E-Rate Reporting Mechanisms: Closing CIPA's Backdoor for Unconstitutional Infringements on Students' First Amendment Rights

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I. INTRODUCTION

Content restriction is perhaps best understood as an effort to control a narrative under the guise of protection. However, those in power have historically abused their authority to project interests ranging in extremity, purpose, and impact. Going back as far as the dominance of Ancient Greece and Rome, ideologies conflicting with the political and religious regimes were censored from the general public.[1] In 1933, Nazi-affiliated student groups infamously burned 25,000 pieces of literature found to be "un-German"—practically anything directing animosity toward Nazi ideologies or advocating for socialism, communism, or social justice.[2] Clearly, this conflicts with the modern American liberty of free speech and expression. However, this inherent constitutional right,[3] and broader human right,[4] is a mere privilege in some parts of the world. For example, the Communist Party of China strictly regulates Internet content, "ensuring that only information matching the government's desired narrative is shared."[5] Additionally, following Russia's invasion of Ukraine in 2022, the Kremlin[6] restricted platforms including Facebook and the BBC, and "enact[ed] a law to punish anyone spreading 'false information' about its Ukraine invasion with up to 15 years in prison."[7]

The above instances may seem more critical compared to the availability of a book in a school classroom or library. Especially as they tend to address the rights of adults compared to children, whose rights, in the First Amendment context, are more perplexing. This Note explores this debate further, first providing a background on literature censorship in the United States, focusing on the intersection between First Amendment speech restriction and the public education system. This section details infamous Supreme Court precedent and the path it paved in defining the scope of

1. *See History of Censorship*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/topic/censorship/Medieval-Christendom [https://perma.cc/4EFU-PS6C] (last visited Jan. 23, 2024).

2. *See Book Burning*, THE HOLOCAUST ENCYCLOPEDIA, https://encyclopedia.ushmm.org/content/en/article/book-burning [https://perma.cc/9VGF-MATT] (last visited Jan. 23, 2024).

3. *See* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.").

4. *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) ("Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.").

5. *China's Disregard for Human Rights*, U.S. DEP'T OF STATE, https://2017-2021.state.gov/chinas-disregard-for-human-rights/ [https://perma.cc/UA7J-2H4F] (last visited Jan. 23, 2024).

6. *See The Kremlin of Moscow*, ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/place/Moscow/The-Kremlin [https://perma.cc/P3NH-YE65] (last visited Jan. 23, 2024) (stating the Kremlin "has served as the official residence of the president and Russian Federation since 1991").

7. Anton Troianovski & Valeriya Safronova, *Russia Takes Censorship to New Extremes, Stifling War Coverage*, N.Y. TIMES (May 18, 2022) https://www.nytimes.com/2022/03/04/world/europe/russia-censorship-media-crackdown.html [https://perma.cc/5KXB-49VB].

student rights to freely access materials in schools and libraries, alongside parental and state interests. Next, this Note explores the notable surge of content restrictive legislation over the past ten years, specifically in conservative states. This section focuses explicitly on the state of Florida and H.B. 1069's expansion of school authority to ban politically controversial subjects, including but not limited to, lessons against racial discrimination, LGBTQ+ fiction, and the proposition of a non-binary gender system.[8] This Note then details unprecedented, pending litigation in the U.S. District Court for the Northern District of Florida, where plaintiffs have been granted standing to sue a school district in federal court for the removal of books from library shelves.[9] This section then transitions into a discussion of the Children's Internet Protection Act (CIPA) and its implementation through the E-Rate federal discount program. Specifically, the discussion evaluates the controversy and former case law debating CIPA's potential to excessively restrict content that is relatively unharmful to minors, and therefore an unjust exercise of state power.

This Note does not take issue with CIPA's intention, nor does it disqualify the legitimacy of a state's interest in shielding young children from objectively inappropriate or obscene Internet materials, such as explicit sexual content or child pornography.[10] Rather, this Note argues that, in a modern America driven by political polarization and culture wars, states may try to push their interests too far, twisting the legitimacy of their role as regulators to advance a desired social agenda. Therefore, this Note proposes that CIPA, as it is presently written, creates a backdoor for states to restrict materials in public schools that qualify as constitutionally protected speech, thereby infringing upon students' First Amendment rights. The analysis argues how such a possibility is a logical outgrowth from banning physical literature, as modern education is increasingly relying on the Internet for classroom materials and instructional learning. It concludes with a proposed framework of a heightened reporting mechanism via the E-Rate program, requiring schools and libraries applying for E-Rate discounts to show that they are not exceeding the limits and intentions of CIPA to push an unconstitutional infringement on speech. This solution will help balance the uneven scales, upholding the protection of minors online and their constitutional right to access free speech.

8. *See generally* H.B. 1069, 2023 Leg. Sess. (Fla. 2023).

9. *See In Win for Free Expression, Judge Rules Lawsuit Challenging Escambia County, FL Book Bans Can Move Forward*, PEN AM. (Jan. 10, 2024), https://pen.org/press-release/in-win-for-free-expression-judge-rules-lawsuit-challenging-escambia-county-fl-book-bans-can-move-forward/ [https://perma.cc/9XVK-WZP9].

10. *See Children's Internet Protection Act (CIPA),* FCC, https://www.fcc.gov/consumers/guides/childrens-internet-protection-act [https://perma.cc/3JGT-RLLU] (last updated July 5, 2024).

II. BACKGROUND

A. The Intersection of First Amendment Rights and the American Education System

Despite the vast array of rights the United States Constitution affords American citizens, a right to education is not expressly provided.[11] In fact, it was only in 1954, following the groundbreaking decision of *Brown v. Board of Education*, that the status of public education evolved from a privilege to a fundamental right.[12] Even now, the right to equal access merely extends to the quality of education offered, not the fact that it's offered in the first place.[13] This then begs the question of whether access to accurate, impartial information should be a protected element of quality education. Nonetheless, it is widely accepted that students have constitutional rights associated with education,[14] and more generally, the dissemination of information.[15] In the 1969 case of *Tinker v. Des Moines Independent Community School District*, the Supreme Court addressed whether students wearing black armbands in protest of the Vietnam War was protected speech under the First Amendment.[16] The majority opinion, written by Justice Fortas, held that it is, emphasizing "it can hardly be argued that students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[17]

Notwithstanding *Tinker's* precedent, whether students relinquish their First Amendment rights when the school bell rings remains at issue. There has been a recent wave of state legislation dictating the content accessible to

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11. Stephen Lurie, *Why Doesn't the Constitution Guarantee the Right to Education?*, THE ATLANTIC (October 16, 2023), https://www.theatlantic.com/education/archive/2013/10/why-doesnt-the-constitution-guarantee-the-right-to-education/280583/ [https://perma.cc/N5QH-32ZL].

12. *See* Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) (explaining that "it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education" and that "such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms")*; see also* Patricia Wright Morrison, *The Right to Education: A Constitutional Analysis*, 44 U. CIN. L. REV. 796, 801 (1975).

13. *See generally Brown*, 347 U.S. 483.

14. *See* Trish Brennan-Gac, *Educational Rights in the States*, AM. BAR ASS'N (Apr. 1, 2014), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2014_vol_40/vol_40_no_2_civil_rights/educational_rights_states/ [https://perma.cc/HU4T-Y9KL]. While the Constitution itself does not grant educational rights, "[a] limited number of state constitutions explicitly recognize education to be a fundamental right, entitling all students to the same quality of education[.]" *Id.*

15. *See* Adam Horowitz, *The Constitutionality of the Children's Internet Protection Act*, 13 ST. THOMAS L. REV. 425, 426 (2000) (citing First Nat'l Bank v. Bellotti, 435 U.S. 765, 783 (1978) (noting the First Amendment plays a role in "affording the public access to discussion, debate, and the dissemination of information and ideas")).

