DHEC to notify a school's superintendant and nurse if a minor student has HIV or AIDS.<sup>40</sup> South Carolina law requires all health professionals who diagnose or treat an STD to report the name, date of birth, and address of the patient to the DHEC.<sup>41</sup> Upon receiving a report that a minor who attends public school has HIV or AIDS, the DHEC must report the minor's name and medical status to the minor's school superintendent and nurse.<sup>42</sup> These officials may disclose the information to other personnel who have “a bona fide need to know.”<sup>43</sup> Strict confidentiality binds all persons receiving the information, and violations may result in criminal and civil liability.<sup>44</sup>

The reporting requirement mandates a level of HIV/AIDS disclosure unauthorized in most other states.<sup>45</sup> This level of disclosure concerned South Carolina lawmakers, and in January 2008, legislators proposed a new bill voiding the current reporting requirement and instead mandating: (1) that school officials report to the DHEC any incidents of blood or bodily

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37. See *id.* at 637 (finding that every stage of HIV infection meets the statutory definition of “physical impairment”).

38. See *id.* at 638 (holding that reproduction is one major life activity among many that may be substantially limited by HIV).

39. See Scott Thompson, Abbott, *AIDS, and the ADA: Why a Per Se Disability Rule for HIV/AIDS is Both Just and a Must*, 15 DUKE J. GENDER L. & POL'Y 1, 2 (2008) (arguing that because of the difficulty proving limitations of major life activities, HIV should be classified as a *per se* disability to ensure that those infected get ADA protection).

40. See S.C. CODE ANN. § 44-29-135(e) (2008) (mandating DHEC reporting of HIV-positive minors to school authorities because STDs constitute a threat to public health).

41. See S.C. CODE ANN. REGS. 61-21(C)(1) (2008) (delineating the process for reporting STDs to the DHEC).

42. See § 44-29-135(e) (requiring reporting to public school officials solely in the case of minors infected with HIV/AIDS).

43. See 61-21(G)(3).

44. See 61-21(H)(2); see also S.C. CODE ANN. § 44-1-15061-21(H)(2) (2008) (noting that breaches of confidentiality by persons with a “need to know” may be penalized by up to \$200 in criminal fines, thirty days imprisonment, or \$1000 per day of violation in civil penalties).

45. See Staff of Volume 13, *supra* note 8, at 7, 20, 173, 311, 333, 470 (reporting nonconsensual school notification requirements in only six states, including South Carolina, as of 2004).

fluid exposure that occur between students at school or school-sponsored events, and (2) that schools adopt the CDC-recommended universal precautions for preventing blood-borne disease exposure.<sup>46</sup> The bill's sponsors highlighted federal privacy law that rendered the current reporting requirement useless since the information could not be conveyed to other parties, and South Carolina AIDS activists emphasized the necessity of voiding the law in order to promote HIV testing of adolescents.<sup>47</sup>

Although the General Assembly passed the bill in June 2008, Governor Mark Sanford vetoed it, and the House sustained the veto.<sup>48</sup> Governor Sanford reasoned that the students' health and safety interests required lawmakers to add, instead of delete, highly contagious, deadly diseases to the notification list.<sup>49</sup> He also condemned federal disclosure prohibitions as "misguided principle[s]" not to be codified at the state level.<sup>50</sup> The reporting requirement therefore remains operative, leaving student privacy and HIV testing concerns unaddressed.<sup>51</sup>

### *C. The Constitutional Right to Privacy in Personal Matters: A Limitation on the State's Authority to Regulate Public Health*

#### *1. State Public Health Regulation and the Emergence of a Constitutional Right to Privacy*

States retain the authority to enact public health regulations under the Tenth Amendment.<sup>52</sup> The Supreme Court recognizes this authority and holds that states may restrict individual liberty in the interest of public

46. See S. 970, 117th Gen. Assem., 2d Reg. Sess. §§ 1, 2, 4 (S.C. 2008) (mandating that records of bloodborne diseases be kept strictly confidential except when released consensually, for anonymous statistical purposes, to enforce other disease-control regulations, to medical personnel "to protect the health or life of any person," or if the person diagnosed is a minor and a report must be made under the Child Protection Act of 1977).

47. See *Sponsors of South Carolina Bill that Would Modify Regulations Concerning HIV-Positive Students Will Attempt to Override Veto*, KAISER DAILY HIV/AIDS REPORT, June 16, 2008, available at [http://www.kaisernet.org/daily\\_reports/rep\\_index.cfm?hint=1&DR\\_ID=52745](http://www.kaisernet.org/daily_reports/rep_index.cfm?hint=1&DR_ID=52745) [hereinafter *Sponsors*] (noting advocates' contention that the law's effect of discouraging testing could lead to the continued prevalence of HIV, especially in the African-American community).

48. See STATENET, 2007 BILL TRACKING SC S.B. 970, 1-2 (2008).

49. See 88 S.C. S. JOUR., 2008 Reg. Sess. (June 25, 2008) (quoting Gov. Sanford's letter explaining his concern that elimination of the requirement would increase the risk to students).

50. See *id.* (quoting Gov. Sanford's letter arguing that failure to disclose the status of HIV-positive students infringes upon the rights of other students).

51. See Associated Press, *Lawmakers Annul 15 of Sanford's 20 Vetoes in One Day*, AUGUSTA CHRON., June 26, 2008, at B09 (reporting that lawmakers upheld the veto because they believed that school nurses should know students' HIV status).

52. See U.S. CONST. amend. X (reserving to the states all powers not prohibited or delegated to the federal government).

health, safety, and welfare.<sup>53</sup> However, a reasonableness requirement limits state regulations, and states cannot enact public health measures that unreasonably infringe upon constitutionally protected rights.<sup>54</sup>

The Constitution protects the right to privacy and therefore limits state health regulation.<sup>55</sup> The Supreme Court reasons that a fundamental right to privacy emanates from the Bill of Rights, and that many Bill of Rights provisions presume this right, even though the Constitution does not explicitly grant it.<sup>56</sup> The ambiguous nature of the right to privacy causes it to evolve incrementally, with the Court slowly extending its scope to encompass matters such as procreation, contraception, family relationships, child rearing, and child education.<sup>57</sup>

The Court's decision in *Roe v. Wade* evinces that the privacy right does not bar state regulation.<sup>58</sup> States may restrict Court-recognized privacy rights if the regulations meet the applicable standard of scrutiny.<sup>59</sup> The Supreme Court initially asserted strict scrutiny as the standard for privacy cases.<sup>60</sup> However, subsequent Court analyses do not consistently apply this standard, and the Court's privacy decisions often neglect to state explicitly the applicable standard of review.<sup>61</sup>

## 2. Whalen v. Roe: *The Right to Privacy in Personal Matters*

The Supreme Court has not specifically addressed whether non-disclosure of one's HIV test results falls within the constitutional right to

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53. See *Jacobson v. Massachusetts*, 197 U.S. 11, 25-26 (1905) (affirming state police power to enact health laws and holding that individual rights are subject to reasonable restraints).

54. See *id.* at 30-31, 39 (upholding a statute that required smallpox vaccinations because it was a reasonable, effective health law and therefore did not unconstitutionally restrict liberty).

55. See, e.g., *Roe v. Wade*, 410 U.S. 113, 164 (1973) (striking down a Texas statute that outlawed non-therapeutic abortion because the law violated the constitutional right to privacy).

56. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (holding that penumbras emanating from the First, Third, Fourth, Fifth, and Ninth Amendments create protected zones of privacy because these amendments presuppose the right of privacy).

57. See *Roe*, 410 U.S. at 152 (explaining the many constitutional bases for the privacy right and its gradual extension via jurisprudence).

58. See *id.* at 154 (acknowledging that some state regulation of abortion is permissible once the state interest in the pregnancy becomes sufficient to sustain regulation, despite the privacy right to an abortion).

59. See *id.* at 154-55 (allowing state regulation of abortion when the state interest becomes sufficiently compelling).

60. See *Griswold*, 381 U.S. at 485-86 (holding that the right to privacy in marriage is a fundamental constitutional right).

61. Compare *Roe*, 410 U.S. at 155 (using strict scrutiny to strike down Texas's abortion statute), with *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (failing to state the level of scrutiny used in finding Texas' anti-sodomy law unconstitutional).

privacy.<sup>62</sup> However, the Court's *Whalen v. Roe* decision provides a general framework for analyzing privacy issues concerning medical disclosures, and circuit courts use this precedent in cases addressing the legal implications of disclosing a person's HIV status.<sup>63</sup>

The *Whalen* Court considered a statute requiring centralized state reporting of a patient's name if the patient received certain medical prescriptions.<sup>64</sup> The state enacted the statute to control the illegitimate use of prescription drugs.<sup>65</sup> The appellees claimed the law unconstitutionally violated their right to privacy because the reporting requirement individually identified them as users of the drugs, disclosure of this data could lead to stigmatization as "drug addicts," and some persons in need of these medications would decline treatment out of fear of disclosure and stigmatization.<sup>66</sup> The Court upheld the statute because the state has a "vital interest" in ensuring that potentially dangerous medications are properly distributed.<sup>67</sup> Furthermore, the state's security measures sufficiently minimized disclosure risks.<sup>68</sup>

The *Whalen* decision notably expanded the scope of the privacy right to encompass a right to privacy in personal matters.<sup>69</sup> The Court drew its conclusion in *Whalen* by analyzing the statute in light of two distinct privacy interests: (1) the interest in avoiding disclosure of personal matters, and (2) the interest in maintaining independence when making critical

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62. See Nicole Kamm, *HIV Reporting in California: By Name or By Number?*, 25 J. NAT'L ASS'N ADMIN. L. JUDGES 545, 560-61 (2005) (noting that while the Supreme Court has yet to address whether mandatory, name-based HIV reporting schemes implicate the privacy right, the Court has considered whether related medical situations, such as mandating vaccinations and disclosing the names and addresses of persons taking certain prescriptions, implicate privacy rights).

