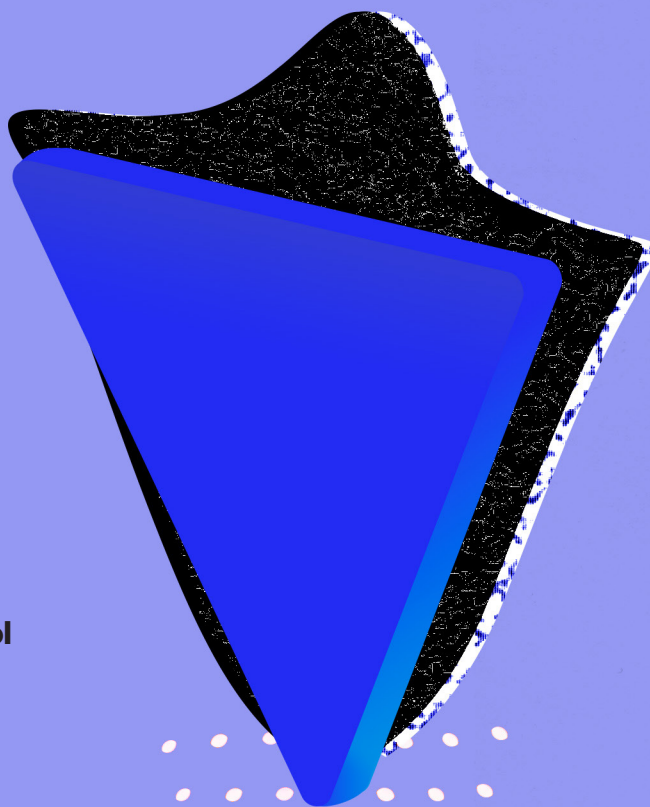


# Field Guide to Blocking Statutes

## Limiting Interstate Abortion Investigations

**Tech Accountability &  
Competition Project  
(TAC), Yale Law School**



**March 2023**

# Field Guide to Blocking Statutes: Limiting Interstate Abortion Investigations

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## Acknowledgements

This Field Guide was prepared by student participants in the Tech Accountability & Competition Project (TAC), a division of the Media Freedom & Information Access Clinic at the Yale Law School, at the request and under the direction of the Center for Democracy & Technology.

TAC, a student initiative now in its second year of operations, works to promote and enforce comprehensive legal regimes that require digital platforms and other tech companies to (1) reduce harms arising from their business models and practices; and (2) respect the rights of all people affected by their products and services.

**March 2023**

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# Introduction

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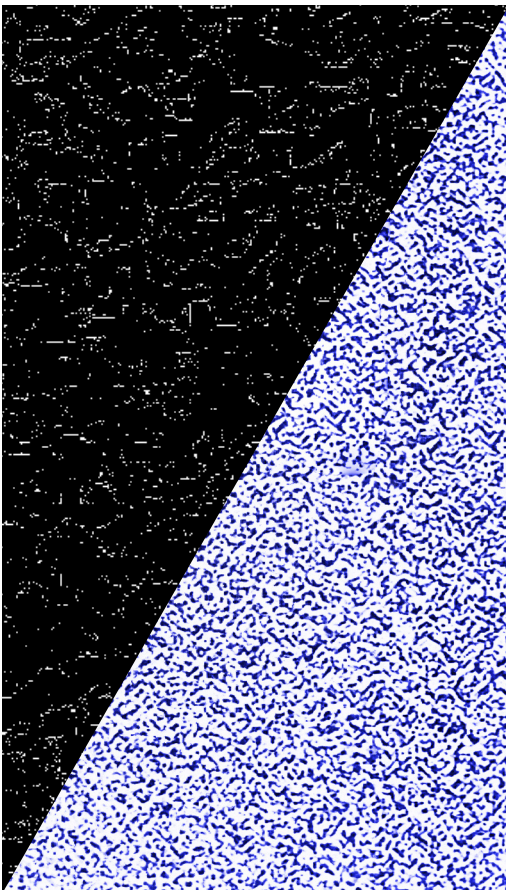
The implementation of state-level abortion bans in the wake of the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization* has raised challenging new questions for communications and technology companies. While many such companies are headquartered in right-to-choose states, they may nonetheless possess data that constitute clear evidence of violations of out-of-state abortion bans by patients, providers, and other parties. As such, law enforcement officials and other litigants in abortion-ban states have a clear interest in accessing data held by communications and technology companies as part of abortion-related investigations and legal proceedings. Right-to-choose states seeking to avoid complicity in out-of-state enforcement of abortion bans should consider limiting cooperation in such matters by state officials and by in-state companies that provide electronic communications and remote computing service ("ECS" and "RCS" service providers).

