

PUTTING THE “UNIVERSAL” BACK IN  
“UNIVERSAL SERVICE”:  
BROADBAND ACCESS FOR LOW-  
INCOME CITIZENS UNDER NET  
NEUTRALITY

ALEX TRON\*

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\* Senior Diversity Editor, *Southern California Review of Law & Social Justice*, Volume 31; J.D. Candidate 2022, University of Southern California Gould School of Law; B.A. Political Science and B.A. Anthropology 2014, University of California, Irvine. Many thanks to Professor Clare Pastore for her guidance; the entire *RLSJ* team for their thoughtful editing of this Note; and to my parents Lanny and Terry Tron who both believed in themselves enough to be the first in their families to go to college. I will always be thankful for their love and support, especially as the COVID-19 pandemic so unexpectedly interrupted our lives.

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I. INTRODUCTION

As the severity of COVID-19 intensified in the United States, closures of all kinds affected American life. Businesses shuttered, schools went virtual, and many government buildings closed soon after. What quickly emerged was an ad-hoc, patchwork response to fill the gaps in access that the pandemic had laid bare. State, federal, and local governments attempted to find solutions to minimize person-to-person contact while court systems tried to balance the pressing needs of justice with a pandemic larger than anticipated. Even the Supreme Court was forced to go into an extended recess due to the public health crisis, something that had not occurred since 1918.<sup>1</sup>

Amidst the crisis, Americans have recognized how vital an Internet connection is for living in a modern society.<sup>2</sup> What was once perceived as a luxury has now become the only way that people around the world continued to function in a pandemic. In America, regrettably, the barriers to connect to the Internet are high.<sup>3</sup> It was not until July 2020—almost 120 days into the pandemic—that the Federal Communications Commission (“FCC”) announced the “Keep Americans Connected” pledge for service providers, which was a voluntary pledge on behalf of

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<sup>1</sup> See Katie Bart & Kalvis Golde, *Supreme Court’s Closure Could Be First Disease-Related Shuttering in a Century (Updated)*, SCOTUSBLOG (Mar. 12, 2020, 5:27 PM), <https://www.scotusblog.com/2020/03/supreme-courts-closure-could-be-first-disease-related-shuttering-in-a-century/> [<https://perma.cc/5SU2-7AX3>] (describing the history of Supreme Court closures).

<sup>2</sup> See Emily A. Vogels, Andrew Perrin, Lee Rainie & Monica Anderson, *53% of Americans Say the Internet Has Been Essential During the COVID-19 Outbreak*, PEW RSCH. CTR. (Apr. 30, 2020), <https://www.pewresearch.org/internet/2020/04/30/53-of-americans-say-the-internet-has-been-essential-during-the-covid-19-outbreak> [<https://perma.cc/3VUV-UBT4>] (noting trends in Americans’ perception of the necessity of internet access).

<sup>3</sup> BECKY CHAO & CLAIRE PARK, NEW AM. & OPEN TECH. INST., *THE COST OF CONNECTIVITY 2020* 29 (2020), [https://d1y8sb8igg2f8e.cloudfront.net/documents/The\\_Cost\\_of\\_Connectivity\\_2020\\_XatkXnf.pdf](https://d1y8sb8igg2f8e.cloudfront.net/documents/The_Cost_of_Connectivity_2020_XatkXnf.pdf) [<https://perma.cc/A99W-VVBX>] (asserting “U.S. consumers pay the highest average costs out of any region,” referring to paying for an internet connection.); see also Inti Pacheco & Shalini Ramachandran, *Do You Pay Too Much for Internet Service? See How Your Bill Compares.*, WALL ST. J. (Dec. 24, 2019, 10:00 AM), <https://www.wsj.com/articles/do-you-pay-too-much-for-internet-service-see-how-your-bill-compares-11577199600?mod=searchresults&page=1&pos=1> (showing that there is a \$66/month median price for home broadband service in the United States).