16. *See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

17. *Id.* at 506-08 (noting that the students' actions did not equate to "aggressive, disruptive action or even group demonstrations" but "direct, primary First Amendment rights akin to 'pure speech'").

students in classrooms and school libraries.[18] Such legislation has led to a resurgence of book bans and conversations concerning the possible infringements on students' First Amendment rights.[19]

Book bans are by no means breaking news. Going back as far as the 17th century, states have restricted access to materials conflicting with religious, political, or community values.[20] As tensions rose in the 19th century, before the peak of the Civil War, censorship distinctly differed based on geography.[21] For example, states in the South strictly forbade expression of "anti-slavery sentiments" while Northern states belonging to the Union banned books promoting "pro-Southern" ideologies.[22] In 1873, the federal government made an effort to curb immorality and "a culture of sexual impurity" by passing the Comstock Act, "prohibiting the mailing of 'obscene, lewd, or lascivious' materials . . . intended for the prevention of conception or the procuring of abortion."[23] However, by the 20th century, America's stance on immorality had evolved, leaving the Comstock Act to become somewhat of a "relic," interpreted to prevent the mailing of illegal materials

18. *See* Jonathan Friedman & James Tager, *Educational Gag Orders*, PEN AM. (Nov. 8, 2021), https://pen.org/report/educational-gag-orders/ [https://perma.cc/VX8N-C3GP] ("Between January and September 2021, 24 legislatures across the United States introduced 54 separate bills intended to restrict teaching and training in K-12 schools, higher education, and state agencies and institutions."). *See also* H.B. 1069, 2023 Leg. Sess. at 11-12 (Fla. 2023); H.B. 1084, 156th Gen Assemb., Reg. Sess. (Ga. 2022); S.B. 150, 2023 Gen. Assemb. Reg. Sess. (Ky. 2023); S.B. 2114, 2022 Reg. Sess. (Miss. 2022); H.B. 1508, 67th Leg. Assemb. Spec. Sess. (N.D. 2021); H.B. 5150(1B), 124th Gen. Assemb. Reg. Sess. (S.C. 2022); H.B. 4300(1B), 125th Gen. Assemb. Reg. Sess. (S.C. 2023); S.B. 623, 112th Gen. Assemb. Reg. Sess. (Tenn. 2021); H.B. 3979, 87th Leg. (Tex. 2021); H.B. 427, 2023 Gen. Sess. (Utah 2023).

19. *See* Friedman & Tager, *supra* note 18 ("The bills' vague and sweeping language means that they will be applied broadly and arbitrarily, threatening to effectively ban a wide swath of literature, curriculum, historical materials, and other media, and casting a chilling effect over how educators and educational institutions discharge their primary obligations.").

20. *See* Erin Blakemore, *The history of book bans–and their changing targets–in the U.S.*, NATIONAL GEOGRAPHIC (Apr. 24, 2023), https://www.nationalgeographic.com/culture/article/history-of-book-bans-in-the-united-states [https://perma.cc/MW85-QN3F]. In 1650, Massachusetts Puritan colonists who believed that "only a special few were predestined for God's favor" banned *The Meritorious Price of Our Redemption*, "a pamphlet that argued that anyone who was obedient to God and followed Christian teachings on Earth could get into heaven." *Id.*

21. *See id.*

22. *See id.* Published in 1851, Harriet Beecher Stowe's *Uncle Tom's Cabin* was widely banned and burned by Southern slaveholders for its exposition of "the evils of slavery." *Id.*

23. Luke Vander Ploeg & Pam Belluck, *What to Know About the Comstock Act*, N.Y. TIMES (May 16, 2023), https://www.nytimes.com/2023/05/16/us/comstock-act-1978-abortion-pill.html [https://perma.cc/63HF-KQA3]. The Comstock Act gained its name from Anthony Comstock, who successfully imparted his religious ideals, persuading Congress that the restriction of materials via mail was necessary to prevent the moral corruption of the American public. *Id.*

instead of immoral materials.[24] Still, efforts to restrict books deemed obscene, indecent, or objectionable remained.[25]

The educational sphere is also no stranger to book bans. However, it wasn't until 1982 that the highest court addressed the blurry line between protecting minors from harmful content and infringing upon their First Amendment rights.[26] In *Board of Education v. Pico*, the principal question was "whether the First Amendment imposes limitations upon the exercise by a local school board of its discretion to remove library books from high school and junior high school libraries."[27] In 1975, following a conference hosted by conservative parents concerned about the state of education in New York, the school board for the Island Trees School District (the "Board") motioned to review twelve library books categorized as "objectionable" and of an "anti-American, anti-Christian, anti-[Semitic], and plain filthy" nature.[28] The Board instated a committee (the "Committee"), consisting of parents and staff, to read the books in question and determine their value, evaluating factors including "educational suitability," "good taste," "relevance," and "appropriateness to age and grade level."[29] Through this evaluation, the Committee concluded that two of the twelve books should be removed from library shelves: *The Naked Ape* and *Down These Mean Streets*.[30] Despite the Committee's conclusion, the Board, without explanation, chose to retain only one title, *The Laughing Boy*, and motioned to remove *The Naked Ape*, *Down These Mean Streets*, as well as seven other titles.[31] Following this decision, five students filed suit against the Board claiming their First Amendment rights had been violated.[32] Further, the students alleged the Board "ordered

24. *See id.* American society no longer embraced "the rigidity of the Comstock Act" as women were bestowed the right to vote and the Great Depression prompted acceptance, or at least acknowledgment, of the benefits of contraception. *Id.*

25. *See* Dan Sheehan & Lisa Tonlin, *Manuscripts Don't Burn: A Timeline of Literary Censorship, Destruction, and Liberation*, PEN AM. (July 13, 2023), https://pen.org/censorship-history-book-bans [https://perma.cc/N8Z4-7D5B]. In 1921, a trial was held to determine whether James Joyce's *Ulysses* should be banned in the United States. *Id.* The court held that the text was "obscene," banning the book throughout the country and sanctioning burnings by the U.S. Postal Service throughout the decade. *Id. See also* Blakemore, *supra* note 20. Boston's New England Watch and Ward Society "petitioned against printed materials they found objectionable, sued booksellers, pressured law enforcement and courts to bring obscenity charges against authors, and spurred the Boston Public Library to lock copies of the most controversial books[.]" *Id.*

26. *See generally* Bd. of Educ. v. Pico, 457 U.S. 853 (1982).

27. *See id.* at 855-56.

28. *Id.* at 855-57.

29. *Id.* at 857.

30. *See id.* at 858 n.6; *see also* Robin Dunbar et al., *The Naked Ape at 50: Its central claim has surely stood the test of time*, THE GUARDIAN (Sept. 24, 2017), https://www.theguardian.com/science/2017/sep/24/the-naked-ape-at-50-desmond-morris-four-experts-assess-impact [https://perma.cc/T52L-FQG7] (detailing how Desmond Morris' *The Naked Ape* showcased the intersection of human behavior, animal behavior and evolution.). *See generally* Felice Blake, *What Does It Mean To Be Black?: Gendered Redefinitions of Interethnic Solidarity in Piri Thomas's Down These Mean Streets*, 51 AFR. AM. REV. 95 (2018). Piri Thomas's *Down These Mean Streets* "engages with the struggles against antiblack racism and for civil rights" through the lens of a Puerto Rican man living in New York. *Id.*

31. *See Pico*, 457 U.S. at 858 n.10.

