EDITOR'S NOTE

Welcome to the second Issue of Volume 78 of the *Federal Communications Law Journal*, the nation's premier communications law journal and the official journal of the Federal Communications Bar Association (FCBA). We are excited to present the second Issue of this Volume showcasing the diverse range of issues encompassed by technology and communications law. This Issue provides thoughtful scholarship on topics including spectrum allocation, FCC rulemaking authority, and the use of technology in differing sectors, from government to healthcare to the nonprofit world.

This Issue begins with an Article from T. Randolph Beard, PhD, George S. Ford, PhD, and Michael Stern, PhD. This Article provides an economic perspective on issues facing the spectrum allocation landscape, outlining general principles experts and lawmakers should consider when reallocating commercial radio spectrum.

This Issue also features four student Notes, all of which provide tailored analysis and insight into emerging technological, legal, and social trends.

First, Jessica Buchanan recommends non-defense government agencies leverage the Department of Defense model for procurement of Generative AI (GenAI) technologies to ensure procurement timelines align with the fast-paced evolution of GenAI.

In our second Note, Ella Hillier examines organized hate group's use of nonprofit status to access online funding and legitimacy, proposing a narrow change to the review process for hate groups' nonprofit applications while considering First Amendment concerns.

Third, Talia Spillerman analyzes privacy concerns related to abortion information within hospital data networks, arguing for a data segmentation requirement to protect medical patients' privacy and unfettered access to healthcare.

Finally, Nicholas Teachenor explores the FCC's rulemaking authority in post-Loper Bright era to strengthen the equal time rule by introducing stronger notice requirements.

The Editorial Board of Volume 78 would like to thank the FCBA and The George Washington University Law School for their continued support of the Journal. We also appreciate the hard work of the authors and editors who contributed to this Issue.

The Federal Communications Law Journal is committed to providing its readers with in- depth coverage of relevant communication law topics. We welcome your feedback and encourage the submission of articles for publication consideration. Please direct any questions or comments about this Issue to fclj.eic@law.gwu.edu. Articles can be sent to fcljarticles@law.gwu.edu.

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Ella Hillier
Editor-in-Chief

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The *Federal Communications Law Journal* is published jointly by the Federal Communications Bar Association and The George Washington University Law School. The *Journal* publishes three issues per year and features articles, student Notes, essays, and book reviews on issues in telecommunications, First Amendment, broadcasting, telephony, computers, Internet, intellectual property, mass media, technology, privacy, communications and information policymaking, and other related fields.

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THE TECH JOURNAL

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ARTICLE

Deciding how to allocate commercial radio spectrum among a myriad of competing interests is one of the most consequential choices in telecommunications policy, yet these decisions are frequently driven by irrelevant industry advocacy rather than sound economic principles. This paper establishes the economic principles for optimal spectrum allocation among alternative uses, specifically examining the allocation of newly-available spectrum among alternative uses. This analysis demonstrates that optimal spectrum allocation depends on marginal value creation across competing uses. Spectrum should be assigned to the service that generates the highest incremental value for each additional unit allocated. For small spectrum increments, allocation decisions are straightforward—assign to the highest-value use. However, when larger amounts of spectrum are involved, the optimal allocation may require balancing multiple services. We also show that when mobile and Wi-Fi services are complementary (as evidenced by Wi-Fi carrying approximately 90% of smartphone traffic), both services should receive portions of any newly-available spectrum rather than allocating this spectrum entirely to one use.

NOTES

The rapid development and deployment of Task-Oriented and Generative Artificial Intelligence technologies has outpaced the traditional procurement processes employed by non-defense government agencies, creating a significant gap between Artificial Intelligence and procurement. This Note proposes a solution to this challenge by suggested non-defense government agencies employ two of the Department of Defense's expedited acquisition pathways combined with agile and outcome-based procurement strategies, along with specialized Artificial Intelligence procurement teams to efficiently procure both Task-Oriented and Generative Artificial Intelligence systems. The use of these modern procurement strategies will

Since 1934 the FCC has been the referee for the enforcement of the equal time rule but has traditionally been hesitant to strengthen the rule. The spotlight for the rule is largely on flashy political races such as the Presidency or celebrity candidates, but the current state of the rule leads to an inability for working class candidates to utilize the rule. This note explains how the usage of the word "afford" in the statute can be used alongside the broad regulatory power given to the FCC to justify rule making. The Note recommends that the FCC can use the tools given to them by their mandate in the Communications Act of 1934 to require broadcasting licensees to give notice to opposing candidates who are eligible for equal opportunities under the rule. There has been a body of writing based around the equal time rule, including recommendations to adopt a notification requirement, but none of those explore the viability of creating a notification rule through regulation.

How to Allocate New Spectrum Among Alternative Uses

T. Randolph Beard, PhD, George S. Ford, PhD, Michael Stern, PhD*

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I. INTRODUCTION

Deciding how to allocate commercial radio spectrum among a myriad of competing interests are among the most consequential choices in telecommunications policy, yet economic analysis plays a surprisingly limited role in these decisions.[1] Spectrum policy debates are instead dominated by industry advocacy emphasizing auction revenue potential, imbalances in spectrum allocations among competing uses, international spectrum allocation comparisons claiming the United States "lags behind" other nations (particularly China), and fantastical claims about transformative economic benefits.[2] Yet, the proper allocation of newly available spectrum has almost nothing to do with this sort of advocacy.

In this paper, we present clear principles for optimal resource allocation that should help policymakers make better spectrum allocation choices. To do so, we contemplate the allocation of a new block of spectrum between two competing uses (*e.g.*, licensed mobile wireless and unlicensed Wi-Fi). There are, of course, other licensing models, including shared licensed spectrum, and our findings would translate directly to those other models. As might be expected, spectrum resources should be allocated to uses that generate the highest marginal social value. This marginal social value need not bear any relationship to the sorts of pedantic advocacy we typically see in spectrum allocation debates. Moreover, while alternative spectrum licensing arrangements (*e.g.*, licensed versus unlicensed) are typically treated as rivals, they are often complements. Most data on a 5G home fixed wireless service, for example, originates and terminates over Wi-Fi, so an increase in spectrum allocated to 5G might require a contemporaneous increase in the allocation of spectrum for Wi-Fi services. In all, about 90% of traffic on smartphones used at home (amounting to 75% of total smartphone use) is carried by Wi-Fi and about 80% of smartphone traffic *away from home* uses Wi-Fi, so Wi-Fi is

1. C.f. T. Randolph Beard, George S. Ford, Lawrence J. Spiwak and Michael Stern, *Wireless Competition Under Spectrum Exhaust*, 65 FED. COMM. L.J. 79 (2012); T. Randolph Beard, George S. Ford, Lawrence J. Spiwak, and Michael Stern, *Taxation by Condition: Spectrum Repurposing at the FCC and the Prolonging of Spectrum Exhaust*, 8 HASTINGS SCI. & TECH. L.J. 183 (2016); T. Randolph Beard, George S. Ford, Lawrence J. Spiwak and Michael Stern, *A Policy Framework for Spectrum Allocation in Mobile Communications*, 63 FED. COMM. L. J. 639 (2011); T. Randolph Beard, George S. Ford, Lawrence J. Spiwak and Michael Stern, *Market Mechanisms and the Efficient Use and Management of Scarce Spectrum Resources*, 66 FED. COMM. L. J. 263 (2014).

2. Recent empirical evidence suggests these promises have been significantly overstated. George S. Ford, *The 5G Promise Falls Short of Reality: Examining Economic Impact Claims*, PHOENIX CTR. POL'Y PERSPECTIVE No. 25-03 (May 28, 2025).

vital to wireless communication even over smartphones that use exclusively-licensed spectrum.[3]

We do not attempt to quantify the relevant margins, which will require a rich mix of engineering and economic considerations, and perhaps other concerns. We do explain, however, what sort of factors are irrelevant to the decision. Certainly more work on this issue is required, and we hope this analysis will help guide such efforts.

II. SPECTRUM ALLOCATION

Allocating spectrum for commercial use is a challenging task with myriad engineering concerns, interference problems, global coordination, consumer demand considerations, and competing corporate interests. This complexity may, in part, explain why spectrum advocacy attempts to focus the debate on politically-charged rhetoric rather than upon genuine concerns.

One virtue of economics is that it is often able to tell us important things even when the specifics of the problem under consideration are debatable. We exploit this facility here by analyzing a spectrum allocation decision in the simplest of cases: there is a hypothetical block of spectrum that policymakers must allocate between two uses, licensed mobile wireless service (m) and unlicensed Wi-Fi services (w). Our purpose is to highlight the basic issues involved in doing this efficiently—*i.e.,* to the greatest benefit of society. Let S denote the total available spectrum and let S_m and S_w denote the amount allocated to the two services (mobile and Wi-Fi) respectively. Hence, society faces the following endowment constraint related to scarce spectrum:

$$S_m + S_w = S\,. \tag{1}$$

We presume that the allocated spectrum can be used to produce mobile and Wi-Fi data services with their demands denoted by D_m and D_w. Let $f(S_m)$ and $g(S_w)$ denote the production functions whereby spectrum is used to produce mobile and Wi-Fi data services.

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3. Rupert Bapty, Andrey Popov, and Francesco Rizzato, *Wi-Fi Drives Smartphone Data Consumption in the US, but Trends Vary Across Operators*, OPENSIGNAL (Oct. 31, 2024), https://www.opensignal.com/2024/10/31/wi-fi-drives-smartphone-data-consumption-in-the-us-but-trends-vary-across-operators?_ga=2.145110452.1696707333.1748359883-370070466.1745866310; Claus Hetting, *Bombshell Report: Mobile Data Consumption Over Wi-Fi Closes in on 90% in the US*, WIFI NOW (Nov. 1, 2024), https://wifinowglobal.com/news-blog/bombshell-report-mobile-data-consumption-over-wi-fi-closes-in-on-90-in-the-us/#:~:text=Wi%2DFi's%20share%20of%20data,Above%20graphic%20courtesy%20OPENSIGNAL; *WiFi Dominates Android Mobile Data Usage*, USTELECOM (Jan. 13, 2017), https://ustelecom.org/wifi-dominates-android-mobile-data-usage [https://perma.cc/44XF-SJRX]; *What Drives Data Usage?*, NIELSEN (Nov. 2016), https://www.nielsen.com/insights/2016/what-drives-data-usage [https://perma.cc/DCA5-88KF].

Consumers are presumed to derive utility, denoted by $U(D_m, D_w)$, from the consumption of these data services. (We aggregate all consumers together for simplicity.) A society that wishes to use its spectrum resources efficiently faces the following constrained optimization problem:

$$\max_{S_m, S_w}\{U(D_m, D_w)\}, \textit{ such that,} \tag{2}$$

$$D_m = f(S_m),\ D_w = g(S_w), \text{ and } S_m + S_w = S. \tag{3}$$

This constrained optimization problem defines the optimal allocation of spectrum to mobile and Wi-Fi, denoted- by S_m^* and S_w^*, as functions of the total available spectrum (S). This optimal allocation will depend on both the productivity of spectrum in its two applications as well as the social value of mobile and Wi-Fi services.

Any interior optimal allocation must satisfy the following two first-order necessary conditions:

$$\frac{\partial U}{\partial D_w} g'(S_w^*) = \frac{\partial U}{\partial D_m} f'(S_m^*), \tag{4}$$

$$S_m^* + S_w^* = S. \tag{5}$$

In Condition (4), the left-hand side represents the marginal social benefit of allocating one more unit of spectrum to Wi-Fi services and the right side represents the marginal social benefit of allocating one more unit to mobile wireless services.[4] The marginal social benefit of a service is generally composed of two elements: the marginal utility of additional service ($\partial U/\partial D_i$) and the marginal productivity of allocated spectrum (g' and f'). Condition (4) reminds us of the correct principles for allocating scarce spectrum—when society is operating at an efficient optimum, if a very small bit of additional spectrum becomes available, then society should be indifferent between the use to which it was put because, at the margin, each application should generate equal benefits.

From a practical perspective, there are (at least) two things worth observing about the optimal condition. First, it is worth considering what is *not* in Condition (4):

Excluded from Condition (4) is how much spectrum has, in the past, been allocated to the two services. The optimality condition *does not require equal spectrum allocation*, but rather an allocation that *equalizes marginal*

4. Wi-Fi spectrum, being unlicensed, permits a wide range of uses beyond the standard Wi-Fi networks that connects homes, businesses, and public areas to the internet. The freedom to innovate in the spectrum bands, unlike licensed spectrum where innovation is limited to the choices of few providers, is a source of value.

social benefits. Yet, comparing the "stock" of spectrum among services is frequently mentioned in the mobile wireless industry's advocacy. For instance, an Accenture study (Commissioned by CTIA) on spectrum observes that "unlicensed spectrum users have access to over 7x" the amount of licensed mid-band spectrum.[5] But such "they have more than me" and "it's my turn" arguments are irrelevant to optimal spectrum allocation;

it is the marginal benefits among services and not the present stock of spectrum that is important.

Excluded from Condition (4) is the amount of spectrum allocated to mobile wireless services in China. But, again, the "5G race with China," whatever that is, is frequently mentioned in spectrum allocation debates.[6] Mobile wireless services provided on Chinese networks cannot be purchased in the United States.

Excluded from Condition (4) is any term regarding how many jobs would be created if 100 MHz of spectrum was allocated to mobile wireless services. Yet, once more, this is the sort of "evidence" presented to policymakers by the mobile wireless industry regarding spectrum allocation decisions.[7]

Excluded from Condition (4) is the amount of auction revenue raised by auctioning spectrum, though the potential for auction revenues is commonly used in spectrum allocation debates.[8] Certainly, the U.S. Government needs revenue to cover its prolific spending, but using spectrum auctions to obtain it is not relevant to the optimal allocation decision. Auctions may, however, do better than other mechanisms in sorting out where the marginal benefits are larger for licensed spectrum (though not unlicensed spectrum, which is not auctioned), at least for that portion of benefits that can be captured by providers (which is less than the total social benefit).

Second, while the marginal benefits are equal at the margin in the optimal state, for the current allocation there is no reason to expect that the marginal benefits are equal. If they are not equal, then society could benefit

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5. *Spectrum Allocation in the United States*, ACCENTURE (COMMISSIONED BY CTIA) (Sept. 2022), https://www.ctia.org/news/spectrum-allocation-in-the-united-states [https://perma.cc/A2NE-CMLK].

6. *Licensed, Mid-band Spectrum Needed to Keep Pace with China*, CTIA (last visited May 28, 2025), https://api.ctia.org/wp-content/uploads/2023/09/Licensed-Mid-band-Spectrum-Needed-to-Keep-Pace-with-China-1.pdf [https://perma.cc/3UVF-PPAM].

7. *The Economic Impact of Each Additional 100 MHz of Mid-band Spectrum for Mobile*, NERA (COMMISSION BY CTIA) (Jan. 2023), https://www.ctia.org/news/the-economic-impact-of-each-additional-100-mhz-of-mid-band-spectrum-for-mobile [https://perma.cc/3M4K-RF8S].

8. Meredith Atwell-Baker, *#RestoreAuctionAuthoritywithaSpectrumPipeline*, CTIA BLOG (Mar. 8, 2024), https://www.ctia.org/news/restoreauctionauthority-with-a-spectrum-pipeline [https://perma.cc/F3VG-F9P9].

by increasing the amount of spectrum allocated to the service with the higher-value marginal use. In doing so, the marginal benefit of the higher-value use declines (due to diminishing marginal returns) so the marginal benefits move closer together. If there is a large block of new spectrum to be allocated, or else the margins are very sensitive to even small amounts of additional spectrum, then both service types might receive some portions of the large block of spectrum to approach the optimal condition. If one use always produces lower social benefits than the other then, even if these benefits are positive, that use should not be awarded any spectrum.

We may push this reasoning a bit further. Say that use *i* has sufficient spectrum to meet all current and forecast demand. In this scenario, the marginal benefit of allocating more spectrum to service *i* is zero ($\partial U/\partial D_i = 0$), and it is pointless to allocate more spectrum to service *i*. Or, if service *i* has insufficient spectrum to meet current or expected demand, then the marginal benefit from additional spectrum is presumably large. If both services are spectrum constrained, then the allocation requires a balancing act. Robust evidence on spectrum exhaustion, therefore, is probative and affects policy choices.[9] At present, both the mobile wireless industry and Wi-Fi analysts claim the capacity of the services are constrained by a lack of spectrum, so the engineers need to determine where the need is greatest.[10] Of course, if one use of spectrum has no social value, then all the spectrum should be used in the productive sector regardless.

III. BALANCING SPECTRUM ALLOCATION

This logic can be generalized if we interpret the analysis as the problem of considering how an *increase* in available spectrum should be used or

9. *See* Ford, *Wireless Competition Under Spectrum Exhaust*, supra note 1; George S. Ford, *Have We Got It All Wrong? Forecasting Mobile Data Use and Spectrum Exhaust*, PHOENIX CTR. POL'Y PERSPECTIVE No. 14-06 (Oct. 21, 2014) https://www.phoenix-center.org/perspectives/Perspective14-06Final.pdf [https://perma.cc/3QWY-W8H8]; J.Pierre De Vries, Ljiljana Simic, Andreas Achtzehn, Marine Petrova, and Petri Mahonen, *The Wi-Fi "Congestion Crisis": Regulatory Criteria for Assessing Spectrum Congestion Claims*, 38 TELECOMM. POL'Y 838-580 (2014).

10. *See, e.g.*, Coleman Bazelon, Paroma Sanyal, and Preetul Sen, *Assessing Wi-Fi Exhaustion and Shortfalls in Wi-Fi Capacity*, BRATTLE (Apr. 30, 2025), https://wififorward.org/wp-content/uploads/2025/05/Assessing-Wi-Fi-Exhaustion-and-Shortfalls-in-Wi-Fi-Capacity.pdf [https://perma.cc/QF4L-BNLZ]; Mark Walker, *Wi-Fi Spectrum: 6 GHz Use Is Surging and Headed Toward Exhaustion*, CABLELABS (May 20, 2025), https://www.cablelabs.com/blog/wi-fi-spectrum-6-ghz-use-surging-headed-toward-exhaustion [https://perma.cc/LZE5-PC48]; Claus Hetting, *Spectrum: Unlicensed Bands in Focus at US Senate Hearing on 5G*, WIFI NOW (July 30, 2018), https://wifinowglobal.com/news-and-blog/spectrum-unlicensed-bands-in-focus-at-us-senate-hearing-on-5g; *The Looming Spectrum Crisis*, ACCENTURE (COMMISSIONED BY CTIA) (2025), https://api.ctia.org/wp-content/uploads/2025/03/Looming-Spectrum-Crisis-Accenture.pdf [https://perma.cc/6ZMW-ENLF]; William Webb, *It's Time to Rethink 6G*, IEEE SPECTRUM (Feb. 10, 2025), https://spectrum.ieee.org/6g-bandwidth [https://perma.cc/593G-YNDJ]; *The Evolution of 5G Spectrum*, 5G AMERICAS (Jan. 2024), https://www.5gamericas.org/wp-content/uploads/2024/01/WP-Evolution-of-5G-Spectrum-1.pdf [https://perma.cc/WC38-GZ82].

"shared" between competing applications. In this generalization, the historic allocation of spectrum between uses affects both the production possibilities and the social value derived from the "additional" distribution of *S*. This analytical construct highlights an important fact: when advocates for one or another plan for allocating newly available frequencies speak about existing spectrum allocations, their arguments are relevant only if they establish why these historic patterns of usage affect current social values and production opportunities.

The analysis supports a further, conditional conclusion. Differentiating these equations with respect to the total available spectrum (*S*), and collecting and rearranging terms, yields

$$\left[U''_{wm}f'g' - U''_{ww}g'g' - U'_{w}g''\right]\frac{dS^{*}_{w}}{dS} = \left[U''_{wm}f'g' - U''_{mm}f'f' - U'_{m}f''\right]\frac{dS^{*}_{m}}{dS}, \qquad (6)$$

and,

$$\frac{dS^{*}_{m}}{dS} = 1 - \frac{dS^{*}_{w}}{dS}. \qquad (7)$$

Solving for the derivative of the optimal spectrum allocation for Wi-Fi yields the expression:

$$\frac{dS^{*}_{w}}{dS} = \frac{\left[U''_{wm}f'g' - U''_{mm}f'f' - U'_{m}f''\right]}{\left[U''_{wm}f'g' - U''_{ww}g'g' - U'_{w}g''\right] + \left[U''_{wm}f'g' - U''_{mm}f'f' - U'_{m}f''\right]}. \qquad (8)$$

It is a standard assumption that production of data services is strictly increasing in allocated spectrum yet there is a (weakly) diminishing return. Moreover, consumer utility almost always has a diminishing margin. Hence, in terms of the signs of derivates we surely have:

$$f' > 0, g' > 0, f'' \leq 0, g'' \leq 0 \text{ and } U'_{m} > 0, U'_{w} > 0, U''_{mm} < 0, U''_{ww} < 0.$$

The one remaining term in the expression for dS^{*}_{w} / dS is the cross-partial derivative U''_{wm}. The sign of this partial derivative represents the impact of an increase in mobile data services on the marginal utility from Wi-Fi. Given that most consumers have many Wi-Fi enabled devices that they wish to distribute data across given the acquisition of such data from either mobile or fixed networks, we can generally expect a complementary effect. As mentioned above, recent evidence indicates that about 90% of traffic on smartphones used at home is carried by Wi-Fi and about 80% of smartphone traffic away from home uses Wi-Fi.11 Hence, U''_{wm} would be

11. Bapty, et al., supra note 3.

positive—Wi-Fi service is a complement to mobile service. We can thus determine that both the numerator and denominators are positive in the expression for dS_w^* / dS. The resulting conclusion is that an increase in available spectrum would increase the optimal social allocation of spectrum to Wi-Fi:

$$\frac{dS_w^*}{dS} > 0. \tag{9}$$

Inequality (9) is important and is the most direct and implementable result of this analysis. It can be rendered simply as: when society is efficiently allocating available spectrum, ordinary diminishing returns in consumption and production of data services, combined with complementarity between those services, implies that both uses will receive a share of any additional spectrum. It is generally not socially efficient to allocate all newly available spectrum to one application or the other when the services are complements. Since that appears to be the case with mobile and Wi-Fi, when new spectrum is allocated some of it should be directed to unlicensed uses. Spectrum allocation need not be an either/or scenario.

IV. CONCLUSION

Radio spectrum is the lifeblood of wireless communications. Mobile wireless networks, which rely heavily on exclusive, high-power licenses, create enormous benefits for society and are constantly demanding more radio spectrum to meet their users' needs. Yet, it is Wi-Fi networks that carry the bulk of the wireless data transmissions—a ratio of 9:1 relative to mobile wireless. When spectrum is cleared for reallocation, policymakers face the challenging task of prudently allocating the resource among alternative uses, at least when the spectrum cannot be shared. We outline the broad parameters of that decision here. While the analysis is somewhat technical, the findings are simple. What matters is how much benefit is created—at the margin—when spectrum is assigned to one use or another. If one service creates more value than another for some small increment of spectrum, then the spectrum should be put to that higher-valued use. When large increments are involved, there may be some balancing act in the allocations, especially when alternative uses are complementary, such as the relationship between mobile and Wi-Fi networks.

A key finding of this analysis is that much of the advocacy directed at the issue is utterly irrelevant. The shares of spectrum already assigned to different uses, what China is doing, how many jobs are created by one use or another are all irrelevant. How much auction revenue is generated is *nearly* irrelevant though it can help, to some extent, expose where the marginal and extractable benefits are greatest. However, the unlicensed nature of Wi-Fi

spectrum and the transactions cost of organizing users weakens the relevance of auction revenues.

Certainly, we cannot claim that the proper allocation of newly available spectrum is an easy task—the analysis here is theoretical and it is not obvious exactly how the relevant marginal benefits can be measured. Policymakers must condense many considerations into a choice, including engineering concerns, global spectrum practices, economic value, and perhaps many other factors. Still, the policy choice should be based on the relevant factors measured as accurately as feasible. Perfection need not be the enemy of good, but advocacy that is extraneous to the genuine concerns should be ignored.

AI Procurement Reboot: Modern Strategies for Faster, Smarter Solutions

Jessica Buchanan*

TABLE OF CONTENTS

* J.D., May 2026, The George Washington University Law School; B.A. 2023 Sociology, Computer Science, University of Florida. I am deeply grateful to my professors in artificial intelligence for their intellectual rigor and for continually fueling my curiosity in this field. I also thank the Editorial Board of the Federal Communications Law Journal for the countless hours they devoted to editing and refining this Note. Finally, I am profoundly thankful to my family—Rhonda, Steve, Kristen, and Nick—my extended family, and my friends, whose unwavering support and encouragement during these demanding and stressful times made this work possible. I am forever indebted to you all.

I. INTRODUCTION

Imagine this: You are tasked to find, store, manage, sift through, and remember hundreds of thousands of pages of policy initiatives, just to find a few gaps—only to add even more pages to the mountain of policy that already exists.[1] Before Artificial Intelligence (AI) came to the rescue, policy workers at the Department of Defense were essentially reading Crime and Punishment over 150 times. That was a crime and punishment in its own right.

The use of AI is now widespread throughout the federal government. According to the Office of Management and Budget, forty-one federal agencies and departments had a combined 2,133 AI use cases.[2]

There are a multitude of examples of the federal government deploying AI to streamline tasks. As of January 23, 2025, the Department of State alone was employing fifty-one different AI use cases.[3] Among these is using AI to "translate global media articles" and social media posts to English and deploying "StateChat" which is an internal chatbot using Generative Artificial Intelligence (GenAI).[4] The Transportation Security Administration (TSA) under the Department of Homeland Security has deployed "Touchless PreCheck Identity Solution" facial recognition AI technology at border checkpoints.[5] This technology uses AI to verify identity by rapidly attempting to match the picture taken of you in real time to images that were previously provided to the government.[6] The Federal Bureau of Investigations is using AI to identify languages spoken on sound clips and filter data after conducting analysis on video footage in order to enhance their investigative processes.[7] The Department of Defense uses an AI system, GAMECHANGER, to sift through hundreds of thousands of pages of policy requirements to find gaps and has "transform[ed] the way policymakers access, analyze and create guidance."[8]

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1. *See DoW Directives and Issuances*, EXEC. SERVS. DIRECTORATE, https://www.esd.whs.mil/Directives/issuances/dodd/ [https://perma.cc/57P4-X3W6] (last visited Apr. 4, 2025).

2. *2024 Federal Agency AI Use Case Inventory*, GITHUB, https://github.com/ombegov/2024-Federal-AI-Use-Case-Inventory [https://perma.cc/V6P2-K2YJ] (Jan. 23, 2025).

3. *See Department of State AI Inventory 2024*, U.S. DEP'T OF STATE (Dec. 13, 2024), https://2021-2025.state.gov/department-of-state-ai-inventory-2024/ [https://perma.cc/DM8Y-A9NE].

4. *See id.*

5. *See Artificial Intelligence Use Case Inventory*, U.S. DEP'T OF HOMELAND SECURITY, https://www.dhs.gov/archive/data/AI_inventory [https://perma.cc/7MY2-MB77] (Dec. 16, 2024).

6. *See id.*

7. *See Artificial Intelligence*, FED. BUREAU OF INVESTIGATION, https://www.fbi.gov/investigate/counterintelligence/emerging-and-advanced-technology/artificial-intelligence# [https://perma.cc/39WA-3GLF].

8. DIA Public Affairs, *Gamechanger: Where Policy Meets AI,* DEF. INTEL. AGENCY (Feb. 7, 2022), https://www.dia.mil/News-Features/Articles/Article-View/Article/2926343/gamechanger-where-policy-meets-ai/ [https://perma.cc/6Z7L-E6ET].

In particular, GenAI is a technology advancing at a rapid rate. The market for GenAI is expected to reach $1.3 trillion by 2032.[9] It has great potential for streamlining national security and public use functions, but it comes with several challenges such as the risk of generating misinformation ("hallucinations"), posing a threat to national security, and being an expense that cannot keep up with annual budgeting plans.[10]

In order for the federal government to acquire products such as AI technologies they must refer to the controlling Federal Acquisition Regulation (FAR). It is the "primary regulation for use by all executive agencies in their acquisition of supplies and services with appropriated funds."[11] Further, when an agency wants to acquire "cloud technologies" it must refer to The Federal Risk and Management Program (FedRAMP).[12]

While investment in GenAI continues to increase, the strategies for procuring this software are slow, often taking almost two years to complete, while some AI companies are developing GenAI at a rate of almost a version a year.[13] This misalignment between the rapid development of GenAI and the traditional, lengthy government procurement cycles presents a significant barrier to timely adoption and effective use of the technology in government operations.

The procurement of GenAI tools is often slower than the pace at which GenAI technology evolves, necessitating a shift toward a more dynamic and efficient procurement model. Therefore, non-defense government agencies should leverage the Department of Defense's expedited acquisition pathways—specifically the Middle Tier Acquisition and Software Acquisition Pathways—in combination with agile, outcome-based procurement strategies to rapidly procure both task-oriented and GenAI technologies. This strategy offers a solution by accelerating the contracting process, enhancing risk management, addressing budgeting challenges and

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9. *See Generative AI to Become a $1.3 Trillion Market by 2032*, *Research Finds,* BLOOMBERG (June 1, 2023), https://www.bloomberg.com/company/press/generative-ai-to-become-a-1-3-trillion-market-by-2032-research-finds/ [https://perma.cc/LMX4-YDW2].

10. *See Science and Tech Spotlight: Generative AI,* U.S. GOV'T ACCOUNTABILITY OFF. (June 2023), https://www.gao.gov/assets/830/826491.pdf [https://perma.cc/D5T2-WT2Q]; *See* Anirban Ghoshal, *Government Tech Procurement Takes Three Times Longer Than Average*, CIO (Sept. 7, 2022), https://www.cio.com/article/406456/government-tech-procurement-takes-three-times-longer-than-average.html [https://perma.cc/V9U2-JDLA]; *See* Army Maj. Wes Shinego, *Defense Officials Outline AI's Strategic Role in National Security*, U.S. DEP'T OF WAR (Apr. 24, 2025), https://www.war.gov/News/News-Stories/Article/Article/4165279/defense-officials-outline-ais-strategic-role-in-national-security/[https://perma.cc/TJ7F-N85D]; *See* Uyen Chu, *AI in Public Sector: Top Use Cases You Need to Know* (Sept. 10, 2025), SMARTDEV, https://smartdev.com/ai-use-cases-in-public-sector/ https://perma.cc/ZL9T-M2FN].

11. *Federal Acquisition Regulation: Foreword*, GEN. SERVS. ADMIN., https://www.acquisition.gov/sites/default/files/current/far/pdf/FAR.pdf [https://perma.cc/HDF9-KMK3] (Apr. 4, 2024).

12. *See Program Basics*, FEDRAMP, https://web.archive.org/web/20250323001508/https://www.fedramp.gov/program-basics/ [https://perma.cc/5VAP-PQF6].