service providers to: (1) not terminate service of their customers, (2) waive late fees, and (3) “open [their] Wi-Fi hotspots to any American who needs them.”<sup>4</sup> By the FCC’s own admission, this pledge by 800 service providers had no enforcement capacity<sup>5</sup> and represented only approximately 30% of the 2,885 total Internet Service Providers (“ISPs”) in the United States.<sup>6</sup>

This pandemic has highlighted the structural inequalities that surround the digital divide.<sup>7</sup> This divide represents the gap between the “haves” who maintain readily available Internet connections (and all the economic benefits that come along with it)<sup>8</sup> and the “have-nots” who have Internet connections that are unsuitable, unusable, or lack any connection at all.<sup>9</sup> Policies that attempt to close the digital divide by expanding Internet access sit at a fascinating intersection of antitrust law, economic policy, and technology—with the rights of low-income citizens caught in the middle.

This Note will show that the first step towards closing the “digital divide” is to expand procedural due process protections for those facing disconnection. It will accomplish this by outlining the constitutionally protected rights and procedural due process protections arising from the

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<sup>4</sup> *Keep Americans Connected*, FCC, <https://www.fcc.gov/keep-americans-connected> [<https://perma.cc/2N4X-VMED>].

<sup>5</sup> Press Release, FCC, FCC Reaffirms Successful Light-Touch Regulatory Framework for Broadband Services (Oct. 27, 2020) [hereinafter FCC Press Release] (“While I’m glad that many ISPs pledged not to disconnect customers during the initial months of the pandemic, the [order ending Net Neutrality] has removed any FCC authority to enforce this voluntary commitment.”) (dissent of Commissioner Starks).

<sup>6</sup> See *The Complete List of Internet Companies in the US*, BROADBANDNOW, <https://broadbandnow.com/All-Providers> [<https://perma.cc/34WZ-JA2R>] (last visited Mar. 24, 2022) (provides a list of all public and private cable, copper, DSL, fiber, fixed wireless, mobile broadband and satellite internet service providers in the United States).

<sup>7</sup> Gerald Doppelt, *Equality and the Digital Divide*, 24 HASTINGS COMM’N & ENT. L.J. 601, 602 (2002) (defining the digital divide as the “disparities [sic] between the ‘info-haves’ and the ‘info-have-nots’ based on differences of income, race, ethnicity, education, profession, and gender, between nations, and especially between groups within nations”).

<sup>8</sup> It has been shown that broadband Internet assists families in saving money. For example, “an Internet Innovation Alliance study found that broadband access allows Americans to save an average of \$11,944 per year on household spending [by providing] . . . deal comparison, competitive pricing (including online-only discounts), and group-buying, thereby enabling them to save on necessities like housing, food, clothing, entertainment, and news.” Stephanie Mariani, *Universal Internet Access as a Tool to Fight Poverty: The FCC’s Lifeline Program*, 23 GEO. J. POVERTY L. & POL’Y 551, 555–56 (2016).

<sup>9</sup> See Amrita Khalid, *America’s Digital Divide Is Even More Urgent During the Pandemic*, QUARTZ (Apr. 9, 2020), <https://qz.com/1836040/americas-digital-divide-is-more-urgent-during-a-pandemic/> (noting that 5 million Americans live in an “internet desert” where no ISP serves their region).

termination of utility services, how those rights would be affected by broadband Internet being regulated under “net neutrality”<sup>10</sup> as a utility service under Title II of the 1996 Telecommunications Act, and how FCC programs, which subsidize broadband Internet access, could be better structured to ensure procedural due process protections. By tracing the historical trajectory of governmental protection from the termination of utility services for the low-income, and the legal and regulatory justifications for those protections, this Note will assess the ways in which a reclassification of the Internet under Title II of the 1996 Act would positively impact the rights of low-income communities by affording them procedural due process protections that will help prevent their broadband connection from being severed.