California has led the charge with a recently enacted blocking statute introduced as AB 1242, which prohibits ECS and RCS service providers headquartered or incorporated in the state from complying with any warrant, subpoena, or other legal process related to an alleged violation of an out-of-state abortion ban.<sup>1</sup> Among other things, AB 1242 also limits state officials' cooperation with the investigation or enforcement of such bans. But, given that many technology companies are incorporated and headquartered outside of California, this first statute does not mark the end of the road.

This Field Guide provides an overview of numerous features that drafters should consider including in state statutes

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<sup>1</sup> [Assemb. B. 1242, 2021-2022 Reg. Sess.](#) (Cal. 2022) (codified in scattered sections of the Cal. Penal. Code).



**Right-to-choose states seeking to avoid complicity in out-of-state enforcement of abortion bans should consider limiting cooperation in such matters by state officials and by in-state companies that provide electronic communications and remote computing service (“ECS” and “RCS” service providers).**

blocking out-of-state legal process seeking discovery of abortion-related records from ECS and RCS service providers. The descriptions below often draw on or make comparisons to California’s blocking statute, which provides a valuable model. Features are grouped into three categories:

- **“Essential Features”** are those that virtually every blocking statute — or at least those taking a similar approach to the California statute — should include. These overlap heavily with the California statute, but in some cases we advise approaches differing from the California statute.
- **“Advisable Features”** are those that would substantially strengthen a blocking statute by going beyond the baseline established by the California statute; and
- **“Potentially Useful Features”** are those that might push the usefulness of a blocking statute even further, but would raise policy or implementation questions.

As noted throughout this document, blocking statutes must be carefully tailored to the specific laws of the states in which they are passed.

## Essential Features

### **1. A description of the abortion-related offenses (“prohibited violations”) to which the blocking statute applies.**

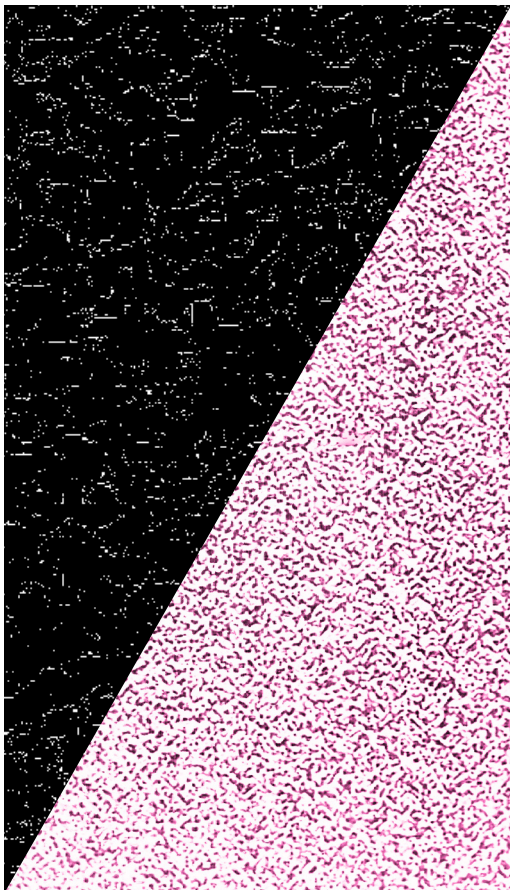
Every blocking statute should clearly define the substantive scope of its prohibitions, indicating the types of matters for which out-of-state discovery will be limited. California’s statute targets investigations and other proceedings arising out of “prohibited violations,” which it defines as any violations of law that create liability for “providing, facilitating, or obtain[ing]” an abortion that is lawful under California law.<sup>2</sup> The definition also covers liability arising from defendants’ attempts or intentions to commit such violations. Most bills would be well-served by a similar definition, but drafters might consider adding a clear indication that the definition does not cover quality-of-care claims against abortion providers who perform abortions negligently. For example, a bill’s definition could stipulate that acts by an abortion provider that would give rise to a cause of action arising from quality-of-care issues under [Blocking State] state law are not prohibited violations as they are defined in that statute.