32. *See id.* at 859.

the removal of the books from school libraries and proscribed their use in the curriculum because particular passages in the books offended their social, political and moral tastes and not because the books, taken as a whole, were lacking in educational value."[33] In its plurality opinion, the Supreme Court noted the unique environment a library fosters, expressing that "students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding."[34] Further, while recognizing that entities like the Board "possess significant discretion to determine the content of their school libraries," such "discretion may not be exercised in a narrowly partisan or political manner."[35] The Court held that the Board's action of removing nine books from school library shelves was motivated by their desire to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion[,]" thereby violating the students' First Amendment right to access constitutionally protected speech.[36]

B. Pushing the Limits of Constitutional Content Restriction in the Name of Safety?

1. Local Efforts to Fight State Legislation that Broadens Discretion to Restrict Content in Schools

Although educational book bans are not geographically limited, they tend to manifest more frequently and more restrictively in historically conservative states, and by extension, conservative legislation.[37] However, a comparative analysis of book bans nationwide is not relevant for purposes of this Note—which will instead focus exclusively on Florida statutes and legislation. In 2023, the Florida State Legislature enacted Florida Statute § 1006.28, which outlines the duties and powers of school districts, boards, and persons working for them.[38] Specifically, the statute conveys broad authority to school districts to control curriculums presented in classrooms and materials available in school libraries.[39] It also requires school boards to implement a detailed process for parents or community members to raise

33. *Id.* at 858-59.
34. *Id.* at 868 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).
35. *Id.* at 870.
36. *Id.* at 872 (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).
37. *See* Alexandra E. Petri, *Book bans are on the rise in U.S. schools, fueled by new laws in Republican-led states*, L.A. TIMES (Apr. 22, 2023), https://www.latimes.com/world-nation/story/2023-04-22/book-bans-soaring-schools-new-laws-republican-states [https://perma.cc/BU4B-6JTL] (noting that "state legislatures and courthouses in Republican-controlled states have largely led the charge" in removing material from classrooms and library shelves).
38. *See generally* FLA. STAT. § 1006.28 (2023).
39. *See id.* at § 1006.28(2)(a)(1) ("Each district school board is responsible for the content of all instructional materials and any other materials used in a classroom, made available in a school or classroom library, or included on a reading list, whether adopted and purchased from the state-adopted instructional materials list, adopted and purchased through a district instructional materials program under s. 1006.283, or otherwise purchased or made available.").

objections to certain materials.[40] Any material objected to will be inaccessible to students until resolution, and if the material is found to be unsuitable, the school district will permanently discontinue its availability for relevant grades.[41] Such extensive discretion has perpetuated a rising cycle of book bans in Florida public schools, with approximately 300 bans occurring in the 2022-2023 academic year.[42]

Many of these bans have sparked lawsuits based on concerns for students' First Amendment rights, but one in particular garnered national attention as the first claim filed in federal court.[43] Pen America Center, along with Penguin Random House[44] and two Escambia County public school parents, (together, "Petitioners"), filed suit against the Escambia County School District and School Board, challenging the removal and restriction of books from public school libraries.[45] Pen America Center is a non-profit organization that advocates on behalf of students and schools nationwide fighting for equitable and protected access to diverse educational materials.[46] Lindsay Durtschi, one of the parents suing Escambia County, expressed her inability to stay silent once she realized that Florida law would prevent children from accessing "a healthy, comprehensive collection of – whether it be reading material, knowledge, or history – the good, the bad and the ugly of our country and our state."[47] Banding together and relying on precedent from *Tinker* and *Pico*, Petitioners assert that the "restrictions and removals have disproportionately targeted books by or about people of color and/or LGBTQ people, and have prescribed an orthodoxy of opinion that violates the First and Fourteenth Amendments."[48]

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40. *See id.* at § 1006.28(2)(a)(2) (requiring such objections to be supported by evidence exhibiting that the material at issue does not meet statutory standards and is either (1) "pornographic or prohibited under § 847.012"; (2) "[d]epicts or describes sexual conduct"; (3) "[i]s not suited to student needs and their ability to comprehend the material presented"; or (4) "[i]s inappropriate for the grade level and age group for which the material is used").

41. *See id.* at § 1006.28(2)(a)(2)(b).

42. Matt Lavietes, *Florida school districts removed roughly 300 books last school year*, NBC NEWS (Sept. 12, 2023), https://www.nbcnews.com/nbc-out/out-news/florida-school-districts-removed-roughly-300-books-last-school-year-rcna104367 [https://perma.cc/SSN5-FLQU]. *See also 2022-2023 School District Reporting Pursuant to Section 1006.28(2)*, FLA. DEP'T OF EDUC. (2023), https://www.fldoe.org/core/fileparse.php/5574/urlt/2223ObjectionList.pdf [https://perma.cc/XD7M-JV3G].

43. *See generally* Brief for Petitioner & Demand for Jury Trial, Pen Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd., No. 3:23-cv-10385 (N.D. Fla. filed May 17, 2023).

44. *Our Story*, PENGUIN RANDOM HOUSE, https://www.penguinrandomhouse.com/about-us/our-story/ [https://perma.cc/MA7S-SMHD] (last visited Jan. 19, 2024). Penguin Random House is an international publishing company and "champion of expression, ensuring that [authors'] voices carry beyond the page and into the folds of communities and societies around the globe." *Id.*

45. *See* Brief for Petitioner & Demand for Jury Trial, *supra* note 43 at 1.

46. *See About PEN America*, PEN AM., https://pen.org/about-us/ [https://perma.cc/SR3Y-AP9P] (last visited Jan. 19, 2024).

47. Brittany Misencik, *Why this Escambia County mom is suing her daughters' school district*, PENSACOLA NEWS J. (May 31, 2023), https://www.pnj.com/story/news/education/2023/05/31/why-this-escambia-county-mom-is-suing-her-daughters-school-district/70260161007/ [https://perma.cc/35GJ-KEQF].

48. Brief for Petitioner & Demand for Jury Trial, *supra* note 43 at 2.

Shortly after Petitioners filed this brief, the Florida Legislature enacted H.B. 1069, setting out a series of provisions "designed to protect children in schools."[49] The bill expanded upon § 1006.28, affording all school boards, in each school district, complete control over the content presented to its students.[50] Specifically, H.B. 1069 aims to restrict educational instruction to reflect a binary sex and gender system associating gender and pronouns with biological sex assigned at birth.[51] Additionally, in conformance with Florida Statute 1006.29(6),[52] it requires school libraries and those in charge of shelving them to attend trainings to determine what materials are appropriate.[53] H.B. 1069's effectiveness, beginning July 1, 2023, yielded debates over mootness for the pending Escambia County lawsuit, with a federal judge issuing a temporary stay to consider a motion to dismiss in August 2023.[54] However, in January 2024, a U.S. District Judge ruled that the petitioners had standing to proceed with their claims under the First Amendment as they adequately alleged that Escambia County's decisions could be based on their own personal disagreement to the content contained within the banned materials.[55] The Court noted its skepticism toward the likelihood of successful relief because the banned books in question are under objection, and therefore permitted, under state law, to "remain unavailable . . . until the objection is resolved."[56] Further, the court dismissed the petitioners' equal protection claim, concluding the removal and restrictions were of "disparate impact" and "require[] far too many inferences to conclude that the

49. *2023 Summary of Legislation Passed: CS/CS/HB 1069 – Education*, THE FLORIDA SENATE 1 (2023), https://www.flsenate.gov/PublishedContent/Session/2023/BillSummary/Education_ED1069ed_01069.pdf [https://perma.cc/G46G-MBJ9].

50. *See* H.B. 1069, 2023 Leg. Sess. at 11-12 (Fla. 2023) ("Each district school board is responsible for the content of all instructional materials and any other materials used in a classroom, made available in a school or classroom library, included on a reading list"); *see also* Andrew Albanese, *Judge Stays Escambia County Book Banning Lawsuit to Consider Dismissal*, PUBLISHER'S WEEKLY (Aug. 25, 2023), https://www.publishersweekly.com/pw/by-topic/industry-news/publisher-news/article/93043-judge-stays-escambia-county-book-banning-lawsuit-to-consider-dismissal.html [https://perma.cc/4RPB-X4YD].

51. *See* H.B. 1069 at 4 ("It shall be the policy of every public K-12 educational institution that is provided or authorized by the Constitution and laws of Florida that a person's sex is an immutable biological trait and that it is false to ascribe to a person a pronoun that does not correspond to such person's sex.").

52. FLA. STAT. § 1006.29(6) (2023).

53. *See* H.B. 1069 at 16 ("[S]chool librarians, media specialists, and other personnel involved in the selection of school district library materials must complete the training program developed pursuant to s. 1006.29(6) before reviewing and selecting age-appropriate materials and library resources.").

54. Albanese, *supra* note 50.

55. Pen Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd., No. 3.23cv10385-TKW-ZCB, 2024 U.S. Dist. LEXIS 7314, at *6-10 (N.D. Fla. Jan. 12, 2024) (denying motion to dismiss). *See also In Win for Free Expression, Judge Rules Lawsuit Challenging Escambia County, FL Book Bans Can Move Forward*, PEN AM. (Jan. 10, 2024), https://pen.org/press-release/in-win-for-free-expression-judge-rules-lawsuit-challenging-escambia-county-fl-book-bans-can-move-forward/ [https://perma.cc/3P44-78VX].