## II. EXISTING PROCEDURAL PROTECTIONS FROM DISCONNECTION OF UTILITIES

In general, there is no constitutional right to access utilities, but certain procedural protections exist to allow the appeal of a decision prior to disconnection from service in some situations when an individual has failed to pay. Individuals are afforded procedural due process protections when a property interest is being deprived by the government,<sup>11</sup> and this property interest has been extended to include an interest in the continued receipt of welfare benefits.<sup>12</sup> In *Goldberg v. Kelly*, a group of welfare recipients in New York allegedly committed fraud and were denied benefits without a hearing.<sup>13</sup> In recognizing these benefits as a form of “new property,” the Court in *Goldberg* held that the continued receipt of those benefits was a constitutionally protectable property interest that

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<sup>10</sup> Kincaid C. Brown, *Net Neutrality: An Explainer*, 99 MICH. BAR J. 48 (2020) (citing Tim Wu, *Network Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. L. 141, 145 (2003)).

<sup>11</sup> U.S. CONST. amend. V (describing the basis for federal due process protections) (“No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .”); U.S. CONST. amend. XIV (establishing a corresponding due process right for actions done by the states) (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .”).

<sup>12</sup> See *Goldberg v. Kelly*, 397 U.S. 254, 254 (1970) (“[P]rocedural due process requires that pretermination evidentiary hearing be held when public assistance payments to welfare recipient are discontinued.”).

<sup>13</sup> *Id.*

required due process in the form of a pre-termination hearing before deprivation.<sup>14</sup>

The level of procedural due process required before the deprivation of a benefit must be proportional to the interest in question, as well as proportional to the risk of error and the burden placed on the government in administering that due process.<sup>15</sup> In *Mathews v. Eldridge*, a low-income citizen challenged the termination of his Social Security benefits without a pre-termination hearing.<sup>16</sup> The Supreme Court ultimately upheld the termination of his benefits without a pre-termination hearing, but in doing so set out a three-factor test to determine the constitutional sufficiency of administrative procedures regarding the termination of benefits.<sup>17</sup> The Court held that in deciding if procedural due process protections are sufficient, a court must consider:

(1) the private interest that will be affected by the official action; (2) the risk of an erroneous deprivation of such interest through the procedures used, and probable value, if any, of additional procedural safeguards; and (3) the Government's interest, including the fiscal and administrative burdens, that the additional or substitute procedures would entail.<sup>18</sup>

This property interest has been recognized in a citizen's continued access to utilities, and the same procedural due process considerations must apply before the termination of utility service.<sup>19</sup> In *Memphis Light v. Craft*, renters were being double billed for electricity due to an error by the public utility provider.<sup>20</sup> The renters failed to pay the increased amount after good faith efforts to try to resolve the issue, and the public utility company proceeded with disconnecting service after only giving them notice of the termination of service in an inconspicuous "final notice" attached to the renter's bill that did not adequately detail the options for challenging a termination.<sup>21</sup> State law in Tennessee required that service

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<sup>14</sup> *Id.* at 262 n.8 (citing Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) (describing the perception of benefits as a form of "new property")).

<sup>15</sup> See *Mathews v. Eldridge*, 424 U.S. 319, 321 (1976) (finding that a pre-termination hearing was not necessary in this case but establishing a balancing test for future litigation).

<sup>16</sup> *Id.* at 319.

<sup>17</sup> *Id.* at 321 (describing the holding and establishment of the three-pronged test).

<sup>18</sup> *Id.*

<sup>19</sup> See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978).

<sup>20</sup> *Id.* at 1–2.