13. *See* Ghoshal, *supra* note 10; *See* Zee, *The History of ChatGPT: A Timeline of Events,* TECHROUND (Nov. 13, 2024), https://techround.co.uk/startups/chatgpt-history-timeline/ [https://perma.cc/BZ2T-JCSH].

encouraging innovation, ultimately enabling faster and more effective adoption of task-oriented and GenAI for non-defense government agencies.

II. BACKGROUND

A. What is AI and GenAI?

AI has evolved from basic human performance tests to performing advanced capabilities. AI is a "machine-based system that can, for a given set of human-defined objectives, make predictions, recommendations or decisions influencing real or virtual environments" with inputs generated by the machine or manually input by a human.[14] It was first invented back in the 1950s by Alan Turing with his published book describing a test known as "The Imitation Game" or "The Turing Test" which looks radically different from the AI most of the population imagines today.[15] The Turing Test was a "way of dealing with the question whether machines can think."[16] The test involves a human interrogating another human and a machine at the same time to decipher which responses are generated by the machine and if the interrogator is fooled, the machine has passed the test.[17] Since the introduction of the Turing Test in the 1950s, AI steadily improved. In the 1990s, a computer with the ability to play chess defeated a human adversary.[18] In the 2000s, there was a boom in the development of robots.[19] Then, in the 2010s, more modern AI emerged when an advanced AI system defeated two former Jeopardy! champions.[20]

The government increasingly implements AI into its functions. Today, the government procures AI technologies to expedite and automate repetitive tasks such as welfare payments.[21] As AI has become more sophisticated, it has been deployed and relied on for matters of increasing importance such as for national security interests. For instance, the Department of Homeland Security has deployed AI facial recognition technology at TSA checkpoints during US border crossings.[22]

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14. National Artificial Intelligence Initiative Act of 2020, H.R. 6216, 116th Cong. (2020).

15. *See The Birth of Artificial Intelligence (AI) Research,* LAWRENCE LIVERMORE NAT'L LAB'Y: SCI. AND TECH., https://st.llnl.gov/news/look-back/birth-artificial-intelligence-ai-research [https://perma.cc/4A4P-CGC6].

16. *The Turing Test*, STANFORD ENCYCLOPEDIA OF PHIL. (Oct. 4, 2021), https://plato.stanford.edu/entries/turing-test/ [https://perma.cc/UT98-MC9K].

17. *See id.* at § 1.

18. *See History of AI: Timeline and Future,* MARYVILLE UNIV. (May 19, 2023), https://online.maryville.edu/blog/history-of-ai/ [https://perma.cc/BJ64-E4MF].

19. *See id.*

20. *See id.; see also What are Large Language Models (LLMs)?,* IBM, https://www.ibm.com/think/topics/large-language-models [https://perma.cc/2G4H-VR8K] (last visited Jan. 24, 2025).

21. *See The Government and Public Services AI Dossier*, DELOITTE, https://www2.deloitte.com/us/en/pages/consulting/articles/ai-dossier-government-public-services.html [https://perma.cc/8DA8-ZWRK].

22. *See* U.S. DEP'T OF HOMELAND SECURITY, *supra* note 5.

GenAI is an extension of AI and an even more powerful tool. The Government Accountability Office defines it as a "technology that can create content, including text, images, audio, or video, when prompted by a user."[23] In other words, it creates new content based on the data from a previous input. Creators of the technology train the system on real data so that it can form patterns that will later be used by an AI system to generate new content.[24] Developers will gather an incredibly large data set, sometimes with thousands or millions of data points. Then, the system will learn "patterns and relationships from massive amounts of data."[25] A popular GenAI is the Large Language Model. Large Language Models take in a large amount of data and offer greater diverse capabilities and applications as compared to other AI models which may only be applicable to performing one, specific task.[26] For instance, ChatGPT is able to take in all different types of input including different spoken languages and even code to generate the user's desired result.[27] In comparison, other, more limited AI tools, such as image generators, are only able to generate pictures from the user's prompts.[28]

The Turing Test phenomenon was always theorized until ChatGPT rose to the occasion in 2024, when the GenAI "was not distinguishable from its human counterparts" thus passing the test.[29]

ChatGPT is a GenAI tool that is available for public use.[30]

ChatGPT looks like a chatbot that prompts the user to enter anything they want and in response the model will return content that is generated in that moment such as emails, code, announcements, answer questions, write essays, perform mathematical computations and more.[31] The Government also uses GenAI. The Department of State's "StateChat" is a prime example of a GenAI. Employees prompt and interact with the chatbot and it is expected to generate answers such that the employee can expedite internal tasks.[32]

"StateChat" is akin to a Large Language Model that "learn[s] patterns

23. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 10.

24. *See id.*

25. *Id.*

26. *See* IBM, *supra* note 20 (explaining Open AI's Chat GPT-3 and GPT-4 are examples of public Large Language Models).

27. *See* Amanda Hetler, *What is ChatGPT?*, TECHTARGET, https://www.techtarget.com/whatis/definition/ChatGPT [https://perma.cc/E2HE-FZV2] (Mar. 2025).

28. *See* Altexsoft Editorial Team, *AI Image Generation Explained: Techniques, Applications, and Limitations*, ALTEXSOFT (July 9, 2023), https://www.altexsoft.com/blog/ai-image-generation/ [https://perma.cc/HYM6-DGCE].

30. *Study Finds ChatGPT's Latest Bot Behaves Like Humans, Only Better*, STANFORD: SCHOOL OF HUMANITIES AND SCIENCES (Feb. 22, 2024), https://humsci.stanford.edu/feature/study-finds-chatgpts-latest-bot-behaves-humans-only-better [https://perma.cc/9HP9-MZCE].

30. *See Introducing ChatGPT,* OPENAI (Nov. 30, 2022), https://openai.com/index/chatgpt/ [https://perma.cc/UD4Y-GREG].

31. *See* Hetler, *supra* note 27.

32. *See* U.S. DEP'T OF STATE, *supra* note 3.

in written language."[33] When prompted, a Large Language Model can generate writing that a human could have seemingly written.[34]

GenAI is poised to be a trillion-dollar technology and rapidly surpass the mass use of Personal Computers (PCs) and the internet. GenAI is a market expected to grow to $1.3 trillion by 2032, almost 32 times greater than in 2023.[35] It has also been picked up profoundly faster by a wider audience compared to other marvels of their time such as the adoption of PCs and the internet.[36] PCs and the Internet had a 20 percent adoption rate two years after their reveal, while GenAI has doubled that with an adoption rate of almost 40 percent.[37]

B. The Rapid Development of GenAI

GenAI is a fast-growing industry with technology that is growing even faster in terms of its capabilities. One of the most well-known GenAI systems is OpenAI's ChatGPT. OpenAI would release five versions in just a mere six years.[38] The first version of their platform was GPT-1 released in 2018.[39] OpenAI proceeded to rapidly release new versions of their platform each year after the initial release.[40] In 2022, OpenAI released their most developed version of GenAI ChatGPT and a new, updated version quickly followed in 2023.[41] Almost less than two years later, OpenAI is set to release ChatGPT-5.[42]

C. The Government is After AI

GenAI is rapidly being integrated into government agencies.[43] There have already been agencies that have adopted the use of GenAI resulting in "improvements in employee satisfaction, compliance, and operational costs and time savings."[44] GenAI is sought after by the government for its use in

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33. U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 10; *see* Madison Alder, *From Translation to Email Drafting, State Department Turns to AI to Assist Workforce*, FEDSCOOP (Dec. 11, 2024), https://fedscoop.com/state-department-ai-chatbot-email-drafting-northstar-famsearch/.

34. *See* Hetler, *supra* note 27.

35. *See* BLOOMBERG, *supra* note 9.

36. *See* Christina Pazzanese, *Generative AI Embraced Faster than Internet, PCs*, HARVARD GAZETTE (Oct. 4, 2024), https://news.harvard.edu/gazette/story/2024/10/generative-ai-embraced-faster-than-internet-pcs/ [https://perma.cc/L2KQ-G77M].

37. *See id.*

38. *See Zee*, *supra* note 13.

39. *See id.*

40. *See id.*

42. *See id*.

42. *See* Adam Rowe, *When Is ChatGPT-5 Release Date, and What New Features Will it Have?,* TECH.CO (Aug. 20, 2024), https://tech.co/news/when-is-chatgpt-5-release-date [https://perma.cc/FE8D-FX4W].

43. *See New Study: Government GenAI Optimism May be Outpacing Ability to Deploy,* SAS INSTITUTE (Oct. 3, 2024), https://www.sas.com/ro_ro/news/press-releases/2024/october/government-genai-report.html [https://perma.cc/L9EJ-79B5].

44. *Id.*

processing, optimization abilities, and automation of many tasks.[45] For example, the Federal Risk and Authorization Management Program (FedRAMP), a government program that standardizes the security and risk assessments and the authorizations of cloud services with the goal of promoting the use of secure cloud services across the federal government released an Emerging Technology Prioritization Framework in June of 2024.[46] This framework put forth a list of three GenAI capabilities that will be at the forefront of their technology government procurement: "chat interfaces, code-generation and debugging tools, and prompt-based image generators."[47] Since then, several agencies have taken action. On August 14, 2024, the Department of Defense awarded a contract titled "Generative AI-Driven Defense and Machine Learning Against Advanced Phishing Attacks."[48] On September 15, 2025, The Department of Health and Human Services awarded a contract titled "Next Generation Dual Targeting ADCs For SCLC Empowered By Generative AI."[49] On December 15, 2026, The Department of Veterans Affairs awarded a contract titled, "Artera Artificial Intelligence (AI) for Prostate Cancer Cost-Per Test. Bpa Called."[50]

Funding for AI has surged. Federal funding for AI has nearly tripled since 2017.[51] In 2023, Nondefense government agencies requested $1.8 billion for the fiscal year budget for AI research and development compared to $560 million in 2018.[52] Nondefense government agencies are those in "education, transportation, income security, veterans' health care, and homeland security."[53] Federal funding for AI research and development was

45. *See* Anurag Singh, *Generative AI in the Government Sector: Use-cases, Challenges & Best Practices,* REZOLVE.AI (July 16, 2025), https://www.rezolve.ai/blog/generative-ai-government [https://perma.cc/RUG9-JKNV].

46. *See Release of Emerging Technology Prioritization Framework,* FEDRAMP (June 27, 2024), https://www.fedramp.gov/2024-06-27-release-of-et-framework/ [https://perma.cc/RV24-EN4S].

47. *Id.*

48. *Contract Award FA864924P1084*, USASPENDING.GOV, https://www.usaspending.gov/award/CONT_AWD_FA864924P1084_9700_-NONE-_-NONE- [https://perma.cc/PL6B-A5XR].

49. *Contract Award 75N91025C00040*, USASPENDING.GOV, https://www.usaspending.gov/award/CONT_AWD_75N91025C00040_7529_-NONE-_-NONE- [https://perma.cc/X48M-7WKX].

50. *Contract Award 36C24826N0220*, USASPENDING.GOV, https://www.usaspending.gov/award/CONT_AWD_36C24826N0220_3600_36C24825A0009_3600 [https://perma.cc/2D9F-PRRY].

51. *See* ARTIFICIAL INTELLIGENCE INDEX REPORT 2023, STANFORD UNIV. 24 (2023), https://aiindex.stanford.edu/wp-content/uploads/2023/04/HAI_AI-Index-Report-2023_CHAPTER_6.pdf [https://perma.cc/B6M3-73MD].

52. *See id.*

53. *Discretionary Spending Options,* CONG. BUDGET OFF., https://www.cbo.gov/content/discretionary-spending-options [https://perma.cc/RX5B-5R72].

about $2.4 billion in 2021, but for fiscal year 2025 a request was made for over $3.3 billion.[54]

D. Risks Associated with the Implementation of GenAI

1. Hallucinations

While GenAI has immense capabilities, it offers many challenges that create hesitancy in its use and application in the government. For example, GenAI can "hallucinate" which is where the system generates a response that is inaccurate and akin to misinformation.[55] This is typically a result when the user has asked for a result that the model did not learn in the training phase because it lacked the data necessary to form that pattern.[56] In such a case, the model will spit out information that is anywhere from just slightly misguided or completely made up.[57] ChatGPT, a Large Language Model that generates content when prompted by the user, has been in hot water for "hallucinating."[58] In June of 2023, two lawyers litigating an injury case against an airline submitted documents to a court that contained six court cases and details that were completely fabricated, also known as hallucinated, by ChatGPT.[59] The information either "[was not] real, misidentified judges, or involved airlines that did not exist."[60] While this hallucination was limited to the private sphere, OpenAI, the owner of ChatGPT, has contracted with federal agencies such as the National Aeronautics and Space Administration (NASA) and the Internal Revenue Service (IRS) to obtain annual licenses for ChatGPT enterprise software.[61] Therefore, the potential for hallucinations in the federal government sphere has become imminent. AI hallucinations that occur within the federal system can have greater impact as compared to private, personal use due to the potential for the widespread dissemination of false information. Information that is "ungrounded" can "misguide

54. *See Artificial Intelligence R&D Investments Fiscal Year 2019–Fiscal Year 2025*, NETWORKING AND INFORMATION TECHNOLOGY RESEARCH AND DEVELOPMENT PROGRAM (NITRD), https://www.nitrd.gov/ai-rd-investments/ (last visited Jan. 16, 2026) [https://perma.cc/3MTE-5MSR].

55. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 10.

56. *See id.*

57. *The Dangers of AI Hallucinations in Federal Data Streams*, IT VETERANS (May 20, 2024), https://www.itveterans.com/the-dangers-of-ai-hallucinations-in-federal-data-streams/ [https://perma.cc/UQ86-K5G5].

58. *See Introducing ChatGPT, supra* note 30; Larry Neumeister, *Lawyers Submitted Bogus Case Law Created by ChatGPT. A Judge Fined them $5,000*, ASSOCIATED PRESS (June 22, 2023, 6:16 PM), https://apnews.com/article/artificial-intelligence-chatgpt-fake-case-lawyers-d6ae9fa79d0542db9e1455397aef381c [https://perma.cc/62BQ-QMVE].

59. *See* Neumeister, *supra* note 58.

60. *Id.*

61. *See* Rebecca Heilweil, *OpenAI Further Expands its Generative AI Work with the Federal Government*, FEDSCOOP (Nov. 4, 2024), https://fedscoop.com/openai-expands-chatgpt-work-federal-government/ [https://perma.cc/348M-FQ7M].

policymakers … churn out misleading trends … [and] spawn incorrect medical guidelines."[62]

2. Algorithmic and Machine Learning Bias

AI systems, including Large Language Models, are subject to algorithmic bias and machine learning bias.[63] Algorithmic bias is the output of results that mirror and reinforce societal biases and comes from the "initial training data, the algorithm, or the predictions of the algorithm procedures."[64] Since GenAI, especially Large Language Models, intake a large amount of data, they are susceptible to bias risks.[65] When these models are deployed in such large formats, the biases are amplified.[66]

Training data can become corrupt when overinclusive or underinclusive data is used to train the algorithm.[67] For example, with a facial recognition AI, if the data training set has a disproportionate amount of white faces to people of color, the algorithm could fail to appropriately recognize the group with less representation, possibly perpetuating bias.[68] If a flawed training data set is used, algorithmic bias can result because the system has learned off of flawed data.

Algorithmic bias can also come from the algorithm itself on the programmer's side.[69] Algorithms that are constantly taking new data in and learning in the moment can suffer from a "runaway feedback loop."[70] A feedback loop occurs when bias has already been introduced to the training set, causing the algorithm to make decisions based on biased data.[71] These biased decisions are then fed back into the algorithm, making increasingly biased decisions, ultimately creating a feedback loop.[72] This has become a well-known issue in predictive policing. Predictive Policing uses location, previous arrest statistics, and more to train their algorithm to point out high crime areas.[73] These areas experience higher patrols which leads to more crime identified which are fed into the algorithm.[74] Ultimately, these areas are "over-emphasized[d]" in the system due to the feedback loop.[75] When procuring AI systems, the federal government and the public may be wary of

62. IT VETERANS, *supra* note 57.

63. *See generally*, *Shedding Light on AI Bias with Real World Examples*, IBM (Oct. 16, 2023), https://www.ibm.com/think/topics/shedding-light-on-ai-bias-with-real-world-examples [https://perma.cc/4XAJ-5HR2].

64. *Id.*

65. *See* IBM, *supra* note 20; *see id.*

66. *See* IBM, *supra* note 65.

67. *See id.*

68. *See id.*

69. *See id.*

70. Clare Veal et al., *The Perils of Feedback Loops in Machine Learning: Predictive Policing*, GILBERT+TOBIN (Feb. 20, 2023), https://www.gtlaw.com.au/insights/the-perils-of-feedback-loops-in-machine-learning-predictive-policing [https://perma.cc/BF3K-YMP5].

71. *See id.*

72. *See id.*

73. *See id.*

74. *See id.*

75. *See id.*

these potential biases having far-reaching, negative societal effects and it could be a factor that prevents non-defense agencies from fully diving in.[76]

3. Privacy and National Security Risks

The government is also concerned about the privacy and national security risks of AI.[77] Regarding private models, the system may not be programmed to or is unable to rid itself of sensitive content not available to the public, making itself vulnerable if a cyberattack were to occur.[78]

Public GenAIs such as ChatGPT pose a substantial risk to the revelation of secure data. The Department of Defense believes imputing data into public Large Language Models "risks having the Army's sensitive data bleed into the public domain via the internet and training models that adversaries could access."[79] In September of 2023, The U.S. Space Force, a branch of the US Armed Forces, released an internal memorandum to its workforce that prevented the use of public AI tools such as ChatGPT "due to data aggregation risks."[80]

An overall danger leading to hesitancy is the lack of comfortability with the technology and specialized knowledge from both the procurement team's and end users' point of view. The SAS Institute is a heavy research-based, data analytics company that manages data software and supplies businesses with data intelligence.[81] According to the SAS institute, a large barrier to GenAI being procured by government agencies is the "inadequate regulatory preparedness and lack of understanding of [GenAI]."[82] There has been guidance put into place, but only a little bit more than half of government agencies guide employees on the permissible uses of GenAI.[83] Additionally, only thirty-eight percent of "senior government decision makers say they understand [GenAI] and its impacts on business processes well or completely."[84] Though, comfortability and confidence is expected to grow the more the GenAI software is used.[85] On January 23, 2025, President Donald Trump signed an Executive Order setting the United States' goal of securing a stronghold in the field of AI to "promote human flourishing, economic

76. *See generally* Clare Veal et al., *supra* note 70; *see generally* Rosie Tomiak, *Analyzing AI Use in Government Agencies*, THE ANTI-FRAUD COAL. (Feb. 6, 2025), https://www.taf.org/ai-government-agencies/ [https://perma.cc/V9HP-EANQ].

77. *See* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 10.

78. *See id.*

79. Jon Harper, *Army Set to Issue New Policy Guidance on Use of Large Language Models*, DEFENSESCOOP (May 9, 2024), https://defensescoop.com/2024/05/09/army-policy-guidance-use-large-language-models-llm/ [https://perma.cc/DXN2-HET7].

80. *U.S. Space Force Pauses Use of AI Tools Like ChatGPT Over Data Security Risks*, REUTERS (Oct. 12, 2023, 2:36 AM), https://www.reuters.com/technology/space/us-space-force-pauses-use-ai-tools-like-chatgpt-over-data-security-risks-2023-10-11/ [https://perma.cc/AHN4-HZ2L].

81. *SAS Institute Inc: Overview,* GLOBALDATA, https://www.globaldata.com/company-profile/sas-institute-inc/ [https://perma.cc/MDC7-UNAG].

82. SAS INSTITUTE, *supra* note 43.

83. *See id.*

84. *Id.*

85. *See id.*

competitiveness, and national security."[86] This order requires that assistants, directors, and heads of various government agencies develop an action plan to achieve these objectives within 180 days.[87] This concerted effort demonstrates the federal government's willingness to incorporate AI into the government's daily operations.

E. The Classic Process of AI Government Procurement

The federal procurement process for AI is slow as agencies face lengthy cycles, budget issues and delayed decision-making. The current procurement process of AI software and technology in general is slow.[88] Federal agencies are reported to have the "longest average buying cycle for technology" as compared to other areas.[89] The term for federal agencies can be up to 22 months while some private sectors are averaging about six months.[90]

Federal agencies cite strict procurement laws and budgeting hurdles as to why the process takes so much longer.[91] A procurement project is typically connected to the approval of an annual budget and any relevant legislation.[92] This means that a government procurement project that takes almost two years to deliver is operating with a budget almost two years old and contracting for technology two years old. Additionally, "procurement is siloed in its own office separate from policy and technology functions."[93]

The lack of overlap between diverse, decision-making teams also stalls progress. The division prevents large procurement teams from coming to a consensus quickly.

1. Technology Procurement in the Federal Acquisition Regulation Framework

The Federal Acquisition Regulation Framework (FAR) governs the acquisition of supplies and services, with Part 39 specifically regulating Information Technology. The Federal Acquisition Regulation Framework (FAR) is the "primary regulation for use by all executive agencies in their

86. Exec. Order No. 14,179, 90 Fed. Reg. 8741 (Jan. 23, 2025).

87. *See id.*

88. *See* Christopher R. Barlow et al., *Enhancing Acquisition Outcomes through Leveraging of Artificial Intelligence* 6, THE MITRE CORP. 2024, https://www.mitre.org/sites/default/files/2025-03/PR-24-0962-Leveraging-AI-Acquisition.pdf.

89. Ghoshal, *supra* note 11.

90. *See id.*

91. *See id.*; *See* Charli Renken, *Why Government Tech Is So Slow — and How D.C. Companies Are Bringing It Up to Speed*, BUILT IN (Mar. 16, 2022), https://builtin.com/articles/dc-companies-government-tech-modernization-031622 [https://perma.cc/6WUA-QLZ4].

92. *See* Renken, *supra* note 92.

93. Chloe Autio et. al., *A Snapshot of AI Procurement Challenges*, THE GOVLAB 1, 18 (June 2023), https://files.thegovlab.org/a-snapshot-of-ai-procurement-challenges-june2023.pdf [https://perma.cc/X6LU-HAKD].

acquisition of supplies and services with appropriated funds."[94] Part 39 regulates the acquisition of Information Technology.[95] Information technology within the framework is defined as "any equipment, or interconnected system(s) or subsystem(s) of equipment, that is used in the automatic acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the agency."[96]

While GenAI is not specifically mentioned in the FAR,[97] it falls into the Information Technology definition as it is typically a system that performs those enumerated functions. Part 39 of FAR covers information and communication technology for the general use of the agencies or public.[98]

FAR suggests that agencies should use "modular contracting" which is the "use of one or more contracts to acquire information technology systems in successive, interoperable increments."[99] The FAR adopts this method consistent with 41 U.S.C.§ 2308.[100] The FAR specifies that an agency within the next 180 days should award the next increment and delivery should occur within 18 months.[101]

The FAR gives agencies the flexibility to choose procurement methods, but the traditional approach struggles to keep pace with the fast-evolving field of Generative AI. The FAR leaves open what method of procurement to use at each increment[102] but ultimately does not address the timing issue. With the agencies able to use their own discretion as to the method, this is where the process can stall. The traditional procurement method that the FAR sets forth is a slow process that does not align with the rapid pace of the development of GenAI. The traditional procurement method begins with laying out the entire, full scope of the project from the start and soliciting competitive bids.[103] The procurement team will go through the contracting process step-by-step, conferring with each other at each step and only after a consensus will they move onto the next step.[104]

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94. *Federal Acquisition Regulation: Foreword*, GEN. SERVS. ADMIN., https://www.acquisition.gov/browse/index/far [https://perma.cc/HDF9-KMK3].

95. *See Federal Acquisition Regulation: Part 39*, GEN. SERVS. ADMIN., https://www.acquisition.gov/far/part-39 [https://perma.cc/8RKK-L5AP].

96. *Federal Acquisition Regulation: Part 2*, GEN. SERVS. ADMIN., https://www.acquisition.gov/far/part-2 [https://perma.cc/2Q84-4PHB].

97. *See id.*

98. *See id.* at pt. 39.

99. *Id.* at 39.

100. *Federal Acquisition Regulation*, *supra* note 95, at pt. 39.103 ("This section implements 41 U.S.C. 2308.").

101. *Id.*

102. *See id.*

103. *See* Graham McConnell, *Agile Procurement v. Traditional Procurement*, RESPONSIVE (Aug. 1, 2024), https://www.responsive.io/blog/agile-procurement/ [https://perma.cc/PR3V-YK4S]; *see also Federal Acquisition Regulation: Part 6,* GEN. SERVS. ADMIN., https://www.acquisition.gov/far/part-39 [https://perma.cc/8RKK-L5AP].

104. *See id.*

2. Technology Procurement in the Federal Risk and Authorization Management Program

GenAI requires substantial computing power, making cloud use essential, but is difficult to implement due to the need for FedRAMP authorization. GenAIs require an incredibly large data set and computing power which puts pressure and strain on "compute, storage, and networking" necessitating the use of a "cloud" for the product.[105] The Federal Risk and Authorization Management Program (FedRAMP) is the authoritative approach to procuring "cloud services" which is a subset of "cloud computing."[106] The National Institute of Standards and Technology defines "cloud computing" as offering "on-demand network access" to a common group of resources that involves little effort to manage or supervise.[107] Within the models included in FedRAMP there is a "government-only" community deployment model which concerns a cloud that contains only data owned by the government, i.e. no private organization or public information.[108] As of January 17, 2026, there are 488 FedRAMP authorized government-only cloud services.[109]

The authorization process involves preparation, security assessments, and continuous monitoring. There are two main stages involved in the authorization process followed by a continuously monitoring stage.[110] In the first stage, "Preparation," the cloud service provider goes through an optional "readiness assessment" and a mandatory "pre-authorization" which establishes the partnership with the federal agency and identifies the security impact of the service.[111] In the second phase, "Authorization," the cloud service provider will go through a "full security assessment" with a third party, then conduct a debrief with stakeholders encompassing the assessment approach, any residual risk and mitigation techniques, how the federal agency

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105. Chhavi Arora et al., *In Search of Cloud Value: Can Generative AI Transform Cloud ROI?*, MCKINSEY & CO. (Nov. 15, 2023), https://www.mckinsey.com/capabilities/mckinsey-digital/our-insights/in-search-of-cloud-value-can-generative-ai-transform-cloud-roi [https://perma.cc/9WJU-BEWK].

106. *Program Basics*, FED. RISK & AUTHORIZATION MGMT. PROGRAM, https://www.fedramp.gov/program-basics/ [https://perma.cc/5VAP-PQF6]; *see also* H.R. 21, 117th Cong. (2021).

107. *See* Peter Mell & Timothy Grance, *The NIST Definition of Cloud Computing*, NAT'L INST. OF STANDARDS & TECH. (Sept. 2011), https://nvlpubs.nist.gov/nistpubs/Legacy/SP/nistspecialpublication800-145.pdf [https://perma.cc/J8ED-SLPW].

108. *See FedRAMP CSP Authorization Playbook*, FED. RISK & AUTHORIZATION MGMT. PROGRAM (Feb. 15, 2024), https://www.fedramp.gov/assets/resources/documents/CSP_Authorization_Playbook.pdf [https://perma.cc/V5JG-KNL9].

109. *See FedRAMP Marketplace*, FED. RISK & AUTHORIZATION MGMT. PROGRAM, https://marketplace.fedramp.gov/products [https://perma.cc/H3SA-M6S6].

110. *See REV5 Agency Authorization*, FED. RISK & AUTHORIZATION MGMT. PROGRAM, https://www.fedramp.gov/rev5/agency-authorization/ [https://perma.cc/5A9J-SV6Q] (last visited Apr. 4, 2025); *see also* FED. RISK & AUTHORIZATION MGMT. PROGRAM, *supra* note 108, at 14.

111. *See* FED. RISK & AUTHORIZATION MGMT. PROGRAM, *supra* note 108, at 8-9.

reviewed the assessment, and more.[112] In the last phase, the cloud service provider will provide monthly reports to the federal agency addressing system vulnerabilities and incidences.[113] This FedRAMP certification process typically takes twelve to eighteen months to complete with a possible timeline spanning as little as six months to two years.[114] With the boost in use of GenAI, FedRAMP has released an "Emerging Technology Prioritization Framework" that serves to prioritize the authorization of GenAIs such as "chat interfaces, code-generation and debugging tools, and prompt-based image generators."[115] However, even though these technologies will be prioritized, the actual procurement process and ultimate approval of the technology is up to the agency as they "drive their own acquisition, evaluation, and authorization processes using a far broader set of criteria."[116]

Recently, FedRAMP also put out prioritization criteria complete with five criteria as well as a prioritization process.[117] They also shortlisted three programs that were on track for authorization by January 2026.[118]

Additionally, FedRAMP has a pilot program called 20x that aims to make the authorization process significantly faster and in 2025 doubled the numbered of authorizations as compared to 2024.[119] However, this is for a low-impact authorization and the numbers remain low for GenAI, standing at 13 as of January 18, 2025.[120] This may be due to the technologies still being subject to the agency's timeline and budget constrictions.[121]

F. Agile and Outcome Based Procurement Strategies

Agile approaches prioritize flexibility and communication. Agile approaches are iterative and keep track of necessary changes to accommodate and adapt.[122] Agile approaches organize the implementation and completion of a project in a way such that the software is implemented within the original time specified and the original budget.[123] Key components of an agile approach are breaking the process into small digestible pieces, adapting to

112. *See id.* at 11-12.

113. *See id.* at 14.

114. *See* ANCHORE, *FedRAMP Compliance: FAQs & Key Things to Know*, https://anchore.com/fedramp/fedramp-overview [https://perma.cc/5REA-4R84] (last updated Jan. 7, 2025).

115. FEDRAMP, *supra* note 46.

116. *Id.*

117. See FEDRAMP, *FedRAMP AI Prioritization* (Aug. 18, 2025), https://www.fedramp.gov/ai/ [https://perma.cc/2E3N-BU2G].

118. *See id*.

119. *FedRAMP 20x CWG: What Federal Agencies Need to Know in 2026*, ELEVATE CONSULT (Jan. 14, 2026), https://elevateconsult.com/insights/fedramp-20x-cwg-what-federal-agencies-need-to-know-in-2026/ [https://perma.cc/6JNS-SY4K].

120. *FedRAMP Marketplace: Products*, FEDRAMP, https://marketplace.fedramp.gov/products [https://perma.cc/39JH-2UZ7] (last visited Jan. 18, 2026).

121. FEDRAMP, *supra* note 46.

122. *See* Benjamin J. Balter, Note, *Toward a More Agile Government: A Case For Rebooting Federal IT Procurement*, 41 PUB. CONT. L.J. 149, 164 (2011).