63. See 429 U.S. 589, 599-600 (1977) (holding that a state-mandated prescription disclosure did not violate a constitutional privacy right); see also *Doe v. Delie*, 257 F.3d 309, 315 (3d Cir. 2001) (quoting the *Whalen* privacy interest test in determining that the Fourteenth Amendment protected an HIV-positive inmate's privacy right in his medical records).

64. See *Whalen*, 429 U.S. at 599-600 (discussing the claim that the statute infringes upon Court-recognized "zones of privacy").

65. See *id.* at 591-92 (detailing how the statute responded to commission findings that existing laws were ineffective to prevent the illegal diversion of prescription medications).

66. See *id.* at 600 (recognizing that reporting has a deterrent effect spurred by valid patient fears that disclosure adversely affects reputation).

67. See *id.* at 598.

68. See *id.* at 593-95 (highlighting that the files were stored in a room protected by a locked wire fence and alarm system, the computer data was kept in a locked cabinet, and the statute provided for the destruction of the files after five years).

69. See, e.g., Jessica Ansley Bodger, Note, *Taking the Sting Out of Reporting Requirements: Reproductive Health Clinics and the Constitutional Right to Informational Privacy*, 56 DUKE L.J. 583, 595 (2006) (arguing that the "individual interest in avoiding disclosure of personal matters" recognized in *Whalen* is significant in light of the need to protect the confidentiality of abortion services).

personal decisions.<sup>70</sup> Consequently, many lower courts interpret *Whalen* as requiring a constitutional privacy analysis if state regulation infringes upon the confidentiality of personal matters or independence in making personal decisions.<sup>71</sup>

The *Whalen* Court neither defined “personal matters” nor determined which matters garner constitutional protection.<sup>72</sup> The Court’s subsequent decision in *Nixon v. Administrator of General Services*, however, affirmed the right to privacy in personal matters and outlined a test for determining whether a privacy interest falls within the scope of protected personal matters.<sup>73</sup> The *Nixon* decision promulgates a two-part analysis whereby courts determine: (1) whether the party asserting an interest in non-disclosure of a personal matter has a legitimate expectation of privacy in that matter, and (2) if so, whether the interest outweighs the government’s interest in disclosure.<sup>74</sup>

### 3. *Personal Matters and the Disclosure of Personal Information: A Circuit Split*

Despite the *Nixon* guidelines, not all circuit courts conclude that the right to privacy in personal matters protects against the disclosure of personal information.<sup>75</sup> Nine circuits support this privacy protection, with six of these circuits explicitly protecting medical records or HIV status.<sup>76</sup> The

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70. See *Whalen*, 429 U.S. at 600 (upholding the statute because strict security regulations and continued use of prescriptions shows that the law does not threaten either privacy interest).

71. See, e.g., *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990) (recognizing *Whalen* as creating a constitutional right to privacy in non-disclosure of personal matters).

72. See *Whalen*, 429 U.S. at 605-06 (highlighting that the holding turns on the adequacy of the New York statutory scheme and noting that the Court is not deciding any other issues in which unwarranted disclosures implicate privacy in personal matters).

73. See 433 U.S. 425, 429-30, 456-58 (1977) (analyzing whether a statute requiring an executive official to take custody of presidential papers and recordings unconstitutionally violates the President’s privacy interests and holding that the personal matters of public officials are constitutionally protected).

74. See *id.* (weighing Nixon’s legitimate expectation of privacy in his personal communications against the government’s interest in reviewing the communications).

75. Cf. *Bodger*, *supra* note 69, at 599-600 (noting that the majority of circuit courts hold that disclosure of private information garners some constitutional protection).

76. Compare *Walls*, 895 F.2d at 193, *Daury v. Smith*, 842 F.2d 9, 13 (1st Cir. 1988), and *Fadjo v. Coon*, 633 F.2d 1172, 1175 (5th Cir. 1981) (holding various personal information as garnering protection under *Whalen*), with *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998); *A.L.A. v. West Valley City*, 26 F.3d 989, 990 (10th Cir. 1994); *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994); *Harris v. Thigpen*, 941 F.2d 1495, 1513 (11th Cir. 1991); *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980), and *Woods v. White*, 689 F. Supp. 874, 876 (W.D. Wis. 1988), *aff’d*, 899 F.2d 17, 17 (7th Cir. 1990) (explicitly holding that medical records or HIV status constitute personal information).

Sixth Circuit denies the existence of a constitutional right to privacy in personal information, and the Eighth Circuit only regards the right as operative in circumstances of egregious disclosure.<sup>77</sup> The D.C. Circuit refrains from holding on the issue.<sup>78</sup>

Fourth Circuit right to privacy jurisprudence regarding medical records and HIV status is inconclusive.<sup>79</sup> The Fourth Circuit is among the nine that recognize the right to privacy in personal matters as encompassing a right to non-disclosure of personal information.<sup>80</sup> However, the Fourth Circuit has declined to rule on whether medical records require constitutional privacy protection.<sup>81</sup> The Fourth Circuit therefore presents no clear precedent for determining whether South Carolina's reporting requirement violates students' constitutional right to privacy.<sup>82</sup>

Of the circuits recognizing a right to privacy in medical records, the Third Circuit's *United States v. Westinghouse Electric Corp.* decision articulates an especially comprehensive set of factors for consideration in the *Nixon* balancing test.<sup>83</sup> The factors are: (1) the type of record, (2) the information the record contains, (3) the potential for harm from unauthorized disclosure, (4) the injury that disclosure would cause to the relationship in which the record was created, (5) the adequacy of the measures taken to prevent disclosure, (6) the degree of the need for access, and (7) whether there is an express statutory mandate, policy, or pertinent

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protected by *Whalen*).

77. See *Doe v. Wigginton*, 21 F.3d 733, 740 (6th Cir. 1994) (refusing to recognize a right to non-disclosure of private information due to a lack of explicit mandate from the Constitution or the Supreme Court); see also *Alexander v. Peffer*, 993 F.2d 1348, 1350 (8th Cir. 1993) (finding no unconstitutional violation of privacy because disclosure was not extremely degrading, humiliating, or betraying).

78. See *Am. Fed'n of Gov't Employees v. Dep't of Hous. & Urban Dev.*, 118 F.3d 786, 793 (D.C. Cir. 1997) (expressing doubt that a right to privacy in personal information exists).

79. See *Ferguson v. City of Charleston*, 186 F.3d 469, 483 (4th Cir. 1999), *rev'd on other grounds*, 532 U.S. 67 (2001) (refraining from deciding whether medical records garner constitutional right to privacy protection).

80. See *Walls*, 895 F.2d at 193-94 (holding that the constitutional right to privacy in personal information was not violated because there was no reasonable expectation of privacy in personal information that was publicly available).

81. See *Ferguson*, 186 F.3d at 482-83 (holding that the appellants' right to privacy in their medical records was not violated without deciding whether the appellants possessed this right).

82. See *id.* (recognizing the circuit split regarding the privacy right in medical records but not holding on the issue).

83. See *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 572 (3d Cir. 1980) (considering the constitutionality of disclosing employee medical records to the National Institute for Occupational Safety and Health); see also *Kamm*, *supra* note 62, at 564-65 (highlighting the seven factor *Westinghouse* test as especially helpful in determining whether HIV reporting is justified because its multifaceted elements provide for thorough analysis of medical disclosure issues).

public interest tending toward supporting access to the information.<sup>84</sup> Other circuits commonly refer to *Westinghouse* in applying the *Nixon* balancing test to personal information cases.<sup>85</sup>

#### D. Public School Students and the Right to Privacy

The Supreme Court in *Vernonia School District 47J v. Acton* held that public school students enjoy a lesser expectation of personal privacy than the general public.<sup>86</sup> The various medical exams and procedures that states require public school students to undergo corroborate this reduced expectation.<sup>87</sup> The states' keen interest in preserving the health and safety of students justifies reasonable invasions of students' privacy.<sup>88</sup>

Even so, *Vernonia* does not completely strip public school students of their constitutional privacy rights.<sup>89</sup> The state must establish the reasonableness of privacy invasions for courts to deem them constitutional.<sup>90</sup> The reasonableness turns on the extent to which the expectation of privacy is decreased, the obtrusiveness of the invasion, and the need for invasion.<sup>91</sup>

### III. ANALYSIS

South Carolina's reporting requirement violates public school students' constitutionally protected right to privacy in personal matters.<sup>92</sup> This violation jeopardizes the state's public health goals of maintaining healthy and safe students and stemming the spread of HIV/AIDS because it undermines the use of universal precautions in South Carolina schools and

84. See *Westinghouse*, 638 F.2d at 578-79 (noting that the court must use several factors in balancing the employee's privacy interests in their medical records against the state interest in addressing occupational health hazards).