<sup>21</sup> *Id.* at 1, 13 ("Despite respondent wife's good-faith efforts to determine the cause of the 'double billing,' she was unable to obtain a satisfactory explanation or any suggestion for further

only be disconnected for “nonpayment of a just service bill,” and thus the renters disputed the sufficiency of the administrative procedures involved in the termination of service.<sup>22</sup> In siding with the renters, the Supreme Court reasoned that:

Under the balancing approach outlined in *Mathews*, some administrative procedure for entertaining customer complaints prior to termination is required to afford reasonable assurance against erroneous or arbitrary withholding of essential services. The customer’s interest is self-evident. Utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety. And the risk of an erroneous deprivation, given the necessary reliance on computers, is not insubstantial.<sup>23</sup>

However, termination of utility service by a private, non-state utility may not qualify for constitutional procedural protections.<sup>24</sup> In *Jackson v. Metropolitan Edison Company*, a customer sued a privately owned and operated utility provider, arguing that the provider terminated her service improperly, and in doing so, had deprived her of the procedural due process rights required by *Memphis*.<sup>25</sup> In ruling against the customer, the Court found that the private electricity utility was not a state actor and thus their termination did not constitute a procedural due process violation.<sup>26</sup> The Court held that to determine if the private entity is a state actor, consideration must be paid to (1) whether the involvement of the state is such that it prevents an “exercise of [ ] choice” on behalf of the regulated

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recourse from the utility’s employees . . . . The ‘final notice’ contained in MLG&W’s bills simply stated that payment was overdue and that service would be discontinued if payment was not made by a certain date. As the Court of Appeals determined, ‘the MLG&W notice only warn[ed] the customer to pay or face termination.’”

<sup>22</sup> *Id.* at 11 (describing the standard for public utility termination in Tennessee at the time of *Memphis Light*).

<sup>23</sup> *Id.* at 18.

<sup>24</sup> See *Jackson v. Metro. Edison Co.*, 419 U.S. 345 (1974); see also *McCarthy v. Middle Tenn. Elec. Membership Corp.*, 466 F.3d 399, 411 (6th Cir. 2006) (asserting that a private entity does not transform itself into a state actor merely because it “operate[s] according to state legislative mandate and in conjunction with the state government”).

<sup>25</sup> *Jackson*, 419 U.S. at 345.

<sup>26</sup> *Id.* at 358–59 (“We conclude that the State of Pennsylvania is not sufficiently connected with respondent’s action in terminating petitioner’s service so as to make respondent’s conduct in so doing attributable to the State for purposes of the Fourteenth Amendment.”).

entity;<sup>27</sup> (2) whether a regulated entity is performing a function “traditionally the exclusive prerogative of the State;”<sup>28</sup> and (3) whether a “symbiotic relationship” exists between the regulated entity and the state.<sup>29</sup> This differentiates a state actor from those such as doctors, lawyers, and other regulated industries who provide “arguably essential goods and services, ‘affected with a public interest.’ [The Court did] not believe that such a status converts their every action, absent more, into that of the State.”<sup>30</sup>

The fact that a private entity administers a benefit on behalf of the state does not, by itself, convert its action into that of the state.<sup>31</sup> In *Blum v. Yaretsky*, a group of Medicaid patients alleged that they had not been afforded procedural due process when they were provided notice of being transferred to a lower level of nursing care.<sup>32</sup> The Medicaid patients argued that they deserved due process procedural protections because the reduced nursing fees were paid by the state, offering a form of approval for the conduct.<sup>33</sup> The Court disagreed, finding that the decision was based on independent medical judgment despite 90% of the nursing facilities’ patients receiving Medicaid-subsidized care, the state’s response of altering the payment of benefits accordingly did not rise to the level of involvement necessary to constitute state action.<sup>34</sup>

Furthermore, due process procedural protections have not been extended to telephone service.<sup>35</sup> There is no Supreme Court case dealing

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<sup>27</sup> *Id.* at 357 (“Respondent’s exercise of the choice allowed by state law where the initiative comes from it and not from the State, does not make its action in doing so ‘state action’ for purposes of the Fourteenth Amendment.”).

<sup>28</sup> *Id.* at 353.

<sup>29</sup> *Id.* at 357.

<sup>30</sup> *Id.* at 354.