123. *See id.* at 157.

changes, and pushing certain long-term decisions until they necessarily need to be made.[124] Agile procurement strategies reinforce the notion of communication being at the core of a software procurement project.[125]

The need to procure software on the basis that it will need to continuously adapt to the agency's needs and circumstances promotes "face-to-face discussions."[126]

Outcome-based procurement contracts incentivize innovation and risk-management. Outcome-based procurement contracts, sometimes referred to as results-based financing, center around the idea that payment will be received when a certain milestone has been achieved.[127] It allows the agency to set the overall goal but for the bidder to implement their own solution.[128]

Outcome-based procurement works best when the agency has a "clear purpose" in mind and the large costs associated with the project.[129] It typically serves three purposes: promoting desired behavior, managing risks financial, security or otherwise, and reducing costs by driving up the competitive value of the project which in turn drives innovative solutions.[130]

Regarding timeline and risk, the risk of non-delivery of the product falls onto the bidder, rather than the agency.[131] Outcome-based procurement benefits from the inverse relationship of costs and competition.[132] Costs of the project reduce when competition increases.[133] Outcome-based procurement has been historically hard to implement due to the lack of technical expertise and ill-trained contracting employees.[134]

Depending on the technology being procured and the agency procuring, a different strategy will work best in different circumstances, so it is critical to evaluate and assemble long-term and short-term goals and project all potential costs of the project in order to choose the strategy that will produce the best results.

G. Adaptive Acquisition Framework Pathways

The Adaptive Acquisition Framework was developed for expediting defense acquisitions.[135] The framework has become a critical guide for the

124. *See id.* at 164.
125. *See id.* at 167.
126. *See id*. at 167-68.
127. *See* Government Outcomes Lab, *Outcomes-Based Contracting*, UNIV. OF OXFORD, https://golab.bsg.ox.ac.uk/the-basics/outcomes-based-contracting/ [https://perma.cc/6BW3-QF7F].
128. Nick Wakeman, *Outcome-based contracts are smart but hard to field*, WASH. TECH.(Nov. 30, 2022), https://www.washingtontechnology.com/companies/2022/11/outcome-based-contracts-are-smart-hard-field/380293/ [https://perma.cc/UH7F-YDVY].
129. *See* Government Outcomes Lab, *supra* note 127.
130. *See id.*
131. *See id.*
132. *See id.*
133. *See id.*
134. *See* Wakeman, *supra* note 128.
135. *See* Kevin Fahey, *DOD's Transformational Adaptive Acquisition Framework*, DAU (Nov. 5, 2019), https://www.dau.edu/news/dods-transformational-adaptive-acquisition-framework [https://perma.cc/VZ5V-WUDE].

Department of Defense's procurement strategies.[136] Within this framework are six different types of pathways designed to work with different technologies, strategies, and teams.[137]

1. Middle Tier of Acquisition Pathway

The Middle Tier of Acquisition Pathway (MTA) is specifically used for the development of technologies that only need to "minimally develop a capability before rapidly fielding."[138] The Department of Defense has found success in the MTA pathway. For instance, The Department of Defense has been able to make continuous changes to its autonomous robotic combat vehicles through the middle tier acquisition pathway, which without the pathway would have involved lengthy, iterative follow-ups preventing critical updates and improvements.[139]

The pathway offers three advantages. It reduces cost to the department by proving capability prior to making the big purchase, it allows smaller businesses to compete and offer innovative solutions that could not otherwise afford the traditional procurement process, and serves to "jump start" innovative technologies.[140] Within five years of beginning the pathway, the technologies are expected to be prototyped or fielded.[141] This is in comparison to the Department's typical eleven-year delivery timeline, so the pathway is designed to deliver results with speed.[142] However, five years is still a long process for procuring emerging technologies given the timeline of releases of GenAI. [143]

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136. *See* Jim Garamone, *Transformational Change Comes to DOD Acquisition Policy*, U.S. DEP'T OF DEF. (Oct. 21, 2019), https://www.defense.gov/News/News-Stories/Article/Article/1994041/transformational-change-comes-to-dod-acquisition-policy/ [https://perma.cc/T6TT-2J8G].

137. *See* Def. Acquisition Univ., *Adaptive Acquisition Framework*, https://aaf.dau.edu/# [https://perma.cc/9WFV-TUA9] (last visited Apr. 4, 2025).

138. *Id.*

139. *See* Pete Modigliani et al.*, Get to Know the Middle-Tier, the Awesome-er Acquisition,* DEFENSE ONE (Sept. 12, 2022), https://www.defenseone.com/ideas/2022/09/get-know-middle-tier-awesomeer-acquisition/377017/ [https://perma.cc/P8LQ-SCAK]; *see generally* ANDREW FEICKERT, CONG. RSCH. SERV., IF11876, THE ARMY'S ROBOTIC COMBAT VEHICLE (RCV) PROGRAM (2025).

140. Def. Acquisition Univ., *MTA Overview & Benefits*, https://aaf.dau.edu/aaf/mta/overview/ [https://perma.cc/3MLV-KNC5] (last visited Apr. 4, 2025).

141. *See* Def. Acquisition Univ., *supra* note 137.

142. *See* Peter Musurlian, *Major DoD Acquisition Programs Taking Too Long, GAO Says*, FED. NEWS NETWORK (June 18, 2024), https://federalnewsnetwork.com/federal-newscast/2024/06/major-dod-acquisition-programs-taking-too-long-gao-says/#:~:text=GAO%20said%20on%20average%2C%20DoD's,three%20years%20longer%20than%20planned [https://perma.cc/HHS7-SDVH].

143. *See* Zee, *supra* note 13.

2. The Software Acquisition Pathway

The Software Acquisition Pathway was developed to rapidly deploy software systems to users in the defense industry.[144] It is an agile and iterative solution to procuring and acquiring software rapidly and continuously. A key point in the pathway is that the capabilities of the software will be shown not more than one year post the dedication of funds.[145] As the software is improved, these improvements will be distributed to the end user at least annually.[146] Moreover, the improvements to the software over time will be done in "collaboration with end users" which seems to promote harmony amongst the software and the updated needs of the department.[147]

Program Maven demonstrated the success of the Department of Defense's expedited software acquisition pathway. Program Maven, originally Project Maven, is a Pentagon initiative that began in 2017.[148]

The project featured AI capabilities that could "scan photos and identify objects on the battlefield."[149] Program Maven was introduced in the battlefield a mere six months after receiving funding due to acquisitions through the expedited software acquisition pathway. [150] Through the pathway, the National Geospatial-Intelligence Agency has been able to maintain "agility, flexibility, and speed" in keeping the projects capabilities up-to-date.[151] This pathway has been used to acquire fifty software programs since its unveiling.[152] The then Assistant Secretary of Defense for Acquisition, Cara Abercrombie, notes that greater adoption of the software acquisition pathway could result from "a team of experts who know how to use the software pathway, who know how to do agile acquisition strategies" illuminating that expertise is key to making the pathway successful.[153]

The Federal Aviation Administration (FAA) could similarly make use of this pathway in their flight monitoring software. The implementation of AI could "monitor America's crowded skies… [and] mean quicker safety

144. *See* Def. Acquisition Univ., *Software Acquisition*, https://aaf.dau.edu/aaf/software/ [https://perma.cc/H3HA-9NYY].

145. *See id.*

146. *See id.*

147. *Id.*

148. *See* Saleha Mohsin, *Inside Project Maven, The U.S. Military's AI Project*, BLOOMBERG (Feb. 29, 2024), https://www.bloomberg.com/news/newsletters/2024-02-29/inside-project-maven-the-us-military-s-ai-project [https://perma.cc/3FRA-VNFC].

149. *Id.*

150. *See* Gregory C. Allen, *Project Maven Brings AI to the Fight Against ISIS*, CTR. FOR A NEW AM. SEC. (Dec. 21, 2017), https://www.cnas.org/publications/commentary/project-maven-brings-ai-to-the-fight-against-isis# [https://perma.cc/L5HU-DEEL]; *See also* Lizbeth Perez, *NGA Official Updates on Program Maven, AI Initiatives*, MERITALK (Oct. 25, 2023), https://www.meritalk.com/articles/nga-official-updates-on-program-maven-ai-initiatives/ [https://perma.cc/PBP2-9K9Q].

151. Perez, *supra* note 150.

152. *See* Jared Serbu, *DoD Stands Up 'SWAT Team' to Help Speed Software Acquisition*, FED. NEWS NETWORK (May 10, 2024), https://federalnewsnetwork.com/defense-news/2024/05/dod-stands-up-swat-team-to-help-speed-software-acquisition/# [https://perma.cc/UMA6-4MNT].

153. *Id.*

checks."[154] However, as is the case with the rapid development and improvements to AI, it would be advantageous of the FAA to use the software acquisition pathway to ensure their technology is always up to date, ensuring safety and trust.

The procurement process for GenAI lags behind the rapid improvements in AI, causing non-defense agencies to encounter procurement challenges with regards to the technology. The use of expedited acquisition pathways is a promising solution that when properly leveraged, can elevate and expedite the non-defense procurement process.

III. ANALYSIS

The Middle Tier of Acquisition Pathway and the Software Acquisition Pathway have demonstrated success when it comes to procuring and acquiring emerging technologies.[155] The ability of these pathways to produce rapid results serves to solve budgeting, risk and timeline challenges.

A. The Rapid Development of GenAI Illuminates the Need for Non-Defense Government Agencies to Use AI to Procure GenAI

Implementing AI in government contracting will work to automate much of the process, generate insights, detect fraud, manage risk, predict cost and timeline, and track compliance with regulations.[156] Currently, the typical procurement process involves multiple stages that have long, drawn out implications. Federal contracting officers are facing the strain of reviewing more material than ever before. "In 2022, for every Federal contracting officer, an average of 2,000 contracting actions had to be executed per year. Comparing that number to the 300 actions per year in 2013 reveals the scope of the problem."[157] This explosion in workload has led to inefficiencies and delays, highlighting the need for a more effective and streamlined approach.[158] Non-GenAI, such as task-orientated AIs that do not need the use of a cloud and thus require no FedRAMP certification, can be obtained

154. *FAA Eyes AI System to Watch America's Airways*, PYMNTS (Nov. 12, 2024), https://www.pymnts.com/artificial-intelligence-2/2024/faa-eyes-ai-system-to-watch-americas-airways/ [https://perma.cc/MM6L-HKMX].

155. *See Integrated Visual Augmentation System (IVAS),* FY 2019 ANNUAL REPORT 85 (2019), https://www.dote.osd.mil/Portals/97/pub/reports/FY2019/army/2019ivas.pdf [https://perma.cc/QY5Z-PD3F]; *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, *Defense Software Acquisitions: Changes to Requirements, Oversight, and Tools Needed for Weapon Programs,* GAO-23-105867 (July 20, 2023), https://www.gao.gov/assets/gao-23-105867.pdf [https://perma.cc/S22T-DWAR].

156. *See* Ben Allen, *Improving Procurement with AI in Government Contracting*, APPIAN (Oct. 24, 2024), https://appian.com/blog/acp/public-sector/ai-in-government-contracting [https://perma.cc/6ZTQ-CL7E].

157. Harry Menear, *Is There a Role for Generative AI in Public Sector Procurement?*, CPO STRATEGY (Feb. 23, 2024), https://cpostrategy.media/blog/2024/02/23/is-there-a-role-for-generative-ai-in-public-sector-procurement/ [https://perma.cc/JC7H-XF9L].

158. *Id.*

quickly through The Department of Defense's expedited software acquisition pathway previously mentioned.

AI will streamline the contract bidding selection process. The use of this AI will be able to monitor the contract phases, perform financial checks on bidders, and review past performance in earlier contract jobs.[159] AI can significantly reduce the time and resources needed to execute procurement actions. AI can analyze industry-wide data and have it generate factors on performance history and reputation.[160]

One large hesitancy to procuring GenAI was the associated security risks.[161] However, AI can help that process. An AI system can flag problematic clauses and inconsistencies.[162] It may also project delays or failures with the intended project.[163] Additionally, the use of AI during the procurement process by government employees will foster greater confidence, aiding in comfort level when it comes to using the procured GenAI. Moreover, the use of AI, while it can be expensive on the forefront, can save and recover money.[164] The Treasury Department was able to recover $375 million through their use of AI, demonstrating the money-saving impact of AI.[165]

1. Non-Defense Government Agencies Should Use the Department of Defense's Middle Level Acquisition Pathway to Procure Non-Generative, Task-Orientated AIs for Future Government Use

For non-defense government agencies, the Middle Level Acquisition Pathway presents a valuable opportunity to quickly field AI solutions designed to support procurement processes. The Middle Level Acquisition Pathway[166] will serve non-defense agencies in rapidly fielding AI technology. This pathway would be integral in the procurement of task-orientated AIs because there is a plethora of AI.[167] Task-oriented AI systems are focused on specific, narrow tasks—such as reviewing vendor performance history, monitoring contract compliance, or flagging potentially fraudulent activities.[168] Task-orientated AIs can stay local to the computer as compared

159. *See* Molly Colaneri, *The Transformative Power of AI in USG Procurement*, U. DAYTON L., https://udayton.edu/law/government_contracting/articles/transforming_government_procurement_ai.php# [https://perma.cc/4DZ4-EYHH].
160. *See id.*
161. *See* Allen, *supra* note 156.
162. *See id.*
163. *See id.*
164. *See* Tomiak, *supra* note 76.
165. *See id.*
166. *See* Def. Acquisition Univ., *supra* note 137.
167. *See id.*
168. *See* Allen, *supra* note 156.

to GenAIs, meaning no FedRAMP certification is needed.[169] With no FedRAMP certification needed, the procurement process will be quicker and there is an added bonus of security with no cloud-based networks needed for it to operate.[170] The absence of FedRAMP requirements is a significant advantage in speeding up the procurement process.

Despite hesitancy around AI procurement, Middle Level Acquisitions attract bidders with mature technologies that require minimal modification, addressing both risk concerns and the needs of non-defense agencies. Typically, there is hesitancy surrounding procurement of AI due to the timeline being too short to adequately address the risk concern. However, the point of Middle Level Acquisitions is to attract bidders who have technologies that need very little in order to be fielded.[171] They are mature technologies that require minimal modification or further development before they can be deployed.[172] Therefore, bidders for the project should already have security and risk assessments performed and submitted to the procurement team. This aligns well with the needs of non-defense agencies looking for reliable task-oriented AI tools.

The lower cost and the competitive environment fostered by the MTA Pathway not only help keep procurement costs within budget but also promote innovation and diversity in the vendor pool. As of April 3, 2025, the Office of Management and Budget released a memorandum (M-25-21) guiding federal agencies to remove barriers that are preventing AI innovation giving even more reason to implement this pathway.[173] Regarding the budget, Middle Level Acquisitions attract smaller companies[174] whose prices have not inflated compared to AIs from Microsoft and OpenAI. Smaller companies, eager to establish a presence in the government contracting space, are likely to offer more cost-effective solutions in exchange for the opportunity to scale their technologies. Thus, the likelihood of staying within the budget is high. This will also promote competition and innovative solutions.

B. Non-Defense Government Agencies Should Leverage the Department of Defense's Software Acquisition Pathway with Agile and Outcome Based Procurement Strategies to Procure GenAI

The software acquisition pathway in combination with the agile and outcome-based procurement methods are critical to rapidly acquiring emerging technologies such as generative AI. The Software Acquisition Pathway allows agencies to integrate agile procurement principles, enabling

169. *See* Gary Stevens, *Understanding Locally Hosted AIs,* NAMECHEAP (March 29, 2024) https://www.namecheap.com/blog/understanding-locally-hosted-ais/ [https://perma.cc/87Y2-PCU9].

170. *See id*.

171. *See* Def. Acquisition Univ., *supra* note 137.

172. *See id.*

173. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB M-25-21, DRIVING EFFICIENT ACQUISITION OF ARTIFICIAL INTELLIGENCE IN GOVERNMENT (2025).

174. *See id.*

them to respond quickly to technological advancements and agencies can adjust the technology as needed.[175] Nondefense agencies looking to acquire GenAI are constantly faced with the challenge of the technology necessitating upgrades after procurement which leads to requesting larger budgets, more risk assessment reviews, waiting on senior decision makers, and constantly revising AI guidance. Sticking to the traditionally long procurement process entails an arduous process with stagnation and the inability to keep up to date with the constant updates that characterize GenAI. However, the software acquisition pathway allows for agile and outcome-based procurement methods to be implemented.

1. Agile and Outcome-Based Procurement Methods Will Allow for Flexibility and Security and an Overall Faster Procurement Process When it Comes to GenAI

Agile procurement streamlines the procurement process by focusing on high-level goals and outcomes, allowing flexibility for bidders.[176] Regarding the timeline, with agile procurement, the government only needs to relay their high-level goal instead of laying out every single detail.[177] This gives way to a win-win situation between the bidder and the agency. The bidder has more flexibility in how they reach the outcome and develop their solution, while the FAR requirements are satisfied by keeping up competition for contracts.[178] With developers choosing their own way to get the project done it will inevitably speed up the decision-making process thus making the whole procurement process faster. Outcome based procurement satisfies the budgeting challenging.[179] If payments and contract renewals are based on the achievement of specific outcomes, providers are more motivated to deliver the desired outcome and on time within budget.

One major challenge in adopting emerging technologies is addressing the evolving risk assessment, necessitating a more flexible approach. Due to the risk, there is often a "wait-and-see" approach taken, rather than immediately taking steps to procure AI.[180] When it comes to AI, there is a strong desire for the government agency to wait for the market to do the risk assessment so that the government can pick up the AI on the second or third version.[181] However, due to some GenAI's releasing versions almost yearly, [182] this is not an option and lends to the current procurement process being

175. *See* Def. Acquisition Univ., *supra* note 144.

176. *See* Benjamin J. Balter, *supra* note 122; *see also* Government Outcomes Lab, *supra* note 127.

177. *See* Benjamin J. Balter, *supra* note 122.

178. *See* Government Outcomes Lab, *supra* note 127; *see also Federal Acquisition Regulation: Part 6*, *supra* note 103.

179. *See id.*

180. *See* Bob Violino, *Dept. of Homeland Security embraces AI and Other Federal Agencies are Likely to Follow*, CNBC (Apr. 17, 2024), https://www.cnbc.com/2024/04/17/dept-of-homeland-security-embraces-ai-other-agencies-to-follow-html [https://perma.cc/NSH7-N6PK].

181. *See id.*

182. *See* Zee, *supra* note 13.

outdated. With the software acquisition pathway and agile procurement, the risk assessment can constantly be addressed.[183] When procuring through these methods, it allows for constant iteration and annual updates and reviews.[184]

There are built-in opportunities for risk reassessment at each stage of deployment.[185] The most important element is constant communication between the developer and the end user.[186] This means that a security assessment can and should be done with each evaluation and update making sure there is always compliance with the agency's security specifications.

Moreover, non-defense government agencies typically face different, lower levels of risk when it comes to national security. Defense agencies deal with classified information such as military intelligence, operations, knowledge of weapons systems.[187] In contrast, non-defense agencies handling education, environment stability, healthcare and research have less high-risk information vulnerable to security compromise.[188] While cybersecurity is still needed, should a data breach occur, the consequences are less severe for non-defense agencies. Moreover, M-25-21 has established that agencies should be utilizing AI that is "American-Made" which should further reduce national security fears.[189] It is important to note that public facing departments will need to employ additional guardrails mandated based on the technology they are procuring.

C. Non-Defense Government Agencies Should Bring in AI Talent and Make the Decision Circle Smaller to Streamline the Procurement Process

To fully capitalize on the potential of generative AI, non-defense government agencies must ensure that they have the right expertise on hand to manage the procurement process effectively. GenAI is an expensive endeavor that demands keen attention to security, the ability to keep up with current technologies, and knowledge of its implementation and use. A typical procurement team oversees multiple offices, as factors like budgeting, risk management, security, and specialized knowledge all play a role in the procurement process.[190] This team setup can work with more procurement

183. *See* Def. Acquisition Univ., *supra* note 144.
184. *See id.*
185. *See id.*
186. *See id.*
187. *See generally* DEFENSE INTELLIGENCE AGENCY, *About DIA*, https://www.dia.mil/About/About-Us/ [https://perma.cc/4P6Q-44P6] (last visited Apr. 7, 2025).
188. *See Policy Basis: Non-Defense Discretionary Programs*, CTR. ON BUDGET AND POL'Y PRIORITIES (Dec. 19, 2024), https://www.cbpp.org/research/federal-budget/non-defense-discretionary-programs [https://perma.cc/93UC-9SRX].
189. *See* OFF. OF MGMT. & BUDGET, EXEC. OFF. OF THE PRESIDENT, OMB M-25-21, DRIVING EFFICIENT ACQUISITION OF ARTIFICIAL INTELLIGENCE IN GOVERNMENT (2025).
190. *See* Shyam Sundar, *How to Build a Procurement Team: It's Structure and Key Roles*, RAMP (Feb. 21, 2025), https://ramp.com/blog/procurement-team-structure-responsibilities [https://perma.cc/3YZT-84B6].

projects, but due to the intricacies of GenAI, a team of AI experts who have specialized knowledge on the technology will better serve the team.

A specialized, knowledge-based GenAI team can enhance risk-assessment and decision-making speed. Instead of having a large, all-inclusive team that have varying educations on AI, it would be beneficial to have a dedicated GenAI knowledge-based team.[191] Making these teams smaller with a more refined education will foster greater risk management and speed up the time it takes to make the decision to move forward with that phase of the project. A team composed of AI experts with deep technical knowledge of the technology can make more informed decisions, quickly assess risks, and move projects forward with greater confidence. These specialized procurement teams who are incredibly familiar with the technology can develop guidance on how to use the procured GenAI and conduct trainings which will foster greater confidence in senior decision makers and the employees.

While the initial investment in hiring specialized procurement teams may raise budgeting concerns, it will streamline decision-making and save money in the long run.[192] Research has shown that implementing "AI-driven decision-making" will decrease operation costs by ten percent and may result in savings upwards of 20 percent.[193] This solution may bring up budgeting concerns because the budget will have to accommodate the hiring of more individuals and those with specialized knowledge, but these savings will leave room in the budget for these AI professionals to join procurement teams. Additionally, this solution will streamline decision making, keeping the project on the correct timeline, which outweighs the initial investment. Agile procurement teams usually consist of less people as compared to traditional teams, enabling them to reach a consensus more efficiently.[194] In fact, by streamlining the procurement process and adopting agile methods, agencies can actually save money over time by reducing the delays and inefficiencies typically associated with government procurement. Additionally, through the use of the previously mentioned Department of Defense's borrowed expedited pathways and the combination of agile and outcome-based techniques, the procurement project will be able to attract smaller, more affordable companies overall making room in the budget for AI expert expenditures.

191. *See* Exec. Order No. 14,110, 88 Fed. Reg. 75191 (Oct. 30, 2023).

192. *See* Helene Laffitte, *Generative AI in Procurement: Real Innovation or False Promise?*, CONSULTING QUEST (Feb. 23, 2025), https://consultingquest.com/insights/generative-ai-in-procurement/ [https://perma.cc/5DTJ-S3BR].

193. *Id.*

194. *See* Graham McConnell, *Agile Procurement v. Traditional Procurement*, RESPONSIVE.IO (Aug. 1, 2024), https://www.responsive.io/blog/agile-procurement/ [https://perma.cc/PR3V-YK4S].

IV. CONCLUSION

This Note highlights the need for non-defense government agencies to adjust or overhaul their AI and GenAI procurement processes. The rapid development and constant updates to GenAI do not fit with the long, burdensome, and outdated non-defense procurement process.

The Middle Tier of Acquisition Pathway offers a streamlined approach to procure task-oriented, non-GenAI systems. This pathway is ideal for quickly fielding mature AI technologies that require minimal modification, ensuring faster deployment and enhanced security. Non-defense agencies can leverage the Middle Tier Acquisition Pathway to benefit from more affordable, innovative solutions provided by smaller companies, thereby fostering competition and keeping costs within budget.

For procuring GenAI, the Department of Defense's Software Acquisition Pathway combined with agile and outcome-based procurement strategies provides the flexibility needed to address the constant changes and updates to GenAI technology. Agile and outcome-based procurement methods serve to satisfy timeline constraints, budgeting challenges, and earn positive risk assessments. Additionally, the use of both pathways and the two methods comply with The Office of Management and Budget's Memo on the federal government's use of AI.

To successfully implement these AI solutions, agencies must invest in specialized talent with deep knowledge of AI technologies. An expert-focused AI procurement team can facilitate faster decision-making and more effective risk management, helping agencies navigate the complexities of GenAI while keeping with the timeline and staying within budget.

Ultimately, adopting these modern procurement pathways and strategies, supported by the right specialized AI team, will overcome the current challenges and position these agencies for success in the rapidly evolving AI field.

Why Are We Paying For Hate? Refashioning the Methodology Test For "Educational" Nonprofit Hate Groups

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I. INTRODUCTION

In the IRS Targeting Scandal of 2013, the Internal Revenue Service (IRS) was exposed for more rigorously assessing the 501(c)(3) status applications of groups whose names or documents included specific right-wing dog whistles, such as "Patriot" or "Tea Party."[1] The result: the first Trump Administration's Justice Department referred to the review as an "abuse of power," and many organizations impacted reached financial settlements with the IRS.[2] In addition, the IRS issued a formal apology for its "mistreatment" of the various conservative organizations.[3]

This "scandal" angered many far-right and anti-government groups who all sought to reap the benefits of tax-exempt status.[4] Among those benefits: access to deductible donations; expanded funding opportunities, such as grants reserved for charities; limited liability; and even lower postal rates.[5] 501(c)(3) status, which grants an exemption from federal taxation for nonprofit organizations, was originally created to benefit organizations that further the "public good."[6] So what allows hate groups to obtain this designation? The answer, at least what appears to be the answer in this case, is to protect freedom of speech as required by the First Amendment.

In 2023, the IRS reported over 1.48 million 501(c)(3) organizations, accounting for a clear majority of tax-exempt organizations.[7] Groups organized for charitable, educational, religious, or similar purposes all may apply and obtain 501(c)(3) status. The benefits associated with 501(c)(3) status are greater than for any other tax-exempt organization – most notably, these groups are not subject to any income tax, and donors may deduct their contributions from their personal income tax returns.[8] These added benefits, as well as the prestige that follows from being a recognized charity, creates

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1. Note, too, that some left-leaning groups (admittedly not as many) were also affected by the heightened review. *See* Peter Overby, *IRS Apologizes for Aggressive Scrutiny of Conservative Groups*, NPR (Oct. 27, 2017, 3:08PM) https://www.npr.org/2017/10/27/560308997/irs-apologizes-for-aggressive-scrutiny-of-conservative-groups [https://perma.cc/4KJH-JX28].
2. *Id.*
3. *Id.*
4. *Id.*
5. *See Benefits and Disadvantages of Obtaining 501(c)(3) Tax Exemption*, MINNESOTA COUNCIL OF NONPROFITS, https://minnesotanonprofits.org/resources-tools/starting-a-nonprofit/benefits-and-disadvantages-of-obtaining-501c3-tax-exemption [https://perma.cc/6X5G-GR4U].
6. Paul Arnsberger et al., *A History of the Tax-Exempt Sector: An SOI Perspective*, STAT. INCOME BULL., Winter 2008, at 110 [https://perma.cc/R6M6-8EX4].
7. *Table 14. Tax-Exempt Organizations, Nonexempt Charitable Trusts, and Split-Interest Trusts, Fiscal Year 2023*, IRS, https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.irs.gov%2Fpub%2Firs-soi%2F23dbs02t14eo.xlsx&wdOrigin=BROWSELINK [https://perma.cc/9NKR-DA46]; *see How Many Nonprofits Are There in the U.S.?*, USA FACTS (Nov. 16, 2023), https://usafacts.org/articles/how-many-nonprofits-are-there-in-the-us/ [https://perma.cc/CHT4-5J3Q].
8. *Compare* I.R.C. § 501(c)(3), *with* I.R.C. § 501(c)(4). 501(c)(4) organizations can participate in political lobbying but donations are not deductible to the donating taxpayer.

an incentive for groups to push the limits on what counts as a charity, or, as will be discussed in this Note, groups that identify as "educational."[9]

Some groups seeking 501(c)(3) designation are not what one would think of as an "educational" organization. This includes a variety of groups commonly understood as "hate groups."[10] White supremacist, anti-immigrant, anti-Muslim, anti-LGBTQ+, and far-right militia groups have all accessed some form of tax exemption by achieving 501(c)(3) status.[11] While this may feel like a distinction without a difference, prestige and the ability to fundraise is an essential component of the longevity of these groups, and federal tax-exempt designation provides an avenue for funding among an otherwise bleak landscape.[12]

This Note proposes two central advancements to the current test applied to educational nonprofits when determining whether the group qualifies for 501(c)(3) status. First, that nonprofit status generally should be recognized as a subsidy, and that with this designation, no First Amendment rights are violated with a test that is not viewpoint neutral. Second, that the IRS should maintain its current test for the term "educational" in the nonprofit context but amend the trigger for the test to exclude hate groups from reaping the benefits of tax exemption.

To do this, this Note will examine the history, development, and interplay between hate groups, nonprofit status, and free speech in the United States. Part II.A will discuss the definition of hate groups in different areas of government and public life and discuss their relationship with nonprofit status, particularly their attraction to nonprofit designation. Next, Part II.B will explain the history and origins of tax exemption for nonprofits in the United States. This includes a discussion of the Methodology Test, the test currently applied to applicants for educational nonprofits that advocate a specific viewpoint. Next, Part III will explain the development of First Amendment jurisprudence as it relates to hate speech, which is an integral feature of hate groups generally. A foundational element of First Amendment analysis in this area is the level of scrutiny applied by courts when assessing regulations that target speech. Part III.B will specifically discuss scrutiny doctrine under the umbrella of government funding and explain the difference between subsidies and government entitlements. Part IV will describe this Note's proposed solution and demonstrate its legal basis.

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9. *See Bankrolling Bigotry: An Overview of the Online Funding Strategies of American Hate Groups*, THE GLOB. DISINFORMATION INDEX & THE INST. FOR STRATEGIC DIALOGUE 14 (2020) [https://perma.cc/7F2L-VVU7] [hereinafter *Bankrolling Bigotry*].

10. *Id.* at 8–9.

11. *Id.* at 14.

12. *Id.* at 5; *Funding Hate: How White Supremacists Raise Their Money*, ANTI-DEFAMATION LEAGUE 1 (Dec. 1, 2017), https://www.adl.org/sites/default/files/adl-report-funding-hate-how-white-supremacists-raise-their-money.pdf [https://perma.cc/WTZ3-UR5C] [hereinafter *Funding Hate*].