56. *Pen Am.*, 2024 U.S. Dist. LEXIS 7314, at *10 n.12 (citing FLA. STAT. §1006.28(2)(a)).

removal or restriction of a book about a particular subject constitutes intentional discrimination against an individual in a protected class."[57]

C. The History of CIPA and E-Rate Funding

Current laws such as § 1006.28 and H.B. 1069 only begin to pierce the veil of possibility concerning the extent to which states may attempt to restrict students' First Amendment rights. As society becomes increasingly reliant on digital technology, and education supplements curriculums with online resources, states may further perpetuate content restriction under the guise of Internet protection for minors.[58]

Intentions to regulate the growing variety of digital content accessible to minors first sprouted in 2000 when Congress enacted the Children's Internet Protection Act (CIPA).[59] Due to the basic principles of federalism and the federal government's limited ability to regulate state-based public education, CIPA exclusively applies to schools and libraries receiving discounts through the E-Rate program.[60] E-Rate, a program regulated by the Federal Communications Commission (FCC), is designed to make telecommunication services, including "[I]nternet access, internal connections, managed internal broadband services, and basic maintenance of internal connections" more affordable to eligible schools and libraries through discounts funded by the Universal Service Fund (USF).[61] By putting the FCC (a federal entity) in charge of the E-Rate budget, CIPA created a funding loophole to the Tenth Amendment, thereby allowing the federal government

57. *Id.* at 9 (citing FLA. STAT. §1006.28(2)(a)).

58. *See* Lucinda Gray & Laurie Lewis, *Use of Educational Technology for Instruction in Public Schools: 2019–20*, INST. OF EDUC. SCIS. (Nov. 2021), https://nces.ed.gov/pubs2021/2021017Summary.pdf [https://perma.cc/D9HP-73JX].

59. *See Children's Internet Protection Act (CIPA),* FCC, https://www.fcc.gov/consumers/guides/childrens-internet-protection-act [https://perma.cc/3JGT-RLLU] (last updated July 5, 2024).

60. *See id.*; *see also* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Brendan Pelsue, *When it Comes to Education, the Federal Government is in Charge of…Um, What?*, HARVARD ED. MAG. (Aug. 29, 2017), https://www.gse.harvard.edu/ideas/ed-magazine/17/08/when-it-comes-education-federal-government-charge-um-what [https://perma.cc/48N4-37BE]]. The language of the Tenth Amendment implies a "preclu[sion of] any federal oversight of education" except to the extent the Fourteenth Amendment requires "equal protection of the laws." *Id.*

61. *E-Rate: Universal Service Program for Schools and Libraries*, FCC, https://www.fcc.gov/consumers/guides/universal-service-program-schools-and-libraries-e-rate [https://perma.cc/UG6B-5RGX] (last updated Feb. 27, 2024). *See also E-Rate Program - Discounted Telecommunications Services*, DEP'T OF EDUC., https://www2.ed.gov/about/inits/ed/non-public-education/other-federal-programs/fcc.html [https://perma.cc/D23K-4W78] (last modified Sept. 3, 2019). The Universal Service Fund is administered by the Universal Service Administrative Company (USAC), "an independent, not-for-profit corporation created in 1997 to collect universal service contributions from telecommunications carriers and administer universal support mechanisms (programs) designed to help communities across the country secure access to affordable telecommunications services." *Id.*

to regulate certain aspects of public education.[62] To meet the USF's E-Rate eligibility requirements, schools must operate at the elementary or secondary level, while libraries must fall under the categories excerpted in the 1996 Library Services and Technology Act.[63] Once deemed eligible, schools and libraries submit requests for their desired goods and services,[64] which prospective vendors[65] bid on.[66] With price as the primary consideration, schools and libraries select the most cost-effective goods and services and submit their desired selections to the Universal Service Administrative Company (USAC)[67] for approval.[68] The E-Rate program is in great demand, with the FCC capping the 2021 budget at $4.276 billion.[69] In 2019, over 30,000 public schools across the United States participated and received funds from the E-Rate program, totaling over $700 million.[70]

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62. *See generally* VICTORIA L. KILLION, CONG. RSCH. SERV., R46827, FUNDING CONDITIONS: CONSTITUTIONAL LIMITS ON CONGRESS'S SPENDING POWER (2021), https://crsreports.congress.gov/product/pdf/R/R46827 [https://perma.cc/Q5R7-ACRN]]. *See also* U.S. CONST. art. I, § 8, cl. 8, 18.

63. *See E-Rate Program - Discounted Telecommunications Services*, *supra* note 61; *see also* 20 U.S.C. § 7801(19) (defining elementary school as "a nonprofit institutional day or residential school, including a public elementary charter school, that provides elementary education, as determined under State law"); 20 U.S.C. § 7801(45) (defining secondary school as "a nonprofit institutional day or residential school, including a public secondary charter school, that provides secondary education, as determined under State law, except that the term does not include any education beyond grade 12"); 20 U.S.C. § 9122(1) (defining library as "(A) a public library; (B) a public elementary or secondary school library; (C) a tribal library; (D) an academic library; (E) a research library . . . (F) a private library or other special library, but only if the State . . . determines that the library should be considered a library"); 20 U.S.C. § 9122(2) (defining a library consortium as "any local, statewide, regional, interstate, or international cooperative association of library entities which provides for the systematic and effective coordination of the resources of school, public, academic, and special libraries and information centers, for improved services for the clientele of such library entities").

64. Goods and services offered under the E-Rate program are divided into two categories: (1) Category 1, consisting of "the services needed to support broadband connectivity to schools and libraries" (i.e., cable modems, ethernet, satellite, wireless); and (2) Category 2, consisting of "internal connections needed for broadband connectivity within schools and libraries" (i.e., antennas, cabling, routers). *Order In the Matter of Modernizing the E-Rate Program for Schools and Libraries*, FCC (Dec. 15, 2023), https://docs.fcc.gov/public/attachments/DA-23-1171A1.pdf [https://perma.cc/4AES-R5DN].

65. Although the FCC does not provide qualifications or guidelines for defining an E-Rate Vendor, the New York Department of Education has defined an E-Rate Vendor as "an entity that is providing, or seeking to provide, to the NYC [Department of Education], products or services related to technology or telecommunications" (i.e., AT&T Corp., T-Mobile USA, Inc., Dell Marketing L.P.). Memorandum from the Office of Federal and State Regulatory Compliance Junaid Qaiser, E-rate Compliance Officer on E-Rate Vendor Gifts, Donations, and Grant Procedures (Mar. 2018) (on file with the New York Department of Education), https://infohub.nyced.org/docs/default-source/default-document-library/e-rate-vendors.pdf [https://perma.cc/L8CQ-QQKK].

66. *See E-Rate: Universal Service Program for Schools and Libraries*, *supra* note 61.

67. *About USAC*, UNIVERSAL SERV. ADMIN. CO., https://www.usac.org/about/ [https://perma.cc/HYH9-777N] (last visited Mar. 3, 2024) (the USAC is "an independent not-for-profit designated by the FCC" which is responsible for administering the USF, including the E-Rate program).

68. *See E-Rate: Universal Service Program for Schools and Libraries*, *supra* note 61.

69. *See id.*

70. Center for Public Education, *E-rate Schools*, NAT'L SCH. BD. ASS'N 7 (2020), https://www.nsba.org/-/media/NSBA/File/cpe-e-rate-schools-report-march-2020.pdf [https://perma.cc/66BU-MXHT].