### **2. A requirement that out-of-state legal process must include a “negative certification” indicating that the legal process does not relate to a prohibited violation.**

As it will often not be facially evident whether a given discovery request relates to a prohibited violation, blocking statutes should require that out-of-state legal process be

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<sup>2</sup> Cal. Penal. Code § 629.51(a)(5).



accompanied by a certification that it does not relate to such violations. The California statute applies this requirement to out-of-state warrants,<sup>3</sup> but drafters should consider applying it to other forms of legal process like subpoenas and surveillance-related court orders. Certification requirements place the burden of compliance on the out-of-state requester, who can readily assess whether the request relates to a prohibited violation, rather than on the communication service provider. A blocking statute should require out-of-state requesters to make certifications on penalty of perjury under state law, though effective enforcement of perjury rules across state lines may be complicated in practice.

### **3. Restrictions on the activities of government officials, such as judges and law enforcement officers, that effectuate the prohibition.**

Blocking statutes should include provisions prohibiting state government officials from facilitating discovery or enforcement related to prohibited violations. These provisions will need to be tailored to state law but should cover all applicable forms of interstate legal processes. They should also limit activities of state agencies and officials that are not directly related to discovery, like arrests or voluntary interstate information sharing. For example, the California statute:

- Prohibits judges from entering ex parte orders authorizing interception of wire or electronic communications to investigate or recover evidence of a prohibited violation.<sup>4</sup>
- Prohibits magistrates from entering ex parte orders authorizing installation and use of pen registers or tap-and-trace surveillance systems to investigate or recover evidence of a prohibited violation.<sup>5</sup>
- Prohibits the issuance by state courts of search warrants for “any item or items” sought as part of an investigation into a prohibited violation.<sup>6</sup>
- Requires judges to set bail at \$0.00 for individuals arrested in connection with an abortion performed lawfully in California that may be illegal in another state.<sup>7</sup>
- Prohibits state law enforcement agencies and officers from arresting individuals in connection with an abortion performed lawfully in California that may be illegal in another state.<sup>8</sup>
- Prohibits state agencies from cooperating with out-of-state agencies seeking information related to an investigation of an abortion performed lawfully in California that may be illegal in another state.<sup>9</sup>

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3 *Id.* § 1524.2(c).

4 *Id.* § 629.52(e).

5 *Id.* § 638.52(m).

6 *Id.* § 1524(h).

7 *Id.* § 1269b(f)(2).

8 *Id.* § 13778.2(a).

9 *Id.* § 13778.2(b).

- Prohibits state officials from issuing subpoenas in connection with a proceeding in another state related to an abortion performed lawfully in California that may be illegal in another state.<sup>10</sup>

A blocking statute should also go beyond A.B. 1242 by prohibiting in-state judges from entering any type of orders to help out-of-state prosecutors obtain evidence or records related to any prohibited violation (not just in-state abortions), as well as prevent any form of support to such investigations by law enforcement agencies and officers.

#### **4. Restrictions on procedures facilitating interstate surveillance demands that do not require the involvement of a state official.**

In some instances, state law may allow legal process to be served upon communications service providers without the involvement of a state official. Blocking statutes should condition the use of these procedures on a certification requirement or other mechanism that filters out surveillance demands related to prohibited offenses. This will require state-by-state tailoring. For example, California's statute prohibits "authorized attorneys" from issuing subpoenas in connection with out-of-state proceedings related to prohibited violations.<sup>11</sup>

#### **5. Restrictions on in-state assistance and data production by communications service providers pursuant to out-of-state investigations of prohibited violations.**

This restriction is the core prohibition of a blocking statute. Every blocking statute should include prohibitions on in-state assistance and data production related to abortion investigations covering any form of legal process, including warrants, court orders, pen registers or tap and trace orders, subpoenas, other forms of legal process within the state, and any legal process issued out of state. These restrictions should apply to corporations providing "electronic communication services" (ECS) or "remote communication services," (RCS) as defined in the federal Stored Communications Act.<sup>12</sup> California's statute includes the following provisions, which distinguish between corporations incorporated in California and corporations headquartered in California:

- Prohibiting California corporations and corporations headquartered in California that provide ECS or RCS services from, "in California, provid[ing] records, information, facilities, or assistance in accordance with the terms of a warrant, court order, subpoena, wiretap order, pen register trap and trace order, or other legal process issued by, or pursuant to, the procedures of another state or a

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<sup>10</sup> *Id.* § 13778.2(c)(2).