II. THE PROBLEM: ORGANIZED HATE GROUPS AND 501(C)(3) STATUS

A. Organized Hate Groups and their Use of 501(c)(3) Status

The meaning of a "hate group" may feel intuitive, but the definition is often harder to pin down. The KKK, The Proud Boys, or The Oath Keepers are typical examples of extremist groups, often lumped together as "hate groups."[13] Despite the vivid imagery associated with these groups, the federal government struggles to define them, and even more so to regulate them.[14]

Organizations across the public and private sectors have developed unique approaches to epitomize "hate groups." The Federal Bureau of Investigation, while not proposing a formal definition, investigates hate group activity, focusing on threats of violence, the ability to follow through on the threat, and when the threat would lead to a violation of federal law.[15] The Global Disinformation Index and the Institute for Strategic Dialogue, which conducted extensive study into hate groups and their use of the internet, defined the term "hate" as "belief or practices that result in attacking, maligning, delegitimising or excluding an entire class of people on the basis of immutable characteristics, including their ethnicity, religion, gender, sexual orientation or disability."[16] It used this definition of hate to categorize what groups should be considered "hate groups." Other groups, however, have ventured to formalize a definition. The Southern Poverty Law Center defines hate groups as "an organization or collection of individuals that – based on its official statements or principles, the statements of its leaders, or its activities – has beliefs or practices that attack or malign an entire class of people, typically for their immutable characteristics."[17] Similarly, the Anti-Defamation League determined that the mere presence of bigotry among members is not enough for an organization to earn hate group status; the group itself "must have some hate-based orientation/purpose."[18]

Each draws a central line: using speech to target swaths of people for an immutable characteristic, such as race, gender, ethnicity, or sexual orientation. These groups organize around this speech and aim to act on it, both through intimidation and violence against protected classes and spreading the word with hateful messaging.

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13. *Hate Map*, S. POVERTY L. CTR. https://www.splcenter.org/hate-map/ [https://perma.cc/ZB4T-UBW2].

14. Hate groups are particularly difficult to regulate because hate speech is protected by the First Amendment. *See infra* Part III.

15. *Does the FBI Investigate Hate Groups in the United States?*, FBI, https://www.fbi.gov/about/faqs/does-the-fbi-investigate-hate-groups-in-the-united-states [https://perma.cc/JU2J-6A7L].

16. *See Bankrolling Bigotry*, *supra* note 9, at 7.

17. *Frequently Asked Questions About Hate and Antigovernment Groups*, S. POVERTY L. CTR. (June 4, 2024), https://www.splcenter.org/20220216/frequently-asked-questions-about-hate-and-antigovernment-groups#hate-group [https://perma.cc/L94P-PW2G].

18. *Hate Group*, ANTI-DEFAMATION LEAGUE, https://www.adl.org/glossary/hate-group [https://perma.cc/2RZT-AS6S].

In the modern age, hate groups use the internet to fundraise, message, and recruit.[19] A study conducted by the Global Disinformation Index and the Institute for Strategic Dialogue, which followed over 70 different hate groups, found 191 instances of hate groups utilizing online fundraising mechanisms.[20] They also found that over a third of online fundraising platforms do not have any policies preventing hate speech or hate groups, and even the programs that do generally fail to enforce them.[21] Hate groups also cultivate their own online ecosystems to fulfill their messaging, recruiting, and fundraising needs, which thrive in the United States due to the legal barriers to restricting hateful speech.[22] These groups are often fueled by online disinformation.[23] They not only distribute inaccurate information throughout their platforms but also use disinformation as a basis for their hateful beliefs.[24]

When these groups obtain 501(c)(3) status, their perceived legitimacy and fundraising ability only continues to increase.[25] For example, the Global Disinformation Index study found that 70% of hate groups targeting the LGBTQ+ community had 501(c)(3) status, and that this positively correlated to fundraising capability for these groups.[26] These capabilities are heightened further by their savvy of internet ecosystems, spearheaded by hate groups' use of crowdsourcing.[27] Crowdsourcing, or crowdfunding, is a means of internet fundraising where users can post requests for donations for specific events or general causes.[28] Some crowdsourcing vendors, such as GoFundMe, offer specialized products and services for registered nonprofits.[29] These online platforms have inadvertently helped support a variety of hateful causes: for example, a white supremacists charged with assault at the "United the Right" rally in Charlottesville, Virginia in 2017 used an online funding platform to raise over $1,000 after his arrest.[30]

Research has also demonstrated an important relationship between hate groups and nonprofit status. Hate groups often present themselves as educational organizations to apply for, and ultimately obtain, federal tax exemption.[31] They are then able to leverage 501(c)(3) status to further

19. Alexander Tsesis, *Hate in Cyberspace: Regulating Hate Speech on the Internet*, 38 SAN DIEGO L. REV. 817, 833–34 (2001); *Funding Hate*, *supra* note 12.

20. *See Bankrolling Bigotry*, *supra* note 9, at 14.

21. *Id.*

22. Tsesis, *supra* note 19, at 838.

23. Oprah Cunningham, *Small Steps, Big Impact: Combating Hate Through Individual Actions*, THE LEADERSHIP CONF. ON CIV. AND HUM. RTS. (May 29, 2024), https://civilrights.org/blog/combating-hate-through-individual-actions/ [https://perma.cc/B9V2-DDXJ].

24. *Id.*

25. *See Bankrolling Bigotry*, *supra* note 9, at 14.

26. *Id.*

27. *Funding Hate*, *supra* note 12.

28. *Id.*

29. *GoFundMe Terms of Service*, GOFUNDME, https://www.gofundme.com/c/terms#:~:text=Description%20of%20the%20Services%20provided,will%20benefit%20from%20the%20funds [https://perma.cc/2P7K-CN6S].

30. *Funding Hate*, *supra* note 12, at 10–11.

31. *See Bankrolling Bigotry*, *supra* note 9, at 14.

fundraise and recruit, all under the guise of a federally-approved designation.[32] Altogether, 501(c)(3) status gives hate groups an opportunity not only to exist, but to thrive on both the web and in real life.

B. How Do Hate Groups Get Tax Exemption? 501(c)(3) Status for Educational Organizations

Selective tax exemption in the United States dates to the late 1800s.[33] The earliest reference to tax exemption for charitable organizations can be found in the Tariff Act of 1894, which outlined three main policy objectives: promoting charitable organizations through tax exemption; banning private inurement; and incentivizing giving.[34] First, the early legislators granted charitable organizations complete freedom from federal income taxation.[35] Second, the legislature required these organizations to be free from "private inurement" to ensure funds were applied to the public good.[36] Finally, to highlight the importance of giving, the early legislatures incentivized donations by providing tax deductions for charitable contributions, which was later codified in the Revenue Act of 1917.[37] While tax-exempt status for charitable organizations has evolved, these three principles are still central to the regulation of charitable organizations and are reflected in the tax code today.

Today, the code section governing tax exempt organizations is I.R.C. § 501.[38] Section 501(a), Exemption from Taxation, states generally that "an organization described in subsection (c)...shall be exempt from taxation under this subtitle...unless such exemption is denied under section 502 or 503."[39] Within Section 501, Section 501(c)(3) describes the broadest form of tax exemption, as defined by the code:

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty

32. *Id.*
33. Arnsberger, *supra* note 6, at 106.
34. *Id.*
35. *Id.*
36. Private inurement occurs when charitable funds are diverted to insiders of a nonprofit organization. It remains forbidden in current practice. *Id.* at 106; *see Inurement/Private Benefit: Charitable Organizations*, IRS https://www.irs.gov/charities-non-profits/charitable-organizations/inurement-private-benefit-charitable-organizations (last visited Jan. 1 2026) [https://perma.cc/79DV-A6ER].
37. Arnsberger, *supra* note 6, at 106.
38. Title 26 of the United States Code contains the United States Tax Code, but is generally cited as "I.R.C." rather than "26 U.S.C." This Note will reflect that practice.
39. I.R.C. § 501(a).

> to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.[40]

Several elements are worthy of note. First, and likely most obvious for its application to hate groups identifying as educational organizations, is the passage which grants nonprofit status for groups "organized and operated exclusively for. . .educational purposes."[41] This means that groups which are defined as "educational" qualify for tax exemption as described in section 501(a). It is also notable that the code explicitly excludes groups whose activities are "substantial[ly]...carrying on propaganda, or otherwise attempting...to influence legislation." This provision places a limitation on the activities that groups can participate in and still qualify for tax exemption.

Treasury Regulations, which are published by the Treasury Department to supplement the tax code, defines educational as "(a) The instruction or training of the individual for the purpose of improving or developing his capabilities; or (b) The instruction of the public on subjects useful to the individual and beneficial to the community."[42] This encompasses organizations that aim to generally educate the public, such as Khan Academy, Teach for America, or Girls Who Code.[43] However, "an organization may be educational even though it advocates a particular position or viewpoint so long as it presents a sufficiently full and fair exposition of the pertinent facts as to permit an individual or the public to form an independent opinion or conclusion."[44] In other words, a group that does advocacy work, like promoting substance abuse prevention, can obtain 501(c)(3) status in certain circumstances.[45] Based on the IRS definition of lobbying as compared to general advocacy, groups' advocacy is supposed to

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40. I.R.C. § 501(c)(3).
41. *Id.*
42. Treas. Reg. §1.501(c)(3)-1 (last amended June 30, 2017).
43. *About Us*, KHAN ACAD., https://support.khanacademy.org/hc/en-us/sections/4404526433293-About-Us#:~:text=Khan%20Academy%20is%20a%20501(c)(3)%20nonprofit%20organization (Jan. 10, 2025); Teach for America, Inc., Return of Organization Exempt from Income Tax, Form 990 at 1 (2023) [https://perma.cc/9S6J-MGST]; *Girls Who Code Inc.*, PROPUBLICA, https://projects.propublica.org/nonprofits/organizations/300728021#:~:text=Designated%20as%20a%20501(c)(3)) [https://perma.cc/8LDY-5BHJ]; *About Us*, Girls Who Code, https://girlswhocode.com/about-us [https://perma.cc/7X3N-4XN7].
44. Treas. Reg. §1.501(c)(3)-1.
45. *D A R E America*, PROPUBLICA, https://projects.propublica.org/nonprofits/organizations/954242541#:~:text=Designated%20as%20a%20501(c)(3) [https://perma.cc/MM32-5WAH].

be limited to building education and awareness.[46] This regulation lacked clarity as a standard in practice, so the Treasury Department published The Methodology Test in 1959.[47]

C. The Methodology Test

Pursuant to the Methodology Test, a court may find that an organization is not "educational" when it advocates a particular viewpoint if it meets any of the following criteria:

1. The presentation of viewpoints unsupported by facts is a significant portion of the organization's communications.

2. The facts that purport to support the viewpoints are distorted.

3. The organization's presentations make substantial use of inflammatory and disparaging terms and express conclusions more on the basis of strong emotional feelings than of objective evaluations.

4. The approach used in the organization's presentations is not aimed at developing an understanding on the part of the intended audience or readership because it does not consider their background or training in the subject matter.[48]

Rev. Proc. 86-43, published in 1986, formalized these four factors as the Methodology Test and "remains the Service's official administrative pronouncement on the subject."[49] The 1986 also regulation added a catch-all to give the IRS some discretion, stating that "the Service will look at all the facts and circumstances…despite the presence of one or more of such factors"

46. The IRS defines lobbying as "attempting to influence legislation," whereas advocacy is more general, even when it may be related to general legislative efforts. Examples of advocacy not considered lobbying include: organizing educational meetings, distributing education materials, or "otherwise consider public policy issues in an educational manner." *Lobbying*, IRS (Aug. 20, 2024) https://www.irs.gov/charities-non-profits/lobbying#:~:text=In%20general%2C%20no%20organization%20may,loss%20of%20tax%2Dexempt%20status [https://perma.cc/5KRM-WVPV].

47. Ward L. Thomas & Robert Fontenrose, *Education, Propaganda, and the Methodology Test*, EXEMPT ORGS.–CONTINUING PRO. EDUC. 87–88 (1997) [https://perma.cc/H9TS-D482]; Big Mama Rag, Inc. v. United States, 631 F.2d 1030, 1032 (D.C. Cir. 1980) (holding that the term "educational" was unconstitutionally vague).

48. Rev. Proc. 86-43, 1986-2 C.B. 729.

49. Thomas & Fontenrose, *supra* note 47, at 91.

to deny tax-exempt status.[50] This test is to come into force when the topic of advocacy is "controversial."[51]

The Methodology Test has survived legal challenges, particularly in the context of groups which could fit the definitional framework of a hate group. In *National Alliance v. United States*, the IRS successfully denied 501(c)(3) status to National Alliance, which applied for 501(c)(3) status under the guise of being an "educational" organization.[52] The group regularly published racist stereotypes and smears about Black and Jewish Americans, presenting them as facts.[53] National Alliance argued that denying the group's 501(c)(3) application based on its speech violated the First Amendment.[54] The lower court agreed, and went further to hold that the Methodology Test was unconstitutionally vague.[55] The D.C. Circuit reversed, supporting the Methodology Test.[56] The court applied the Methodology Test to National Alliance and affirmed the revoking of its nonprofit status. In doing so, the court concluded that the information dispersed by National Alliance was not educational within the meaning of 501(c)(3) because their methodology did not clearly present a link between the information and the claims asserted.[57] They were, rather, outside any reasonable interpretation of "educational" as their publications failed each prong of the Methodology Test.[58]

This would seem to highlight the triumph of the Methodology Test, however, it is scarcely used in the modern context.[59] Scholarship cites two main reasons for this: lack of funding for the IRS and continued questions about the constitutionality of the test itself, particularly due to the test's vague trigger.[60] The Methodology Test is only triggered when an organization advocates "controversial" subject matter – an undefined term that leaves the IRS and the public with little guidance as to when and where it will actually

50. Rev. Proc. 86-43, 1986-2 C.B. 729.
51. *Id.*
52. *See generally* National Alliance v. United States, 710 F.2d 868 (D.C. Cir. 1983).
53. *Id.* at 871-872.
54. *Id.* at 870.
55. *Id.*
56. *Id.* at 875 ("We observe that, starting from the breadth of terms in the regulation, application by IRS of the Methodology Test would move in the direction of more specifically requiring, in advocacy material, an intellectually appealing development of the views advocated. The four criteria tend toward ensuring that the educational exemption be restricted to material which substantially helps a reader or listener in a learning process. The test reduces the vagueness found by the Big Mama decision.").
57. *Id.*
58. *National Alliance*, 710 F.2d at 874.
59. Eric Franklin Amarante, *Why Don't Some White Supremacist Groups Pay Taxes?,* 67 EMORY L. J. ONLINE 2045, 2059–60 (2018).
60. *Id.*

be applied.[61] Therefore, this test is rarely applied, and it is more common for groups to lose their non-profit status by failing to file proper paperwork.[62]

III. CONSIDERATIONS IN DESIGNING A SOLUTION: THE FIRST AMENDMENT AND THE SUBSIDY DEBATE

A. The First Amendment Jurisprudence

The First Amendment of the Constitution states, in part, "Congress shall make no law…abridging the freedom of speech."[63] The Supreme Court has clarified this standard to limit the ability to regulate speech, including hate speech.[64] This Part will discuss the evolution of the doctrine as it pertains to hate speech as a generally protected category of speech. First, Section i will look at high bar for limiting speech as specified by *Brandenburg v. Ohio* and *Virginia v. Black*, and Section ii it will outline the prohibition on content-based restrictions affirmed by *R.A.V. v. City of St. Paul*. Section iii will outline the standard of review courts use when applying First Amendment jurisprudence.

i. The "Imminent Lawless Action" Standard

Brandenburg was a pivotal case in establishing the broad reach of the First Amendment in protecting hateful speech, placing a limit only where speech turns into incitement of "imminent lawless action."[65] In *Brandenburg*, a known leader of the Klu Klux Klan ("KKK") challenged the Ohio Criminal Syndicalism statute after he was arrested following a rally. Prior to the rally, a reporter observed KKK members brandishing weapons, burning crosses, and the leader urging that the group would seek "revengeance" against the government for "suppressing the white, Caucasian race."[66] The leader was charged under The Ohio Criminal Syndicalism statute, which made illegal

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61. *Id.* Vaugness concerns arise from a constitutional principle known as the "vagueness doctrine." This is a due process principle that prevents arbitrary enforcement of statutes where the text is unclear or has an indefinite meaning. For further explanation, *see* A.G.A, *The Void-for-Vagueness Doctrine in the Supreme Court,* 109 U. PA. L. REV. 67 (1960).

62. Alex Reed, *Subsidizing Hate: A Proposal to Reform the Internal Revenue Service's Methodology Test*, 17 Fordham J. Corp. & Fin. L. 823 at 826 (2012); Amy Blackwood & Katie Roeger, *Revoked: A Snapshot of Organizations that Lost their Tax-Exempt Status*, URB, INST. (Aug. 9, 2011) https://www.urban.org/sites/default/files/publication/27486/412386-Revoked-A-Snapshot-of-Organizations-that-Lost-their-Tax-Exempt-Status.PDF. For example, the National Policy Institute, a white nationalist group, lost its nonprofit status in 2017 for failing to file a return with the IRS for three consecutive years, as is required by the IRS. *See* Bill Morlin, *White Nationalist Group Loses Tax-Exempt Status*, S. POVERTY L. CTR. (Mar. 15, 2017) https://www.splcenter.org/resources/hate-watch/white-nationalist-group-loses-tax-exempt-status/ [https://perma.cc/UVV6-QWM9].

63. U.S. CONST. amend. I.

64. Tsesis, *supra* note 19, at 838–39.

65. Brandenburg v. Ohio, 395 U.S. 444, 447 (1969).

66. *Id.* at 445–46.

"criminal syndicalism."[67] In the statute, criminal syndicalism included "advocating the duty, necessity, or propriety of crime...as a means of accomplishing industrial or political reform."[68] The Court held that the statute, and thus the KKK leader's criminal prosecution, was unconstitutional because the government may not prevent speech even if it advocates for violence unless "such advocacy is directed to inciting or producing *imminent lawless action* and is likely to incite or produce such action."[69] Through the imminent lawless action standard, the Court adopted a distinction between general advocacy of violence, which is protected speech, and advocacy in preparation of violence, which is not.[70] In *Brandenburg*, the statements were deemed to be teaching an "abstract viewpoint," not directly calling upon a specific criminal act.[71] This standard is also referred to as the "fighting words" or "true threats" standard.[72]

Further, In *Virginia v. Black*, the Supreme Court struck down a Virginia law that made cross burning with the "intent to intimidate" for First Amendment concerns.[73] The Virginia law at issue provided that any cross burning created a prima facie case for the intent to intimidate, meaning that evidence of a burning cross was enough to prove intent to violate the law.[74] In this case, the KKK held a rally and burned a cross in front of the home of a Black family.[75] The Court conducted a lengthy analysis into the history of cross burning as a tool of intimidation by the KKK, but also as a celebratory symbol for the group.[76] While the Virginia legislature may have included the "intent to intimidate" mens rea requirement to ensure the law was consistent with *Brandenburg*, the Court nevertheless held the law to be unconstitutional: the prosecution had to prove that the cross burning was truly a threat of imminent, unlawful violence (as opposed to some other purpose, like a celebration).[77] A law which created a presumption of criminal intent based on speech alone violated the First Amendment.[78] The Court also used this case to further clarify the definition of "true threat" from *Brandenburg*, which it defined as "a serious expression" suggesting that the speaker intends to commit "an act of unlawful violence."[79]

The doctrine is clear. Speech, even particularly hateful speech, that does not incite imminent violence is protected by the First Amendment.

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67. *Id.* at 144.
68. *Id.*
69. *Id.* at 447 (emphasis added).
70. Tsesis, *supra* note 19, at 839–40.
71. *Id.* at 840.
72. Chaplinsky v. New Hampshire, 315 U.S. 568, 573 (1942) (discussing "fighting words"); Virginia v. Black, 538 U.S. 343, 359 (2003) (discussing "true threats").
73. *Virginia*, 538 U.S. at 366–67.
74. *Id.* at 348.
75. *Id.* at 349–50.
76. *Id.* at 352–58.
77. *Virginia*, 538 U.S. at 359.
78. *Id.*
79. *Id.* at 359.

ii. Content-based Restrictions

R.A.V. v. City of St. Paul further expanded the imminent lawless action standard to prevent content-based speech restrictions. In *R.A.V.*, several teens were arrested for burning a cross on the lawn of a Black family.[80] They were charged with a crime based on a local statute that read:

> Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.[81]

The petitioner challenged the statute as unconstitutional for restricting freedom of speech, specifically calling the law "substantially overbroad and impermissibly content based and therefore facially invalid under the First Amendment."[82] The Court agreed, writing "the government may not regulate use based on hostility – or favoritism – towards the underlying message expressed."[83] Thus, content-based limitations on speech are impermissible.

The Court's decision in *R.A.V.* further highlighted the Court's skepticism towards criminalizing speech and revealed a throughline: Courts will limit speech only to prevent the unique and specific consequence of violence.[84] Even now, the Court prioritizes an "uninhibited marketplace of ideas" over the harm speech can inflict on minority communities.[85] With the high bar of the incitement standard and little-to-no content-based limitations, speech that attacks members of protected classes, however untrue or ugly, cannot be contained by statute.

iii. Appropriate Standards of Review

When the Supreme Court reviews a law or regulation for an alleged violation of the First Amendment, it has adopted various tiers of scrutiny to determine whether the law is constitutional.[86] One such approach is

80. R.A.V. v. City of St. Paul, 505 U.S. 377, 380 (1992).
81. *Id.*
82. *Id.*
83. *Id.* at 386.
84. *Id.* at 388; Tsesis, *supra* note 19, at 852.
85. 303 Creative v. Elenis, 600 U.S. 570, 585 (2023) (internal citation omitted); Tsesis, *supra* note 19, at 853 (discussing the way hate speech that is protected under current First Amendment jurisprudence decreases social wellbeing and causes harm to the dignity of the targets of such speech).
86. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1278–79 (2007).

commonly referred to as strict scrutiny. For a law to survive strict scrutiny, there must be a compelling government interest in restricting a right through legislation, and the law is narrowly tailored to restrict the right as little as possible.[87] In free speech cases in particular, this test is broadly applied: the Court has generally recognized the First Amendment as especially important and should not be limited when other options are available.[88]

It is very difficult for a statute to survive strict scrutiny. Recently, the Supreme Court struck down a Colorado law that prevented public businesses from discriminating on the basis of, in relevant part, sexual orientation.[89] In *303 Creative*, a website content creator challenged the law preemptively because it would have required her to build wedding websites for LQBTQ+ couples, which she opposed on personal grounds.[90] The Court here pointedly used strict scrutiny, inquiring whether the law "would serve a compelling governmental interest and that no less restrictive alternative exists to secure that interest."[91] There, the Court weighed the compelling interest of eliminating discrimination in places of public accommodation against the burden that the law could impose on freedom of expressive speech.[92] Rather than discussing alternatives, the Court focused on the importance of the First Amendment free speech clause throughout the history of the United States.[93] The Court has also moved towards this type of balancing test for content-based limitations on speech, however is extremely skeptical of any viewpoint limitation.[94] Content-based regulation will almost certainly be subject to strict scrutiny review.[95]

It is important to note that in some contexts, courts have latitude in categorizing the rights at issue, thus determining the appropriate level of scrutiny.[96] For example, where the right at issue is the receipt of certain government funds, invoking the First Amendment does not guarantee that

87. *See* United States v. Carolene Products Co., 304 U.S. 144, 155 n.4 (1938).

88. Fallon, Jr., *supra* note 83, at 1278 (discussing the evolution of the doctrine as developed by Justice Harlan).

89. *See 303 Creative*, 600 U.S 570. While this case was about compelling rather than restricting speech, it demonstrates how the modern Court approaches the tiers of scrutiny.

90. *Id.* at 580.

91. *Id.* at 583– 84, 586.

92. *Id.* at 590– 92.

93. *Id.* at 602– 03.

94. *See* John Inazu, *First Amendment Scrutiny: Realigning First Amendment Doctrine Around Government Interests*, 88 BROOK. L. REV. 1, 21– 22 (2023).

95. *See id.* at 22.

96. Regan v. Taxation with Representation, 461 U.S. 540, 547-48 (1983) (quoting Madden v. Kentucky, 309 U.S. 83, 87-88 (1940) ("The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized... [The] passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification.").

courts will apply strict scrutiny.[97] Rather, courts may use a lower standard of review, often referred to as rational basis.[98] Under this level of scrutiny, there need not be a compelling government interest, but just a legitimate reason for the government to restrict certain conduct.[99]

B. The Subsidy Debate: Subsidy versus Benefit or Entitlement

The interplay between tax benefits, their function as a form of subsidy, and freedom of speech concerns have been regarded as a "notoriously tricky question of constitutional law."[100] While the government "may not deny a benefit to a person on a basis that infringes his…freedom of speech *even if he had no entitlement to that benefit*," the government is also not required "to subsidize activities that it does not wish to promote."[101] The subsidy debate affects the level of scrutiny that a Court should apply to cases where the government may infringe upon otherwise protected speech. Courts have found that the government cannot deny a *benefit* to a speech-producing organization based on the viewpoint of the speech but has significantly more leeway in making such determinations when a *subsidy* is at issue.[102]

A government benefit, or entitlement, is something that the government must provide to people who meet certain requirements.[103] Two recent cases that have forced the Supreme Court to confront what it means for funds to be a "public benefit" are *Matal v. Tam* and *Iancu v. Brunetti*. In *Matal v. Tam*, the Supreme Court found that the prohibition of "disparaging" trademarks violates the First Amendment freedom of speech principle that "speech may not be banned on the ground that it expresses ideas that offend."[104] There, the government argued in part that a trademark is essentially a form of government subsidy.[105] While the Court did not agree that a trademark was a subsidy, it laid out factors to help make that determination. The topmost factor is what the recipient gains from the government–a subsidy is associated with

97. *Id.* at 549 ("We have held in several contexts that a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny."); *see infra* Part III.B.

98. *Regan*, 461 U.S. at 547–48 (quoting Madden v. Kentucky, 309 U.S. 83, 87-88 (1940)) ("Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.").

99. *See* United States v. Carolene Products Co., 304 U.S. 144, 155 n.4.

100. Matal v. Tam, 582 U.S. 218, 239 (2017) (emphasis added).

101. *Id.* at 240.

102. Camelot Banquet Rooms, Inc. v. U.S. Small Bus. Admin., 24 F.4th 640, 633 (7th Cir. 2022); *Regan*, 461 U.S. at 547– 48**.**

103. GOVERNMENT ACCOUNTABILITY OFFICE, A GLOSSARY OF TERMS USED IN THE FEDERAL BUDGET PROCESS (2005).

104. *Matal*, 582 U.S. at 223.

105. *Id.* at 234.

a cash or similar benefit.[106] There, the distinction between owed government benefits and a subsidy was fundamentally *financial*. Under this view, a trademark could not be a subsidy because other, non-cash rights were attached. The importance of trademarks for consumer confidence, and the fact that they come with "important legal rights and benefits," all led the Court to find that a trademark is a government benefit, and therefore standard First Amendment principles applied and the Court applied strict scrutiny.[107]

Further, in *Iancu v. Brunetti*, the Court held that The Lanham Act's prohibition on registration of "immoral or scandalous" patents violated the First Amendment because it based decisions for granting a patent on a viewpoint.[108] Similarly to *Matal*, the patent not only implicated speech, but came with special rights and privileges that could not be denied to an otherwise worthy applicant based on the viewpoint expressed. Therefore, the patent was a form of government benefit that could not be denied on the basis of speech or viewpoint.[109] Like how regulations limiting speech must be viewpoint neutral, limitations on government benefits must be neutral as well.[110]

Alternatively, Courts have not required grants of government subsidies to be done on a viewpoint-neutral basis. *Regan v. Taxation with Representation* embodied this sentiment by the Court. There, Taxation with Representation, an organization aimed at promoting changes to the tax code, challenged its denial of 501(c)(3) status, which it was denied for engaging in substantial amounts of political lobbying.[111] The Court was confronted with the difference between a subsidy and a benefit, admitting that the government cannot deny a benefit simply on the basis of their exercising their freedom of speech rights.[112] But, the Court strongly distinguished subsidies from general public benefits–with subsidies, those denied are still able to exercise their speech rights, but in the benefit context, denial could inhibit their ability to do so.[113] In fact, the Court shut down the idea of this being speech infringement outright, with Justice Rehnquist writing that he rejects the "notion that First Amendment rights are somehow not fully realized unless they are subsidized by the State."[114] The Court unanimously held that Congress may decide not

106. *Id.* at 240.

107. *Id.* at 226, 224 ("[trademark designation] helps consumers identify goods and services that they wish to purchase, as well as those they want to avoid.").

108. In this case, the plaintiff appealed his denial of a trademark for his clothing brand, "FUCT." The trademark was denied under section 2(a) of the Latham Act which prohibited "immoral or scandalous" trademarks. Iancu v. Brunetti, 588 U.S. 388 (2019).

109. *See Iancu*, 588 U.S. at 393.

110 . *See id.; supra* Part III.A.ii.

111. *Regan*, 461 U.S. at 541, 545.

112. *Id.* at 545.

113. *Id.*

114. *Id.* at 546.

to subsidize certain speech without infringing upon the First Amendment protections afforded to the speech itself.[115]

This framework has also been upheld outside of the taxation context, and, notably, in the same general time frame in which *Matal* and *Iancu* were decided. For example, in *Camelot Banquet Rooms, Inc. v. United States SBA*, an adult entertainment establishment challenged the Small Business Association's ("SBA") denial of Paycheck Protection Program ("PPP") Loans during the COVID-19 pandemic based on the company's expressive nature.[116] Rather than seeing the denial as "viewpoint discrimination" as urged by Camelot Banquet Rooms, the Seventh Circuit concluded that the SBA had the authority to decide which types of business would be eligible for the PPP loan.[117] With this settled, it was also the SBA's choice to exclude adult entertainment establishments from the program.[118] The court held that "excluding the entire category or subject matter...from a government subsidy program does not amount to viewpoint discrimination and does not violate the Free Speech Clause."[119] The Court took two essential steps: first determining that the PPP program was a subsidy, and second, holding that the government's discretion to deny subsidizing certain organizations did not violate the First Amendment.[120]

The issue in subsidy cases is not whether the organization may *participate* in its desired speech (in fact, it is free to do so), it is "whether Congress is required to provide it with public money" when they do.[121] The Court clearly stated that Congress does not.

IV. ANALYSIS

Hate groups, by promoting violence and hatred towards their victims, should not be deemed as educational under the 501(c)(3) analysis. Groups that attack and promote violence may try to find a "hook," something to make them appear educational, but under the Methodology Test they are more likely to be denied 501(c)(3), saving the taxpayers from footing the bill for hate. In practice, they are generally not educational within the existing definition and would likely fail the Methodology Test if it were applied to them. As the Methodology Test states, groups cannot be educational if they fail to meet any

115. The Court gave two additional insights of importance: first, this case may have come out differently if Congress "were to discriminate invidiously in its subsidies in such a way as to aim at the suppression of dangerous ideas," and the concurrence noted that in the case of lobbying, the availability of 501(c)(4) status prevents any further constitutional issues. *See id.* at 548; 552–553.

116. Camelot Banquet Rooms, Inc. v. U.S. Small Bus. Admin., 14 F.4th 624, 627 (7th Cir. 2021). The plaintiffs, a group of adult entertainment establishments, were granted an injunction in the lower court disallowing the government from denying their eligibility for the loan program. The SBA appealed and the Seventh Circuit stayed the injunction. *Id.* at 627-28.

117. *Id.* at 633.

118. *Id.*

119. *Id.* at 649.