85. See, e.g., *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (using the *Westinghouse* analysis to support its holding that the privacy right protects health information).

86. See 515 U.S. 644, 657 (1995) (upholding drug testing for student athletes because First, Fourth, and Fourteenth amendment rights operate differently in the public school setting).

87. See *id.* at 656-57 (explaining that required vaccinations and physicals decrease privacy expectations in schools).

88. See *id.* at 661 (recognizing the state's important interest in deterring drug use and keeping drugs from infiltrating schools).

89. See *id.* at 655-56 (holding that student status restricts constitutional rights but does not eliminate them altogether).

90. *Id.* at 665.

91. See *id.* at 664-65 (sustaining drug testing of student athletes because the tests are minimally invasive and the need to detect drug use by student athletes is great).

92. See, e.g., *Woods v. White*, 689 F. Supp. 874, 876 (W.D. Wis. 1988), *aff'd*, 899 F.2d 17 (7th Cir. 1990) (holding that disclosure of inmate's HIV status by prison medical personnel to nonmedical personnel violated the inmate's constitutional right to privacy in his medical records).

deters adolescents from receiving HIV tests.<sup>93</sup> Since the state legislature and governor illustrated an unwillingness to amend this unconstitutional and detrimental law, courts must void the reporting requirement in the interest of protecting students' constitutional right to privacy and promoting effective public health policy.<sup>94</sup>

*A. The Reporting Requirement Infringes upon Public School Students' Constitutionally Protected Right to Privacy in Personal Matters*

*1. The Reasonable Expectation of Privacy in the Non-Disclosure of Medical Records and HIV Test Results*

The privacy interest in one's HIV status satisfies the first part of the *Nixon* right to privacy test because people reasonably and legitimately expect privacy in their medical records, including their HIV status.<sup>95</sup> This expectation is reasonable because medical records contain highly sensitive information and require a heightened level of protection.<sup>96</sup> The federal government recognizes the public expectation of privacy in medical records, and it has responded by implementing national regulations governing the maintenance and use of patient medical records.<sup>97</sup> The federal response legitimizes the public's reasonable expectation of privacy in medical information, even though the federal regulations are not explicitly framed as a means of protecting the constitutional right to privacy.<sup>98</sup>

Positive HIV test results, even when compared to other kinds of medical information, reasonably garner an especially heightened expectation of

93. See *Sponsors, supra* note 47 (explaining that the reporting requirement acts as a barrier to students accessing HIV tests).

94. See *Whalen v. Roe*, 429 U.S. 589, 605 (1977) (upholding a statutory reporting requirement because the medical data was not disclosed beyond the state department of health, which employed strict security measures to prevent disclosure, and the statute did not significantly deter people from receiving medication).

95. See Judith Wagner DeCew, *The Priority of Privacy for Medical Information*, in *THE RIGHT TO PRIVACY* 213, 213-17 (Ellen Frankel Paul et al. eds., 2000) (arguing that there is heightened public concern for the privacy of patient medical records due to the sensitive information contained therein and discussing shortcomings in the statutory guidelines for its protection).

96. See, e.g., *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) (noting that various federal regulations grant medical data a heightened level of protection because information about one's body is especially intimate).

97. See Kevin B. Davis, *Privacy Rights in Personal Information: HIPAA and the Privacy Gap Between Fundamental Privacy Rights and Medical Information*, 19 J. MARSHALL J. COMPUTER & INF. L. 535, 536-37 (2001) (noting that the Health Insurance Portability & Accountability Act ("HIPAA") regulations address popular privacy concerns by regulating the use of people's medical information).

98. See *id.* at 538 (explaining that the Supreme Court recognizes a fundamental right to privacy but has not expounded an explicit constitutional right to non-disclosure of private information).

privacy and confidentiality because of the extremely intimate nature of the information.<sup>99</sup> HIV/AIDS is a life-threatening illness often associated with homosexuality, illegal drug use, or irresponsible sexual behavior, and those living with HIV/AIDS are susceptible to stigmatization, discrimination, and intolerance.<sup>100</sup> Due to this susceptibility, the unauthorized disclosure of HIV/AIDS status potentially poses detrimental personal and social consequences for infected individuals.<sup>101</sup> HIV/AIDS status garners a legitimate expectation of privacy because of these consequences.<sup>102</sup> The *Nixon* decision therefore requires that courts afford protection to the non-disclosure of HIV/AIDS status under the constitutional right to privacy in personal matters.<sup>103</sup>

Circuits that decline to recognize that the right to privacy in personal matters includes the confidentiality of medical records and HIV status refrain from applying the *Nixon* method for determining whether a privacy interest falls within the scope of *Whalen*.<sup>104</sup> Instead, this minority of courts disregard the right because the Supreme Court has not established the right to privacy in personal information as a fundamental right, and no Supreme Court decision explicitly recognizes medical information as encompassed within the scope of the right to privacy.<sup>105</sup>

The minority's reasoning is unjustified in light of the non-textual nature of the right to privacy.<sup>106</sup> Although the right to privacy is nebulous in its

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99. See, e.g., *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (finding that HIV/AIDS status is highly personal because of the negative social attitudes toward HIV-positive persons).

100. See *id.* (protecting Doe's right to confidentiality in his HIV status under *Whalen* because his status is especially personal and subject to social stigma).

101. See, e.g., *Woods v. White*, 689 F. Supp. 874, 876 (W.D. Wis. 1988), *aff'd*, 899 F.2d 17 (7th Cir. 1990) (recognizing that HIV-positive persons have a high interest in confidentiality because people associate HIV/AIDS with irresponsible sexual activity and drug use).

102. See *Walls v. City of Petersburg*, 895 F.2d 188, 192 (4th Cir. 1990) (explaining that the more intimate the information, the more justified the expectation that it will be kept confidential).

103. See *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457-58 (1977) (holding that disclosure of personal communications implicates *Whalen* privacy interests because there is a legitimate expectation of privacy in these materials).

104. See *Jarvis v. Wellman*, 52 F.3d 125, 126 (6th Cir. 1995) (failing to consider whether there was a reasonable expectation of privacy before finding that the disclosure of medical records does not violate any constitutional rights and further stating that only when "fundamental rights" are implicated does a right to privacy take on "constitutional dimensions").

105. See, e.g., *Ferguson v. City of Charleston*, 186 F.3d 469, 482-83 (4th Cir. 1999), *rev'd on other grounds*, 532 U.S. 67 (2001) (holding that strict limitations on disclosure apply only to "fundamental" rights and that the appellant's right to non-disclosure of medical records had not been established as a fundamental right).

106. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965) (finding that individuals enjoy a protected privacy right even though the Constitution does not explicitly state this right).

origin and definition, its lack of parameters does not negate the existence of a constitutionally protected right to privacy in personal information.<sup>107</sup> Indeed, the Supreme Court emphatically rejected the notion that a constitutional right to privacy does not exist due to a lack of explicit textual mandate, and lower courts are therefore unjustified in denying the right to privacy in medical records simply because a Supreme Court decision has yet to expressly define this right.<sup>108</sup>

Additionally, the *Nixon* "legitimate expectation" standard and balancing test constitute the precedent for determining whether a *Whalen*-protected privacy interest exists and for analyzing government infringement upon this interest.<sup>109</sup> The minority circuits have foregone this precedent, and as a result, these courts deny judicial protection to legitimate and reasonable privacy interests that the Constitution protects.<sup>110</sup>

## 2. Public School Students' Legitimate Expectation of Privacy in Their HIV Test Results

The *Whalen* decision generally affords constitutional protection to the HIV status of public school students because HIV status falls within the scope of the right to privacy in personal matters.<sup>111</sup> Although the Supreme Court's decision in *Vernonia School District 47J v. Acton* holds that public school children have a lesser privacy expectation in medical records than the general public, students' privacy interest in their HIV status is distinguishable from the student privacy interests considered in *Vernonia*.<sup>112</sup>

The situation of South Carolina's HIV-positive students differs from the *Vernonia* case in three ways. First, HIV-positive students are different from the student athletes in *Vernonia* because in receiving an HIV test, they

107. See *id.* at 484-85 (inferring that the Bill of Rights assumes a right to privacy, including the right of married couples to use contraception).

108. See *id.* at 482-83 (illustrating that numerous rights not explicitly stated in the Constitution—such as parents' right to educate a child in a school of their choice—enjoy constitutional protection).

109. See *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457-58 (1977) (holding that the *Whalen* precedent protects the appellant's privacy interest because he had a legitimate expectation of privacy in his personal papers, but that the government's interests outweighed appellant's, and thus finding no violation of appellant's constitutional privacy right).

110. Compare *Doe v. City of New York*, 15 F.3d 264, 266-67 (2d Cir. 1994) (citing *Whalen* and *Nixon* as precedent in holding that Doe had a constitutional right to non-disclosure of his HIV status), with *Doe v. Wigginton*, 21 F.3d 733, 740 (6th Cir. 1994) (refusing to acknowledge a constitutional right to medical privacy and finding that the *Whalen* and *Nixon* holdings should not be imputed to Doe's claim).