<sup>11</sup> *Id.* § 13778.2(c)(2).

<sup>12</sup> 18 U.S.C. § 2711.



political subdivision thereof that relates to an investigation into or enforcement of” prohibited violations.<sup>13</sup>

- Prohibiting California corporations that provide ECS or RCS services from “produc[ing] records when the corporation knows or should know that [a] warrant relates to an investigation into, or enforcement of” prohibited violations.<sup>14</sup> This separate provision was necessary because pre-existing California law required that California corporations treat certain out-of-state warrants for electronic records as if they were issued by California courts.
- Although California distinguishes between ECS and RCS services, a blocking statute need not make that distinction unless it already exists in state law and should extend the block to providers of both ECS and RCS services.

## 6. Sanctions on providers that violate the statute, including injunctive relief.

Blocking statutes should permit a cause of action against providers that produce data or provide assistance for what they knew or should have known were investigations into prohibited violations. Blocking statutes should also include a provision that allows suit to compel compliance. For example, the California statute:

- Generally immunizes California corporations and corporations headquartered in California for complying with legal process, except “where the corporation knew or should have known” that an investigation related to a prohibited violation.<sup>15</sup> Drafters might consider immunizing covered corporations that rely on a negative certification accompanying legal process.<sup>16</sup>
- Permits the California Attorney General to bring a civil action to compel compliance with the statute.<sup>17</sup>

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13 *Id.* § 1546.5(a).

14 Cal. Penal. Code § 1524.2(c)(1).

15 *Id.* § 1546.5(c).

16 The California statute’s attestation requirement for out-of-state warrants immunizes companies that rely on attestations in determining whether a request relates to a prohibited violation. *See id.* § 1524.2(c)(3). States may wish to also condition such a rule on companies not having evidence that would lead a reasonable actor to distrust a certification, such as receiving repeated past misrepresentations or contradictory information from a requesting entity.

17 *Id.* § 1546.5(b).

## Advisable Features

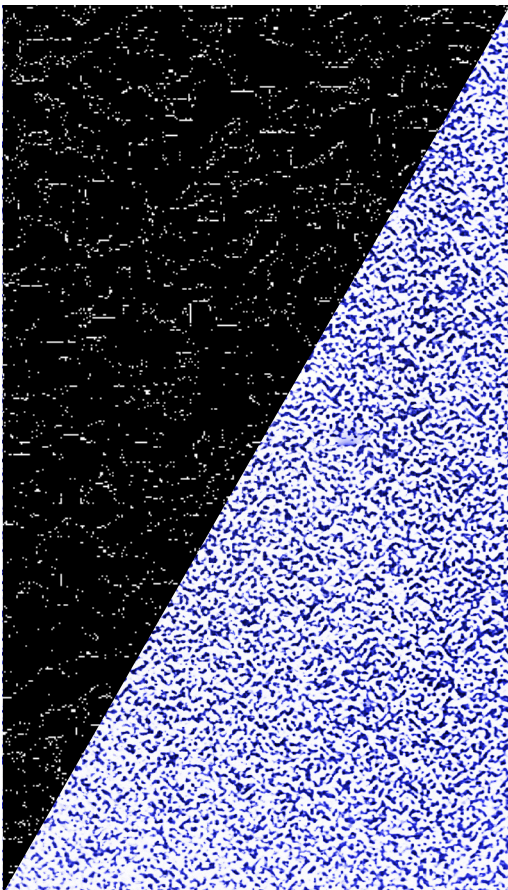
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### **1. A requirement that ECS and RCS providers notify the state Attorney General when they receive non-compliant legal process.**

The California statute gives the California Attorney general the power to commence a civil action to compel compliance with its prohibitions, but does not require ECS and RCS providers to give notice to the AG when they receive non-compliant legal process. To ensure the state AG has an opportunity to intervene to enforce blocking statute prohibitions, drafters should consider requiring providers to notify the state AG when they receive a non-compliant demand, unless such notice clearly is prohibited by the terms of the legal process they received.