120. *Id.*

121. *Regan*, 461 U.S. at 551.

of four factors, which ensure that facts are presented in an accurate, unbiased fashion. The test itself is not the problem. Rather, this test is not utilized effectively because the "trigger," or the indicator that tells the IRS when to apply the test, is vague: it is unclear what makes an organization "controversial," which kneecaps the Test and leaves it particularly ripe for abuse.[122] With strained resources, clarity is essential for effective enforcement.[123] Vagueness, simply for the purpose of being viewpoint neutral, is not necessary because of 501(c)(3)'s special status as a subsidy.

A. Alternative Proposed Solutions and their Shortfalls

Scholars and lawmakers alike have considered how to best prevent hate groups from obtaining the benefits of 501(c)(3) status. For example, Eric Amarante in his article, *Why Don't Some White Supremacist Groups Pay Taxes?,* suggested limiting the definition of "educational" so only traditional schools, universities, or enumerated educational organizations would receive federal tax exemption.[124] This would eliminate advocacy groups from counting as "educational," period.[125] This solution would not be beneficial as it would eliminate significantly more 501(c)(3)s than just hate groups. It is an overly broad solution because it would unnecessarily stifle other advocacy groups. What about organizations that advocate *for* protected classes? Would the adverse consequences be worth such a narrow recasting of the term "educational"? With the availability of a more tailored solution, this Note suggests no.

Alternatively, terrorist organizations are banned from obtaining 501(c)(3) status under the current test, so another way the IRS could limit hate groups from obtaining nonprofit status is through terrorist designation. For this to work, hate groups would need to receive "terrorist" designation, which

122. A vague term leaves applicants unsure if they fall into the "controversial" category and therefore cannot determine if their organization will be subject to the Test. Vaugeness also creates a potential weaponization problem whereby the Executive branch may take different approaches to what would be "controversial," and could then define the term in new ways to target nonprofit organizations based on their policy objectives. Such concerns were somewhat realized in the IRS Targeting Scandal. *See* Overby, note 1.

123. While that will not be addressed here, the IRS could look to other organizations that regulate speech-driven content, such as the Federal Communications Commission (FCC). The FCC, like the IRS, has an Enforcement Bureau, but it also provides consumers the opportunity to file complaints. With monitoring, this could potentially be a way that the IRS could expand its enforcement reach. This would admittedly require greater resources, but could help to address the enforcement problem, which remains despite this Note's proposed solution. Future scholarship could address this issue.

124. Amarante, *supra* note 59, at 2068 (citing "traditional schools, distance-learning organizations, and museums, zoos, planetariums, symphony orchestras, and other similar organizations" as educational) (internal citation and quotations omitted).

125. *Id.* at 2066– 67.

is problematic in its own right.[126] This has recently been explored by the House of Representatives, which failed to pass H.R. 9495 on November 12, 2024.[127] This bill sought to, among other things, give the executive branch broad authority to strip current tax-exempt status from groups deemed to be "terrorist organizations." Though the intended outcome is not known, some speculated that the goal of this legislative was to target groups deemed by the Trump administration as political enemies, including the NAACP and pro-Palestine organizations.[128] Due to the heightened risk of Executive abuse and lacking legal basis, this too would not be an effective solution to the problem of hate groups obtaining federal nonprofit status.

An efficient, effective, and legally sound solution to this problem goes back to its root: the Methodology Test.

B. Charitable Status is A Subsidy

To move forward on this issue, 501(c)(3) status must be treated as a subsidy because it is, in fact, a subsidy. The basic argument for tax-exemption being a subsidy is this: when an organization does not have to pay income tax, it has more disposable income to spend on its charitable efforts. The heightened liquidity from not paying a tax is essentially the same as the government handing an organization cash to conduct its activities. The result in both scenarios the same–the organization having more cash on hand. The debate on this issue becomes much less nuanced when looking at groups, like 501(c)(3) educational groups, that often rely on donations.[129] Donors contribute post-tax dollars to an organization and want the entirety of their donation to go to the charitable organization, not back to the government in the form of a tax. Freedom from taxation allows the groups to net the entirety of what they receive, producing the aforementioned result: more cash on hand to continue their work. Think of two groups, a nonprofit (N) and a typical corporation (C). Now imagine both groups receive $100 in a taxable year. N, who is tax exempt as a 501(c)(3), will retain $100 of the $100 received. C,

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126. The federal government struggles to categorize and label domestic terrorist groups as "terrorists" because they cannot be formally charged with "domestic terrorism." While domestic terrorism is likely interrelated with hate groups, it will not be discussed in this Note in more depth because of the unrelated legal implications of designation. LISA N. SACCO, CONG. RSCH. SERV., R47885 UNDERSTANDING AND CONCEPTUALIZING TERRORISM: ISSUES FOR CONGRESS 1 (2023).

127. Stop Terror-Financing and Tax Penalties on American Hostages Act, H.R. 9495, 118th Cong. (2024).

128. *See Oppose H.R. 9495: Protect Nonprofit Organizations*, NAACP, https://naacp.org/actions/oppose-hr-9495-protect-nonprofit-organizations (last visited Jan. 24, 2025) [https://perma.cc/TEE6-BVCX].

129. Ellen Aprill & Lloyd Hitoshi Mayer, *Tax Exemption is Not a Subsidy – Except for When It Is*, TAX NOTES FED. (Sept. 20, 2021), https://www.taxnotes.com/featured-analysis/tax-exemption-not-subsidy-except-when-it/2021/09/17/7830q ("Often, references to the subsidy afforded nonprofit or tax-exempt organizations are in fact referring primarily to nonprofit organizations exempt under section 501(c)(3) and rely at least implicitly on the charitable contribution deduction, which has been consistently treated as a subsidy. That is, tax exemption is included as an additional subsidy without much thought.") [https://perma.cc/H8WP-VJ4B].

subject to a 21% corporate tax rate, will only retain $79 of the $100 received.[130] N received a "free" $21 from the government, which equates to the government injecting an extra $21 into N's activities. Put in other words, N was subsidized, in the amount of $21, as a result of their nonprofit designation.

Courts have already treated 501(c)(3) status as a subsidy. The Court in *Matal* discussed that subsidies are a special area of First Amendment case law, applying specifically to cash or cash-equivalent benefits to organizations.[131] Further, the Court in *Regan* based its opinion on the premise that tax exemption under 501(c)(3) is a subsidy.[132] As a subsidy, Congress can choose what activity it funds.[133] Groups are not entitled to taxpayer money simply because they are exercising their First Amendment rights.[134] As the Court noted, "where governmental provision of subsidies is not 'aimed at the suppression of dangerous ideas,' its 'power to encourage actions deemed to be in the public interest is necessarily far broader.'"[135] While the IRS and Treasury have been less consistent on this front,[136] it is clear that 501(c)(3) status is a subsidy from both the perspective of case law and financial logic. Therefore, the special rules applied to subsidies should apply in all areas of the nonprofit application process, particularly when it comes to denials. With this, the IRS can amend the Test or, as this Note proposes, the trigger in a way that is consistent with First Amendment jurisprudence in this area–it need only survive the appropriate rational basis review.

C. The Trigger For The Methodology Test Should Be Amended To Apply When A Group Implicates Or Targets An Immutable Characteristic in Its Educational Functions

The IRS has not promulgated new guidance relating to the Methodology test since 1986.[137] And yet, the IRS and the Treasury Department, through Treasury Regulations and other means, has the authority

130. This hypothetical assumes the 2025 corporate tax rate of 21%. I.R.C. § 11(b).

131. *Matal*, 582 U.S. at 240.

132. *Regan*, 461 U.S. at 544 ("A tax exemption has much the same effect as a cash grant to the organization of the amount of tax it would have to pay on its income. Deductible contributions are similar to cash grants of the amount of a portion of the individual's contributions. The system Congress has enacted provides this kind of subsidy to nonprofit civic welfare organizations generally, and an additional subsidy to those charitable organizations that do not engage in substantial lobbying.").

133. *Id.* at 545.

134. *Id.*

135. *Id.* at 550.

136. Aprill & Hitoshi Mayer, *supra* note 129.

137. Thomas & Fontenrose, *supra* note 47.

to interpret its existing legislation.[138] This is well within the bandwidth of the Treasury Department to accomplish. Further, *National Alliance* demonstrated the effectiveness of the Methodology Test when it is actually applied.[139] The test itself is not the problem; its underutilization is. Updating the trigger for the Methodology Test with specific, targeted language could rectify and prevent hate groups' abuse of charitable status. Further, the Treasury Department does not need to tailor its trigger around surviving First Amendment strict scrutiny, were the new trigger to be challenged. This is because 501(c)(3) status is a subsidy, and subsidies would undergo rational basis review. The current test's attempts at remaining neutral make it easily abused, hard to enforce, and arguably unconstitutionally vague.[140] Instead, Treasury should amend the trigger in a way that is both constitutional and prevents the hate group problem.

Luckily, the court in *Regan* seemed to chart a path for a constitutional trigger for the Methodology Test. It suggests that lawmakers may paint with a broad brush when deciding how public funds should be used.[141] However, it outlined some limitations on content regulation within the subsidy sphere: denial of 501(c)(3) status cannot aim to suppress "dangerous ideas."[142] In addition, Congress could not deny a subsidy based on an immutable characteristic, such as race or national origin.[143] The new trigger must color between these lines, basing the limitation on something akin to lobbying, i.e., a type of otherwise protected speech that tax funds will not pay for. Rather than calling on the Methodology Test only when an organization is "controversial," the new trigger could invoke specific elements associated with hate groups.

To prevent hate groups from obtaining 501(c)(3) status, the Treasury Department needs to find language that can best capture such groups. As most other government entities have not ventured to define hate groups, it would be understandable why the IRS would not want to be the first. Instead, it could focus on the qualities that hate groups have in common: people organizing around their prejudice towards various minority groups, usually promoting their own traits, expressing these viewpoints to intimidate the groups they target, and having the purpose of promoting such bigotry through their speech and resulting action. With this common understanding in place, the IRS can focus the scope of the activating language. The updated trigger should be more specific, causing the Test to apply when a group "implicates or targets

138. I.R.C. § 7805(a) ("the Secretary shall prescribe all needful rules and regulations for the enforcement of this title, including all rules and regulations as may be necessary by reason of any alteration of law in relation to internal revenue"); *Regan*, 451 U.S. at 548-49. *Regan* suggests that an act of Congress is required to dictate what Congress is willing to subsidize. This Note will not focus on the "who" in the solution, but it is worth noting that the Treasury Department may be able to make this change unilaterally by promulgating new regulations.

139. *National Alliance*, 710 F.2d at 874-75.

140. Amarante, *supra* note 59, at 2064.

141. *Regan*, 451 U.S. at 550.

142. *Id.* (citing Cammarano v. United States, 358 U.S. 498, 513 (1959)).

143. *Id.* at 548.

an immutable characteristic in its educational functions." This, rather than the current "controversial" standard, is superior because it excels where current standard fails: it is clear, therefore the IRS and applicants alike will know exactly when they will be subject to the Methodology Test, and, by using similar language to definitions of hate groups, ensures that hate groups will fall into the bucket subject to the Methodology Test.

While this implicates content-based speech rights, the test need not pass strict scrutiny muster because the Court should not apply strict scrutiny. This test stays within the bounds of outlined in *Regan*: it does not deny a subsidy based on the characteristics of the speaker, nor does it suppress dangerous ideas. Instead, it provides an added layer of review for groups that discuss common targets of hate speech to ensure that their educational materials are truly educational. This Note's proposed new trigger for the Methodology Test, or any new trigger that would not be viewpoint neutral within the bounds of *R.A.V.*, would likely fail a standard strict scrutiny test. Under the Court's current application of strict scrutiny demonstrated in *303 Creative* and *Iancu*, the test would be seen as unconstitutional pursuant to the First Amendment freedom of speech clause for an essential reason: the government cannot restrict speech or deny government entitlements based on specific viewpoints. But, because 501(c)(3) status is differentiated as a subsidy, it is immune from such analysis.

Under the appropriate rational basis test applied in *Regan*, there need only be a clear government interest that is related to the outcome. The goal here is clear: prevent groups that are not spreading truthful, educational materials, such as hate groups, from taking advantage of nonprofit status through 501(c)(3) designation. Altering the trigger to exclude such groups is clearly related to this goal and would likely survive this level of scrutiny. Congress had already made the decision only to subsidize groups that are "educational" and groups that fail the Methodology Test fall outside of that scope. This does not limit the free speech rights of hate groups. For instance, if they chose to continue under a formal organizational structure, they could organize as standard corporation a pay the standard corporate tax rate on their earnings. Like in *Regan*, the groups are free to continue exercising their speech rights, but the rest of the country will not have to pay for it.

While this new trigger may increase the number of groups that have their 501(c)(3) applications scrutinized, it will not negatively impact groups that do other important advocacy work. Groups like Planned Parenthood, the ACLU, and the Human Rights Campaign would be subject to the Methodology Test in the same way the group from *National Alliance* was.[144] Groups that do positive advocacy work would need to ensure that their educational materials are supported by facts, the language they use is not overly inflammatory or disparaging, and they use tried-and-true educational methods. Overall, increased use of the Methodology Test benefits everyone:

144. Planned Parenthood Federation of America, Form 990, 1 (2023) [https://perma.cc/P4PC-P524]; ACLU Foundation, Form 990, 1-2 (2023) [https://perma.cc/4N8X-BVQP]; Human Rights Campaign Foundation, Form 990, 1-2 (2023) [https://perma.cc/AWK5-A8UY].

it will limit the ability for hate groups to access the benefits of nonprofit status, as many would likely fail the Methodology Test, and would maintain the quality of educational materials coming from other advocacy groups. Because the Methodology Test is the essential next step, the updated trigger proposed here cannot unilaterally be misused to remove tax exemption groups from doing fact-based advocacy work.

V. CONCLUSION

Hate groups enjoy the protections of the First Amendment in the United States, but that does not make their preachings "educational," and thus eligible for 501(c)(3) charitable nonprofit status. Many hate groups, affiliated with a variety of causes, currently enjoy 501(c)(3) status and the financial benefits associated. 501(c)(3) status is supposed to be for charities and organizations that benefit the public in some way, and groups that advocate hatred seem to fall outside of that category.

One of the only tools at IRS's disposal to prevent educational organizations from obtaining 501(c)(3) status is the Methodology Test. IRS currently has little guidance on when to use the test, making an otherwise effective tool obsolete. The current trigger–when a group is "controversial"–is vague and makes the Methodology test unworkable, and the rationale behind it, remaining content neutral, is unnecessary. The First Amendment free speech principles are fundamentally different when the government is subsidizing activity, and Congress has already made clear it only intended to subsize truly educational organizations. Therefore, an updated trigger for the Methodology Test that more specifically targets harmful speech is the best way to add clarity to the test and limit the ability for hate groups to take advantage of charitable status. The trigger does not have to be viewpoint neutral because it need only pass rational basis muster.

The IRS should be able to plainly call out the groups that have been abusing nonprofit status by their common features, targeting certain groups with hateful speech. This is why the new trigger should be when a group "implicates or targets an immutable characteristic in its educational functions." By cutting out the vague language and focusing on hate groups, the IRS can ensure that taxpayer money no longer goes to fund hate.

Sharing is not Always Caring: Protecting Reproductive Health Data with a Certified Health IT Segmentation Requirement

Talia Spillerman*

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* J.D., May 2026, The George Washington University Law School; Notes Editor, Federal Communication Law Journal, Volume 78; B.A. 2023 Political Science, University of Pittsburgh. To my mentors at ASTP in 2024 —thank you for your guidance and generosity. This Note would not have been possible without you. Thank you to the FCLJ Editorial Board and April Jones for your invaluable feedback in drafting this Note. A special thank you to my friends for sparking joy even on the bleakest days. Last but not least, thank to my parents for your endless encouragement and support to dream big throughout my legal education.

I. INTRODUCTION

Dr. Michelle Gomez, a California primary care and abortion doctor, became alarmed when she received a notification through her office's Electronic Health Record (EHR) system.[1] She saw that a patient who traveled to her from Texas, where abortion is illegal, had returned home and sought care for bleeding.[2] Gomez viewed the information from her patient's intake and eventual referral to an OBGYN in Texas.[3] It then occurred to Gomez that if she, in California, could view her patient's information in Texas, any clinician, billing person, or social worker accessing her patient's record could find that she and her patient violated Texas law.[4] Any of these people who viewed her patient's record could report her and her patient's actions to Texas authorities who could then charge both of them with criminal and civil penalties.[5]

This situation is a result of *Dobbs v. Jackson Women's Health Organization*, where the Supreme Court decided that the right to abortion is not constitutionally protected.[6] Since then, 17 states have enacted laws banning physicians from performing abortions and patients from receiving abortions in the state's bounds.[7] And one of these 17 states, Texas, enacted laws to criminalize patients who travel outside the state to receive an abortion.[8] Overall, the number of patients who travel out of state for an abortion to double from 2019 to 2023 because of these abortion bans.[9] In turn, 1 in 5 abortion patients must now travel out of their state for care.[10]

While 22 states have enacted laws that shield abortion patients from possible criminal penalties from other states, patients in states with abortion bans have reported that they will not seek out of state reproductive care because they fear that clinicians in their home state could see their abortion

1. *Health Information Hearing on A.B. 352 Before the Assemb. Standing Comm. on Health*, 2023 Leg., (Ca. 2023-2024) [hereinafter *Statement of Michelle Gomez*] (statement of Michelle Gomez).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. Ivette Gomez et al., *10 Things to Know About Abortion Access Since the Dobbs Decision*, KAISER FAM. FOUND. (Jun. 20, 2024), https://www.kff.org/policy-watch/10-things-to-know-about-abortion-access-since-the-dobbs-decision/ [https://perma.cc/T279-TT4E].
7. *Interactive Map: U.S. Abortion Policies and Access After Roe*, GUTTMACHER (Nov. 13, 2023) [https://perma.cc/8W3W-F7QA].
8. TEX. HEALTH & SAFETY CODE ANN. §170A.005 (West 2023).
9. Molly Cook Escobar et al. *171,000 Traveled for Abortion Last Year. See Where They Went*., NY TIMES. (Jun. 13, 2024) [https://perma.cc/NQ8G-N6C2].
10. *Id.*

record.[11] Thus, this inter-state data sharing has created a chilling effect on abortion access.[12]

The Office of the National Coordinator for Health IT/Assistant Secretary of Health IT (from here on out referred to as ASTP) enacted programs and regulations to increase EHR interoperability, or EHRs ability to share data.[13] These initiatives and industry advancements have improved EHR interoperability, allowing clinicians to provide more consistent and accurate patient treatment.[14]

However, the aforementioned chilling-effect arises because EHRs cannot consistently keep just a patient's abortion data private.[15] Most medical providers have two options when sharing patient health information: to share a patients' entire health data record or share none of a patient's health information.[16] Medical providers cannot choose to share just some of a patient's health information.[17] Thus, clinicians need a middle ground: sharing segmented patient information.[18]

EHRs can separate patient's health data from their record through a process called data segmentation.[19] Most EHRs cannot segment data, but they do have the capacity to allow for data separation by adhering to ASTP's recommended standards.[20] Despite EHR's technological capability to segment data, developers insist that EHR technology cannot perform this function.[21]

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11. *Shield Laws for Reproductive and Gender-Affirming Health Care: A State Law Guide*, UCLA LAW (Dec. 2025), https://law.ucla.edu/academics/centers/center-reproductive-health-law-and-policy/shield-laws-reproductive-and-gender-affirming-health-care-state-law-guide [https://perma.cc/54LK-YSB3]; He*alth Information Hearing on A.B. 352 Before the S. Standing Comm. on Health*, 2023 Leg., (Ca. 2023-2024) [hereinafter *Statement of Pana Lassi*] (statement of Pana Lassi).

12. *Statement of Michelle Gomez*, *supra* note 1; Letter from The Ctr. for Reproductive Rts. to Micky Tripathi, Nat'l Coordinator for Health Info. Tech. (June 16, 2023) [hereinafter *Center for Reproductive Rights*].

13. *See* Julia Adler-Milstein et al., *A Survey of Health Information Exchange in Advance of a Nationwide Connectivity Framework*, 40 HEALTH AFFAIRS 736, 737 (2021), https://doi.org/10.1377/hlthaff.2020.01497.

14. Peter Pronovost et al., *Procuring Interoperability: Achieving High-Quality, Connected, And Person-Centered Care*, NAT'L ACADS. OF MED. 9 (2018) ("Interoperability leads to increased efficiency, lower costs, and better quality of care through four primary drivers: reducing adverse events because of safety interlocks ($1.9 billion); reducing redundant testing ($1.5 billion); reducing clinician time spent manually entering information ($12 billion); and shortening length of stay through more timely transmission of critical information such as lab results ($18 billion).").

15. *Statement of Pana Lassi*, *supra* note 11.

16. *Id.*

17. *See* Mark A. Rothstein & Stacey A. Tovino, *Privacy Risks of Interoperable Electronic Health Records: Segmentation of Sensitive Information Will Help*, 47 J. L., MED. & ETHICS 476, 771-77 (2019); Adela Grando et al., *Pilot Evaluation of Sensitive Data Segmentation for Privacy*, INT'L J. MED. INFORMATICS 514, 515 (2020).

18. *See* Rothstein & Tovino, *supra* note 17.

19. *Id.*

20. *See* Grando et al., *supra* note 17.

21. Letter from HIMSS Elec. Health Rec. Ass'n to Mark Ghaly, Sec'y, Ca. Health & Hum. Servs. Agency (Feb. 21, 2024).

Abortion providers and advocates support an EHR segmentation function.[22] Per the National Abortion Federation's standards, abortion providers should take all reasonable precautions to protect patient's confidentiality.[23] However, providers can only protect abortion data as much as EHR technology permits.[24] In turn, national organizations such as Planned Parenthood and the Center for Reproductive Rights have called for a segmentation standard. [25]

With no national requirement, states have taken the lead on requiring EHR segmentation.[26] In 2023, California and Maryland passed laws to require EHRs to keep a patient's reproductive health information separate from the rest of their record.[27] While these laws are an important step to protecting patient data, these varying standards require developers to develop multiple segmentation programs.[28]

This Note argues that ASTP should require Certified EHRs to segment reproductive health data. When out-of-state abortion patients know that EHRs will not share their data, they will feel more confident that authorities in their home state will not charge them for obtaining an abortion. In turn, patients will feel more inclined to travel out of state to obtain the abortion procedures they need.

First, this Note will offer an overview of federal and state actions that aim to protect reproductive health information post *Dobbs*. Then, this Note will discuss the landscape of EHR technology and interoperability. Next, this Note will discuss how a certified Health IT reproductive health segmentation requirement will make out-of-state patient's more willing to get the abortion services they need. This section will also address how this proposal considers previous patient, clinician, and EHR developer concerns. Finally, this Note will discuss further federal and state action needed, to require clinicians to use the EHR segmentation technology.

22. Health Gorilla, Privacy Value Sets and Sensitive Data Management Webinar, YouTube (May 15, 2024), https://www.youtube.com/watch?v=p9YYn8K1-6k [https://perma.cc/3UHX-29NH].

23. NAT'L ABORTION FED'N, CLINICAL POLICY GUIDELINES FOR ABORTION CARE 5 (2024).

24. *Id*.

25. *Center for Reproductive Rights*, *supra* note 12; Health Gorilla, *supra* note 22.

26. *Statement of Pana Lassi*, *supra* note 11; *See generally* MD. DEP'T OF FIN., POLICY NOTE: SB 786, 2023 Sess. (2023).

27. *Id.; Cal. Civ. Code §§56.101,56.208* (West 2024).

28. *Statement of Pana Lassi*, *supra* note 11; *See generally* Letter from HIMISS Elec. Health Rec. Ass'n to Ben Steffen, Exec. Dir. Md. Health Care Comm'n, and Jordan Green, Dir., Off. of Regul. and Pol'y Coordination (Feb. 12, 2024).

II. BACKGROUND

A. Overview of State and Federal Action Post Dobbs

1. Agency Action to Protect Reproductive Data Post Dobbs

Post *Dobbs*, the Department of Health and Human Services (HHS) amended the Health Insurance Portability and Accountability (HIPAA) Privacy Rule to protect patient's reproductive data.[29]

The HIPAA Privacy Rule allows individuals to access and determine which medical providers can view their health information.[30] However, even under this protective rule, a HIPAA covered entity can disclose a patient's health information for treatment, payment, health care operation, or law enforcement purposes without the patient's authorization.[31] This means that billing departments, medical records departments, and other clinicians who have access to a patient's records could see their medical history.[32] For example, a radiologist and a referring physician can send a patient's health information to one another without the patient's approval.[33] While this rule helps clinicians share patient information easily and in turn provide comprehensive care, patients are not always aware of all the clinicians or employees that view their medical information.[34]

To alleviate some of these privacy concerns, HHS enacted the HIPAA Rule to Support Reproductive Health Care Privacy.[35] This rule provides an exception to the HIPAA Privacy Rule: abortion clinicians in abortion-protective state do not have to disclose abortion data to authorities in an abortion-criminalizing state.[36] Also, if a clinician must disclose abortion information to an entity in an abortion criminalizing state for treatment, payment, or operation purpose, the receiving entity cannot report this

29. *HIPAA Privacy Rule Final Rule to Support Reproductive Health Care Privacy: Fact Sheet*, U.S. DEP'T OF HEALTH AND HUM. SERVS., https://www.hhs.gov/hipaa/for-professionals/special-topics/reproductive-health/final-rule-fact-sheet/index.html [https://perma.cc/M2KF-SGAY] (last visited Nov. 18, 2024).

30. *Summary of the HIPAA Privacy Rule*, U.S. DEP'T OF HEALTH AND HUM. SERVS., www.hhs.gov/hipaa/for-professionals/privacy/laws-regulations/index.html [https://perma.cc/Y4YK-94XP] (last visited Nov. 18, 2024).

31. *Id.*

32. *Statement of Michelle Gomez*, *supra* note 1.

33. *See id.*

34. *See id.*

35. *HIPAA Privacy Rule Final Rule to Support Reproductive Health Care Privacy: Fact Sheet*, U.S. DEP'T OF HEALTH AND HUM. SERVS., https://www.hhs.gov/hipaa/for-professionals/special-topics/reproductive-health/final-rule-fact-sheet/index.html [https://perma.cc/M2KF-SGAY] (last visited Nov. 18, 2024).

36. *Id.* This rule also requires HIPAA covered entities to get "attestations prior to using or disclosing PHI that could be related to reproductive care for certain purposes." This rule does not apply if the abortion was not lawful or there is strong evidence to suggest it was not lawful.

procedure to state authorities under the HIPAA Rule to Support Reproductive Health Care Privacy .[37]

However, HIPAA Rule to Support Reproductive Health Care Privacy is no longer in effect.[38] In *Purl v. United States Department of Health and Human Services*, a federal district court in Texas found that the Department of Health and Human Services did not have the authority to enact this regulation because, "HHS regulations cannot preempt a contrary state law with 'more stringent' health-information protection requirements."[39] According to the Northern District of Texas, the fact that HIPAA Rule to Support Reproductive Health Care Privacy "preempts contrary state law" because the HIPAA Rule allows clinicians to not report abortion information while Texas state law that requires reporting.[40] Following *Purl*, the federal government can no longer hold entities liable for disclosing a patient's reproductive health information in cooperation with a criminal or civil investigation.[41]

Still, the Assistant Secretary of Technology and Policy (ASTP) rules to enhance reproductive health protection remain in effect.[42] In December 2024, ASTP finalized the Protecting Care Access Exception to Information Blocking, which permits entities to keep patient's reproductive health private without risking information blocking charges.[43] The Protecting Care Access Exception (PCA) states that an actor can limit sharing Electronic Health Information (EHI) to reduce the risk of exposing patients or healthcare workers to legal action based on their administering, seeking, or obtaining reproductive health care.[44] ASTP provides three main justifications for this exception: (1) if a patient thinks that sharing their history will put themselves

37. *Id.*; *see also* TEX. HEALTH & SAFETY CODE ANN. §170A.002 (West 2023). While entities may be required to report an out-of-state abortion under state law, HIPAA preempts state law.

38. *Purl v. United States Dep't of Health & Hum. Servs*. F. Supp. 3d 284 (N.D. Tex. 2025).

39. *Id*. at 297.

40. *See id*.

41. *See Purl*, *supra* note 38.

42. 45 C.F.R. §§ 171.102, 171.202, 171.204, 171.206.

43. *Information Blocking Exceptions*, THE OFF. OF THE NAT'L COORDINATOR FOR HEALTH INFO. TECH. (July 2024), healthit.gov/sites/default/files/page/2024-07/HTI2ProposedRuleInformationBlockingExceptionsFactsheet508.pdf [https://perma.cc/B34B-CKHS]; *INFORMATION BLOCKING*, ASSISTANT SEC'Y FOR TECH. POL'Y, https://www.healthit.gov/topic/information-blocking [https://perma.cc/UQV3-DBXK] (last accessed Jan. 8, 2015). The Office of the Inspector General (OIG) can charge an fine an entity up to $1 million per violation if standards, health IT developers of certified Health IT, entities offering certified Health IT, Health Information Exchanges (HIEs), and Health Information Networks (HINs) act in ways that they know, or reasonably know, will interfere with the exchange of health information. An entity does not have disclose information is sharing information would: violate state law, violate federal agency action, or clinicians cannot share the information without also sharing health information the patient does not want to disclose.

44. 45 C.F.R. §§ 171.102, 160.103 (defining reproductive health as health care that "affects the health of an individual in all matters relating to the reproductive system and to its functions and processes.").

or providers at legal risk, they will be less willing to share their real health history or conditions; (2) without this candor, health care providers cannot provide care that will best help patients; and (3) a health provider's belief they can adequately protect their patient's health information can "erode the mutual trust" between physicians and patients that leads to better health care outcomes.[45]

2. State Action to Criminalize Abortion Post Dobbs

Some states have passed laws criminalizing patients who travel to another state for an abortion and the clinician who provides abortion services.[46] For example, in Texas, abortion is only legal when the pregnant person's life is in danger or the pregnant person faces "substantial impairment of a majorly bodily function."[47] Patients who travel to another state for an abortion procedure can be subject to penalties of up to 99 years in prison and civil penalties of up to $100,000 in fines.[48] Abortion clinicians providing services to Texas abortion patients are subject to these same penalties as well as the loss of their medical license.[49] Similarly, both Idaho and Tennessee adopted an abortion trafficking ban, criminalizing adults who travel out of state to obtain an abortion for a minor.[50] Adults convicted under these laws can face up to 11 months and up to 5 years respectively in prison.[51]

3. State Actions to Protect Reproductive Data Post Dobbs

In response to some state's abortion bans, 18 states have enacted abortion protection laws called interstate shield laws.[52] These laws prohibit health care facilities from sharing patient's medical records with states

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45. *Id.*

46. *See Texas*, CTR. FOR REPRODUCTIVE RTS., reproductiverights.org/maps/state/texas/ [https://perma.cc/6YC5-2QNL] (last visited Nov 19, 2024). Since abortion is now a crime in Texas, other criminal laws such as solicitation, aiding, attempt, and conspiracy can apply to abortion.