<sup>31</sup> *Blum v. Yaretsky*, 457 U.S. 991, 1012 (1982) (“We conclude that respondents have failed to establish ‘state action’ in the nursing homes’ decisions to discharge or transfer Medicaid patients to lower levels of care.”). *But see* *Logan v. Bennington Coll. Corp.*, 72 F.3d 1017, 1027–29 (2d Cir. 1995) (finding that the private organization was considered a public entity whose actions were state action for due process purposes in a case in which a city built a hospital but used a private organization to operate the hospital).

<sup>32</sup> *Blum*, 457 U.S. at 991.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* at 1011 (“That programs undertaken by the State result in substantial funding of the activities of a private entity is no more persuasive than the fact of regulation of such entity in demonstrating that the State is responsible for decisions made by the entity in the course of its business.”).

<sup>35</sup> *See* case cited *infra* note 36; *see also* case cited *infra* note 38 (describing the lack of protections for phone termination). *But see* *Tel. News Sys., Inc. v. Ill. Bell Tel. Co.*, 220 F. Supp. 621, 625–26 (N.D. Ill. 1963), *aff’d* 376 U.S. 782 (1964) (“The fifth amendment forbids

with the disconnection of telephone service similar to *Memphis* or *Jackson*, but the issue of whether a telephone company is acting “under color of state law” in choosing to terminate service has been addressed by the Seventh Circuit in *Kadlec v. Illinois Bell Telephone Company*<sup>36</sup> and the Eighth Circuit in *Occhino v. Northwestern Bell Telephone Company*.<sup>37</sup> In both instances, the decision of a telephone provider to terminate service according to their own policies and procedures was *not* found to be done under the “color” of state law, and thus the private entity could not be sued for constitutional due process violations regarding the disconnection. It is important to note that neither case involved a termination of service due to good faith dispute over a failure to pay—a fact central to the court’s finding in *Memphis* and a key differentiating factor.<sup>38</sup>

However, the decision about whether a private entity’s actions are to be considered a state action is ultimately a fact-specific inquiry that must determine if there is a “public entwinement in the management and control of ostensibly separate trusts or corporations.”<sup>39</sup> In *Brentwood Academy v.*

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the taking of property without due process of law. It seems probable that one’s right to telephone service is a property right within the protection of this amendment, inasmuch as under the common law and most utility statutes a public utility must serve all members of the public without unreasonable discrimination.”).

<sup>36</sup> See *Kadlec v. Ill. Bell Tel. Co.*, 407 F.2d 624, 627 (7th Cir. 1969) (“Here there is no showing that defendant telephone company acted under color of law in terminating the service; as a consequence, no action for damages may be maintained under § 1983 of the Civil Rights Act.”). In *Kadlec*, a business owner’s use of a line intended for residential service for business purposes led to the termination of service by the telephone company. *Id.* at 625–26. The Court found that the telephone company was not acting under the color of the law in terminating the customer’s service because they were enforcing their own policies and procedures in how lines charged at different rates were to be used. *Id.* at 627.

<sup>37</sup> See *Occhino v. Nw. Bell Tel. Co.*, 675 F.2d 220 (8th Cir. 1982). In *Occhino*, a customer’s disconnection from telephone service after complaints of profanity was not improper, even if the provider did not give notice. *Id.* at 226. The company was following their own policies and procedures regarding profanity and was not acting under the color of state law in enforcing the termination. *Id.* at 225; see also 74 AM. JUR. 2d *Telecommunications* § 45 (describing the facts of *Occhino*) (“[T]he public utilities commission’s regulations, which require[ed] notice before disconnection of service in only eight specific situations, were not contravened by termination of a customer’s service after the telephone company received complaints that the customer had placed abusive and profane telephone calls, after it warned the customer, and after the customer continued to place harassing calls.”).

<sup>38</sup> See *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14–15 (1978) (finding that the provision allowing termination only for failure to pay an undisputed bill central to the decision to find that procedural due process is required).