CIPA requires E-Rate participants to implement a program that ensures minors are unable to access, via school or library computers, "visual depictions that are (i) obscene; (ii) child pornography; or (iii) harmful to minors."[71] Schools and libraries must enforce "the operation of such technology protection measure[s] during any use of such computers by minors" and "educate minors about appropriate online behavior."[72] In short, CIPA blocks and filters information individuals can access, creating yet another gray area between protection from harm and the infringement of First Amendment rights. This blurriness became a point of contention in *American Library Association v. United States*, where a group of libraries, associations, and website publishers (libraries) filed suit against the United States alleging that CIPA was unconstitutional on First Amendment grounds.[73] They specifically alleged that CIPA forced public libraries to violate their patrons' First Amendment rights and to renounce their own as a necessary means to obtain federal funding.[74]

The Eastern District Court for Pennsylvania held that CIPA was an unconstitutional use of the Spending Clause because it promoted the suppression of First Amendment rights by permitting the filtering of protected speech on library computers.[75] Applying strict scrutiny,[76] the court determined that current technology lacked the ability to fulfill Congress' intent in enacting CIPA and would instead promote a culture of overblocking content "that is completely innocuous for both adults and minors, and that no rational person could conclude matches the filtering companies' category definitions, such as 'pornography' or 'sex.'"[77] However, the Supreme Court later reversed in a plurality opinion written by Chief Justice Rehnquist, holding that CIPA was not infringing upon libraries' or their patrons' First Amendment rights.[78] The Court found that libraries were not public forums,[79] but entities designed to "facilitate research, learning, and recreational pursuits

71. 47 U.S.C. § 254(h)(5)(B).

72. *Id.*

73. *See* Am. Libr. Ass'n v. United States, 201 F. Supp. 2d 401, 407 (E.D. Pa. 2002).

74. *See id.*

75. *See id.* at 476.

76. *See id.* at 454 (citing United States v. Playboy Ent. Grp., 529 U.S. 803, 813 (2000) (finding "software filters [that] block access to speech on the basis of its content, and content-based restrictions on speech are generally subject to strict scrutiny"); *see also* Richard H. Fallon Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1269 (2007) (explaining strict scrutiny as "the baseline rule under the First Amendment for assessing laws that regulate speech on the basis of content, as well as for scrutinizing content-based exclusions of speakers from public fora").

77. *See Am. Libr. Ass'n*, 201 F. Supp. 2d at 449 (concluding "the number of pages of constitutionally protected speech blocked by filtering products far exceeds the many thousands of pages that are overblocked by reference to the filtering products category definitions"); *see also* Katherine A. Miltner, *Discriminatory Filtering: CIPA's Effect on Our Nation's Youth and Why the Supreme Court Erred in Upholding the Constitutionality of the Children's Internet Protection Act*, 57 FED. COMM. L.J. 555, 567 (2005).

78. *See* United States v. Am. Libr. Ass'n, 539 U.S. 194, 206 (2003).

79. *See* Cornelius v. NAACP Legal Def. & Educ. Fund, 473 U.S. 788, 802 (1985) (citing Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n, 460 U.S. 37, 45 (1983) ("Traditional public fora are those places which 'by long tradition or by government fiat have been devoted to assembly and debate.'"); *id.* at 802 (citing Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939)) (qualifying public streets and parks as public forums).

by furnishing materials of requisite and appropriate quality."[80] Consequently, the case did not qualify for strict scrutiny, with the Court instead applying the rational basis standard of review.[81] Justice Breyer's concurrence emphasized that the federal government, through CIPA, has a "legitimate" and "compelling" interest in restricting children's access to "obscenity, child pornography . . . and material that is comparably harmful."[82] Also concurring, Justice Kennedy explained that the supposed issue nearly becomes moot as an adult patron may simply request a librarian to unblock restricted Internet content.[83] So long as that request is met "without significant delay, there is little to this case."[84] Dissenting, Justice Stevens agreed with the plurality that a public library's decision to filter sexually explicit content available to children on the premises is "neither inappropriate nor unconstitutional."[85] However, he did raise concern for the impracticability of individual librarians being able to review every piece of restricted content an adult may request to view.[86] And because "most of that information is constitutionally protected speech . . . th[e] restraint is unconstitutional."[87] Justice Stevens also expressed how CIPA's reliance on E-Rate perpetually furthers the infringement of First Amendment rights and is entirely "unnecessary to accomplish Congress' stated goal."[88]

In balancing the states' interests and CIPA's purpose alongside constitutionally protected speech, perhaps one of the biggest debates concerns the question of "obscene" Internet materials[89] and precisely what material falls within the given parameters.[90] The Supreme Court defined the term via a three-pronged test in *Miller v. California*:[91]

80. *Am. Libr. Ass'n*, 539 U.S. at 206.

81. *See id.* at 207 n.3 ("We require the Government to employ the least restrictive means only when the forum is a public one and strict scrutiny applies . . . In deciding not to collect pornographic material from the Internet, a public library need not satisfy a court that it has pursued the least restrictive means of implementing that decision.").

82. *See id.* at 218 (Breyer, J. concurring).

83. *See id.* at 214 (Kennedy, J. concurring).

84. *Id.*

85. *See id.* at 220 (Stevens, J. dissenting).

86. *See Am. Libr. Ass'n*, 539 U.S. at 220 (Stevens, J. dissenting) ("[T]he Children's Internet Protection Act (CIPA) operates as a blunt nationwide restraint on adult access to 'an enormous amount of valuable information' that individual librarians cannot possibly review.").

87. *Id.*

88. *See id.* at 231 (Stevens, J. dissenting) ("[A] library in an elementary school might choose to put filters on every single one of its 10 computers. But under this statute, if a library attempts to provide Internet service for even *one* computer through an E-rate discount, that library must put filtering software on *all* of its computers with Internet access, not just the one computer with E-rate discount.").

89. *See* 47 U.S.C. § 254(h)(5)(B).

90. *See id.*

91. Miller v. California, 413 U.S. 15, 39 (1973).

(a) whether "the average person, applying contemporary community standards" would find that the work, taken as a whole, appeals to the prurient interest; [92]
(b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
(c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[93]

In *Miller*, the Court held that the Defendant's act of mailing pornographic materials to individuals without request or consent was obscene and therefore within the realm of state regulation because it had no "serious literary, artistic, political, or scientific value."[94] Although this provides some guidance to defining "obscene," the *Miller* decision still affords broad discretion and an opportunity for restriction influenced by disagreement, discomfort, or distaste.[95] Petitioners in the Escambia County lawsuit assert that this is no happenstance, but rather a "clear agenda . . . to categorically remove all discussion of racial discrimination or LGBTQ issues from public school libraries."[96]

III. THE USAC SHOULD HEIGHTEN E-RATE REPORTING MECHANISM REQUIREMENTS TO PREVENT AN UNCONSTITUTIONAL APPLICATION OF CIPA

A. Unconstitutional Content Restriction via CIPA is a Logical Outgrowth of Current State Legislation

Considering the decision in *Miller v. California* came nearly twenty years before the inception of the World Wide Web,[97] the Court failed to contemplate obscenity in the digital context and the difficulties associated

92. *See Miller*, 413 U.S. at 16 n.1 (defining prurient interest as "a shameful or morbid interest in nudity, sex, or excretion, which goes substantially beyond customary limits of candor in description or representation . . . and is . . . utterly without redeeming social importance").

93. *See id.* at 24.

94. *See id.* at 17-24.

95. *See* Hanna Natanson, *Objection to sexual, LGBTQ content propels spike in book challenges*, WASH. POST (June 9, 2023), https://www.washingtonpost.com/education/2023/05/23/lgbtq-book-ban-challengers/ [https://perma.cc/CJF3-6NVK] (finding that "sixteen percent of all objections claimed that school books violated wither state obscenity laws or legislation . . . restricting education on race, racism, sexuality, and gender identity").

96. Brief for Petitioner & Demand for Jury Trial, *supra* note 43, at 4.

97. *See* Evan Andrews, *Who Invented the Internet?*, HISTORY.COM (Oct. 28, 2019), https://www.history.com/news/who-invented-the-internet [https://perma.cc/HK56-9P98]. Computer scientist Tim Berners-Lee invented the World Wide Web in 1990, thereby "populariz[ing] the [I]nternet among the public, and serv[ing] as a crucial step in developing the vast trove of information that most of us now access on a daily basis." *Id.*

with regulating the vast wealth of information now available on the Internet.[98] Even *United States v. American Library Association*, which was decided in 2003, lacked exposure to the Internet we know today.[99] This then begs the question of whether CIPA can be reconciled in a world with rapidly developing technology, in recovery from a global pandemic, and heavily transitioning to a dependence on online learning.[100] Although digital technology had risen by the time of CIPA's enactment, Congress certainly could not have foreseen the extent to which education and the Internet would intertwine. Nor could they have predicted states' eagerness and dedication to restrict student access to previously accepted materials suddenly deemed improper for school classrooms and libraries. And since its enactment in 2000, CIPA has not been amended.[101] As states continue to seek out opportunities to restrict content available to students in schools, the next logical step is to do so online. Hence, CIPA could very easily become a backdoor for conservative agenda-pushing and First Amendment speech violations.