47. TEX. HEALTH & SAFETY CODE ANN. §170A.002 (West 2023).

48. TEX. HEALTH & SAFETY CODE ANN. §170A.005 (West 2023).

49. *Id.*

50. Geoff Mulvihill, *Things to know about efforts to block people from crossing state lines for abortion*, ASSOCIATED PRESS (Nov. 10, 2023, 4:49 PM), https://apnews.com/article/abortion-texas-idaho-alabama-state-lines-trafficking-d314933f3f7db93858561a0c6ad0b188 [https://perma.cc/WA9R-YG3E]. This includes taking the minor out of state or obtaining abortion pills out of state. *Idaho*, CTR. FOR REPRODUCTIVE RTS., https://reproductiverights.org/maps/abortion-laws-by-state/idaho/ . [https://perma.cc/PA7F-8974] (last visited Nov 19, 2024); Melissa Brown & Angle Latham, *Tennessee lawmaker, Nashville lawyer sue over 'abortion trafficking law*, THE TENNESSEAN (Jun. 24, 2024, 1:25 PM), www.tennessean.com/story/news/health/2024/06/24/ tennessee-abortion-trafficking-lawsuit/74197839007/ [https://perma.cc/W3K6-JDZ].

51. Anita Wadhwani, *Tenesse Senate passes bill making it a crime to aid a minor seeking an abortion, Tennessee Lookout* (Apr. 11, 2024, 5:00 AM) *Idaho governor signs ban on 'abortion trafficking,'* Associated Press, (Apr. 6, 2023 1:48 PM)

52. David S. Cohen Et Al. Abortion Shield Laws, NEJM Evid. Mar. 28, 2023, https://reproductiverights.org/resources/interstate-shield-laws/ [https://perma.cc/NK5M-K6WM].

looking to impose criminal or civil liability on abortion patients or providers.[53] However, even with these protective laws, clinicians still share health information with other medical providers in abortion-criminalizing states, who could then report any illegal reproductive care to their state's authorities.[54]

Federal courts will soon discern shield law's constitutionality.[55] After a patient in Texas took abortion medication sent to her by a New York doctor, she went to a hospital to receive treatment for a complication.[56] The patient's friend found her abortion medications and reported her abortion to the Texas authorities.[57] Texas then sued this doctor for violating their state's law.[58] However, since New York law protects abortion doctors from out of state abortion liability, federal courts must decide if New York's shield law unconstitutionally limits Texas's law.[59]

A similar case took place in Louisiana.[60] After a patient took abortion pills sent to her by this same New York doctor, she went to the hospital after experiencing a medical emergency.[61] At the hospital, a police officer learned about her pill intake and began an investigation into the doctor who prescribed pills to the patient.[62] Louisiana put a warrant out to arrest the doctor, the governor of New York said she will not turn the doctor over to Louisiana.[63]

California and Maryland have further advanced interstate shield laws by requiring EHRs and clinicians to segment patient's abortion health records.[64] In 2023, California passed a set of laws which prevents providers or vendors from disclosing patient's reproductive health data with entities outside of California.[65] EHR developers who operate in California must create EHRs with the capabilities to segregate and protect medical information related to gender affirming care, contraception, abortion, and abortion-related

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53. *Id.*

54. *Id.*; *Statement of Michelle Gomez*, *supra* note 1. Clinicians can share data across state lines through a multi-state information exchange or an information request.

55. Sean Murphy et al., *Texas' abortion pill lawsuit against New York doctor marks new challenge to interstate telemedicine*, ASSOCIATED PRESS (Dec. 13, 2024), apnews.com/article/abortion-pills-lawsuit-shield-laws-texas-telemedicine-74c9b7d5c3c152e4c8f199b29132daec [hereinafter *Texas suit against New York*] [https://perma.cc/B63A-VCAG].

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Louisiana issues arrest warrant for New York doctor indicted for prescribing abortion pill*, CNN (Feb. 1, 2025, 3:02 PM), www.cnn.com/2025/02/01/us/louisiana-abortion-ny-doctor-arrest-warrant/index.html [hereinafter *Louisiana issues arrest warran*t] [https://perma.cc/KXC5-4977].

61. *Id.*

62. *Id.*

63. *Id.*

64. S.B. 786, 2023 Gen. Assemb., 43rd Sess. (Md. 2023); A.B. 352, 2023 State Assemb., Reg. Sess. (Ca. 2023).

65. A.B. 352, 2023 State Assemb., Reg. Sess. (Ca. 2023).

services.[66] Clinicians are required to use this technology to segment reproductive health data[67].

EHR Developers opposed this law, claiming they could not create technology to comply with these regulations.[68] The Electronic Health Record Association (EHRA), an organization representing 29 EHR companies in the United States, explained that they cannot comply with this law since California does not provide any definitions or codes specifying which data are reproductive health data.[69] Without knowing which data this regulation impacts, developers cannot develop codes, or data categories to comply with these regulations.[70] In turn, EHRs may overly or inconsistently restrict health information.[71] The EHRA recommends that California defines all terms, clarifies which medical information would require this restriction (ex. results, medications), and provides specific value sets to outline which information should be restricted.[72]

However, in May 2024 Health Gorilla, an EHR company, published value sets for the health information covered by the CA Law.[73] These codes help EHRs develops labels for which medical conditions, treatments, and descriptions clinicians must segment under California law.[74]

Similarly, Maryland enacted a law which prohibits Health Information Exchanges (HIEs) and Electronic Health Networks (EHNs) from disclosing data related to abortion care and other reproductive health services without patient pre-authorization.[75] Under this law, the Secretary has the authority to label medical information sensitive, meaning the secretary can change which information can be blocked.[76] Additionally, developers have to flag and segment sensitive data written in free text boxes.[77] Unlike California's law, Maryland provides specific codes to tell EHR vendors which information should be sensitive.[78] Once the information is labeled sensitive, medical providers must ask for patient consent to share the information.[79]

The EHRA claims that this segmentation requirement is infeasible.[80] Developers argue that even if they could develop a segmentation function, it

66. *Id.*
67. *Id*.
68. Letter from HIMSS Elec. Health Rec. Ass'n to Mark Ghaly, Sec'y, Ca. Health & Hum. Servs. Agency (Feb. 21, 2024).
69. *See id*.
70. *Id.*
71. *Id.*
72. *Id.* at 2.
73. Health Gorilla, *supra* note, 22.
74. *Id.*
75. *Id.*
76. *Implementation Guidance: Electronic Health Network*, MD. HEALTH CARE COMM'N (May 22, 2024) [https://perma.cc/KUS7-M92Q].
77. *Center for Reproductive Rights*, *supra* note 12; Health Gorilla, *supra* note 22; A.B. 352, 2023 State Assemb., Reg. Sess. (Ca. 2023).
78. *See Statement of Pana Lassi*, *supra* note 11; MD. DEPT. OF FIN., POLICY NOTE: SB 786, 2023 Sess., at 4 (2023).
79. *Center for Reproductive Rights*, *supra* note 12; Health Gorilla, *supra* note 22; A.B. 352, 2023 State Assemb., Reg. Sess. (Ca. 2023).
80. Letter from Himiss Electronic Health Record Association, *supra* note 28.

would be impossible for EHRs to discern untagged data in a free text box.[81] An in-depth explanation of tagged data will follow below.

B. Overview of ASTP's Health IT Interoperability Regulations and Programs

1. Data Segmentation Allows EHRs to only share some of a Patient's Health Record

Data Segmentation occurs when data is separated from the patient's record.[82] Segmentation does not refer to one specific method of dividing data: depending on the EHR's setup, the data can be separated entirely from the record or filtered out when the record is shared.[83] ASTP has considered requiring Certified EHRs to have a manual segmentation function.[84] Further discussion of Certified Health IT will follow below. In 2023, ASTP proposed that certified health IT developers must allow patients to decide which of their data clinicians can access.[85] Ultimately, ASTP did not publish this requirement in the final rule.[86]

For EHRs to segment data, EHRs must be interoperable or able to exchange information and utilize the exchanged information in its own system.[87] When EHRs understand the information they receive, they can adequately separate the information based on law or the patient's request.[88] The following section will discuss how ASTP has addressed challenges to EHR interoperability.

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81. *Id.*

82. Melissa Goldstein, *Data Segmentation in Electronic Health Information Exchange: Policy Considerations and Analysis*, GW SCHOOL OF PUBLIC HEALTH, Sept. 29, 2010, at 47, 49.

83. *See generally id.*

84. Health Data, Technology, and Interoperability: Patient Engagement, Information Sharing, and Public Health Interoperability, 89 Fed. Reg, 1800 (proposed Jan 9, 2024) (to be codified at 45 C.F.R. 170,171). The proposed HTI-1 rule only required did not mandate how EHRs must segment data.

85. *Id*. The proposed HTI-1 rule only required did not mandate how EHRs must segment data.

86. 45 C.F.R. § 170, 171.

87. *Goldstein* at 9*, supra* note 82; Miriam Reisman, *EHRs: The Challenge of Making Electronic Data Usable and Interoperable* PHARMACY & THERAPEUTICS 572, 573 (Sept. 2017); *NCVHS. Letter to the Secretary of Health and Human Services re: Individual Control of Sensitive Health Information via the Nationwide Health Information Network for Purposes of Treatment* (Feb. 2008) http://www.ncvhs.hhs.gov/080220lt.pdf. NCVHS suggests that systems allow option sequestering of certain categories.

88. *Id*.

2. ASTP's Health IT Certification Program Provides Standards to Enhance EHR interoperability

For interoperability to occur, EHRs must use the same language and structure to divide their data.[89] However, when developers first created EHRs, they each used different terms and ways to organize data, making interoperability impossible.[90]

In turn, Congress established ASTP to encourage developers to create interoperable and secure EHRs.[91] With authority from Congress, ASTP enacted regulations which outline security and interoperability criteria EHR vendors must meet to obtain a Health IT Certification.[92] EHRs can choose to obtain a general certification by meeting many of ASTP's requirements or can obtain a certification for a specific requirement.[93]

Clinicians are encouraged to use Certified Health IT by the Center for Medicaid and Medicare Services (CMS).[94] CMS requires clinicians to use Certified Health IT to receive full funding.[95] While ASTP establishes the criteria for a categorical health IT Certification, CMS decides which of

89. Goldstein, *supra* note 82.

90. Goldstein, *supra* note 82; Redox, *Understanding Healthcare Interoperability Standards*, YOUTUBE, https://www.youtube.com/watch?v=XqXpJ3pbvMo [https://perma.cc/C2YA-ACLV].

91. *Promoting Innovation and Competitiveness*, THE WHITE HOUSE, https://georgewbush-whitehouse.archives.gov/infocus/technology/economic_policy200404/chap3.html [https://perma.cc/K8MZ-W2M4] (last accessed Apr. 4, 2025). George W. Bush signed an executive order creating a National Health Information Technology Coordinator within the Department of Health and Human Services (HHS) to ensure patients can access their data and communication between EHR systems is private and secure. Pub. L. No. 111-5, §§ 13001-13424, 123 Stat. 115, 228-279 (2009). This rule established ASTP and gave them the authority to create continuity in EHR communication and build a framework for EHRs to communicate with one another.

92. 21st Century Cures Act, Pub. L. No. 114-255, § 13101, 130 Stat. 1033 (2016). Congress required ASTP to create a Health IT Certification program, which would develop standards to develop greater EHR interoperability between hospitals, laboratories, and physicians' offices.

93. *Regulation FAQs* THE OFF. FOR THE NAT'L COORDINATOR FOR HEALTH INFO. TECH., https://www.healthit.gov/faq/08-question-09-10-008-2-0 https://www.healthit.gov/sites/default/files/understanding-certified-health-it-2.pdf[https://perma.cc/75GJ-VRBS]; Understanding Certified Health IT, The Office For The Nat'L Coordinator For Health Information Technology. https://www.healthit.gov/sites/default/files/understanding-certified-health-it-2.pdf. Certification groups include privacy and security, patient engagement, care coordination, electronic exchange, health IT design and performance, public health, clinical quality management, and clinical processes.

94. *Centers for Medicare & Medicaid Services (CMS) EHR Incentive Program Measures*, ASSISTANT SEC'Y FOR TECH. POL'Y, HTTPS://HEALTHIT.GOV/DATA/DATASETS/CENTERS-MEDICARE-MEDICAID-SERVICES-CMS-EHR-INCENTIVE-PROGRAM-MEASURES/ [https://perma.cc/3H76-JKVL]. If clinicians do not use Certified Health IT, CMS can give them 1% less funding and fines up to $43,720.

95. *Id.* Clinicians must also show that they are using the technology in a way that positively affects their patient's care.

ASTP's criteria EHRs must meet to obtain a general Health IT Certification.[96] As of 2021, 78% of office-based physicians and 96% of acute care hospitals have adopted an EHR that has a Health IT certification.[97]

The Health IT Certification program promotes EHR interoperability by encouraging EHRs to use the same data language and structure, which in turn, allows EHRs to understand and use the data they send to one another.[98] By 2026, Certified EHRs must adopt the same data tags, known as United States Core Data for Interoperability (USCDI), and communication program, known as HL7 Clinical Document Architecture (HL7 CDA).[99] Currently, 425 out of 693 certified EHR systems can tag data under USCDI and separate data in the HL7 CDA format.[100] Here, it must be noted that this communication framework allows clinicians to share data, they cannot choose to only share certain tagged data sections; they still can either share no patient data or all of a patient's data.[101]

However, a growing number of EHRs are beginning to use HL7 Fast Healthcare Interoperability Resources (FHIR) instead of HL7 CDA to

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96. *Standard Version Advancement Process*, ASSISTANT SEC'Y FOR TECH. POL'Y, https://www.healthit.gov/topic/standards-version-advancement-process-svap 9 [https://perma.cc/H4L9-T9UB]; CTRS. FOR MEDICARE & MEDICAID SERVS., AN INTRODUCTION TO: MEDICARE EHR INNCENTIVE PROGRAM FOR ELIGIBLE PROFESSIONALS (2014) https://www.cms.gov/regulations-and guidance/legislation/ehrincentiveprograms /downloads/ehr_medicare_stg1_begguide.pdf [https://perma.cc/Z4SC-XM8V]. Some medical systems prefer to use Certified Health IT because this certification denotes that an EHR will help them comply with HIPAA or communicate with other EHRs effectively.

97. National Trends in Hospital and Physician Adoption of Electronic Health Recprds. Assistant Secretary for Technology and Policy, https://www.healthit.gov/data/quickstats/national-trends-hospital-and-physician-adoption-electronic-health-records [https://perma.cc/4F8W-69XT].

98. *See* Reisman, *supra* note 87; *Understanding USCDI and Data Exchange,* FORESEE MED. (June 9, 2022), https://www.foreseemed.com/blog/understanding-uscdi-and-data-exchange [https://perma.cc/HH5W-DSCT]. ASTP published updated UCDI version 4 and USCDI version 5 standards that include additional tags.Recent ASTP Certification rules only require USCDI version 3.

99. II, C-CDA Companion Guide Updates; summary. https://www.federalregister.gov/documents/2024/01/09/2023-28857/health-data-technology-and-interoperability-certification-program-updates-algorithm-transparency-and Health Samurai, Data Segmentation for Privacy and Consent, YouTube (May 1, 2024), youtu.be/4xQm-sM9J4o?si=VYEvSEal7IzIzpaim [https://perma.cc/9MFE-WCQ6]; 45 C.F.R. §170.203 (2020); Comparing HL7 vs FHIR Standards to Enhance Interoperability in Healthcare, SPSoft, (July 5, 2024) spsoft.com/tech-insights/comparing-hl7-vs-fhir [https://perma.cc/6C8F-RMJ2]. USCDI categories are tags that ASTP has determined are essential for promoting EHR interoperability, label patient data (ex. immunizations, medications, and patient demographics). ASTP published updated UCDI version 4 and USCDI version 5 standards that include additional tags, recent ASTP Certification rules only require USCDI version 3.

100. *Certified Health IT Product List*, ASSISTANT SEC'Y FOR TECH. POL'Y, chpl.healthit.gov [https://perma.cc/G6RT-AXWJ] (select advanced search; click certification status and select active; select certification criteria and check off 170.315(b)(1), 170.315(b)(7), 170.315(b)(8)).

101. *See* Grando, *supra* note at 17 at 2.380.

separate data.[102] While not yet required in a rule, ASTP encourages EHR vendors to adopt FHIR because each data point is communicated separately, allowing EHRs to just share an individual data point within a patient's health record.[103] For example, while under HL7 CDA an EHR registers all the data labeled as immunizations as one entity, under FHIR, an EHR can recognize each individual immunization entry within this data tag.[104]

It must be noted that even with these technological advancements, EHRs still cannot sort electronic health information recorded in a free text box.[105] Even when clinicians record different treatments and conditions in one box, an EHR cannot label these terms in the free text box.[106] Clinicians may also prefer to write patient information as free text when there is no tag for a patient's data under USCDI or when they are recording numerous patient conditions.[107]

3. EHRs Share Health Information Between States through Health Sharing Information Exchanges, Multi-State Health Networks, and TEFCA

The standardization of Electronic Health Information (EHI) communication allows for regions to establish Health Information Exchanges (HIEs), agreements between health systems to share patient data.[108] Without HIEs, health information is only automatically accessible by clinicians and

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102. WESLEY BAKER ET. AL., *A national survey of digital health company experiences with electronic health record application programming interfaces,* Natiional Library of Medicine (Apr. 3 2024) https://pubmed.ncbi.nlm.nih.gov/38281124/. " Most companies reported use of the Fast Healthcare Interoperability Resources standard.", ASSISTANT SEC'Y FOR TECH. POL'Y (Jan. 12, 2025), www.healthit.gov/isp/about-fhir-action-plan [https://perma.cc/4R4Q-XX5B]; *see* Steven Posnack & Wes Barker, *The Heat is On: US Caught FHIR in 2019*, ASSISTANT SEC'Y FOR TECH. POL'Y, (July 29, 2021), www.healthit.gov/buzz-blog/health-it/the-heat-is-on-us-caught-fhir-in-2019 [https://perma.cc/W3LK-DAPV].

103. *FHIR Use Cases: Breaking Down Digital Health Barriers and Transforming Care*, INTERSYSTEMS, https://www.intersystems.com/resources/fhir-use-cases-digital-health-barriers-transform-care/ [https://perma.cc/5CTN-WGK3].

104. *See id.*

105. Swaminathan Kandaswamy et al., *Clinician Perception on the Use of Free-Text Communication Orders*, 12 APPLIED CLINICAL INFORMATICS 484, 485 (2021).

106. *Id.*

107. *Id.*

108. *For Patients*, CHESAPEAKE INFO. SYS. FOR OUR PATIENTS, www.crisphealth.org/for-patients/ [https://perma.cc/G3MN-NZG9]; *Health Information Exchange*, CALIFORNIA DEP'T OF PUB. HEALTH, hie.cdph.ca.gov/ [https://perma.cc/8JNP-XW8B]; *Overview*, MARYLAND HEALTH CARE COMM'N, mhcc.maryland.gov/mhcc/pages [https://perma.cc/KZM4-H7SN]; *DC HIE*, DEP'T OF HEALTH CARE FIN., dhcf.dc.gov/page/dc-hie [https://perma.cc/Z4GZ-UFQG].

employees within the same medical network.[109] However, if patients want to send information to clinicians who are a part of different medical networks, they must send a request each time they want to share their health information.[110] To make it easier for patients and clinicians to share health information, regions, states, and counties have created networks for medical providers in the same area to share patient data called Health Information Exchanges (HIEs).[111] When patients consent to sharing their information with the network, any of their providers can see their health data, as long as they have approval under HIPAA.[112]

In 2022, ASTP established the Trusted Exchange Framework and Common Agreement (TEFCA), a framework that encourages data sharing on a national scale.[113] Any clinician whose EHR company agrees to TEFCA's terms can request patient information from another provider in the exchange network.[114] So long as a patient agrees to disclose their health information, EHRs receiving the request must share the patient data with the requesting EHR.[115]

109. https://pubmed.ncbi.nlm.nih.gov/?term="Holmgren AJ"[Author]A JAY HOLMGREN ET AL., *Health Information Exchange: Understanding the Policy Landscape and Future of Data Interoperability* (July, 6 2023), https://pmc.ncbi.nlm.nih.gov/articles/PMC10751121/. [https://perma.cc/28XG-DU2G]. Health networks are a collection of hospitals, doctor's offices, billing departments, and other medical facilities under the same corporation which all could be in the same state or span across multiple states. Clinicians and employees do not have to receive consent to view patient information for treatment, payment, or healthcare operations.; *St. Christopher's Hospital for Children Launches Electronic Health Record,* TOWER HEALTH (Mar. 4, 2021) https://towerhealth.org/articles/st-christophers-hospital-children-launches-electronic-health-record [https://perma.cc/QDW8-SR2A]. As medical systems are growing, when they are acquired, they may not use the same EHR system immediately, but they aim to consolidate into one EHR across the system.

110. *See* SUMMARY OF THE HIPAA PRIVACY RULE*, supra* note 30. Unless it is for a treatment, payment, or healthcare operation clinicians must obtain patient consent before disclosure

111. *See* CHESAPEAKE INFO. SYS. FOR OUR PATIENTS, *supra* 108*; See Health Information Exchange*, *supra* 108.

112. *See* CHESAPEAKE INFO. SYS. FOR OUR PATIENTS, *supra* 108; *See* SUMMARY OF THE HIPAA PRIVACY RULE, *supra* note 30.

113. *TEFCA*, ASSISTANT SEC'Y FOR TECH. POL'Y, https://healthit.gov/policy/tefca/ [https://perma.cc/Z6J3-XSMR].

114. *Id.* The request must be for treatment, payment, health care operation, public health, government benefits, or individual access services purposes.

115. *Id.*

4. ASTP uses DS4P Standards to Protect Patient Privacy

While sharing patient data leads to better health outcomes, sharing data that patient's find sensitive can be harmful.[116] In turn, ASTP requires communicating EHRs to note when a patient's data is sensitive.[117]

In 1975, when clinicians relied on paper records, HHS realized that sharing substances abuse history and psychiatric notes could lead to stigmatizing social and legal consequences.[118] In turn, HHS added Title 42 Part 2 to the Code of Federal Regulations (CFR).[119] This rule requires substance abuse treatment and psychiatric facilities to keep patients' information separate from their other records, to only share this information with patient consent, and to denote to any receiving clinicians if they can redisclose the patient's health information.[120]

Once clinicians began using EHRs, it became difficult for clinicians to keep separate records in order to comply with Part 2.l.[121] Thus, this law inhibited care teams from providing patients coordinated and integrated patient care.[122] To alleviate clinician's concerns, the Substance Abuse and Mental Health Services Administration (SAMHSA) created Data Segmentation for Privacy (DS4P), a program which is now part of the Certified Health IT requirements.[123] DS4P allows clinicians to designate on an EHR if a patient has given consent for their information to be redisclosed.[124] However, it must be noted that DS4P only labels sensitive information does not separate it from a patient's health record.[125]

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116. Dennis McCarty et al., *42 CFR Part 2 and Perceived Impact on Coordination and Integration or Care: A Qualitative Analysis*, 68 PSYCHIATRIC SERV. 245, 245–46 (2017) (disclosing this information can lead individuals to losing employment, housing, and child custody).

117. *Security Tags for Sensitive Information*, ASSISTANT SEC'Y FOR TECH. POL'Y, https://www.healthit.gov/isp/security-tags-sensitive-information [https://perma.cc/2XB4-P6LL].

118. *See* McCarty et al., *supra* note 116; *Does HIPAA provide extra protections for mental health information compared with other health information?* U.S. DEP'T OF HEALTH & HUM. SERVS., www.hhs.gov/hipaa/for-professionals/faq/2088/does-hipaa-provide-extra-protections-mental-health-information-compared-other-health.html [https://perma.cc/FU2P-XM9W].

119. *HIPAA and Part 2*, U.S. DEP'T OF HEALTH & HUM. SERVS., https://www.hhs.gov/hipaa/for-professionals/special-topics/hipaa-part-2/index.html [https://perma.cc/528V-LEMX]. Unless legal authorities are requesting patients' information, facilities must also obtain patients' consent before disclosing their treatment, diagnosis history, or psychiatric notes.

120. *Id.*

121. *See* Dennis McCarty et al., POL'Y, *supra* note 116 at 2.

122. *Id.*

123. *2015 Edition Final Rule: Data Segmentation for Privacy*, THE OFF. FOR THE NAT'L COORDINATOR HEALTH INFO. TECH. (2015), www.healthit.gov/sites/default/files/2015editionehrcertificationcriteriads4p10615.pdf [https://perma.cc/H6S4-7BPZ].

124. Sarabu et al., *Shifting into Action: From Data Segmentation to Equitable Interoperability for Adolescents (and Everyone Else)*, 14 APPLIED CLINICAL INFORMATICS 544, 546–47 (2023).

125. *See* ASSISTANT SEC'Y FOR TECH. POL'Y, *supra* note 113.

III. ANALYSIS

This Note has explained that when patients travel out of state for an abortion, their data could be shared with providers in their home state because (1) many systems now use the same language and format to communicate (2) information sharing networks and multi-state health networks can share patient's health information easily, and (3) national privacy laws do not protect patient's reproductive data in all circumstances. This inter-state data sharing creates a chilling effect on abortion access: when out-of-state abortion patients know that clinicians in their home could see their abortion record, patients are unwilling to get the care they need.

This Note calls for ASTP to require EHR developers to build a segmentation function for reproductive health as part of the Health IT Certification program. Since the proposed regulation only requires the segmentation mechanism, not that clinicians must use it, this proposal does not require clinicians in abortion-criminalizing state to disobey state law.

The following section will first discuss how ASTP has the authority to require a segmentation function under the Health IT Certification program. Then, this section will outline how ASTP should enact a reproductive health USCDI category using the reproductive health definition in the HIPAA Privacy Rule to Protect Reproductive Health Data. Finally, this section will address developer's concerns about segmentation feasibility and additional steps federal and state governments need to take to protect reproductive health data.

A. Federal Reproductive Health Protections Need to be Enhanced

The Texas federal court's decision that invalidated the HIPAA Rule to Support Reproductive Health Care Privacy highlights the need for a federal, technological solution to protecting patients' abortion data. Following *Purl,*

clinicians must follow their state law when sharing patient's abortion information.[126] Clinicians in states with abortion shield laws still cannot share patient's abortion information with state authorities seeking to impose a civil or criminal penalty.[127] Thus, the less information that crosses into states without an abortion shield law, the safer patients will be from potential criminal and civil liability for obtaining abortion care.

Still, HTI-3, the Protecting Care Access Exception to Information Blocking remains in place, under this regulation, clinicians can keep patients' reproductive health private and not risk an Information Blocking charge from ASTP. [128] While the PCA laws helped protect patients seeking reproductive

126. *See Purl, supra* note 38.
127. *Id.*
128. 45 C.F.R. §§ 171.102, 171.202, 171.204, 171.206.

health services, it does not incentivize companies to create technology to protect the data from traveling clinicians in other states.

B. Reproductive Health Data Segmentation Regulations Should Take Place through ASTP Action to Avoid Conflicting State Laws

A national reproductive health data segmentation regulation will create a unified approach to protecting reproductive health information, allowing developers to focus their resources on one solution rather than trying to adapt to multiple standards. With no federal solution to protecting abortion data, states such as Maryland and California have attempted to protect patient reproductive health data using different standards.[129] In order to meet each state's regulations, developers must split their resources to create two innovative solutions.[130] Thus, one federal requirement would allow developers to create better protections since they would only have to focus on one solution.

ASTP has the authority and precedent to enact a reproductive health segmentation requirement for certified health IT. A segmentation requirement would build on HHS's historical mission to promote data privacy.[131] Part 2 regulations recognize that redisclosing substance abuse data and psychiatric data could lead to discriminatory legal charges.[132] A similar landscape is emerging in reproductive health data.[133] ASTP added a new requirement to the Health IT Certification process to allow patients to seek medical care without fear their history could lead them to charges.[134] Here, the reverse is occurring but the same idea remains; patients are afraid to seek a medical procedure so they can continue receiving medical care without fear of prosecution.[135] Therefore, there is a precedent for ASTP to develop programs that assist patients and clinicians in safeguarding sensitive health data when it could lead to harmful legal consequences.[136]

ASTP has the authority to add a reproductive health segmentation standard to Certified Health IT requirements.[137] First, the HITECH Act, which allows ASTP to establish regulations for Certified Health IT, makes it possible for ASTP to require Certified Health IT segment reproductive health

129. *Statement of Pana Lassi, supra* note 11; *see also* MD. DEP'T OF FIN., POLICY NOTE, *supra* note 26.

130. *Statement of Pana Lassi, supra* note 11; *see also* MD. DEP'T OF FIN., POLICY NOTE, *supra* note 26.

131. *See* Grando et al., *supra* note 17.

132. *FACT SHEET 42 CFR PART 2 FINAL RULE* US DEPARTMENT OF HEALTH AND HUMAN SERVICES, (Feb. 8, 2024) https://www.hhs.gov/hipaa/for-professionals/regulatory-initiatives/fact-sheet-42-cfr-part-2-final-rule/index.html [https://perma.cc/P2Q9-MY75].

133. *See Statement of Michelle Gomez*, *supra* note 1; *See* Grando et al., *supra* note 17.

134. *Statement of Michelle Gomez*, *supra* note 1.

135. *Id.*; *see HIPAA and Part 2*, *supra* note 119.

136. *See* generally Grando et al., supra note 17.

137. 21st Century Cures Act, Pub. L. No. 114-255 § 13101, 130 Stat. 1033 (2016); *Standard Version Advancement Process*, *supra* note 96.

data.[138] Also, the CURES Act further grants ASTP authority to enforce regulations that will enhance Health IT interoperability.[139] Under HIPAA and Information Blocking regulations, clinicians are not obligated to share information that a patient chooses not to disclose or any information that, if shared, could inadvertently reveal private patient details.[140] However, EHR data segmentation could revolutionize this reality. When EHRs effectively separate patients' confidential data, clinicians can share more patient data that is not sensitive, thereby significantly enhancing interoperability.[141]

Developers are incentivized to comply with Certified Health IT Standards.[142] In order for clinicians to receive full Medicare funding from CMS, they must utilize Certified Health IT.[143] Even clinicians who do not get funding from CMS may use Certified Health IT because these EHRs offer tools that help ensure HIPAA compliance, which can provide clinicians with confidence that they are adhering to their legal obligations.[144] Also, clinicians specifically look for EHRs that are certified to interoperability requirements to confirm that an EHR can help them communicate patient records.[145]

C. Developers Can Feasibly Comply with the Proposed Rule

While the Electronic Health Record Association (EHRA) argues that segmentation is not feasible for developers to create, this argument fails to consider recent technological developments.[146] The following section will argue that this segmentation requirement builds on the already established ASTP interoperability framework and allows developers to segment data using tools their EHR already uses.