<sup>39</sup> *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 297, 302 (2001) (finding that a sufficient “entwinement” had occurred between public officials and private organizations that the action of the private organizations was a state action). *But see* *S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 543 (1987) (holding that the



*Tennessee Secondary School Athletic Association*, a non-profit athletic league, comprised of private and public schools, was alleged to have engaged in a state action when enforcing a rule regarding recruitment.<sup>40</sup> The Supreme Court found state action on behalf of the sports league and opined that the legal status of an entity is “determined neither by its expressly private characterization in statutory law, nor by the failure of the law to acknowledge the entity’s inseparability from recognized government officials or agencies[,]” but is determined by “public entwinement in the management and control of ostensibly separate trusts or corporations[.]”<sup>41</sup>

Procedural due process protections allowing an appeal prior to disconnection are not presently required for broadband Internet connections. This is largely based on their classification by the FCC as “information services” as opposed to “common carriers,” which would be regulated in a manner similar to utilities. In understanding the importance of this classification, it is useful to trace the history of the FCC and the extent of its regulatory enforcement power.

### III. TELECOMMUNICATIONS REGULATION: FROM THE KINGSBURY COMMITMENT TO *MOZILLA V. FCC*

#### A. INITIAL REGULATION OF TELECOMMUNICATIONS

The importance of universal, affordable telecommunications service has been a key part of the development of telecommunications regulations in the United States. It is within this concept of “universal service” that regulation of broadband Internet in a more accessible manner can best be argued. To understand the way it has been applied, one must understand the development of the regulation of telecommunications.

Following the initial federal regulation of the telecommunications market in 1910,<sup>42</sup> AT&T was the largest telecommunications operator in the United States and operated in an anti-competitive manner that required

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congressional creation of a corporate charter and source of funding for the U.S. Olympic Committee was not sufficient to make its actions state action).

<sup>40</sup> See *Brentwood Acad.*, 531 U.S. at 288.

<sup>41</sup> *Id.* at 296–97.

<sup>42</sup> Matthew M. Greenberg, Note, *The Communications Act: The Need for Tariff Reform*, 9 ADMIN. L.J. AM. U. 847, 852 n.25 (1995) (citing Mann-Elkins Act of 1910, ch. 309, § 7, 36 Stat. 539 (1910) (“The Mann-Elkins Act included telephone and telegraph companies within the realm of common carriers.”)).

regulation.<sup>43</sup> However, this ad-hoc regulatory policy was not sufficient to prevent a natural monopoly from forming.<sup>44</sup> AT&T was then bound by a 1913 settlement of an anti-trust investigation to provide “universal service” in what became known as the “Kingsbury Commitment.”<sup>45</sup> However, it took time for this commitment to “universal service” to come to fruition, and the form it has taken has differed greatly across the years.

“Universal service” has historically meant “widespread access to voice-grade telephone service, commonly referred to as ‘plain old telephone service,’” with the goal of giving “all Americans an opportunity to pick up the telephone and, at a reasonable cost, have a voice conversation with anyone else in the country or, increasingly, the world.”<sup>46</sup> Subsequently, “universal service” became a “rallying cry as the social justification for regulated monopoly status[.]”<sup>47</sup> for AT&T as it continued to expand its network and used this mandate to justify monopolistic control.<sup>48</sup>

The first major piece of legislation regarding the modern regulation of telecommunications was the Communications Act of 1934, which led to the replacement of the Federal Radio Commission with the Federal Communications Commission.<sup>49</sup> Its passage shows that, from the very beginning, there was a strong emphasis on the universality of connectivity and public good. The FCC was created

[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible to all the people of the United States, without discrimination on the basis of race,

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<sup>43</sup> See Barry D. Fraser, *Telecommunications Competition Arrives: Is Universal Service Out of Order?*, 15 CAL. REG. L. REP. 1, 2 (1995) (describing the monopolistic control AT&T maintained).

<sup>44</sup> See Greenberg, *supra* note 42, at 852 n.26 (“Congress passed the Mann-Elkins Act in response to a series of acquisitions by AT&T that resulted in the formation of a natural monopoly over interstate telephone service. . . . The fundamental problem with the Act was that it provided a mere ad hoc response to the telecommunications industry without critically needed long-range policy planning.”) (citation omitted).