B. How to Improve Current Reporting Mechanisms

Although this problem remains hypothetical for the time being, easily implementable solutions exist to curb the likelihood of this possibility and ensure CIPA is being used as it was intended. Currently, when public schools and libraries apply for discounts via the E-Rate program, "they must certify they are in compliance with CIPA before they can receive E-Rate funding."[102] This is done through a written pledge[103] and documentations of proof, including but not limited to, "a memorandum or report to an administrative authority of a school or library from a staff member that discusses and analyzes Internet safety policies in effect at other schools and libraries."[104]

98. *See generally Miller*, 413 U.S. 15 (1973) (failing to mention anything concerning the Internet, online material, or the obscenity in the digital context).

99. *See generally Am. Libr. Ass'n*, 539 U.S. 194 (2002).

100. *See* Natasha Singer, *Online Schools are Here to Stay, Even After the Pandemic*, N.Y. TIMES (Apr. 11, 2021), https://www.nytimes.com/2021/04/11/technology/remote-learning-online-school.html [https://perma.cc/FY6Y-FBNK].

101. *See Children's Internet Protection Act (CIPA),* FCC, https://www.fcc.gov/consumers/guides/childrens-internet-protection-act [https://perma.cc/3JGT-RLLU] (last updated July 5, 2024) (lacking reference to any modifications or amendments made to CIPA since its enactment in 2000).

102. *Id.*

103. *See CIPA*, UNIVERSAL SERV. ADMIN. CO., https://www.usac.org/e-rate/applicant-process/starting-services/cipa/ [https://perma.cc/9A9V-D948]. The required certification language is as follows: "Pursuant to the Children's Internet Protection Act, as codified at 47 U.S.C. Section 254(h) and (l), the recipient(s) of service represented in the Funding Request Number(s) on this FCC Form 486, for whom this is the first funding year in the federal universal service support mechanism for schools and libraries, is (are) undertaking such actions, including any necessary procurement procedures, to comply with the requirements of CIPA for the next funding year, but has (have) not completed all requirements of CIPA for this funding year." *Id.*

104. *Id.* (noting that other examples of acceptable documentation include "a published or circulated school or library board agenda with CIPA compliance cited as a topic[,]" "a circulated staff meeting agenda with CIPA compliance cited as a topic[,]" or "an agenda or minutes from a meeting open to the public at which an [I]nternet safety policy was discussed").

However, these documents fail to investigate whether schools are over-regulating or over-restricting content available online.[105] This provides an opportunity for school boards to ban digital content that may not necessarily fail CIPA's guidelines, but rather contradicts community standards or values. And while state and local entities have the authority to dictate curriculums and materials available to students on school grounds,[106] abuse of this authority and the infringement of constitutionally protected speech is entirely plausible. Therefore, this Note proposes a required data report consisting of every website a school chooses to restrict, the types of content the website contains, and a detailed explanation of why it meets the criteria of "visual depictions that are (i) obscene; (ii) child pornography; or (iii) harmful to minors."[107] This way, CIPA would operate in a more practical manner, prioritizing Congress' focus on restricting materials that are genuinely harmful to minors.[108] After all, some schools are responsible for the education of children varying in age, and "there is a substantial difference in what society considers appropriate for a five-year-old as opposed to a sixteen-year-old."[109] Additionally, Justice Kennedy's concurrence in *United States v. American Library Association*, where the Supreme Court upheld CIPA's constitutionality, centered on an adult's option to request disabling the restricting filter—an option that minors don't have.[110] Therefore, a required data report certifying CIPA compliance would ensure that objectively age appropriate, educational, and constitutionally protected materials are accessible to students seeking them.

This data report would be most effective as an audit.[111] Reporting mechanisms alone provide school boards with too much discretion to misrepresent material restrictions. Conversely, "compliance auditing is the

105. *See id.* (notice how none of the provided examples of documentation require disclosing specific sources restricted under CIPA).

106. *See The Federal Role in Education*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/overview/fed/role.html [https://perma.cc/D4CV-JEKT] (last updated May 23, 2024) ("Education is primarily a State and local responsibility in the United States. It is States and communities . . . that establish schools and colleges, develop curricula, and determine requirements for enrollment and graduation."); *see also Responsibility for Selection*, AM. LIBR. ASS'N (Dec. 19, 2017) https://www.ala.org/tools/challengesupport/selectionpolicytoolkit/responsibility [https://perma.cc/VX43-A73C] ("[T]he school board is legally responsible for the resources in school libraries[.]").

107. 47 U.S.C. § 254(h)(5)(B).

108. *Id.*; *see also* S. REP. NO. 106-141, at 1 (1999) ("The purpose of the bill is to protect America's children from exposure to obscene material, child pornography, or other material deemed inappropriate for minors while accessing the Internet from a school or library receiving Federal Universal Service assistance for provisions of Internet access, Internet service, or internal connection.").

109. Miltner, *supra* note 77, at 576.

110. *See Am. Libr. Ass'n*, 539 U.S. at 214 (Kennedy, J. concurring); *see also* Miltner, *supra* note 77, at 576-77 (noting that "a high school student attempting to access information on sexual health for a school paper cannot ask a librarian to disable the filter" without first obtaining parental consent).

111. An audit is "an official examination and verification of accounts and records, especially of financial accounts." *Audit*, DICTIONARY.COM, https://www.dictionary.com/browse/audit [https://perma.cc/4KUN-M5YL] (last visited Apr. 6, 2024).

independent assessment of whether a given subject matter is in compliance with applicable authorities," including "activities, financial transactions, [and] information."[112] The USAC already employs audits to ensure accurate documentation of program contributions and payments to comply with FCC rules.[113] Should the audits uncover non-compliance, auditees will have the opportunity to respond before a subsequent USAC review potentially notes necessary corrective actions.[114] The USAC provides separate audit guidelines and required documentation for different programs, including E-Rate.[115] Specifically, for CIPA, audits evaluate proof of compliance, such as documentation supporting public notice, the use of filtering programs, and service provider verification of operational filters and blocked sites.[116] However, as they currently stand, these audits merely inquire whether CIPA is effectively blocking content, not the type of content or the reasons for the blocking.[117] Therefore, the USAC should strengthen the precision of these audits by requiring schools, libraries, and service providers to examine the blocked materials and ensure that they genuinely contain "visual depictions that are (i) obscene; (ii) child pornography; or (iii) harmful to minors."[118] As a removed entity, service providers can conduct their own objective evaluations without pressure from school boards who may attempt to restrict content based on personal disagreement rather than obscenity or potential to cause harm. Service providers can then submit their findings to the USAC, who can compare them to the schools' findings and inform the schools of any discrepancies or non-compliance. Similar to the current auditing process, schools will have the opportunity to respond in defense of their actions.[119] The USAC will then determine the validity of the defense and whether the content should be accessible to students under CIPA.[120]

Nevertheless, this mechanism may be the subject of challenges, as the First Amendment protects against compelled disclosures, especially when

112. INT'L ORG. OF SUPREME AUDIT INSTS., ISSAI 400 COMPLIANCE AUDIT PRINCIPLES 8 (2019), https://www.intosai.org/fileadmin/downloads/documents/open_access/ISSAI_100_to_400/issai_400/ISSAI_400_en_2019.pdf [https://perma.cc/CC7X-Q3KA].

113. *See Beneficiary and Contributor Audit Program (BCAP)*, UNIVERSAL SERV. ADMIN. CO., https://www.usac.org/about/appeals-audits/beneficiary-and-contributor-audit-program-bcap/ [https://perma.cc/LEZ5-3DGT] (last visited Mar. 2, 2024).