1. The Proposed Rule Builds on Current ASTP Interoperability Framework to Create a Reproductive Health USCDI Tag

ASTP can enact a segmentation requirement because it has already established an interoperability framework using HL7 and United States Core

138. *Standard Version Advancement Process*, *supra* note 96; *Policy,* ASSISTANT SEC'Y FOR TECH. POL'Y, https://healthit.gov/policy [https://perma.cc/F4M5-GAR4].

139. *The 21st Century Cures Act*, NAT'L INSTS. OF HEALTH, www.nih.gov/research-training/medical-research-initiatives/cures [https://perma.cc/MHG8-52LW].

140. Mary Anderlik Majumder & Christi J. Guerrini, *Federal Privacy Protections: Ethical Foundation, Sources of Confusion in Clinical Medicine, and Controversies in Biomedical Research*, 18 AMERICAN MED. ASS'N J. ETHICS 288, 289 (2016); *See* THE OFF. OF THE NAT'L COORDINATOR FOR HEALTH INFO. TECH., *supra* note 43.

141. *See* Grando et al., *supra* note 17.

142. *See* ASSISTANT SEC'Y FOR TECH. POL'Y, *supra* note 96.

143. *Id.*

144. Lisa Eramo, *The importance of certified EHR technology*, THE INTAKE (Mar. 30, 2025), https://www.tebra.com/theintake/ehr-emr/certified-ehr-technology [https://perma.cc/QGH7-EZPW].

145. *Id*.

146. *Id.*

Data (USCDI) that most certified health IT use.[147] For an EHR to segment data properly, it must know if any data in a patient's record meets the requirement for segmentation including data a clinician input manually and data sent to the EHR.[148] A receiving EHRs can only understand data from a sending EHR if they both organize and label their data the same way.[149]

ASTP's EHR interoperability framework does just this by providing a standard for EHR communication.[150] Using USCDI, EHRs label the data using the same vocabulary and under HL7, EHRs organize their data the same.[151] Therefore, because this framework standardizes EHR data sharing by providing a uniform labeling language and organizing method, EHRs can discern reproductive health data as long as this data is labeled under USCDI.[152]

Thus, for EHRs to know which data is reproductive health data, ASTP should create a new USCDI category for reproductive health information using the PCA reproductive care definition. The PCA defines reproductive care as healthcare that "affects the health of an individual in all matters relating to the reproductive system and to its functions and processes."[153] While the EHRA notes that this definition does not provide specific data instances, which makes it hard to discern which data the rule covers, Health Gorilla, an EHR company, created publicly accessible codes to denote which data meets this definition.[154] Thus, ASTP can use these codes to convey to EHR developers which instances the textual definition requires them to segment.

2. The Proposed Rule Does Not Dictate the Manner EHRs must Segment Reproductive Health Data

EHRs use different methods to process health data, leading to various ways in which EHRs can segment data.[155] Some systems might opt to put segmented data in a separate file, while others may choose to filter the data when it's transmitted to other EHRs.[156] The proposed rule accounts for these

147. *See generally United States Core Data for Interoperability (USCDI)*, ASSISTANT SEC'Y FOR TECH. POL'Y, https://www.healthit.gov/isp/united-states-core-data-interoperability-uscdi [https://perma.cc/V2B6-KL5C]; *see* SPSOFT, *supra* note 99 (referring to both Fast Healthcare Interoperability Resources (FHIR) or Clinical Document Architecture (CDA)).

148. Health Gorilla, *supra* note 22.

149. *See* Reisman, *supra* note 87.

150. *Understanding USCDI and Data Exchange,* FORESEE MEDICAL (June 9, 2022), foreseemed.com/blog/understanding-uscdi-and-data-exchange [https://perma.cc/HH5W-DSCT].

151. *Id.; see Resiman,* supra note 87*; see* ASSISTANT SEC'Y FOR TECH. POL'Y, *supra* note 96.

152. *See* FORESEE MEDICAL, *supra* note 150.

153. *Id.*

154. *Id.;* Health Gorilla, *supra* note 22.

155. Electronic Health Record Association, Comment Letter to ONC on the HTI-1 Proposed Rule (June 23, 2023), https://www.ehra.org/sites/ehra.org/files/EHR%20Association%20Comments%20to%20ONC%20on%20the%20HTI-1%20Proposed%20Rule.pdf.

156. *Id.*

differences by mandating only a common outcome: EHRs must to be able to separate a patient's reproductive health data. In turn, this rule will provide developers with flexibility to meet the segmentation requirement in a manner that best suits their technology.

Additionally, EHR segmentation becomes more manageable as more EHRs update their sharing programs to HL7 FHIR.[157] Using FHIR, an EHR registers each data point separately. Thus, since the data are already separate, EHR developers just need to define that data, so the EHR knows which data not to send. Therefore, as more EHRs use HL7 FHIR standards to send data, segmentation will become even easier for EHR developers to create.

D. This Proposal Rule has Technological and Legal Limits but is Still an Important Step Forward in Reproductive Health Data Protection.

1. This Proposal Does Not Require Clinicians to Segment Reproductive Health Data

This proposal only requires EHRs to have the capability to segment reproductive health data. Since ASTP only has the authority to regulate EHR standards through Health IT Certification, this proposal does not mandate clinicians to segment reproductive health data.[158] For federal and state governments to require clinicians to use this technology, the technology must first exist.

The proposed rule establishes a strong incentive for developers to create segmentation technology. Since clinicians must use Certified EHRs to receive full funding from CMS, EHR developers are incentivized to meet these standards for their customers to use their products. Thus, the proposed rule is an important first step to creating a reproductive health data segmentation requirement for clinicians.

Nonetheless, the proposed rule will strengthen current legal protections for patient's reproductive health information.[159] Patients have the right under the HIPAA Privacy Rule to require clinicians to keep their health information private.[160] When patients make such a demand, clinicians can adhere to this request using their best efforts.[161] Therefore, this proposed rule enhances the tools that clinicians use when making their best effort. Under this proposal and HIPAA, if a patient in an abortion-protective state requests for their clinician to keep their reproductive health private, clinicians would have to segment their reproductive health data.[162]

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157. *See* INTERSYSTEMS, *supra* note 103.
158. *See* THE OFF. FOR THE NAT'L COORDINATOR FOR HEALTH INFO. TECH., *supra* note 93.
159. *See* U.S. DEP'T OF HEALTH AND HUM. SERVS, *supra* note 29.
160. *Id.*
161. *Id.*
162. *Id.*

Further, even though this proposal will not require clinicians to segment reproductive health information, many clinicians choose to use this function.[163] According to the National Abortion Federation, abortion providers should take all reasonable precautions to keep abortion information private.[164] In line with this goal, Planned Parenthood and the Center for Reproductive Rights, which represent abortion providers, have advocated for and EHR segmentation function to protect abortion patients and providers.[165] This alignment among abortion advocates highlights that even without a legal requirement, abortion clinicians will likely utilize this segmentation technology to keep patients and clinicians safe.[166] Therefore, while a segmentation requirement for Certified Health IT is not a complete solution to protecting abortion information, it is a crucial first step.[167]

2. This Proposal Does Not Require Clinicians to Segment Free Text

EHRs cannot identify and segment words in a value set within free text.[168] However, clinicians can manually segment the whole free text if their notes include information related to reproductive health.[169] Clinicians have a strong incentive to check if a free text contains reproductive health information when they are treating an out-of-state patient since they could face charges if authorities in the patients' home states discover their actions.[170]

It is not overly burdensome for clinicians to review free text boxes for reproductive health information because clinicians already must review free text to avoid disclosing confidential patient information. Under the HIPAA Privacy Rule and CFR Part 2, clinicians are legally obligated to ensure to not share sensitive information.[171] Specifically, if a patient requests that clinicians keep certain health information private, clinicians must ensure that other providers cannot see the private information on the EHR[172] Also, CFR Part 2

163. The Center for Reproductive Rights, Comment Letter on Proposed Rule Health Data, Technology, and Interoperability: Certification Program Updates, Algorithm Transparency, and Information Sharing 2 (June 16, 2023); Health Gorilla, *supra* note 22; NAT'L ABORTION FED'N, *supra* note 23.

164. NAT'L ABORTION FED'N., *supra* note 23.

165. *Id.*; *Center for Reproductive Rights*, *supra* note 12; Health Gorilla, *supra* note 22.

166. *Id.*

167. *Id.*

168. Swaminathan Kandaswamy et al., *supra* note 105; *see* Letter from HIMSS Elec. Health Rec., *supra* note 68.

169. *See generally* CMS Final Rule: Frequently Asked Questions, 1UPHEALTH, https://1up.health/resources /interoperability-resource-center/cms-final-rule-faqs [https://perma.cc/3T8H-99S6] ([Referring to USCDI v3] "CMS also expressly specified that a payer is only required to share structured documentation that it maintains, but there is no requirement to actually parse through unstructured data in an effort to make it structured.").

170. TEX. HEALTH & SAFETY CODE ANN. §170A.005 (West 2023).

171. *See* Grando et al., *supra* note 17.

172. *Id.*

mandates that clinicians must obtain patient consent before disclosing information related to substance use treatment or psychiatric notes.[173]

3. Investigative Bodies Could Still Acquire a Patient's Medical Record if They Find Probable Cause.

Segmentation is not a complete solution to protecting out-of-state abortion patient data. Clinicians could still infer that a patient obtained an abortion through the absence of health information on a patient's record. States can still obtain a patient's record if they find probable cause that a patient broke the law.[174]

Nonetheless, a reproductive health segmentation requirement will lessen probable cause.[175] While there is a risk a clinician could infer reproductive health information is missing from a patient's record, segmentation makes this data less obvious. Thus, while segmentation may not eliminate probable cause, it will lessen it.

IV. CONCLUSION

As developers have enhanced EHRs data sharing capabilities, they also must continue to develop EHRs data privacy abilities. ASTP must enact a reproductive data segmentation standard in their Health IT Certification requirements. This proposal sets a national standard for EHR's to segment patient's abortion data, an important first step in keeping patient's abortion data private. To fully protect patients' health data, states and federal governments must enact additional requirements to ensure actors use this function.

173. *Id.*

174. *See* Elizabeth Joh, *Fourth Amendment Rights as Abortion Rights*, N.Y. UNIV. L. REV. (Oct. 24, 2022).

175. Health Gorilla, *supra* note 22.

I Can't Afford the Time: How the FCC Could Conduct Rulemaking in a Post-Loper Bright Era to Strengthen the Equal Time Rule and Democracy in General

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TABLE OF CONTENTS

* J.D., May 2026, The George Washington University Law School; B.A. 2022 International Studies, Economics, Southern Methodist University. I am thankful to Professor Rizwan Chowdhry whose knowledge and guidance was essential to this Note's creation. I want to thank everyone who supported me in my previous political work which gave me a special insight into how the law works on the ground. I also thank the Federal Communications Law Journal Editorial Board for their tireless commitment to excellence and for helping bring this piece to publication. I want to especially acknowledge my late step father, Timothy Barron, for always supporting my interests and my journey to the law. Finally, to my family and friends your support means the world.

I. INTRODUCTION

On Saturday November 2, 2024, Presidential candidate Kamala Harris appeared on Saturday Night Live for one minute and thirty seconds.[1] The skit, conducted during the cold open of the show, showed the presidential hopeful speaking to her doppelganger, played by Maya Rudolph, in a comedic exchange through a faux mirror.[2] Just after the airing and announcement of Harris's cameo on the late-night program then FCC Commissioner Brendan Carr, now Chairman, posted on X, the social media platform, saying, "this is a clear and blatant effort to evade the FCC's Equal Time rule."[3] Later an FCC representative noted to the media that there had not been a formal complaint filed by the Donald Trump campaign.[4] In response to the pressure from Commissioner Carr, National Broadcasting Company ("NBC"), the network behind Saturday Night Live, filed notice with the FCC that they gave President Donald Trump equal time on their broadcasting station.[5] NBC gave Trump two different free broadcasts, one a ninety second spot at the tail-end of a NASCAR broadcast and the other a sixty second spot during NBC Sunday Night football.[6]

This is only a blip in the history of political candidates and their appearances on Saturday Night Live and other broadcast television shows. In

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1. Saturday Night Live, *2024 Pre-Election Cold Open*, YOUTUBE at 6:05–8:28 (Nov. 3, 2024), https://www.youtube.com/watch?v=e6Funs6yyEw [https://perma.cc/HKM8-QLN3].

2. *See id.*

3. Brendan Carr (@BrendanCarrFCC), X (Nov. 2, 2024, 9:35 PM), https://x.com/brendancarrfcc/status/1852887210330341693?s=46 [https://perma.cc/FVW5-3WBP]; Tara Suter, *FCC commissioner claims Harris on 'SNL' violates 'equal time' rule*, THE HILL (Nov. 3, 2024), https://thehill.com/homenews/4968217-fcc-commissioner-claims-harris-on-snl-violates-equal-time-rule/ [https://perma.cc/6AGM-5237].

4. Lester Fabian Brathwaite, *FCC responds to claim Saturday Night Live tried to 'evade' Equal Time rule with Kamala Harris Appearance*, ENT. WKLY. (Nov. 3, 2024), https://ew.com/fcc-responds-to-commissioner-claim-regarding-kamala-harris-snl-appearance-8738897 [https://perma.cc/9TJ3-SKJ2].

5. Emily DeLetter, *NBC files FCC 'equal time' notice after Kamala Harris appears on 'SNL'*, USA TODAY (Nov. 3, 2024), https://www.usatoday.com/story/news/politics/elections/2024/11/03/nbc-fcc-equal-time-harris-snl/76039040007/ [https://perma.cc/ZRJ3-QTVP].

6. Ryan Gaydos, *NBC gives Trump free election ad and airtime during NASCAR, NFL broadcasts after Harris 'SNL' furor*, N.Y. POST (Nov. 4, 2024), https://nypost.com/2024/11/04/sports/trump-election-ad-airs-during-nbcs-nascar-nfl-coverage-amid-harris-snl-uproar/ [https://perma.cc/6GR6-EY98]. The viewership on the SNL program which Harris appeared is dwarfed by the combination of the viewership of Sunday Night Football and NASCAR. Rebecca Bunch, *Saturday TV Ratings 11/2/24: Saturday Night Live Soars to Season High, Our Holiday Shop Strong on Hallmark [+Analysis]*, THE TV RATINGS GUIDE, http://www.thetvratingsguide.com/2024/11/saturday-tv-ratings-11224-saturday.html [https://perma.cc/462S-U9LW]; Jesus Mesa, *Donald Trump's NFL Ad and Kamala Harris' SNL Sketch Compete for Ratings*, NEWSWEEK (Nov. 4, 2024), https://www.newsweek.com/donald-trump-kamala-harris-ratings-snl-sunday-night-football-1980095 [https://perma.cc/48VN-NQEA]; Cian Brittle, *Nascar's Phoenix finale gets 2.9m viewers as 2024 season averages 2.87m on NBC*, BLACKBOOK (Nov. 13, 2024), https://www.blackbookmotorsport.com/news/nascar-phoenix-viewership-season-nbc-november-2024/ [https://perma.cc/GZ5V-WNXF].

2016, both Donald Trump and Hillary Clinton made appearances on Saturday Night Live during their respective primaries.[7] Clinton's appearance only resulted in one candidate, a relative non-entity, Larry Lessig, to request equal time.[8] In lieu of Trump's 2016 SNL hosting appearance candidates John Kasich, Mike Huckabee, James Gilmore, and Lindsey Graham reached an agreement with NBC to have 12 minutes of free air time in certain affiliate stations along with time during other Saturday Night Live broadcasts.[9] The FCC even considered "Bedtime for Bonzo," a movie where Ronald Reagan stars alongside a monkey, a "use" under the rule and granted his opponent "equal opportunities."[10] When Dr. Mehmet Oz ran for U.S. Senate in Pennsylvania, Fox Television stations stopped their broadcasting of his TV show "Dr. Oz" in anticipation of a potential equal time rule activations.[11]

While people have been switching to streaming more and more, the broadcast television political advertising market is as strong as ever.[12] In 2024, political ad spending was projected to reach almost 16 billion dollars, with it projected to only grow more as the years go on.[13] Television ad spending still comprises a major share of some campaigns' advertising budgets, with some political ad agencies designating 65% of their client's

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7. Ted Johnson, *NBC Reaches Agreement on Equal Time After Trump's 'SNL' Gig*, VARIETY (Nov. 23, 2015), https://variety.com/2015/tv/news/nbc-equal-time-agreement-donald-trump-snl-1201647112/ [https://perma.cc/9PC3-2SD8]; *What did Hillary Clinton do in her first 2016 "SNL" appearance?*, CBS NEWS (Oct. 4, 2015), https://www.cbsnews.com/news/what-did-hillary-clinton-do-on-her-first-2016-snl-appearance/ [https://perma.cc/9XSK-EVRE].

8. Ted Johnson, *Presidential Candidate Larry Lessig Seeks Equal Time After Hillary Clinton's 'Saturday Night Live' Cameo*, VARIETY (Oct. 18, 2015), https://variety.com/2015/biz/news/hillary-clinton-saturday-night-live-larry-lessig-equal-time-1201620964/ [https://perma.cc/LSC3-U9GH] ("An attorney for Lessig's campaign, Adam Bonin, sent a letter on Oct. 10 to 47 affiliates asking them for comparable time to that given to Clinton — three minutes and 12 seconds.").

9. Johnson, *supra* note 7.

10. *See* Womble Bond Dickinson LLP, *Political Broadcast Manual*, CA. BROADCASTERS ASSOCIATION , https://www.womblebonddickinson.com/sites/default/files/2019-11/PoliticalLawManual_2018_CA.PDF [https://perma.cc/J47V-WLJP] (accessed Nov. 16, 2024).

11. Ronald Reagan and Arnold Schwarzenegger also had their entertainment programming pulled during their respective campaigns. Stephen Battaglio, *Here's what happens to Dr. Oz's talk show now that he's running for Senate*, L.A. TIMES (Nov. 30, 2021), https://www.latimes.com/entertainment-arts/business/story/2021-11-30/dr-oz-show-senate-announcement-pennsylvania-fcc-rules [https://perma.cc/64QK-DH8D].

12. *Compare* Julia Stoll, *Share of consumers who have cut the cord on cable or satellite TV and moved to streaming-only services in the United States from 2022 to 2024*, STATISTA (Sept. 23, 2024), https://www.statista.com/statistics/1484079/cord-cutting-move-streaming-services-us/#:~:text=According%20to%20a%20survey%2C%20the,percent%20of%20respondents%20in%202024 [https://perma.cc/3BKW-2PL9] *with* Sara Fischer, *U.S. political ad market projected to reach record $16 billion in 2024*, AXIOS (Dec. 8, 2023), https://www.axios.com/2023/12/08/us-political-ad-market-2024-spending.

13. Fischer, *supra* note 12.

advertising budgets towards traditional TV spots.[14] While the flashy races such as the ones described above are the ones in which headlines and eyes largely focus on, the equal time rule also extends to down ballot races.[15] These down ballot races are rarely thought about, as the average voter can struggle to name their local candidates.[16] The lack of knowledge about down ballot races and working-class candidates is due in large part to the massive political advertising budgets that are required to get one's name and likeness out there.[17] Due to the financial hurdles, working class candidates can find it too difficult to run for office in their respective communities.[18]

The main problem with the equal time rule is that it does not actually lead to equal opportunities as required within the text. Its current state does not secure equal time since campaigns are regularly unable to utilize the rule.[19] This Note advocates for the FCC to conduct rulemaking on the equal time rule to adopt an affirmative duty for broadcasters to notify opposing candidates of their ability to utilize their equal time. Section II focuses on the history of the equal time rule, the current state and enforcement of the rule, the current legal challenges to rule making in a post-*Loper Bright* world, and the equity problems with the rule. Section III proposes rulemaking which would require broadcasters to have a heightened responsibility to inform opposing candidates when a use is imminent. Section III also provides a legal justification, in anticipation of legal challenges to the proposed rulemaking, which will focus the broad power granted to the FCC to conduct rule making. Section III also analyzes how the FCC has been given broad power to rule

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14. Marty Swant, *Political ad spending piles up in key states less than a month until Election Day*, DIGIDAY (Oct. 14, 2024), https://digiday.com/media-buying/political-ad-spending-piles-up-in-key-states-less-than-a-month-until-election-day/ [https://perma.cc/ETP5-TQMH] ("Doug Thornell, CEO of SKDK" stated that through his agency 65% of spending on political advertising "still goes to linear TV.").

15. *Political Broadcasting Advisory*, PILLSBURY WINTHROP SHAW PITTMAN LLP, Mar. 2010, at 3, 5 , https://www.pillsburylaw.com/a/web/3016/3016.pdf [https://perma.cc/73G7-FH3X].

16. Maria Caspani, *What's in a name? One-third of U.S. voters don't know candidates*, REUTERS (Oct. 3, 2018), https://www.reuters.com/article/us-usa-election-name/whats-in-a-name-one-third-of-u-s-voters-dont-know-candidates-reuters-ipsos-poll-idUSKCN1MD1QC/ [https://perma.cc/35YH-HEJ7] ("34 percent of Republican registered voters and 32.5 percent of Democratic registered voters said they did not know the names of their party's congressional candidates in their districts"); Jill Rosen, *Americans don't know much about state government, survey finds*, JOHNS HOPKINS UNIV. (Dec. 14, 2018), https://hub.jhu.edu/2018/12/14/americans-dont-understand-state-government/ [https://perma.cc/RS3Q-A48S] ("a third of respondents didn't know which state officials they voted for beyond governor, lieutenant governor, and members of the legislature").

17. NICHOLAS CARNES, THE CASH CEILING: WHY ONLY THE RICH RUN FOR OFFICE – AND WHAT WE CAN DO ABOUT IT 126 at 6 (2018); *see* Truel & Hanson, *infra* note 77.

18. Ross Barkan, *It's way too hard for working-class people to run for office*, WASH. POST (Jan. 16, 2019), https://www.washingtonpost.com/outlook/2019/01/16/its-way-too-hard-working-class-people-run-office/ [https://perma.cc/KV9C-AGFR]; Maresa Strano, *Where Have All the Local Candidates Gone?*, NEW AM. (Nov. 6 2023), https://www.newamerica.org/political-reform/blog/where-have-all-the-local-candidates-gone/ [https://perma.cc/W3NV-JKP2].

19. Anne Ricchiuto, *The End of Time for Equal Time?: Revealing the Statutory Myth of Fair Election Coverage*, 38 IND. L. REV. 267, 280-81 (2005).

make; how the public interest standard supports an equitable political market; and argues that the word "afford" in the equal time rule supports affirmative notification duties placed on broadcasters. Section III ends by analyzing possible counter arguments to the adoption of the new rule.

II. BACKGROUND

A. History of the Equal Time Rule

The equal time rule was implemented through the passage of the Communications Act of 1934.[20] The relevant section of the Act which contains the equal time rule is 315(a).[21] Congress passed the Communications Act of 1934 in response to the fear of the growing influence of broadcasting on the American populace.[22] The relevant regulation for the equal time rule is 47 CFR § 73.1941 and outlines the "timing of request," "burden of proof," and several other measures currently apart of the rule.[23] After the FCC ruled that newscast appearances by candidates qualify as a use under the equal time rule, Congress, in 1959, amended the rule adding exceptions to what would be considered "uses."[24] The act's relevant section reads as follows:

> If any licensee shall permit any person who is a legally qualified candidate for any public office to use a broadcasting station, he shall afford *equal opportunities* to all other such candidates for that office in the use of such broadcasting station: *Provided*, That such licensee shall have no power of censorship over the material broadcast under the provisions of this section. No obligation is imposed under this subsection upon any licensee to allow the use of its station by any such candidate.[25]

The FCC requires candidates to request access to broadcast time or have broadcast companies themselves put up notice with the FCC that there is an

20. Jonathan D. Janow, *Make Time for Equal Time: Can the Equal Time Rule Survive a Jon Stewart Media Landscape?*, 76 GEO. WASH. L. REV. 1073, 1073-74 (2008) (citing Communications Act of 1934, 47 U.S.C. § 151 (1934)).

21. *See id.* at 1073.

22. *Id.* at 1074 (citing Farmers Edu. & Coop. Union v. WDAY, Inc., 360 U.S. 525, 529 (1959)).

23. 47 C.F.R. § 73.1941 (1994).

24. *See* Janow, *supra* note 20, at 1076.

25. 47 U.S.C. § 315(a) (2021) (first emphasis added) (second emphasis in original).

opportunity for broadcast time, although there is evidence to suggest that some stations fail to post these records.[26]

The Supreme Court has upheld that political broadcasting laws are in-line with free speech protection.[27] The Communications Act requires the FCC to ensure that broadcasting licensees operate in the public interest.[28] This has become known as a public interest standard and derives from several different sections of the Communications Act of 1934.[29] The public interest standard "is a broad one."[30] Along with the public interest standard stemming from Section 309, Section 315(a) also mentions the existence of the "obligation imposed upon [broadcasters] under this act to operate in the public interest."[31]

Previously, there existed a close cousin of the equal time rule known as the fairness doctrine.[32] In 1949, the FCC justified the fairness doctrine on the idea that the public interest standard given in the Communications Act was justified since broadcasting is "medium of free speech and freedom of expression."[33] The fairness doctrine required that a broadcasting licensee give equal airtime to both sides on issues which were deemed controversial.[34] The Supreme Court upheld the constitutionality of the fairness doctrine by adopting the reasoning that since broadcast companies control the scarcity of the broadcast, that therefore political speech and its dissemination is inherently important to public interest.[35] However, even with the holding of the Supreme Court, the FCC cited first amendment concerns when the commission repealed the fairness doctrine in 1987.[36] There were two rules which survived the repeal of the fairness doctrine, the editorial and personal attack rules, which required notice be given to certain candidates in the event of a personal attack on the candidate or an endorsement against a candidate

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26. The FCC, however, does give rulings on whether certain broadcasts are exempt from the equal time rule. *See generally In re* Petitions of the Aspen Inst. on Commc'n and CBS, INC., 55 F.C.C.2d 719 (1975) (clarifying several exemptions in the equal time rule); *see generally* Pillsbury, *supra* note 15; Christopher Terry, *Candidates Appearances, Equal Time, and the FCC's Online Public File Database: Empirical Data on TV Station Compliance During the 2016 Presidential Primary*, 25 CATH. UNIV. J. L. & TECH. 341, 351-52 (2017).

27. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 388-91 (1969).

28. *See* 47 U.S.C. §§ 307(e)(1), 309(a); *see also Red Lion*, 395 U.S. at 380-81.

29. *See Red Lion*, 395 U.S. at 380-81.

30. *See id.*

31. 47 U.S.C.S. § 315(a) (LexisNexis 2025).

32. *See* Syracuse Peace Council, *Memorandum Opinion and Order*, 2 FCC Rcd 5043, ¶ 17 (1987) [hereinafter *Syracuse*] (repealing the fairness doctrine).

33. Editorializing by Broadcast Licensees, *Report*, Dkt. No. 8516, 1248 (1949), https://docs.fcc.gov/public/attachments/DOC-295673A1.pdf [https://perma.cc/7E93-BHMZ] (creating/clarifying the fairness doctrine).

34. Matt Stefon, *fairness doctrine*, BRITANNICA, https://www.britannica.com/topic/Fairness-Doctrine (Last updated Feb. 24, 2025) [https://perma.cc/E37S-FEYU].

35. *Red Lion*, 395 U.S at 390. The fairness doctrine could be considered a violation of the free speech rights of the broadcasters specifically because they intrude on their freedom of press and the broadcasting companies' freedom of speech in choosing what they want to air. *See id.* at 394.

36. *Syracuse*, *supra* note 32; Jerome Barron, *What Does the Fairness Doctrine Controversy Really Mean*, 12 U.C. L. COMMUN. & ENT. J. 205, 216 (1989).

by a broadcasting licensee.[37] Both of these rules were suspended in 2000 in response to a pending case in the D.C. Circuit, but no court has ever ruled that either of these rules were unlawful.[38]

B. Implementation of the Equal Time Rule

The statute requires that there be equal opportunities afforded to all candidates.[39] This has largely been construed that a broadcaster "make available periods of approximately equal audience potential to competing candidates to the extent that this is possible."[40] The FCC outlines that equal opportunities "generally means providing comparable time and place to opposing candidates."[41] The broadcast station can fulfill this requirement by allotting time on any of their other programming, however, they are not required to allot the time on identical programming.[42] In *the Matter of Summar Corp.*, the FCC was brought an issue regarding advertising spots in a congressional race where a broadcaster had delayed affording equal opportunities to an opposing candidate after several requests by a committee in support of said candidate.[43] The FCC held that giving more spots comparatively to an opposing candidate in an "isolated time frame" is not affording equal opportunity.[44]

The statute requires that someone be a legally qualified candidate, for any public office, to enjoy the usage of the rule.[45] Someone becomes a legally qualified candidate when they, "1) [have] publicly announced [their] candidacy, 2) meets the qualifications prescribed by applicable law to hold office, and 3) have qualified for a place on the ballot."[46] Under certain circumstances, some write-in candidates who do not satisfy all three requirements can also be considered legally qualified.[47] The burden is on the candidate requesting equal time to prove that they are legally qualified to in

37. Lili Levi, *Plan B for Campaign Finance Reform: Can the FCC Help Save American Politics After Citizens United?*, 61 CATH. UNIV. L. REV. 97, 154 n.364 (2011).

38. *See id.* (citing Redio-Television News Dirs. Ass'n v. FCC, 229 F.3d 269, 272 (D.C. Cir. 2000); Repeal or Modification of the Personal Attack and Political Editorial Rules, 65 Fed. Reg. 66643, 66644 (effective Nov. 7, 2000)).

39. 47 U.S.C.S. § 315(a) (LexisNexis 2025).

40. *See* Becker v. FCC, 95 F.3d 75, 84 (D.C. Cir. 1996).

41. *Fact Sheet: FCC Political Programming Rules,* FCC (Aug. 18, 2022), https://www.fcc.gov/sites/default/files/political_programming_fact_sheet.pdf [https://perma.cc/25Q8-K5VG].

42. *See id.*

43. *See* Liability of Summa Corp., Licensee of Station KLAS-TV, Las Vegas, Nev. For Forfeiture, *Memorandum Opinion and Order*, 49 F.C.C. 2d 443, 443 (1974) [hereinafter *Summa Corp.*] (regarding a congressional campaign buying advertising spots).

44. *See id.* at 449.

45. 47 U.S.C.S. § 315(a) (2025).