<sup>45</sup> See Fraser, *supra* note 43, at 3 (describing the Kingsbury Commitment).

<sup>46</sup> *Id.* at 1 (citation omitted).

<sup>47</sup> *Id.* at 3.

<sup>48</sup> *Id.* (quoting Gerald W. Brock, *THE TELECOMMUNICATIONS INDUSTRY* 161 (1981)) (noting that AT&T was “happy to accept regulation so long as it did not encroach on what were considered management prerogatives” and that “[i]t gave the Bell system a powerful weapon to exclude competitors and justification for seeking a monopoly, as well as reducing the chances of outright nationalization or serious antitrust action”).

<sup>49</sup> Communications Act of 1934, Pub. L. 73–416, 48 Stat. 1064 (repealed 1996).

color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges, for the purpose of the national defense, for the purpose of promoting safety of life and property through the use of wire and radio communications.<sup>50</sup>

The FCC is operated by a panel of five commissioners, who are presidentially appointed and confirmed by the Senate for a five-year term.<sup>51</sup> The President designates one of the commissioners to be Chairman, but only three commissioners may be of the same political party at any given time.<sup>52</sup> When proposing changes for rules, the FCC seeks public comment on proposed changes in a “notice and comment” period before making final decisions that must not be “arbitrary” nor “capricious.”<sup>53</sup>

Following its inception, the FCC operated as a strong regulatory agency during the World War II era, which included limiting the monopolies of major networks<sup>54</sup> and working with civil rights leaders to combat discriminatory treatment by southern television stations.<sup>55</sup> However, under the Reagan administration, the FCC went through a series of major changes. This included a focus on de-regulation,<sup>56</sup> expanded

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<sup>50</sup> 47 U.S.C. § 151.

<sup>51</sup> *Id.* § 154(a), (c)(1).

<sup>52</sup> *Id.* § 154(b)(5).

<sup>53</sup> 5 U.S.C. § 706.

<sup>54</sup> See generally FCC, REPORT ON CHAIN BROADCASTING 92 (1941) (“No license shall be issued to a standard broadcast station affiliated with a network organization which maintains more than one network.”); see also Harold L. Erickson, *American Broadcasting Company: American Television Network*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/topic/American-Broadcasting-Company#ref167748> [<https://perma.cc/X6RV-WNXX>] (“After the Federal Communications Commission (FCC) declared in 1941 that no company could own more than one radio network, NBC in 1943 sold the less-lucrative Blue Network to Edward J. Noble, the millionaire maker of Life Savers candy, who initially renamed it the American Broadcasting System before settling on the name the American Broadcasting Company, Inc. (ABC).”).

<sup>55</sup> See Bryan Hardin Thrift, *WLBT-TV and Civil Rights*, MISS. ENCYCLOPEDIA (July 11, 2017), <https://mississippiencyclopedia.org/entries/wlbt-tv-and-civil-rights/> [<https://perma.cc/QD5C-ELT4>].

<sup>56</sup> See, e.g., Richard E. Wiley, Dennis R. Patrick, Laurence A. Tisch, Jonathan D. Blake & Marshall J. Breger, *Broadcast Deregulation: The Reagan Years and Beyond*, 40 ADMIN. L. REV. 345, 348 (1988) (“The selection of Mark Fowler and Dennis Patrick as FCC chairmen in the Reagan administration has kept the FCC in the forefront of the deregulation movement.”).

enforcement of decency standards,<sup>57</sup> and the creation of the Lifeline Program in 1985.<sup>58</sup>

The Lifeline Program was created with the intention of providing discount phone service for low-income consumers, to “ensure that all Americans have the opportunities and security that phone service brings, including being able to connect to jobs, family and emergency services.”<sup>59</sup> Lifeline is funded through fees paid by telephone service subscribers to the non-governmental Universal Service Administrative Company, which gives the subsidy to qualifying providers who administer the actual service to the end user.<sup>60</sup>