111. See *Doe*, 15 F.3d at 267 (holding that *Whalen*'s privacy interests encompass a right to confidentiality in health information, and that this right protects against disclosure of one's HIV status).

112. See 515 U.S. 646, 656-57 (1995).

have not voluntarily engaged in a school activity that subjects them to increased regulation.<sup>113</sup> Second, the *Vernonia* decision considers the students' reduced privacy rights in regard to routine exams and procedures, not in relation to the diagnosis and treatment of a potentially fatal and socially stigmatizing disease.<sup>114</sup> Finally, the reporting requirement constitutes a much greater intrusion on a student's privacy than the urinalysis considered in *Vernonia* because it discloses the student's medical condition (i.e., that the student is HIV-positive), instead of revealing that a student ingested prohibited drugs.<sup>115</sup> Consequently, the reduced privacy expectation in *Vernonia* does not apply to the legitimate expectation of privacy that public school students have in their HIV/AIDS status.<sup>116</sup>

### 3. *South Carolina's Reporting Requirement: An Infringement Upon Public School Students' Right to Privacy in Personal Matters*

South Carolina's reporting requirement infringes upon both of the privacy interests that the *Whalen* decision recognized and the right to privacy in personal matters that the court protected.<sup>117</sup> According to the Supreme Court decisions in *Whalen* and *Nixon*, individuals have a constitutionally protected privacy interest in avoiding the disclosure of personal matters.<sup>118</sup> Personal matters encompass medical records and health conditions such as one's HIV status.<sup>119</sup> South Carolina's reporting requirement mandates the disclosure of students' HIV status to public

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113. *See id.* at 657 (holding that student athletes have a lesser privacy expectation than the general student population because they choose to participate in school-sponsored sports).

114. *See id.* at 656-57 (considering the lessened privacy interest in light of required physical exams, vaccinations, scoliosis screenings, and vision, hearing, and dental checks).

115. *See id.* at 658 (holding that there is a significant difference in the level of intrusion on students' right to privacy between medical tests that reveal drug use and those that reveal medical conditions such as pregnancy and diabetes).

116. *Cf. id.* at 656-58, 664 (upholding the requirement that student athletes undergo urinalyses because students have a lesser expectation of privacy in *routine medical exams and procedures* and the urinalysis *did not reveal any medical conditions* of the student) (emphasis added).

117. *See Whalen v. Roe*, 429 U.S. 598, 599-600 (1977) (citing the individual's interest in avoiding disclosure of personal matters and the interest in independently making certain important decisions as the two interests that constitute the right to privacy in personal matters).

118. *See id.* at 599 (defining the interest in avoiding non-disclosure of personal matters as one of two interests encompassed in the right to privacy); *see also Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 457 (1977) (affirming the appellant's privacy interest in non-disclosure of personal matters, including those related to family and finances).

119. *See Nixon*, 433 U.S. at 459 (protecting the non-disclosure of an individual's private communications with certain others, such as those between President Nixon and his physician).

school officials, requires that the DHEC individually identify students in this disclosure, and bars public school students from preventing the disclosure of their status.<sup>120</sup> Consequently, the reporting requirement seriously infringes upon the *Whalen*-recognized privacy interest in non-disclosure of personal matters.<sup>121</sup>

The disclosure mandated by the reporting requirement further infringes upon the second privacy interest protected under the right to privacy in personal matters: the interest in making independent personal decisions.<sup>122</sup> The maintenance of confidentiality in health care often determines whether adolescents seek medical advice and assistance.<sup>123</sup> Adolescents are especially unlikely to access health services, such as HIV testing, if they doubt that their health information will be kept confidential.<sup>124</sup> The reporting requirement will likely deter students from accessing HIV tests because it compromises the confidentiality of students' positive test results.<sup>125</sup> The requirement, therefore, fundamentally influences the students' choice in whether to undergo an HIV test.<sup>126</sup> In so doing, the reporting requirement infringes upon adolescents' privacy right in independently making personal health decisions in addition to their privacy right in non-disclosure of personal matters.<sup>127</sup> The *Nixon* privacy test therefore maintains that the reporting requirement can only pass constitutional muster if the state's interest in disclosure of students' HIV/AIDS status outweighs the students' interest in non-disclosure.<sup>128</sup>

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120. See S.C. CODE ANN. § 44-29-135(e) (2008) (stating that certain public school officials must be notified if a student in their district tests positive for HIV); see also S.C. CODE ANN. REGS. 61-21(H)(3)(a) (2008) (requiring that HIV-positive students' names, dates of birth, and addresses be provided in the report).

121. See *Doe v. City of New York*, 15 F.3d 264, 269 (2d Cir. 1994) (holding that non-consensual disclosure of the appellant's HIV status infringed upon his right to privacy under *Whalen*).

122. See *Whalen*, 429 U.S. at 600 (establishing the interest in independence in making important personal decisions as one of two privacy interests encompassed in the right to privacy).

123. See *Hartman*, *supra* note 26, at 289-90 (arguing that confidentiality is a chief concern in adolescent care because privacy doubts deter youths from accessing health services).

124. See *id.* (emphasizing that physicians cannot encourage HIV testing of adolescents when confidentiality fears prevent adolescents from being candid with their doctors or from accessing treatment altogether).

125. See § 44-29-135(e) (undermining physician-patient confidentiality in adolescent health care by requiring that HIV status be reported to school officials).

126. See *Hartman*, *supra* note 26, at 286 (describing how reporting requirements such as mandatory parental notification potentially discourage adolescents from accessing HIV testing and treatment).

127. Cf. *Whalen*, 429 U.S. at 603 (noting that the prescription reporting requirement in the case at bar did impinge upon the decision of some patients to access medication but did not rise to the level of a constitutional violation because thousands of people were still filling their prescriptions).

128. See *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 465 (1977) (upholding the

*B. In Applying the Nixon Balancing Test, Courts Should Grant Significant Weight to Students' Interest in Non-Disclosure of Their HIV Status, and They Should Use the Westinghouse Factors to Weigh This Interest Against the State's Interest in Disclosure*

*1. The Significant Weight of the Privacy Interest in Non-Disclosure of HIV Status*

The constitutional right to privacy in personal matters differs from other Court-recognized privacy rights in two ways: first, the Court has not explicitly held that privacy in personal matters is a fundamental right, and second, the Court applies a balancing test instead of a strict scrutiny standard.<sup>129</sup> Some courts interpret these differences as mandating lesser constitutional protection for privacy interests in "personal matters."<sup>130</sup> However, this interpretation is overbroad because the distinctive analysis for privacy in personal matters determines the strength of protection vis-à-vis the specific privacy interest asserted.<sup>131</sup> While some privacy interests may warrant a minimal level of constitutional protection, other interests, such as the interest in maintaining the confidentiality of one's HIV status, necessitate heightened constitutional protection.<sup>132</sup>

The privacy interest in non-disclosure of one's HIV status requires heightened constitutional protection and should be afforded significant weight in the personal matters analysis because it implicates many of the same concerns that caused the Supreme Court to deem other privacy interests fundamental rights.<sup>133</sup> For example, disclosure of one's HIV

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the Presidential Recordings and Materials Preservation Act because the public interest in disclosing the presidential communications outweighed the individual privacy interest in the personal materials contained therein).

129. Compare *Griswold v. Connecticut*, 381 U.S. 479, 485-86 (1965) (finding a fundamental right to privacy in marriage and voiding a law forbidding the use of contraception because the law was not narrowly drawn), with *Nixon*, 433 U.S. at 465 (balancing a legitimate expectation of privacy in personal communications against the state's interest in disclosing the communications).

130. See, e.g., *Jarvis v. Wellman*, 52 F.3d 125, 126 (6th Cir. 1995) (holding that disclosure of an inmate's medical records was not an unconstitutional violation of a fundamental right).

131. See *Nixon*, 433 U.S. at 465 (holding the expectation of privacy in the communications to be weak because of the appellant's status as a public figure and because the communications contained few private materials).

132. See *Woods v. White*, 689 F. Supp. 874, 876 (W.D. Wis. 1988), *aff'd*, 899 F.2d 17 (7th Cir. 1990) (discussing *Westinghouse* and noting that medical information, especially HIV status, requires increased protection and differential treatment due to its personal nature).