### **2. A requirement that ECS and RCS providers notify the target of non-compliant legal process.**

Drafters should consider requiring electronic communications service providers to notify abortion service providers, nonprofit organizations, individuals, and other parties targeted by non-complaint legal process. For example, if an out-of-state administrative agency issues a subpoena seeking information about a reproductive services organization from an in-state ECS provider, that provider could be required to disclose information about that subpoena to the reproductive services organization. With early notice of ongoing investigations, targets may be better able to defend their rights. Drafters should also



include requirements for delaying notice to affected parties like those included in the Stored Communications Act.<sup>18</sup>

### **3. A “rule of specialty” restricting secondary uses of records in investigations and proceedings related to prohibited offenses.**

It is possible that out-of-state parties may request information from an in-state electronic communications service provider in relation to a matter unrelated to a prohibited offense, then later use that information in an investigation or other proceeding related to a prohibited offense. Drafters should consider requiring that the certification attached to out-of-state legal process include a representation that records will not incidentally be used in matters related to a prohibited offense.

### **4. Provisions covering other record types, like electronic health records.**

Like the California bill, this document focuses on general restrictions on ECS and RCS providers. However, a blocking statute could establish other restrictions on the transfer of abortion-related information out of state. Drafters should consider placing restrictions on the transfer of 1) health and medical records, 2) financial and transactional records,<sup>19</sup> and 3) location data that is not generated by the provision of ECS or RCS services (e.g., data from automated license plate readers) for abortion-related investigations.

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<sup>18</sup> *Id.* § 2705.

<sup>19</sup> Carleen M. Zubrzycki, [The Abortion Interoperability Trap](#), 132 Yale L.J. Forum 197, 219-226 (2022).

## Potentially Useful Features

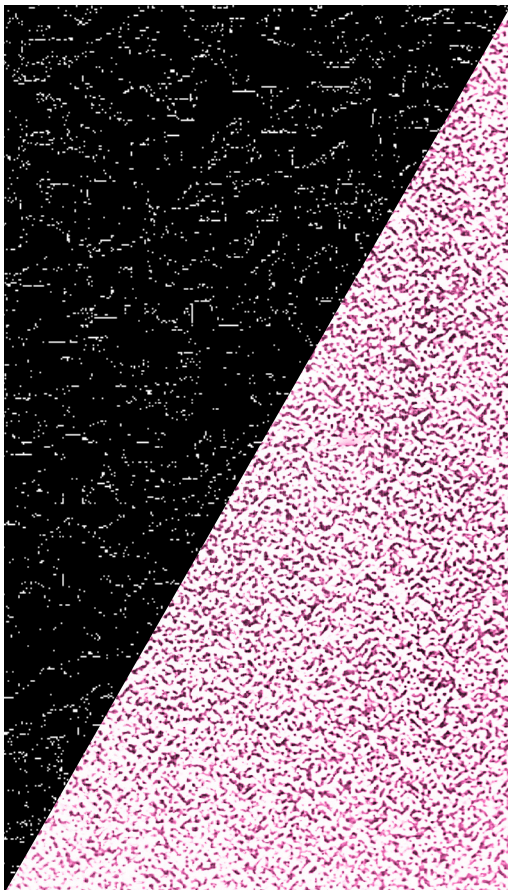
### 1. A private right of action against companies that violate the statute's restrictions.