114. *See id.*

115. *See id.*; *see also E-Rate Program List of Documents to Retain for Audits and to Show Compliance with Program Rules*, UNIVERSAL SERV. ADMIN. CO., https://www.usac.org/wp-content/uploads/e-rate/documents/resources/e-rate-program-list-of-documents-to-retain.pdf [https://perma.cc/WJ5L-J2J8] (last visited Mar. 2, 2024) ("A copy of a report (if applicable) or other documentation on the use of the Technology Protection Measure for the funding year(s) subject to audit (i.e., reports from the service provider of Internet sites blocked, bills from the service provider verifying that the filter was operational, etc.).").

116. *See E-Rate Program List of Documents to Retain for Audits and to Show Compliance with Program Rules*, *supra* note 115.

117. *Id.*

118. 47 U.S.C. § 254(h)(5)(B).

119. *See Beneficiary and Contributor Audit Program (BCAP)*, *supra* note 113.

120. *Id.*

"they require a person to communicate an unwanted message."[121] For example, in *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, the Supreme Court held that disclosure requirements that are "unjustified or unduly burdensome" and fail to "reasonably" reflect the interests of the states "might offend the First Amendment by chilling protected commercial speech."[122] That being said, strengthening an already existing reporting mechanism to an elective program is far different from cases, like *Zauderer*, where the Supreme Court stepped in to oversee compelled speech.[123] Here, the enhanced precision and heightened requirements are neither "unjustified"[124] nor "unduly burdensome"[125] because states seeking discounts from the E-Rate program already have to collect resources to offer as proof of compliance with CIPA. This solution proposes one extra step: while offering compliance assurance, schools and libraries detail which CIPA policies are restricting which materials. Additionally, those involved in the implementation of the program—the USAC, FCC, and Department of Education—have a legitimate interest in doing so: maintaining the integrity of students' First Amendment rights. Furthermore, because the E-Rate program operates on an entirely opt-in basis,[126] entities that do not wish to comply with the reporting mechanism simply do not have to and face no fear of repercussions—they just can't participate in the voluntary program.

The legality of the proposed solution can be analogized alongside *United States v. Phillip Morris*, where the D.C. Circuit Court of Appeals reviewed the language of a proposed disclosure in which the government was requiring cigarette manufacturers to publish "corrective statements" concerning the potential risks of smoking in their advertisements.[127] Relying on *Zauderer*, the court looked at whether the disclosures were "unjustified or unduly burdensome" and "reasonably related to the State's interest."[128] The court held that the government had a legitimate interest in compelling cigarette manufacturers to disclose "purely factual and uncontroversial information" regarding their products in order to "preven[t the] deception of consumers."[129] Further, the court found that such a required disclosure was

121. *See* VALERIE C. BRANNON ET AL., CONG. RSCH. SERV., IF12388, FIRST AMENDMENT LIMITATIONS ON DISCLOSURE REQUIREMENTS (2023) https://crsreports.congress.gov/product/pdf/IF/IF12388 [https://perma.cc/NG8G-7H7D]; *see also* U.S. CONST. amend. I.

122. Zauderer v. Off. of Disciplinary Couns. of Sup. Ct., 471 U.S. 626, 651 (1985).

123. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (holding that a school board's act "in compelling the flag salute and pledge transcended constitutional limitations on their power and invaded the sphere of intellect and spirit which was the purpose of the First Amendment to reserve from all official control"); *see also* BRANNON ET AL., *supra* note 121.

124. *Zauderer*, 471 U.S. at 651.

125. *Id.*

126. *See E-Rate*, UNIVERSAL SERV. ADMIN. CO., https://www.usac.org/e-rate/ [https://perma.cc/GR77-L4SC] (last visited Sept. 17, 2024) ("Public or private schools (K-12), libraries, and groups of schools and libraries (e.g., consortia, districts, systems) *can* apply for discounts on eligible services.") (emphasis added).

127. *See* United States v. Phillip Morris, 855 F.3d 321, 323 (D.C. Cir. 2017).

128. *Zauderer*, 471 U.S. at 651.

129. *Phillip Morris*, 855 F.3d at 327.

not unduly burdensome to the manufacturers.[130] And while the above cases deal exclusively with the analysis of commercial disclosures, the D.C. Circuit held in *American Meat Institute v. United States Department of Agriculture* that *Zauderer* "applies 'to disclosure mandates aimed at addressing problems other than consumer deception.'"[131]

If challenged in a court of law, this proposed solution could be subject to a variety of scrutiny levels. For example, a state or school board challenging the mechanism would likely argue for strict scrutiny, where the government is required "to show its regulatory approach is narrowly tailored to achieve a compelling interest."[132] Cases where this is typically applied reflect "content-based" regulations, where the government "compel[s] individuals to speak a particular message . . . [thereby] 'alter[ing] the content of their speech.'"[133] Often, "such laws 'are presumptively unconstitutional[.]'"[134] However, the proposed reporting mechanism would consist of objective data reports and therefore reflects more of a "content-neutral" regulation, which "imposes only an incidental burden on speech [and] 'will be sustained if it furthers an important or substantial governmental interest . . . unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'" [135] The USAC and FCC would therefore likely argue for intermediate scrutiny because the mechanism "pose[s] a less substantial risk of excising certain ideas or viewpoints from the public dialogue."[136] Under this standard, it is likely a court would uphold the mechanism just as was done in *Turner Broadcasting System, Inc. v. FCC*.[137] There, the Supreme Court held that intermediate scrutiny was the appropriate level of scrutiny to determine the constitutionality of content-neutral "must-carry" provisions in the Cable Television Consumer Protection and Competition Act of 1992, which require "cable operators to carry the signals of a specified number of local broadcast television stations."[138] On remand to the District of Columbia District Court, it was found that the must-carry provisions were constitutional, "surviv[ing] the 'intermediate level of scrutiny applicable to content-neutral restrictions that impose only an incidental burden on speech.'"[139]

130. *Id.* at 328.

131. *Id.* (citing Am. Meat Inst. v. U.S. Dep't of Agric, 760 F.3d 18, 20 (D.C. Cir. 2014)).

132. BRANNON ET AL., *supra* note 121.

133. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 766 (2018) (quoting Riley v. Nat'l Fed'n of Blind, 487 U.S. 781, 795 (1988)).

134. *Id.* (citing Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015)).

135. *See Amdt1.7.3.7 Content-Neutral Laws Burdening Speech*, LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/amendment-1/content-neutral-laws-burdening-speech [https://perma.cc/2QJL-D4FG] (last visited Jan. 28, 2024) (citing Turner Broad. Sys. v. FCC, 512 U.S. 622, 662 (1994)).

136. Turner Broad. Sys. v. FCC, 512 U.S. 622, 642 (1994) (citing Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293 (1984)).

137. *See* Turner Broad. Sys. v. FCC, 910 F.Supp. 734, 751 (D.D.C. 1995).

138. *See Turner*, 512 U.S. at 630.

139. *See Turner Broad. Sys.*, 910 F.Supp. at 751.

C. *Pending Threats to the USF's Future and Viability of Proposed Reporting Mechanisms*

Since writing this Note, cases questioning the USF's constitutionality were brought before the Fifth, Sixth, and Eleventh Circuits.[140] In 2023, both the Sixth and Eleventh Circuits affirmed the program's constitutionality as a proper delegation of congressional power.[141] However, in July 2024, the Fifth Circuit diverged in an en banc decision, holding the USF's funding mechanism unconstitutional under the Taxing Clause.[142] As the USF is responsible for collecting funds to "subsidize communications services to . . . schools and libraries"—including the E-Rate program—the longevity of this Note's proposed solution may now be called into question.[143]

The Supreme Court previously denied certiorari for the Sixth and Eleventh Circuit decisions.[144] However, there are two new petitions pending before the Court: *FCC v. Consumers' Research* (filed September 30, 2024)[145] and *Schools, Health & Libraries Broadband Coalition (SHLB Coalition) v. Consumers' Research* (filed October 11, 2024).[146] Both petitions ask the Court to review the Fifth Circuit's ruling and uphold the USF's constitutionality as a proper delegation of congressional power.[147] Although it remains unclear whether the Supreme Court will grant certiorari in either of these cases, let alone side with the Fifth Circuit's unprecedented decision, "it

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[140] *See generally* Consumers' Rsch. Cause Based Com., Inc v. FCC, 109 F.4th 743 (5th Cir. 2024); Consumers' Rsch. v. FCC, 67 F.4th 773 (6th Cir. 2023); Consumers' Rsch. v. FCC, 88 F.4th 917 (11th Cir. 2023).