133. Compare *Roe v. Wade*, 410 U.S. 113, 153 (1973) (recognizing that the fundamental right to privacy encompasses abortion in part because of the psychological harm and stigma imposed by an unwanted pregnancy), with *Hilton*, *supra* note 1, at 13-14 (describing the emotional toll of HIV-related stigmatization).

status bears consequences similar to the consequences of denying a woman her fundamental privacy right to terminate her pregnancy.<sup>134</sup> In determining that the right of personal privacy includes the abortion decision, the Court in *Roe v. Wade* gave considerable weight to the harmful personal effects of an unwanted pregnancy, such as present and future personal distress, psychological harm, and the continuing stigmatization suffered by unwed mothers.<sup>135</sup>

The stories of Crystal Hilton and other HIV-positive adolescents illustrate how the same harms may arise in relation to the disclosure of HIV status.<sup>136</sup> Just as women facing unwanted pregnancy suffer the effects described by the *Roe* Court, HIV-positive students whose status is disclosed suffer extreme social stigmatization that results in fear, depression, and decreased self-esteem.<sup>137</sup> Disclosure may even result in discrimination that jeopardizes students' future education.<sup>138</sup> Students' privacy interest in maintaining the confidentiality of their HIV status should therefore command significant weight when balanced against the state interest in disclosure under the *Nixon* test.<sup>139</sup>

## 2. *The Westinghouse Factors: A Comprehensive Framework for Balancing Student and State Interests*

The *Westinghouse* factors provide the best framework for weighing the privacy interests of HIV-positive students against the public health interests of the state.<sup>140</sup> A balance of these interests should consider the *Westinghouse* factors because neither the Supreme Court nor the Fourth

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134. See *Roe*, 410 U.S. at 153 (noting the ongoing social stigma that surrounds single motherhood).

135. See *id.* at 153-54 (describing the detrimental effects of denying a woman an abortion and concluding that these effects require recognition that the privacy right includes abortion).

136. See, e.g., Hilton, *supra* note 1, at 12-14 (describing how public disclosure of Crystal's HIV status exposed her to extensive stigmatization and discrimination, such as harassing, late night phone calls from classmates asking her "Do you really have AIDS?").

137. See, e.g., *id.* at 14 (explaining how harassment by other students caused Crystal to hate herself and to fear going to school).

138. See, e.g., *id.* at 13 (detailing Crystal and her grandmother's suspicion that fear of her HIV status led school officials to expel Crystal from school).

139. See *Nixon v. Adm'r of Gen. Servs.*, 433 U.S. 425, 458-59 (1977) (granting the asserted privacy interest less weight because it was weaker than interests asserted in prior cases).

140. See *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980) (articulating seven factors in finding that disclosure of employee medical records did not violate the right to privacy); see also Kevin M. Kramer, Comment, *A National Epidemic, A National Conversation, A National Law: In Support of Unique Identifier Reporting for HIV Surveillance*, 16 J. CONTEMP. HEALTH L. & POL'Y 173, 196 (1999) (emphasizing the factors' applicability in potential litigation arising from HIV surveillance methods).

Circuit have defined a comprehensive framework for analyzing interests that implicate the right to privacy in personal matters.<sup>141</sup> Furthermore, the *Westinghouse* factors essentially encompass the scattered considerations articulated in various Fourth Circuit privacy decisions.<sup>142</sup> The factors additionally constitute the most inclusive list of balancing factors relevant to informational privacy, and they prove particularly useful in analyzing whether HIV reporting requirements unconstitutionally infringe upon the right to privacy in personal matters.<sup>143</sup>

*C. South Carolina's Reporting Requirement Unconstitutionally Violates Students' Right to Privacy in Non-Disclosure of Their HIV Status Because the Privacy Interest of Students Outweighs the Public Health Interest of the State*

Performing the second part of the *Nixon* right to privacy analysis on South Carolina's reporting requirement requires the balancing of two competing, legally-recognized interests: the student's interest in the confidentiality of her HIV status, as encompassed by the right to privacy in personal matters, weighed against the state's interest in protecting the health and safety of public school students by preventing the spread of communicable diseases.<sup>144</sup> An application of the *Westinghouse* balancing test factors to these interests reveals that public school students' privacy interests significantly outweigh South Carolina's public health interest.<sup>145</sup>

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141. See *Whalen v. Roe*, 429 U.S. 589, 605-06 (1977) (limiting its holding to reporting schemes that use similar security measures to those used by New York); see also *Ferguson v. City of Charleston*, 186 F.3d 469, 482-83 (4th Cir. 1999), *rev'd on other grounds*, 532 U.S. 67 (2001) (considering only the number of disclosures in holding that if there is a right to non-disclosure of medical records, the right was not violated).

142. Compare *Westinghouse Elec. Corp.*, 638 F.2d at 578 (describing seven deciding factors for consideration in the privacy balancing test), with *Greenville Women's Clinic v. Comm'r, S.C. Dep't of Health & Envtl. Control*, 317 F.3d 357, 369 (4th Cir. 2002) (establishing the nature of information and necessity of disclosure as factors in the right to privacy analysis), *Watson v. Lowcountry Red Cross*, 974 F.2d 482, 487 (4th Cir. 1992) (holding that the AIDS stigma lends more weight to an individual's privacy interest), *Walls v. City of Petersburg*, 895 F.2d 188, 194 (4th Cir. 1990) (considering the possibility of unauthorized disclosure and the adequacy of safeguards), and *Taylor v. Best*, 746 F.2d 220, 225 (4th Cir. 1984) (holding that a prison psychologist's promise of confidentiality weakens the plaintiff's claim that answering questions about his family history violates his right to privacy).

143. See, e.g., *Kamm*, *supra* note 62, at 564-65 (emphasizing the applicability of the *Westinghouse* analysis to potential HIV privacy cases because of its comprehensiveness).

144. See *Jacobson v. Massachusetts*, 197 U.S. 11, 24-25 (1904) (affirming the state interest in promoting public health by preventing the spread of smallpox); see also *Whalen*, 429 U.S. at 599-600 (recognizing the individual privacy interests in avoiding disclosure of personal matters).

145. See *Walls*, 895 F.2d at 192 (explaining that even where the government has compelling interests for restricting a privacy right, the individual prevails if his interest outweighs the government's interest).

Consequently, courts must hold that South Carolina's reporting requirement unconstitutionally infringes upon public school students' constitutional right to privacy in their personal matters.<sup>146</sup>

*1. Factors One and Two: The Type of Record Requested and the Information the Record Does or Might Contain*

The reporting requirement compels the DHEC to disclose an individually identifiable medical record that reveals a student's HIV status to public school authorities.<sup>147</sup> In general, medical records such as this garner more weight than other kinds of personal information because one has a strong expectation of privacy in information related to one's health.<sup>148</sup> This expectation stems from the legal confidentiality normally granted to medical information and the personal nature of the information that a medical record contains.<sup>149</sup> Consequently, courts often treat disclosure of medical information as more serious than disclosure of other types of personal information.<sup>150</sup> The inclusion of information that allows the subject of the medical information to be personally and individually identified compounds the seriousness of disclosing this type of record, and in addition, the Supreme Court has preferred laws protecting anonymity when analyzing whether reporting requirements unconstitutionally infringe upon the constitutional right to privacy.<sup>151</sup>

Classifying a student's HIV status as an individually identifiable medical record establishes the student's legitimate expectation of privacy in the information; however, it does not render the information impermeable to

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146. See *id.* (upholding a questionnaire because the city's interest in performing background checks outweighed the employee's interest in non-disclosure of personal and financial data).

147. See S.C. CODE ANN. § 44-29-135(e) (2008) (requiring the DHEC to notify school officials if a minor student tests positive for HIV/AIDS); see also S.C. CODE ANN. REGS. 61-21(H)(3)(a) (2008) (stating that the DHEC must provide the officials with the name, birth date, address, and medical status of the HIV-positive minor).

148. See, e.g., *Alexander v. Peffer*, 993 F.2d 1348, 1350-51 (8th Cir. 1993) (ruling that circulating nude photos of an inmate's wife did not violate his constitutional right to privacy in personal matters and highlighting that the disclosure involved neither highly personal medical nor financial information).

149. See *Davis*, *supra* note 97, at 545 (explaining how the federal government responded to social concerns about the confidentiality of medical information by passing and implementing HIPAA).

150. See, e.g., *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 577 (3d Cir. 1980) (citing the increased burden for discovery of medical information imposed by the Federal Rules of Civil Procedure and the exemption of medical records from the Freedom of Information Act to corroborate the court's assertion that personal medical information garners greater protection than other information).

151. See, e.g., *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 900-01 (1992) (upholding a statute that required abortion agencies to report anonymous patient information, such as patients' ages, because the statute did not unreasonably violate patient privacy).

constitutional disclosure because states retain the power to infringe reasonably upon privacy rights.<sup>152</sup> The weight given to a medical record ultimately turns on the second factor of the *Westinghouse* test: the information the record does or might contain.<sup>153</sup>

The second *Westinghouse* factor favors the students' privacy interest because data confirming one's HIV-positive status is of a more sensitive and personal nature than the medical information considered in the *Westinghouse* decision.<sup>154</sup> In *Westinghouse*, there was no evidence that the medical information at issue contained anything more than routine medical test results.<sup>155</sup> The appellee failed to show that the information at issue was of a highly sensitive or personal nature.<sup>156</sup> Comparably, the HIV test results disclosed in compliance with South Carolina's reporting requirement divulge that a potentially fatal and unquestionably stigmatizing disease infects a student attending the school.<sup>157</sup> The highly sensitive nature of this information is court-recognized and commonly understood.<sup>158</sup> Since the information at issue is not only a medical record, but an individually identifiable medical record of a highly personal nature, the first and second factors of the *Westinghouse* test require that courts accord significant weight to students' privacy interest in the non-disclosure of their HIV status.<sup>159</sup>

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152. See, e.g., *Whalen v. Roe*, 429 U.S. 589, 599, 606-07 (1977) (recognizing that appellants have a privacy interest in individually identifiable prescription information but upholding a statute that mandated the reporting of this information).