The California statute leaves enforcement entirely to the attorney general. Drafters might consider including a private right of action against ECS and RCS providers that fail to abide by the statute's disclosure restrictions. A private right of action could either be limited to injunctive relief, or could allow plaintiffs—likely limited to the targets of non-compliant legal process, or parties against whom improperly disclosed information was used—to recover some form of damages. Because actual damages may be difficult to calculate, such a private right of action might include a right to statutory damages of a set amount. As always, a private right of action would limit state control over the enforcement of the statute, and could put ECS and RCS providers in an even more difficult situation. But it may also enable affected parties to better protect their rights, while further incentivizing compliance by ECS and RCS service providers. Should drafters consider a private right of action, they could look to the SCA's private right of action as a model.<sup>20</sup>

### 2. Provisions tending to establish venue proceedings in the home state.

When an out-of-state court issues legal process compelling production of records in a state that has implemented a blocking statute, a conflict-of-laws situation will arise. An ECS or RCS provider presented with such a demand may simultaneously be subject to (a) an order compelling production of records, and (b) an in-state blocking statute

<sup>20</sup> *Id.* § 2707.



forbidding that production. Out-of-state courts considering such conflict of laws positions are likely to vindicate interests of their state by requiring production, rather than quashing discovery in the face of a foreign blocking statute. As such, drafters should establish venue in the home state by giving ECS and RCS providers a cause of action (with in-state venue) to seek a declaratory judgment or injunctive relief that would establish a particular out-of-state request as invalid. Of course, out-of-state courts are unlikely to respect these venue-forcing provisions, making them highly speculative.

### **3. An articulation of state interests in implementing the blocking statute.**

While the conflict-of-laws analysis is likely to favor the interests of the forum state, it will generally require a court to balance the interests of the abortion-ban state in compelling production against the interests of the blocking-statute state in prohibiting it. As such, drafters might consider including a clear articulation of the state's interests in the effective enforcement of the blocking statute to tee up arguments for review.

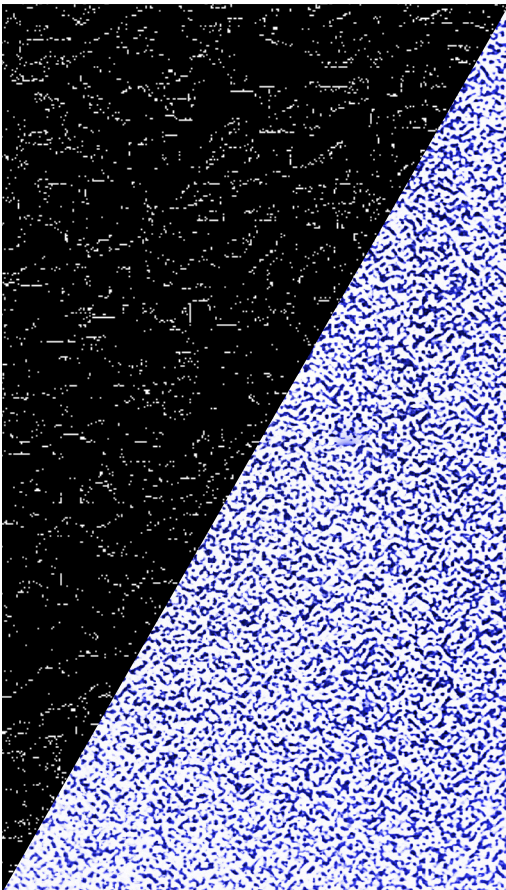
### **4. A prohibition that reaches production outside of the home state.**

It may be helpful for blocking statute drafters to go beyond the scope of the California statute by extending to production outside of the home state. For example, this could include preventing a company headquartered in the home state from producing records located in an office or data center in a different state. This provision may be highly relevant, as electronic communications service providers routinely store data across multiple states. Based on our research, however, constitutional issues may limit the interstate reach of state blocking statutes. Courts might suspect that implementing a blocking statute with interstate reach is tantamount to regulating out-of-state commerce, or otherwise goes beyond the limits of a single state's power under the federal system.

## Conclusion

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States are rapidly taking a range of actions to protect reproductive health choices. In addition to taking steps to protect their own residents, lawmakers should consider whether companies within the state — and the highly sensitive data they often hold — could be used to facilitate the investigation and prosecution of reproductive health choices across the country, and whether such facilitation is acceptable. This Field Guide offers a set of important measures that states can use to shield individuals from the criminalization of abortion. As lawmakers act on legislation to protect reproductive rights, they should strongly consider the policies proposed here.



**This Field Guide provides an overview of numerous features that drafters should consider including in state statutes blocking out-of-state legal process seeking discovery of abortion-related records from ECS and RCS service providers.**

**The descriptions in this report often draw on or make comparisons to California's blocking statute, which provides a valuable model.**

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