[141] *See* Consumers' Rsch. v. FCC, 67 F.4th at 797 ("Congress provided the FCC with a detailed statutory framework regarding universal service. That framework contains an intelligible principle because it offers nuanced guidance and delimited discretion to the FCC. Section 254 therefore does not violate the nondelegation doctrine . . . Accordingly, we DENY the Petition for Review."); Consumers' Rsch. v. FCC, 88 F.4th at 921 ("Because § 254 provides an intelligible principle and the FCC maintains control and oversight of all actions by the private entity, we hold that there are no unconstitutional delegations and therefore DENY the petition."); *see also* Marc S. Martin et al., *Fifth Circuit Shocks Telecom Industry by Overturning the FCC's Universal Service Fund*, PERKINS COIE (July 31, 2024) https://perkinscoie.com/insights/update/fifth-circuit-shocks-telecom-industry-overturning-fccs-universal-service-fund [https://perma.cc/7QG3-UHNP].

[142] *See generally* Consumers' Rsch. Cause Based Com., Inc v. FCC, 109 F.4th 743 (5th Cir, 2024); *see also* Martin et al., *supra* note 141.

[143] Martin et al., *supra* note 141.

[144] *See* Consumers' Rsch. v. FCC, 144 S.Ct. 2628 (2024) (mem.); Consumers' Rsch. v. FCC, 144 S. Ct. 2629 (2024) (mem.).

[145] Petition for Writ of Certiorari at I, FCC v. Consumers' Rsch., No. 24-354 (U.S. Sept. 30, 2024) ("The questions presented are: 1. Whether Congress violated the nondelegation doctrine by authorizing the Commission to determine, within the limits set forth in Section 254, the amount that providers must contribute to the Fund. 2. Whether the Commission violated the nondelegation doctrine by using USAC's financial projections in computing universal service contribution rates. 3. Whether the combination of Congress's conferral of authority on the Commission and the Commission's delegation of administrative responsibilities to USAC violates the nondelegation doctrine.").

[146] Petition for Writ of Certiorari at i, SHLB Coal. v. Consumers' Rsch., No. 24-422 (U.S. Oct. 11, 2024) (presenting the same three issues addressed in the FCC's petition).

[147] Kalvis Golde, *FCC asks court to uphold constitutionality of nationwide rural phone and interest subsidies*, SCOTUSBLOG (Nov. 12, 2024, 12:07 PM), https://www.scotusblog.com/2024/11/fcc-asks-court-to-uphold-constitutionality-of-nationwide-rural-phone-and-internet-subsidies/ [https://perma.cc/B7TC-LBTT].

has long been known that the existence of a circuit split is the best predictor of Supreme Court review."[148]

Before the Fifth Circuit, the FCC argued that the USF operates as a fee rather than a tax in that it "confers special benefits on contributing carriers by (among other things) expanding the network such carriers can serve."[149] However, nine judges disagreed, finding that USF contributions lacked three defining qualities of a fee that is *not* a tax: (1) USF contributions "are not incident to a voluntary act but rather a condition of doing business in the telecommunications industry"; (2) "the cost of [USF] contributions is not borne by parties [the] FCC regulates"; and (3) "the benefits associated with [USF] contributions 'inure to the benefit of the public' . . . rather than to the benefit of the persons who pay them."[150] Determining that USF contributions operate as taxes—a power that Congress must constitutionally delegate via an intelligible principle[151]—the Fifth Circuit further held that the USF's "double-layered contribution mechanism"—in which Congress delegates authority to the FCC and the FCC subsequently delegates to the USAC—violates the nondelegation doctrine.[152]

The seven dissenting judges, however, found the majority's serious break from precedent unconvincing.[153] Judge Stewart concluded that the USF is constitutional under the nondelegation doctrine and that its contributions do in fact possess the three defining qualities of a fee.[154] First, USF contributions are indeed "incident to a voluntary act" in that they reflect "telecommunications providers' willing choice to engage in the industry."[155] Second, Section 254 of the Telecommunications Act fails to mention any scenario in which the costs of USF contributions are passed on from telecommunications providers—whom which the FCC regulates—to the general public.[156] Third, while service providers are the primary beneficiaries

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[148] Deborah Beim & Kelly Rader, Evolution of Conflict in the Federal Circuit Courts 1 (Mar. 19, 2015) (on file with Yale Law School). *See also* SUP. CT. R. 10. According to Supreme Court Rule 10, "[r]eview on a writ of certiorari is not a matter of right, but of judicial discretion" and "will be granted only for compelling reasons." *Id.* Such compelling reasons include a split of consensus among federal courts of appeals regarding "an important federal question." *Id.*; *see also* Joseph A. Grundfest, *Quantifying the Significance of Circuit Splits in Petitions for Certiorari: The Case of Securities Fraud Litigation* 11 (Stanford L. Sch. and The Rock Ctr. for Corp. Governance, Working Paper No. 254, 2024).

[149] *Consumers' Rsch.*, 109 F.4th at 756-57 (quoting en banc Brief for Respondents at 51, Consumers' Rsch. v. FCC, 109 F.4th 743 (5th Cir. 2024) (No. 22-60008).

[150] *Id.* at 757; Martin et al., *supra* note 141.

[151] *See Artl.S1.5.2 Origin of the Intelligble Principle Standard*, LEGAL INFO. INST., https://www.law.cornell.edu/constitution-conan/article-1/section-1/origin-of-the-intelligible-principle-standard [https://perma.cc/KG3Y-L7Y3] (last visited Nov. 17, 2024) (citing Panama Refin. Co. v. Ryan, 293 U.S. 388, 421 (1935)). With regard to the nondelegation doctrine, the 'intelligible principle' standard requires that Congress delineate a legal framework to constrain the authority of the delegee, such as an administrative agency." *Id.*

[152] *See* Martin et al., *supra* note 141 (noting that the Fifth Circuit declined to rule on whether the Telecommunications Act of 1994 includes an intelligble principle); *see also Consumers' Rsch.*, 109 F.4th at 782, 786.

[153] *Consumers' Rsch.*, 109 F.4th at 788-805.

[154] *Id.* at 788.

[155] *Id.* at 800.

[156] *See id.* (noting that "costs incurred by entities and passed down to consumers through the entites' independent business judgment are not taxes"); *see also* 47 U.S.C. § 254.

of USF contributions, "the general public . . . receives an ancillary benefit in the form of more affordable, standardized service."[157] Also dissenting, Judge Higginson noted that the majority not only "ignores statutory criteria" and upends years of collaboration that bridged "the technology divide[,]" but also fails to find "an unconstitutional delegation of legislative power nor an unconstitutional exercise of government power by a private entity."[158]

Thus, while the USF's fate may soon be decided by the highest court, this Note's proposal remains plausible. Should the Supreme Court decide to grant certiorari and side with the Fifth Circuit's break from precedent, the FCC will likely be granted the opportunity to restructure the USF and its funding of the E-Rate program, thereby maintaining its integrity and mission of providing access to affordable telecommunications services.[159]

IV. CONCLUSION

Congress enacted CIPA in 2000 with one goal in mind: the protection of minor children and students.[160] However, protection can remain effective without being excessively defensive. While shielding students from harmful and obscene content is of the utmost importance, equally important are students' First Amendment rights. In an alarmingly polarized America, these rights must remain at the forefront of the content restriction debate and not blinded by social or political disagreement. By pursuing the solution explored above and expanding current CIPA audit requirements, the USAC and FCC can objectively and wholistically review filters and blocking mechanisms, thereby closing CIPA's backdoor for content restriction and preventing infringements on students' First Amendment rights.

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[157] *Consumers' Rsch.*, 109 F.4th at 799.

[158] *Id.* at 801.

[159] *See E-Rate: Universal Service Program for Schools and Libraries*, supra note 61; *see also* Martin et al., *supra* note 141.

160. *See* S. REP. NO. 106-141, at 1 (1999).