153. See *Norman-Bloodsaw v. Lawrence Berkeley Lab.*, 135 F.3d 1260, 1269 (9th Cir. 1998) (determining that results from unauthorized medical tests for syphilis and pregnancy bear greater weight in a privacy balancing test due to the nature of the data).

154. Compare *Westinghouse Elec. Corp.*, 638 F.2d at 580 (holding that the government interest in disclosure of employee medical records outweighed the employee's interest where the information in the records was not highly personal), with *Doe v. Delie*, 257 F.3d 309, 331 (3d Cir. 2001) (Nygaard, J., concurring and dissenting) (describing the circuit's use of *Westinghouse* to affirm the right to privacy in medical records and acknowledging that the medical privacy of individuals with HIV garners heightened protection).

155. See *Westinghouse Elec. Corp.*, 638 F.2d at 579 (explaining that the employees' medical records contained results from routine X-rays, blood tests, audio, and visual tests that were not particularly sensitive).

156. See *id.*

157. See generally LISANNE BROWN ET AL., INTERVENTIONS TO REDUCE HIV/AIDS STIGMA: WHAT HAVE WE LEARNED? 4-5 (2001) (describing the widespread fear, stigmatization, and hostility associated with HIV/AIDS).

158. See, e.g., *Delie*, 257 F.3d at 331 (Nygaard, J., concurring and dissenting) (noting the special importance in protecting the medical privacy of HIV-positive persons because they often face discrimination and violence).

159. Cf. *Westinghouse Elec. Corp.*, 638 F.3d at 579 (giving little weight to the information contained in employee medical records because the information was not of a sensitive nature).

## 2. Factor Three: The Potential for Harm in Any Subsequent Nonconsensual Disclosures

The inadvertent or purposeful disclosure of a student's HIV-positive status to other individuals likely carries extremely harmful consequences for the HIV-positive student.<sup>160</sup> People who are HIV-positive often encounter stigmatization or discrimination due to their status.<sup>161</sup> The stigma arises from the common association of HIV/AIDS with homosexuality, prostitution, intravenous drug use, and reckless sexual behavior, and this association often intensifies the stigmatization suffered by individuals living with HIV/AIDS.<sup>162</sup>

An HIV-positive child whose status is made public will often be marginalized, bullied, and ridiculed due to the stigma attached to HIV, and this treatment could escalate to more dangerous forms of violence and abuse.<sup>163</sup> Additionally, he or she may be discouraged, if not outright prohibited, from participating in certain activities, especially if other individuals fear infection through casual contact.<sup>164</sup> Peers may further stigmatize and fear the HIV-positive child if the child is injured, and others may treat the injury with a heightened sense of caution or alarm.<sup>165</sup> Such treatment could adversely affect the child's self-esteem, social skills, and ability to learn.<sup>166</sup> Considering the high potential for harm if disclosure of a student's HIV status occurs, this *Westinghouse* factor clearly weighs in favor of upholding the privacy interests of students against the state interest

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160. See *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (recognizing that it is especially important for HIV-positive individuals to control the disclosure of their status due to the negative social attitudes directed towards them).

161. See *BROWN ET AL.*, *supra* note 157, at 1-2 (noting the ubiquitous nature and international prevalence of the AIDS stigma).

162. See *id.* at 4 (describing how HIV/AIDS stigma is compounded by other stigmas associated with groups of people whose behavior is viewed as rendering them at risk for HIV infection).

163. See, e.g., *Delie*, 257 F.3d at 331 (Nygaard, J., concurring and dissenting) (discussing how the discrimination and violence experienced by individuals with HIV led the Third Circuit to recognize a heightened interest in HIV patients' medical privacy).

164. See *JONES*, *supra* note 4, at 19 (recounting how one child refused to hold the hand of a classmate who was HIV-positive during a game of Duck-Duck-Goose).

165. See *id.* at 8 (describing how school personnel inadvertently singled out an HIV-positive student by using latex gloves to treat her injuries but not those of other children); see also 29 C.F.R. § 1910.1030(d)(1), (3) (2008) (highlighting the need for using safety measures, such as wearing latex gloves, in every situation where there is a risk of exposure to blood or bodily fluids because proper safety standards require that all such fluids be considered potentially infectious).

166. See *Hilton*, *supra* note 1, at 14 (explaining how her experience with HIV/AIDS stigma at school caused her to fear school, become depressed, and suffer long-term shame).

in disclosing their HIV status to public school officials.<sup>167</sup>

### 3. *Factor Four: The Injury from Disclosure to the Relationship in which the Record Was Generated*

A doctor-patient relationship generates the medical record that is mandatorily disclosed under the reporting requirement.<sup>168</sup> This relationship may be significantly inhibited if minors learn that the doctor must report positive HIV test results to the DHEC, which will then report this information to officials at their schools.<sup>169</sup> The minor adolescent may refrain from entering a doctor-patient relationship in the first place because the confidentiality of the resulting medical information (i.e., the adolescent's HIV test results) cannot be guaranteed.<sup>170</sup> Alternatively, an adolescent who does enter a doctor-patient relationship seeking sexual health care may refuse to heed a doctor's recommendation for HIV testing if the adolescent knows that the results cannot be kept confidential by the doctor.<sup>171</sup> The doctor and patient would therefore lose the important opportunity for detection and treatment of HIV.<sup>172</sup>

The reporting requirement may also prove injurious to adolescents already engaging in doctor-patient relationships.<sup>173</sup> Adolescents are likely to avoid doctor recommendations for HIV testing altogether by lying to their doctors about their risk for HIV infection.<sup>174</sup> This lack of candor jeopardizes the doctor's ability to provide well-informed health care for

167. *Cf.* United States v. Westinghouse Elec. Corp., 638 F.2d 570, 579 (3d Cir. 1980) (giving less weight to the privacy interests of employees because there was no evidence that they would suffer adverse consequences from the required disclosure of their medical records to government personnel).

168. *See* S.C. CODE ANN. REGS. 61-21(C)(1), (H)(3)(a) (2008) (requiring physicians and other health professionals to report the identities of patients who test positive for STDs to the DHEC and obliging the DHEC to report the identities of minor public school students with HIV/AIDS to school officials).

169. *See* AIDS ALLIANCE FOR CHILDREN, *supra* note 28, at 16 (recommending strict privacy and informed consent policies when engaging HIV-positive youths because effective programs require participants' trust).

170. *See* Hartman, *supra* note 26, at 289 (explaining how doubts about confidentiality deter youths from seeking sexual health care).

171. *See* Yvonne Wenger, *House to Debate AIDS, HIV Bill*, CHARLESTON POST & COURIER, Apr. 13, 2008, at B1 (reporting that the deterrent effect of the reporting requirement galvanized legislative efforts to eliminate the law).

172. *See* Hartman, *supra* note 26, at 289 (explaining that adolescent hesitance to access HIV tests is especially dangerous because early detection and treatment are essential in prolonging the survival of HIV-positive individuals and curbing the spread of infection).

173. *See id.* (describing how privacy and confidentiality form the foundation of an effective doctor-patient relationship).

174. *See id.* at 289-90 (detailing the tendency of adolescents to censor the information they provide to their doctors if they doubt that the communication will be kept confidential).

young patients and prevents adolescents from receiving treatment for dangerous diseases.<sup>175</sup> Due to the high probability of impairment to potential and existing relationships between doctors and adolescent patients, the fourth factor of the *Westinghouse* analysis also weighs in favor of the students' interest in non-disclosure of their HIV test results.<sup>176</sup>

#### 4. Factor Five: The Adequacy of Safeguards to Prevent Unauthorized Disclosure

The safeguards instituted by the South Carolina reporting requirement and its implementing regulations do not adequately prevent unauthorized disclosure of students' HIV status.<sup>177</sup> The state law provides some security insofar as it requires school personnel to keep students' HIV status strictly confidential, and a person who violates this confidentiality is subject to criminal and civil penalties.<sup>178</sup> However, these safeguards do not sufficiently protect against disclosure because they fail to mandate a secure procedure for maintaining students' status information in a confidential manner.<sup>179</sup> Criminal and civil penalties provide a strong disincentive for purposeful disclosure by an individual; however, they fail to guard against the inadvertent disclosure and illicit access that may result if the records containing students' medical information are improperly secured.<sup>180</sup>

The reporting requirement and its implementing regulations fall significantly short of the safety standards established in *Whalen v. Roe* because of their complete failure to delineate security standards for the maintenance of student records.<sup>181</sup> Unlike the New York statute upheld in *Whalen*, South Carolina's laws do not compel school officials to provide

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175. See AIDS ALLIANCE FOR CHILDREN, *supra* note 28, at 16 (explaining that youths are more likely to disclose risky behavior, such as sexual conduct and substance abuse, when confidentiality is assured).

176. Cf. *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 579 (3d Cir. 1980) (upholding the disclosure of employee medical records in part because the disclosure did not significantly undermine the employer-employee relationship).

177. See *Whalen v. Roe*, 429 U.S. 589, 605-06 (1977) (highlighting the state's duty to physically secure the records it collects).