46. Flory v. FCC, 528 F.2d 124, 130 (7th Cir. 1975) (citing 47 C.F.R. §§ 73.120(a), 73.657(a)).

47. *See id.*

order to enjoy use of the equal time rule.[48] This has led to some instances of candidates being denied equal time, even when they are in fact a legally qualified candidate.[49]

The statute also requires that there be an initial use before other candidates can utilize the equal time rule.[50] The current regulation defines a use as "a candidate appearance (including by voice or picture) that is not exempt."[51] Previously, the regulation also qualified that an "appearance" be "controlled, approved or sponsored by the candidate or the candidate's authorized Committee," but this provision has been removed.[52] The FCC does not consider a candidate only appearing briefly in a broadcast, i.e. "an incidental inclusion," to cause the entire programming to be considered the use, unless the candidate is "integrally involved in the program, and indeed the focus of the program, and where the program is under the control and direction of candidate."[53] In *Paulsen v. FCC*, the Broadcast Bureau of the FCC held that Pat Paulsen's performance on a Disney produced show constituted a use under the law.[54] The Ninth Circuit, in *Paulsen*, upheld that even non-political appearances qualify as uses under the rule.[55]

The FCC has issued rules pursuant to the statute outlining the process of how a candidate and broadcasting agency approaches implementation of the equal time rule.[56] The regulations require that a request for equal time "must be submitted to the licensee within 1 week of the day on which the first prior use giving rise to the right of equal opportunities occurred[.]"[57] While a station is required to keep a public record of all political advertising and broadcasting time use, the burden is on the opposing candidates to both find out that there has been a use along with requesting for equal time.[58] If a candidate is denied their equal opportunity by a broadcast station, they then could file a formal complaint with the FCC or file a lawsuit in court.[59] It would be at this time that the FCC could step in, either through giving a declaratory

48. 47 C.F.R. § 73.1941 (2022).

49. *See Flory*, 528 F.2d at 131 (while the write in candidate was a legally qualified candidate his filings were not brought quickly enough to allow them to enjoy remedy from a previous adverse ruling).

50. *See Summa Corp.*, *supra* note 43, at 449.

51. 47 C.F.R. § 73.1941(b).

52. *Compare* Equal Opportunities, 57 Fed. Reg. 208 § 73.1941(b) (1992) *with* 47 C.F.R. § 73.1941(b).

53. *See* Complaint of D.J. Leary, *Memorandum Opinion and Order*, 37 F.C.C. 2d 576, 578 (1972) (regarding a brief airing of a political candidate).

54. *See* Paulsen v. FCC, 491 F.2d 887, 887 (9th Cir. 1974).

55. *See id.* at 891-92.

56. 47 C.F.R. § 73.1941 (1994).

57. 47 C.F.R. § 73.1941(c) ("Timing of request").

58. 47 U.S.C.S. § 315(e) (LexisNexis 2025) (requiring that a broadcast licensee keep a publicly available record of all requests for broadcast time done by a legally qualified candidate); Christopher Terry, *Candidate Appearances, Equal Time, and the FCC's Online Public File Database: Empirical Data on TV Station Compliance During the 2016 Presidential Primary*, 25 CATH. UNIV. J. L. & TECH. 341, 342-44 (2017).

59. *See generally* Pillsbury, *supra* note 15.

ruling or pursuing sanctions against the station.[60] Broadcast stations are not required to give notice to other candidates nor the FCC that there is an equal opportunity broadcast available, with the law only requiring that a candidate determine that they are entitled to relief before relief can be granted.[61]

The rule also operates differently depending on the medium or the nature of the candidate appearance. The question of whether the equal time rule applies to cable television seems to be up in the air. Recently, the current FCC Chairman, Brendan Carr, stated in a tweet that cable television is not required to follow the equal time rule, however the Supreme Court has upheld that cable television providers are still required to follow some content neutral regulations on broadcasters.[62] The equal time rule currently does not apply to streaming services since the FCC has declined to expand their jurisdiction to streaming services, although political advertising through streaming has become a widely used way for campaigns to advertise.[63] Separate from the equal time rule, all broadcasting stations are required to allow federal candidates to advertise, but there are no federal requirement for state and local candidates.[64] However, if a station does allow a state or local candidate to advertise on their broadcast then the equal time rule can be used to give other candidates in the same race access to broadcast time.[65]

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60. PILLSBURY WINTHROP SHAW PITTMAN LLP, *supra* note 15; Relief can be denied. *See* Preserving the First Amendment, *Memorandum and Order*, 40 FCC Rcd 433, ¶10-14 (2025) [hereinafter *Preserving First Amendment*] (Denying a request for relief on an alleged violation of the equal time rule regarding a Tim Kaine appearance on SNL).

61. PILLSBURY WINTHROP SHAW PITTMAN LLP, *supra* note 15, at 4.

62. Brendan Carr (@BrendanCarrFCC), X (Nov. 5, 2024, 8:52 AM), https://x.com/BrendanCarrFCC/status/1853797430896062591 [https://perma.cc/H8U7-YELB] ("Sure. The FCC Equal Time rule does not apply to cable shows, whether they are on Fox News or MSNBC." in response to a since-deleted tweet); *but see* Turner Broad. Sys. Inc. v. FCC, 520 U.S. 180 (1997); ERIC HOLMES, CONG. RSCH. SERV., LSB11239, THE EQUAL TIME RULE FOR POLITICAL CANDIDATES: CONSTITUTIONAL CONTEXT 2 (2024), https://crsreports.congress.gov/product/pdf/LSB/LSB11239 [https://perma.cc/7AUB-9J5Y].

63. John Eggerton, *FCC Chair: Regulatory Authority Over Streaming Must Come From Congress*, MULTICHANNEL NEWS (Dec. 1, 2023), https://www.nexttv.com/news/fcc-chair-regulatory-authority-over-streaming-must-come-from-congress [https://perma.cc/M8D8-P4YR]; Mark MacCarthy, *An 'Equal Time' Rule for Social Media*, FORBES (Jan. 21, 2020, 9:31 AM), https://www.forbes.com/sites/washingtonbytes/2020/01/21/an-equal-time-rule-for-social-media/ [https://perma.cc/4VEF-YML7]; Max Greenwood, *Video Ad Spending to Set Record for a Midterm Cycle in 2026*, CAMPAIGNS & ELECTIONS (Nov. 11, 2025).

64. *See* PILLSBURY WINTHROP SHAW PITTMAN LLP, *supra* note 15, at 5. The equal time rule does not require that candidates be given advertising opportunities or uses outside of the prescribed provision of their being an initial candidate use. There do exist some statutes, such as the reasonable access requirement for federal races, in which broadcasting stations are required to give 'access' to a candidate, however the reasonable access requirement does not apply to state or local candidates where the equal time rule does. *See* 47 C.F.R. § 73.941 (1992) (explaining that a station licensee is required to give reasonable access to any legally qualified candidate); The Communications Act of 1934, 47 U.S.C. 312(a)(7).

65. *See* PILLSBURY WINTHROP SHAW PITTMAN LLP, *supra* note 15, at 3, 5.

C. FCC and the Rulemaking Process

Regardless of administration, the FCC has adopted an agenda focused on market forces instead of active regulation, although the new Chairman, Brendan Carr, has voiced some interest becoming more involved with the actors in the communications market.[66] When the FCC or any agency goes into rulemaking, they must ensure that whatever rulemaking they establish will not be denied by the courts. For the last several decades *Chevron* has been the law of the land, allowing for agencies to enjoy deference in the APA rule making process when dealing with ambiguity.[67] However, the Supreme Court struck down the Chevron Doctrine modifying the analysis required under the APA.[68]

The Supreme Court in *Loper Bright* placed the emphasis on the courts and their respective judges to "exercise their independent judgment in deciding whether an agency has acted within its statutory authority."[69] While there is some confusion as to which tools courts should use, the Sixth Circuit has tackled an arbitrary and capricious claim against FCC net neutrality rulemaking post-*Loper Bright*.[70] The Sixth Circuit, in *Ohio Telecom. Association v. FCC*, relied principally on the plain meaning of the statute both through definitions and context within the act at issue.[71] Relying on the plain meaning of the statute has also been the starting point of other Circuit courts in rectifying the *Loper Bright* ruling in the given issues brought before them.[72]

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66. *See* Kathleen Q. Abernathy, Comm'r, Fed. Commc'ns Comm'n, Address to Indiana University: My View from the Doorstep of FCC Change 2-7 (Mar. 4, 2002), https://transition.fcc.gov/ftp/Speeches/Abernathy/2002/spkqa206.pdf [https://perma.cc/56A3-ZTP3]; *Compare with* Ari Cohn, *Commissioner, regulate thyself: The incoming FCC chair is threatening to censor views he doesn't like*, FOUND. FOR INDIVIDUAL RTS. AND EXPRESSION (Nov. 20, 2024), https://www.thefire.org/news/commissioner-regulate-thyself-incoming-fcc-chair-threatening-censor-views-he-doesnt [https://perma.cc/3W46-TM3H].

67. Jeff Turrentine, *The Supreme Court Ends Chevron Deference-What Now?*, NRDC (June 28, 2024), https://www.nrdc.org/stories/what-happens-if-supreme-court-ends-chevron-deference.

68. *See generally* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412 (2024).

69. *See id.* at 412.

70. Leonardo Cuello, *Loper Bright Decision Will Collapse on Itself, Policy Evidence is More Important than Ever Before in Driving Progress*, GEORGETOWN UNIV. MCCOURT SCH. OF PUB.POL'Y (July 31, 2024), https://ccf.georgetown.edu/2024/07/31/loper-bright-decision-will-collapse-on-itself-policy-evidence-is-more-important-than-ever-before-in-driving-progress/ [https://perma.cc/X3GH-AKMC]; *see also* Ohio Telecom Ass'n v. FCC, 124 F.4th 993, 997, 1001 (6th Cir. 2025).

71. *See Ohio Telecom Ass'n*, 124 F.4th at 1007-08. The case was brought in response to Biden era regulations which placed FCC regulatory power over broadband internet to impose net neutrality regulations. The question was whether the phrase "information service" included within its definition broadband internet. The Court relied largely on the plain meaning of information service being that of actual information rather than the connection of transmission offered by broadband striking down the Biden-era regulations.

72. *See* Van Loon v. United States Dep't of the Treasury, 122 F.4th 549, 564 (5th Cir. 2024). The Fifth Circuit, when confronted with an interpretation of what 'property' meant, relied principally on the plain meaning definition of property as the lynch pin of their reasoning.

Pre-*Chevron* decisions regarding FCC rulemaking may also shed a valuable light on how the courts may attempt to interpret FCC rulemaking in a post-*Loper Brig*ht world. In *FCC v. National Citizens Committee for Broadcasting*, the Supreme Court focused on the statutory authority granted to the FCC under the Communications Act.[73] The Supreme Court specifically focused on Section 303 which provides that the commission may conduct regulatory rule making if based on a public interest.[74] The Supreme Court in this analysis in effect did not look to the plain meaning of the text to determine the question at hand rather using a public-interest standard as the benchmark of their reasoning to show that the FCC was acting within its regulatory power.[75] The FCC enjoyed broad regulatory authority in rulemaking in broadcasting even without *Chevron* deference.

D. Modern Issues in the Political Landscape

Working class people make up 52% of the population but "hold just 10% of city council seats, 3% of state legislative seats, and 2% of congressional seats."[76] En masse a given reason for this deficit is the lack of fundraising ability available to working class candidates, as opposed to their white-collar counterparts.[77] Recruiting on the local level which disproportionately biases towards white collar candidates adds into the institutional reasons for this impact, but fundraising prowess can translate into more successful candidacies.[78] Fundraising allows for more successful campaigns since it allows for a candidate to buy more advertising, hire trained staff, and buy their way into institutional support.[79]

In the broadcasting space, the ability to get a political advertisement disseminated requires knowledge and resources.[80] Filming a commercial,

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73. *See* FCC v. Nat'l Citizens Comm. for Broad., 436 U.S. 775, 793 (1978).

74. *See id.*

75. The issue during this case has to do with licensing practices through the FCC which while not entirely topical to the equal time rule, the fact that FCC's prior arguments focused on their broad regulatory power has been able to be successful can be dispositive to how FCC can operate in a post-*Loper Bright* era. *See id.*

76. Sarah Truel & Eric Hanson, *Primary Barriers to Working Class Representation*, 76 POL. RSCH. Q. 1516, at 1519 (2023), https://journals.sagepub.com/doi/epub/10.1177/10659129231154914; *see also* Rachel Porter & Sarah Truel, *Inexperience and Success in Congressional Primaries*, 69 AMERICAN J. OF POL. SCI. 284, 288 (2024), https://ajps.org/2024/04/22/evaluating-inexperience-in-congressional-elections/.

77. *See* Truel & Hansen, *supra* note 76*,* at 1521-29.

78. *See id.* At 1525.

79. Ximena Bustillo, *It takes lots of money to win elections. Here's what you need to know,* NPR (Nov. 1, 2023, 5:01 AM), https://www.npr.org/2023/11/01/1205728664/campaign-finance-donations-election-fec-fundraising-ad-spending [https://perma.cc/FY5S-VEUX].

80. Kathleen Mackay, *Key Factors to Consider When Hiring a Political Advertising* Agency, HEARST BAY AREA (Sept. 2, 2020), https://marketing.sfgate.com/blog/when-should-you-hire-a-political-advertising-agency [https://perma.cc/86GB-89PH].

navigating red tape, and reaching out to broadcasting stations, can be complicated endeavors.[81] Even those candidates with a plethora of resources rely on experienced communications consultants to navigate the broadcasting market space.[82]

The rule in its current form disadvantages working class candidates. Divulging resources to scouring broadcasts and public records to find opportunities to request equal time is simply not feasible for a low resource campaign, which the equal time rule requires for its use.[83] The rule in its current format requires that candidates use their own resources to determine if there was a prior use, request the station to gain their equal opportunity, prove to the station that they are a legally qualified candidate, negotiate their equal opportunity advertising spot, and then pay for the spot.[84] This is not to mention that if they are denied for whatever reason through the process then have to take legal action through an FCC complaint or lawsuit, where candidates are required to divulge even more resources.[85] Furthermore, campaigns are inherently short enterprises, by their very nature everything is on a timetable. Therefore, dealing with an FCC claim or gathering the resources required for a prolonged legal challenge to a broadcast station's decision, is not only untimely to the campaign cycle process but leads to legal decisions occurring well past election days.[86] While there are campaigns that do have the resources to bring claims and recover some form of damages or sanctions against a noncompliant broadcast licensee, many challenger campaigns after election day have their campaign funds drained and the opportunity cost of legal fees and time don't make sense.[87]

81. Bridget Bowman & Ben Kamisar, *Eyes on 2024: How Presidential candidates are spending their money*, NBC NEWS (July 18, 2023, 10:30 AM), https://www.nbcnews.com/meet-the-press/meetthepressblog/eyes-2024-presidential-candidates-are-spending-money-rcna94825 [https://perma.cc/9Z4V-JB66]; Audrey Rawnie Rico, *How to Get a Commercial on TV for Your Business*, FIT SMALL BUS. (Mar. 10, 2023), https://fitsmallbusiness.com/how-to-get-commercial-tv/ [https://perma.cc/G6N9-CHUP].

82. Donald Shaw, *The Democratic Consultants Getting Rich off the Harris Campaign*, SLUDGE (Nov. 13, 2024), https://readsludge.com/2024/11/13/the-democratic-consultants-getting-rich-off-the-harris-campaign-2/ [https://perma.cc/WP6Y-7V74].

83. *See* PILLSBURY WINTHROP SHAW PITTMAN LLP, *supra* note 15, at 3–4.

84. *See id.* at 3–5; *see infra* discussion in Section II Sub Section B, the Implementation of the Equal Time Rule.

85. This process is explained above.

86. A myriad of cases and commission orders occur after election day has passed. *See e.g.*, *Preserving First Amendment*, *supra* note 60, at ¶ 14; *see also* Gary C. Jacobsen, *Party Organization and Distribution of Campaign Resources: Republicans and Democrats in 1982,* 100 POL. SCI. Q. 603, 615-16 (1986), https://www.jstor.org/stable/2151543.

87. *See* Jacobsen, *supra* note 86.

III. HOW TO FIX THE PROBLEMS WITH THE EQUAL TIME RULE

A. *Requiring Equal Time Notification by Broadcasters Fixes Inequities*

The FCC should require that broadcasting stations give notice to all qualified candidates at any point in which another legally qualified candidate use is imminent along with broadcasting spot offerings and their price points. The adoption of a rule which places an affirmative duty of broadcasting stations to give out equal time, allows for working class and grassroots campaigns to be able to properly use the rule. While the issue of low resources is not resolved on this matter, this does allow candidates to enjoy low accessible spot prices for broadcasts, adding another tool to their arsenal. Grassroots candidates around the country have shown that smart campaigning tactics which utilize the tools available to them can win races in instances where they are out-spent.[88] Making the rule affirmative gets rid of roadblocks for the usage of the rule while also empowering campaigns with more options for how to use their limited resources. Further, it could cut out the middlemen, instead of navigating the broadcasting and communication marketplace to put up an advertisement the offering of an equal opportunity can act as an efficient way for a candidate to expend minimal resources toward traditional media voter contact.

The FCC should use rulemaking to pass a regulation that fits in line with creating a notification regime under the equal time rule. Currently regulations set out the parameters for a candidate to request their equal time, but this can be changed by instead having them be notified by the broadcast licensee when a use is imminent. This will assuredly have several critics, broadcasting stations will be upset by the increased burden place on them, incumbent politicians will be upset with the possibility of access increasing to their opponents, and legal scholars may take issue with the similarity of the new rule to the fairness doctrine.

B. *Legal Justification for Notification Regime*

Conducting rulemaking to make the equal time rule impose an affirmative duty on broadcasters would be uniquely able to survive in the changing state of administrative law. Post-*Loper Bright* there is a different

88. Grace Segers, *How Alexandria Ocasio-Cortez won the race that shocked the country*, CITY & STATE N.Y. (June 27, 2018), https://www.cityandstateny.com/politics/2018/06/how-alexandria-ocasio-cortez-won-the-race-that-shocked-the-country/178323/ [https://perma.cc/RD4E-8M7T]; Conor Lynch, *Alexandria Ocasio-Cortes proves that money doesn't win elections: Are Democrats listening?,* SALON (July 6, 2018), https://www.salon.com/2018/07/06/alexandria-ocasio-cortez-proves-that-money-doesnt-win-elections-are-democrats-listening/.

framework for the rulemaking process which doesn't allow agencies the deference they enjoyed during the *Chevron* regime.[89] The FCC has three major arguments to justify the rulemaking change. First, there is an express grant of authority given to the FCC under the Communications Act. Second, the public interest standard supports an equitable political market. Third, the plain language of the statute supports an affirmative duty on broadcasters to notify opposing candidates. With these arguments together the FCC has ample legal standing to defend its rulemaking to support a notification regime.

1. The FCC Has a Grant of Authority to Create a Notification Regime.

The Supreme Court in *Loper Bright* placed emphasis on the importance of an agency having an express grant of authority to perform rule making, being a major reason why they overruled *Chevron*.[90] The Supreme Court in *Loper Bright* emphasized that "when a particular statute delegates authority . . . courts must respect the delegation."[91] Congress has expressly granted the FCC latitude in conducting rulemaking in a way that bolsters the use and viability of the equal time rule.[92]

The equal time rule regulatory authority is not only based generally by Section 303 of the Communications Act of 1934, but also a specific grant of authority is reiterated in Section 315(e) of the equal time rule section.[93] This reiterated provision given to the FCC regarding the equal time rule is broader than the normal grant of authority given to agencies and should be more than sufficient to support this rulemaking.[94] The D.C. Circuit Court in *Chisholm v. FCC* reasoned that this added grant of authority is highly indicative of an intent for broader power for the FCC to promulgate further regulations in relation to the equal time rule.[95] Just as would be the case here, in *Chisholm,*

89. Prior to Loper Bright, courts would utilize a two-step analysis with the first step asking whether there is an ambiguity in a statute and the second step requiring the utilization of statutory interpretation. Importantly, the second step of analysis would give great deference to an agency's interpretation. Dan Farber, *Everything You Always Wanted to Know About the Chevron Doctrine*, LEGAL PLANET (Oct. 23, 2017), https://legal-planet.org/2017/10/23/everything-you-always-wanted-to-know-about-the-chevron-doctrine [https://perma.cc/2KVZ-RWDS].

90. Step zero refers to the first requirement of the *Chevron* doctrine in which a court is to determine whether "Congress meant to delegate to the agency authority to interpret the law in a given field" and courts around the country inability to use this first step was a key argument for *Chevron*'s repeal. *See Loper Bright*, 603 U.S. at 436 (*citing* United States v. Mead Corp., 533 U.S. 218, 226-27 (2001)).

91. *See id.* at 413.

92. *See* 47 U.S.C. §§ 303, 307(a), 309(h).

93. *See generally* 47 U.S.C. §§ 303, 315(e).

94. The D.C. Circuit noted in *Chisholm v. FCC* that the grant of authority in the Communications Act "is something more than the normal grant of authority permitting an agency to make ordinary rules and regulations." *See* Chisholm v. FCC, 538 F.2d 349, 357 (D.C. Cir. 1976).

95. *See id.*

the grant of authority given to the FCC allowed it to change its longstanding interpretation of "bona fide news events" in the equal time rule.[96] In the case of rulemaking on the equal time rule the FCC has been delegated the authority required to interpret Section 315(a) to require notification by broadcast licensees.

2. The Public Interest Standard Supports an Equitable Political Market

The FCC can use the authority granted to them through the public interest standard to support rulemaking, which creates a more equitable political marketplace. Courts have implied that the intention of the Communications Act of 1934 was to ensure that there be proper political discourse, and inequities in the political market impede that goal.[97] The rule as it currently stands leads to inequities due to its enforcement structure, therefore violating the intention of the rule.[98] When looking at the legislative history of the statute, the FCC determined that the "purpose of [Section 315(a)] was to 'prevent discrimination between competing candidates by broadcasting stations.'"[99] The FCC further elaborated that "Congress probably hoped [the equal time rule] would contribute to an informed electorate."[100] The Communications Act of 1934, in Sections 307(a) and 309(a), imposes an independent obligation to broadcasting licensees to "operate in the public interest."[101] The Commission has previously used the public interest standard to justify the argument that the intent of the equal time rule is to disseminate equality in the political market.[102]

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96. *See id.* at 364.

97. While the Supreme Court has not affirmatively stated that the intention of the rule falls in line with this explanation it has used the public interest standard and its subsequent legislative affirmation of that principle to allow for the FCC to rule make based around the fairness doctrine. *See* Red Lion Broad. Co. v. FCC, 395 U.S. 367, 381-82 (1969) (reasoning that since Congress has refused to stop the FCC in their rule making authority through the public interest standard the intention of congress is strong in supporting rule making on the fairness doctrine). In effect, ensuring that the equal opportunities rule maximizes actual equal opportunities can be argued to serve the public interest.

98. This is discussed at length above, In Section II Subsection D, in effect the rule in its current forms has barriers to entry causing for the enjoyment of the rule to become self-limiting.

99. Request of Carter/Mondale Reelection Committee, Inc., *Memorandum Opinion and Order*, 81 F.C.C.2d 409, ¶ 16 (1980) [hereinafter *Carter/Mondale*] (citing Primer of Political Broadcasting & Cablecasting, 69 F.C.C. 2d 2209, 2216 (1978)). The commission relied upon the 1959 Senate Committee Report for the 1959 amendments to 315(a) which states that the equal time rule was done to ensure that a candidate does not acquire "unfair advantage . . . through favoritism of a station." *See id.* at 416 (quoting S. Rep. No. 562, at 8-9 (1959)).

100. *See id.* at 416.

101. *See Red Lion*, 395 U.S. at 379 (citing 47 U.S.C. §§ 307(a), 309(a)).

102. *See* 47 U.S.C. §315(a); The Commission in their footnote applies this justification to the fairness doctrine, however this analysis applies to the equal time rule. *See Carter/Mondale*, *supra* note 99, at n.12.

The public interest standard has been used to impose affirmative duties on broadcasting licensees previously. The political editorial and personal attack rule both required stations to give affirmative notice of an certain impending uses along with spot times.[103] The Supreme Court in *Red Lion* even noted that these two rules "are indistinguishable from the equal-time provision."[104] These previous "complements" to the equal time rule used the public interest standard to place an affirmative burden on broadcasters.[105] The addition of a notification regime to the equal time rule could do the same.[106] Therefore, the equal time rule can impose an affirmative duty on broadcasters under the public interest standard. It was Congress's intent to ensure a proper equitable political marketplace where opportunity was accessible and the statute in its current state fails to properly follow with the public interest.

3. The Plain Meaning Supports Placing Affirmative Duties on Broadcasters

The plain meaning of the word "afford," where licensees are required to "afford" opposing candidates their equal opportunity under the law, supports creating an affirmative duty to broadcasters.[107] The word afford is something that is used quite regularly in the law, however its precise meaning is rarely litigated.[108] Interestingly, the word "afford" is not defined in Black's Law Dictionary.[109] The relevant definition of afford given by Merriam Webster's dictionary is, "to make available, give forth, or provide naturally or inevitably."[110] The Britannica Dictionary gives a simpler definition being, "to supply or provide to . . . someone."[111] Both of these definitions show an action of giving something, an affirmative action. The fact that the word afford implies an affirmative act by broadcasting licensees can be no better exemplified by the listed synonyms to which Merriam-Webster dictionary gives, "give, present, donate, bestow, [and] confer," all of which undoubtedly means an affirmative action, not a conditional one.[112]

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103. Lili Levi, *Plan B for Campaign Finance Reform: Can the FCC Help Save American Politics After Citizens United?* 61 CATHOLIC U. L. REV. 97 n. 364.

104. *Red Lion*, 395 U.S. at 391.

105. *See id.*

106. *See id.*

107. *See* 47 U.S.C. § 315(a).

108. When looking up the term "meaning of afford" on LexisNexis only one case comes up which is *State v. Hahn*, which uses the plain meaning of afford to mean "to make available; provide." *See* State v. Hahn, 586 N.W.2d 5, 11 (Wis. Ct. App. 1998).

109. *See generally* BLACK'S LAW DICTIONARY (9th ed. 2009).

110. The two other definitions are "to manage to bear without serious detriment" or "to be able to bear the cost of" which on their face do not seem to apply in this context as they are verbs which speak to the state of something not an action which is assuredly what is more at issue here. *See Afford,* MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/afford [https://perma.cc/VKY4-TD3C].

111. *Afford*, BRITTANICA DICTIONARY, https://www.britannica.com/dictionary/afford [https://perma.cc/8RKZ-6P8S].

112. MERRIAM-WEBSTER, *supra* note 110.

The current rule requires that a candidate request a station to then be given their equal time, even though the statute makes no mention of requests or conditionality in its plain language.[113] The statute reads that "*if* any licensee shall permit any [candidate] to use a broadcasting station," then "he shall afford [equal time]," showing a direct if-then relationship not one which is conditional on request.[114] Therefore, the use of the word "afford" within the statute imputes in plain meaning that the broadcasting stations must affirmatively 'afford' the equal opportunity. This should be done through affirmative notification to eligible candidates.

C. Addressing Legal and Normative Counterarguments

Broadcasters may argue that this would cause an increased undue burden on them. However, this argument is not persuasive because broadcasters would be able to easily carry the burden, and the burden could be minimal. Broadcasters are already required to keep public records of all uses under the equal time rule, and adding a notification regime would just be a targeted reflection of the public records they are already required to keep. Also, the burden would only be based on how licensees choose to follow this notification regime. Requiring that candidates give information on their opposing candidates would reduce administrative costs for notification. Notification could also be as simple as a publicly available webpage which lists spot prices for opposing candidates.[115]

A question which critics may ask is, why has neither Congress nor the FCC added the notification requirement. On the political front, generally, office holders do not have incentive to pass policy or change the status quo regarding political rules.[116] On the regulatory front, the FCC has been regulation hesitant in general.[117] Also, the FCC may argue that the equal time rule has been in its current form for decades and its interpretation is entrenched. But a law which was incorrect in the first place does not become

113. *See* 47 U.S.C. § 315(a).

114. *See id.* (emphasis added).

115. This is different from the status quo as currently the prescribed way of finding out about a candidate use of a broadcast spot requires requesting the public records at issue or investigating on one's own if a use occurred. *See* PILLSBURY WINTHROP SHAW PITTMAN LLP, *supra* note 15, at 5.

116. This is also like the issues which surround why campaign finance reform, if ever, is passed through Congress, it is not in the interests of the lawmakers who decide the law. Jonathan S. Krasno, *The Incumbents' Case for (Some) Campaign Finance Reform*, BRENNAN CTR. FOR JUST. (May 25, 1998), https://www.brennancenter.org/our-work/research-reports/incumbents-case-some-campaign-finance-reform [https://perma.cc/8U2G-JZKN].

117. *See* Abernathy, *supra* note 66.

correct due to its prolonged existence.[118] Further, the FCC has changed its longstanding interpretation of "bona fide newscast" previously showing that this would not necessarily be new ground for the FCC.[119]

IV. CONCLUSION

The adoption of a notification requirement for broadcasters when a use is imminent under the equal time rule will lead to more equitable outcomes for candidates. Doing so will allow candidates to be more able to properly use the rule to their advantage in any given political race. It gives candidates more time to request their broadcasting spot and allows for any information gaps to be filled between entrenched candidates and grassroots ones. This Note contends that Congress, when implementing the Communications Act, envisioned a more hands-on rule which causes its use to be more prevalent in political races. While Congress does not say to the letter a notification system is required under the statute, it is clear from the usage of the term afford and the broad authority granted to the FCC in rulemaking that Congress intended for the FCC to ensure the rule's effectiveness. The recent action by the Supreme Court in *Loper Bright* has complicated the ability for agencies to defend legal challenges to their rule making, but the fact that the rule in its plain meaning imputes an affirmative burden on broadcast licensees will fit in-line with how Circuit Courts have interpreted rulemaking post-*Loper Bright*. While it is not likely that newly minted Commissioner Brendan Carr will cite to my arguments and change the rule, nonetheless, the usage of the word "afford" and the background to which it is used may help to dissuade the FCC from its current illness against rulemaking. As is demonstrated above, campaign reform is hard to come by, so sometimes it is best to look to the past to find little ways to help make our democracy better.

118. This is in effect the same argument that have been used by critics of stare decisis and adopted by the current Supreme Court. *See* Kent Barnett & Christopher Walker, *Chevron and Stare Decisis*, 31 GEO. MASON L. REV. 475 (2024); Nina Varsava, *Precedent, Reliance, and Dobbs*, 136 HARV. L. REV. 1845, 1845-46 (citing Dobbs v. Jackson Women's Health Organization, 597 U.S. 215 (2022); Roe v. Wade, 410 U.S. 113 (1973); Devin Dwyer, *After Roe Ruling, is 'stare decisis' dead? How the Supreme Court's view of the precedent is evolving,* ABC NEWS (June 24, 2022, 12:20 PM), https://abcnews.go.com/Politics/roe-ruling-stare-decisis-dead-supreme-court-view/story?id=84997047 [https://perma.cc/Q77F-68VQ]. Further, legal scholars for years have argued against the usage of stare decisis to uphold problematic legal doctrine which started on fuzzy legal ground. Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017).

119. However, the change in interpretation of one of the rule's exceptions is less comprehensive than changing the actual implementation of the rule. *See* Chisholm v. FCC, 538 F.2d 349, 358 (D.C. Cir. 1976).