178. See S.C. CODE ANN. REGS. 61-21(G)(3) (2008); see also S.C. CODE ANN. §§ 44-1-150, 44-29-140 (2008) (establishing that breaches of confidentiality by public school personnel may constitute a misdemeanor punishable by a fine up to \$200, imprisonment up to thirty days, or a civil penalty).

179. See 61-21(G) (requiring that DHEC and public school personnel keep students' HIV status strictly confidential without creating guidelines for securing records that contain this information).

180. See 61-21(H)(2) (penalizing personnel breaches of confidentiality without addressing the inadvertent breaches that may result from unsecured student medical records).

181. See 429 U.S. at 605 (upholding the reporting requirement because its implementing procedures mandate specific security measures made to prevent unauthorized record access).

heightened security for the highly sensitive, personally identifiable information disclosed in accordance with the reporting requirement, nor do the laws specify procedures for restricting unauthorized access to this information.<sup>182</sup> This lack of security protocol renders the students' HIV status information susceptible to unlawful disclosure or access, and as a result, this factor of the *Westinghouse* test weighs against the state interest in the disclosure of minor students' HIV status to public school officials.<sup>183</sup>

##### 5. Factor Six: The Degree of Need for Access

The use of universal precautions eliminates the need to grant public school officials access to students' HIV status information.<sup>184</sup> The CDC and the U.S. Occupational Safety and Health Administration ("OSHA") promote universal precautions as the most effective means of preventing the spread of blood-borne pathogens in institutional settings.<sup>185</sup> Universal precautions prevent the spread of blood-borne pathogens without requiring prior knowledge of infection because the measures simply presume that all blood or bodily fluids present a risk of transferring contagious pathogens.<sup>186</sup> This presumption mandates the use of protective measures every time a situation poses a risk of exposure to bodily fluids.<sup>187</sup> Since persons using universal precautions treat all exposure risks with the utmost care, they do not differentiate between treatment of persons who are HIV-positive, persons who are HIV-negative, and persons whose HIV status is unknown.<sup>188</sup> Knowledge of a person's HIV status is therefore inconsequential in implementing the CDC and OSHA recommended public safety measures.<sup>189</sup>

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182. *See id.* at 593-94 (describing the numerous security measures implemented to secure the information at issue in *Whalen*, including an alarm system and locked wire fence protecting the room containing the records, locks on the filing cabinets, and statutorily mandated record destruction after five years).

183. *Cf. id.* at 606 (weighing the statutory safeguards in favor of the state because they provided the medical records with highly sufficient protection against unauthorized disclosure).

184. *See, e.g.*, 29 C.F.R. § 1910.1030(b) (2008) (defining "universal precautions" as an infection control approach based on the concept that one treats all blood and certain bodily fluids as if one knows that a pathogen infects the fluids).

185. *See id.* §§ 1910.1030(c)(1)(i), (d)(1) (requiring all employers whose employees risk occupational exposure to mandate the use of universal precautions).

186. *See id.* § 1910.1030(b) (asserting this presumption since the infection status of bodily fluids is often unknown).

187. *See id.* § 1910.1030(d)(3)(i), (ii), (ix) (requiring the provision and use of personal protective equipment such as latex gloves and the use of disinfectants whenever one can reasonably anticipate exposure).

188. *See id.* § 1910.1030(d)(1) (mandating the use of universal precautions whenever there is a risk of exposure to blood or other potentially infectious materials).

189. *See id.* (compelling employers to implement an Exposure Control Plan that entails the use of universal precautions in all situations that present an exposure risk).

Universal precautions do not address situations where exposure to blood or bodily fluids is not preventable, and South Carolina may argue that public school officials need to know that a student is HIV-positive in case of accidental exposure to the student's blood or bodily fluids.<sup>190</sup> The reporting requirement is still unnecessary, however, because South Carolina law provides for post-exposure notification by the DHEC.<sup>191</sup> If a dangerous exposure were to occur, the DHEC may release a student's positive HIV test result to a school nurse or physician in order to protect the health of the person exposed to the risk.<sup>192</sup> Furthermore, doctors may prescribe post-exposure prophylaxis in cases of dangerous exposure, independent of whether the doctor knows the infection status of the blood or bodily fluid.<sup>193</sup> These post-exposure options, paired with the use of universal precautions, negate the need for notifying school officials when a student tests positive for HIV/AIDS.<sup>194</sup>

The lack of necessity for the reporting requirement, although weighing in favor of invalidating the law, does not automatically render the law unconstitutional.<sup>195</sup> Unnecessary legislation does not equate to unconstitutional legislation, and the *Whalen* decision expressly forbids courts to declare legislation unconstitutional solely because it lacks absolute necessity.<sup>196</sup> The decision instead obliges courts to consider the rationality of the legislation in light of the law's purpose, and the *Westinghouse* balancing test reiterates the need for this reasonableness

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190. See, e.g., *id.* § 1910.1030(d)(3)(ii), (ix) (mandating that the employee use "professional judgment" to determine when exposure to blood or bodily fluids is not preventable and to use gloves when one can "reasonably anticipate" contact with bodily fluids).

191. See S.C. CODE ANN. § 44-29-135(d) (2008) (permitting the DHEC to disclose confidential STD records to medical personnel if the disclosure is necessary to protect any person's health or life).

192. See *id.* (providing exceptions to the requirement that the DHEC keep STD records strictly confidential).

193. See, e.g., CTRS. FOR DISEASE CONTROL & PREVENTION, EXPOSURE TO BLOOD: WHAT HEALTHCARE PERSONNEL NEED TO KNOW 4-6 (2003), available at [http://www.cdc.gov/ncidod/dhqp/pdf/bbp/exp\\_to\\_blood.pdf](http://www.cdc.gov/ncidod/dhqp/pdf/bbp/exp_to_blood.pdf) (explaining the protocol for treating high-risk occupational exposures when the source or status of the bodily fluid is unknown).

194. See Wenger, *supra* note 171 (detailing the process used when a student comes into contact with another's blood, and noting that introduced legislation removing the reporting requirement would have no impact on the safety procedures already used in schools).

195. See *Whalen v. Roe*, 429 U.S. 589, 596-97 (1977) (dismissing the district court's finding that New York's reporting requirement was unnecessary and therefore unconstitutional and instead considering whether the law was reasonable because states need legislative flexibility to address local problems).

196. See *id.* (highlighting how the Court has overruled the necessity doctrine promulgated in earlier cases).

inquiry.<sup>197</sup> The Court-mandated reasonableness analysis requires a consideration of the seventh *Westinghouse* factor: the express public policy compelling South Carolina to retain the reporting requirement.<sup>198</sup>

*6. Factor Seven: The Express Statutory Mandate, Public Policy, or Recognizable Public Interest Militating Toward Access*

The governor's rationale for retaining the reporting requirement asserts that knowledge of a student's HIV/AIDS status increases the health and safety of students and personnel in public schools.<sup>199</sup> Courts recognize the promotion of public health and safety as a legitimate state interest, yet the *Whalen* and *Westinghouse* decisions require the reporting requirement to be a reasonable means for realizing these interests.<sup>200</sup> The governor does not explain his logic for retaining the reporting requirement in the interest of health and safety, but his rationale implicitly suggests that a school will institute heightened safety measures to manage risks of exposure to the blood or bodily fluids of a child who has HIV or AIDS.<sup>201</sup> These elevated safety measures presumably improve the overall health and safety of school students and staff, and therefore further the state interest in promoting public health and safety.<sup>202</sup>

The reasonableness of this justification for the reporting requirement fails, however, because school officials cannot actually use a student's HIV status information to improve health and safety standards in the school.<sup>203</sup>

197. See *id.* at 597-98 (finding that the state reasonably anticipated the prescription reporting requirement to minimize illicit use of legal drugs because the law resulted from an extensive legislative process and considered the effectiveness of similar programs in other states); see also *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 575 (3d Cir. 1980) (holding that the appellee's request for the appellant's employee medical records was reasonably relevant to the appellee's statutory authority to evaluate occupational health hazards).

198. See *Whalen*, 429 U.S. at 597-98 (determining the reasonableness of the prescription drug reporting requirement on the basis of its anticipated relevance to the state's goal of reducing the illegal use of prescription medications).

199. See 88 S.C. S. JOUR., 2008 Reg. Sess. (June 25, 2008) (vetoing the bill repealing the reporting requirement because eliminating notification undermines the health and safety of all students).

200. See, e.g., *Westinghouse Elec. Corp.*, 638 F.2d at 572, 575 (recognizing the important state interest in health and safety but requiring that the mandated disclosure be reasonably relevant to the agency's authority to realize that interest).

201. See 88 S.C. S. JOUR., 2008 Reg. Sess. (acknowledging that federal law prohibits subsequent disclosure of students' HIV status, but maintaining that eliminating the reporting requirement undermines officials' ability to preserve the health and safety of students).

202. See *id.* (asserting that the notification requirement should be expanded to include other contagious, blood-borne diseases in order to further protect the health and safety of students).

203. See *Wenger*, *supra* note 171 (explaining that the prohibition against subsequent disclosure of a student's HIV status renders the information useless in influencing safety procedures).

In addition to the strict confidentiality required under South Carolina law, the federal Family Educational Rights and Privacy Act ("FERPA") prohibits the release of a student's personally identifiable information to other school officials, including teachers, unless the officials have a legitimate *educational* interest in the information.<sup>204</sup> FERPA does not allow school officials to disclose the HIV status of a student for the promotion of general health and safety.<sup>205</sup> Furthermore, the ADA, as interpreted in *Bragdon*, protects HIV-positive students against differential treatment unless the school shows that the student poses a "direct threat" to others.<sup>206</sup> Since casual contact does not spread HIV/AIDS, HIV-positive students simply do not pose a direct threat to health and safety in a school setting.<sup>207</sup> Consequently, South Carolina's reporting requirement proves unreasonable because state and federal privacy law renders individually identifiable information regarding a student's HIV/AIDS status essentially useless in promoting health and safety in schools.<sup>208</sup>

The governor's rationale also proves dangerously faulty because it undermines the essential presumption of universal precautions.<sup>209</sup> Universal precautions presume danger and mandate utmost care in all situations involving an exposure risk, while the governor's implicit suggestion of heightened safety for HIV-positive students presumes danger and mandates utmost care only when one knows that a person is infected with HIV/AIDS.<sup>210</sup> Employing heightened safety measures only in cases of known HIV/AIDS infection assumes that a student's blood or bodily fluids do not pose a risk if the DHEC has not reported the student as HIV-positive.<sup>211</sup> This mistaken assumption fails to consider two points: first,

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204. See 20 U.S.C. § 1232g(b)(1)(A) (2006) (refusing to fund schools that release students' personally identifiable information to personnel without parents' written consent unless there is a legitimate educational interest in disclosure).

205. See *id.* (restricting the exception solely to legitimate educational interests). *But see* 20 U.S.C. § 1232g(b)(1)(I) (allowing for the release of information in individualized health or safety emergencies, subject to further regulation).

206. See *Bragdon v. Abbott*, 524 U.S. 624, 655 (1998) (holding that a woman's HIV infection constitutes a disability, but remanding to determine whether it posed a direct threat to her dentist).

207. See *JONES*, *supra* note 4, at 37 (recommending HIV/AIDS education to children that stresses the importance of not touching other students' blood while also explaining that "you can't get AIDS by being a friend").

208. See *id.* at 36-37 (explaining that FERPA generally binds school officials to respect the privacy of HIV-positive students and to uphold the confidentiality of the students' health records).

209. See 88 S.C. S. JOUR., 2008 Reg. Sess. (June 25, 2008) (suggesting that notification of students' HIV status allows schools to better ensure the health and safety of students).

210. See *id.* (maintaining that the reporting requirement increases safety and health at schools despite federal prohibitions on subsequent disclosure of students' HIV/AIDS status).

211. See *Wenger*, *supra* note 171 (highlighting the necessity of universal

many students have not received HIV tests, so some students are infected but unreported, and second, bodily fluids may contain other dangerous, contagious pathogens besides HIV.<sup>212</sup> The reporting requirement therefore creates a false sense of security regarding the safety of students' blood and bodily fluids, and actually jeopardizes students and school personnel rather than promoting the health and safety of public schools.<sup>213</sup>

The reporting requirement further jeopardizes the health and safety of students by deterring adolescents from receiving HIV tests.<sup>214</sup> Routine HIV testing constitutes a critical element of combating the HIV/AIDS crisis currently gripping the United States.<sup>215</sup> Adolescents informed of the disclosure of positive HIV test results to their schools refrain from accessing HIV tests because they legitimately fear confidentiality breaches, stigma, and discrimination.<sup>216</sup> Consequently, many adolescents remain ignorant of their HIV status.<sup>217</sup> This ignorance jeopardizes their own health and renders them likely to unwittingly spread HIV to their sexual partners.<sup>218</sup> Therefore, the reporting requirement ultimately undermines the health and safety of school students.<sup>219</sup> In doing so, it fails to meet the *Whalen* and *Westinghouse* reasonableness standards.<sup>220</sup>

#### IV. CONCLUSION

South Carolina's reporting requirement violates HIV-positive students' right to non-disclosure of their HIV status, as encompassed by the

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precautions because schools do not know of every student who has HIV/AIDS, despite the reporting requirement).

212. See 29 C.F.R. § 1910.1030(b) (2008) (mandating a presumption of risk in all situations because the infection status of bodily fluids is often unknown and noting that blood-borne pathogens include HIV, Hepatitis B, and other diseases).

213. See *id.* § 1910.1030(d)(1) (requiring the use of universal precautions as the primary means of preventing contact with potentially infectious materials).

214. See, e.g., Hartman, *supra* note 26, at 289 (explaining that adolescents are less likely to access health care, especially HIV testing, if they doubt confidentiality).

215. See BRANSON ET AL., *supra* note 22, at 4 (recommending routine HIV testing for adolescents and adults).

216. See AIDS ALLIANCE FOR CHILDREN, *supra* note 28, at 16 (explaining that awareness of HIV stigma and discrimination renders youths wary of using services that do not guarantee confidentiality).

217. See Hartman, *supra* note 26, at 285 (noting that adolescent HIV infection rates are underestimated because so many adolescents fail to access HIV tests).

218. See BRANSON ET AL., *supra* note 22, at 4 (reporting that HIV-positive individuals aware of their status are sixty-eight percent less likely to engage in unprotected sex than HIV-positive persons unaware of their status).

219. See Hartman, *supra* note 26, at 289-90 (describing how deterrence from testing results in delayed detection and treatment, as well as the increased spread of HIV).

220. See *Whalen v. Roe*, 429 U.S. 589, 597-98 (1977) (requiring the statute to reasonably advance the state interest in curbing illicit drug use before holding that it is constitutional).

constitutional right to privacy in personal matters.<sup>221</sup> The requirement violates students' privacy right because the students' strong interest in non-disclosure of their HIV statuses clearly outweighs South Carolina's interest in disclosure to public school officials.<sup>222</sup> An application of the *Nixon* balancing test employing the comprehensive *Westinghouse* factors reveals that all seven factors weigh in favor of granting constitutional protection to the students' interest: (1) the records at issue are personally identifiable and medical in nature, (2) the information in the records reveals HIV/AIDS status, which is especially personal and requires heightened protection, (3) nonconsensual disclosure and subsequent stigmatization create extreme personal hardship on students living with HIV/AIDS, (4) disclosure seriously undermines the adolescent-doctor relationship, (5) South Carolina regulations fail to properly safeguard student medical records, (6) universal precautions and post-exposure reporting eliminate school officials' need for access, and (7) the reporting requirement does not reasonably further the state's public health and safety goals.<sup>223</sup> A close examination of the reporting requirement's implications indicates that it actually jeopardizes the health and safety of students and school personnel instead of promoting this important interest.<sup>224</sup>

South Carolina has thus far failed to protect the rights and health of public school students by eliminating the reporting requirement.<sup>225</sup> The reporting requirement renders HIV-positive students, like Crystal Hilton, susceptible to nonconsensual disclosure of their status and widespread stigmatization.<sup>226</sup> Furthermore, the requirement deters adolescents from accessing HIV tests and undermines the use of universal precautions in schools.<sup>227</sup> Lawmakers therefore must renew their efforts to abolish the

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221. See *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994) (holding that the plaintiff has a constitutional right to privacy in the confidentiality of his HIV status under *Whalen*).

222. See *id.* (recognizing that HIV/AIDS status especially requires constitutional privacy protection because of the fatal nature and social stigma associated with the disease).

223. See *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 578 (3d Cir. 1980) (explaining that courts only allow state infringement on medical record privacy when an evaluation of these factors shows that the state interest in disclosure outweighs the privacy interest in non-disclosure).

224. See, e.g., Wenger, *supra* note 171 (stating that lawmakers sought to eliminate the requirement because of reports that it caused teens to refuse HIV tests).

225. See STATENET, *supra* note 48, at 1-2 (reporting that the legislature failed to override the governor's veto).

226. See, e.g., JONES, *supra* note 4, at 36 (explaining that non-consensual disclosure by school officials may cause rumors about an HIV-positive child to spread throughout her community).

227. See, e.g., AIDS ALLIANCE FOR CHILDREN, *supra* note 28, at 16 (highlighting how youths will not access HIV programs and services unless providers ensure confidentiality).

reporting requirement and replace it with the mandated use of universal precautions in public schools.<sup>228</sup> If South Carolina again proves unwilling to enact these important legislative changes, courts must invalidate the reporting requirement in the interest of protecting public school students' constitutional right to privacy in personal matters and promoting effective public health policy.<sup>229</sup> The health and safety of South Carolina's students depend on it.

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228. See Editorial, *Overtune Veto of HIV Test Bill*, THE STATE (Charleston, S.C.), June 25, 2008, at 4, available at <http://www.thestate.com/opinion/story/443005.html> (calling upon lawmakers to repeal the reporting requirement because it creates dangerous assumptions that unreported children are HIV negative).

229. See *Whalen v. Roe*, 429 U.S. 589, 600-04 (1977) (upholding New York's prescription reporting because it did not deter people from accessing medicine, extensive security measures protected the information, and it did not jeopardize patients' reputations).