#### B. TELECOMMUNICATIONS ACT OF 1996

After the explosion of mobile phones and Internet technology in the late 1980s, Congress amended the 1934 Communications Act in 1996, with the 1996 Telecommunications Act (“1996 Act”). In the 1996 Act, Congress delegated authority to the FCC to group various services into two categories—Title I, covering “information services,” or Title II covering “common carriers” (which includes telecommunications services).<sup>61</sup>

Title II is the stricter regulatory structure and involves the regulation of “common carriers.” “Common carriers” includes telecommunications services, which are defined as “the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively

<sup>57</sup> See Michael J. Cohen, *Have You No Sense of Decency? An Examination of the Effect of Traditional Values and Family-Oriented Organizations on Twenty-First Century Broadcast Indecency Standards*, 30 SETON HALL LEGIS. J. 113, 117–18 (2005) (“Utilizing the FCC’s definition of broadcast indecency, the Court deemed these reasons sufficiently important to justify the regulation of a broadcast otherwise protected by the First Amendment. For nearly a decade after *Pacifica*, the Commission declined to find any broadcast indecency. However, in 1987, it issued three rulings announcing violations of its decency standards.”).

<sup>58</sup> *Lifeline Program for Low-Income Consumers*, FCC, <https://www.fcc.gov/general/lifeline-program-low-income-consumers> [<https://perma.cc/W5BN-WLZL>] (describing the Lifeline Program).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* (“The Lifeline program is administered by the Universal Service Administrative Company (USAC). USAC is responsible for data collection and maintenance, support calculation, and disbursement for the low-income program.”)

<sup>61</sup> See *U.S. Telecomm. Ass’n v. FCC*, 825 F.3d 674, 691 (D.C. Cir. 2016) (describing the regulatory schema surrounding Title I and Title II regulations) (“The Telecommunications Act subjects a ‘telecommunications service,’ the successor to basic service, to common carrier regulation under Title II. . . . By contrast, an ‘information service,’ the successor to an enhanced service, is not subject to Title II.”); see also 47 U.S.C. § 153(11), (24), (53) (defining “common carrier,” “information service,” and “telecommunication service” for the purposes of the Act).

available directly to the public, regardless of the facilities used.”<sup>62</sup> Title II telecommunications services are more strictly regulated than Title I information services and are required to act as common carriers that allow for other companies to use their networks.<sup>63</sup> In addition, “[c]ommon carriers are also obligated to work with other common carriers to ensure that their facilities’ infrastructures interconnect with each other in a manner adequate to provide high-quality service and effective through-routing of traffic.”<sup>64</sup> They also must work closely with the FCC and “are obligated to establish the rates, terms, and conditions of their service offerings . . . [that are] approved by[] the FCC.”<sup>65</sup> In addition, the FCC also has broader discretion in limiting the expansion of a common carrier and can “prohibit common carriers from entering specific markets, and it can require carriers to implement specific organizational structures or accounting procedures as necessary to regulate rates and terms of service in the public interest.”<sup>66</sup> At the state level, telecommunications services are regulated by Public Utility Commissions, but they have limited authority over information services.<sup>67</sup>

Title I (which includes information services) is a broad title that generally lays out the authority of the FCC and does not include the restrictions imposed upon common carriers under Title II. Title I includes

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<sup>62</sup> § 153(11), (53).

<sup>63</sup> GEORGE B. DELTA & JEFFREY H. MATSUURA, *LAW OF THE INTERNET* § 9.02, Westlaw (database updated 2022) (“The concept of a ‘common carrier’ was developed under common law and has been carried forward into the statutory structure developed at the federal level to regulate telecommunications. At common law, entities that offered certain types of services to the public were deemed to be common carriers (e.g., operators of public accommodation and transportation services). Specifically, to the extent that the services offered to the public were of a type [that] authorities believed was likely to be subject to monopoly power and which the public interest required be made available on a fair and reasonable basis, courts treated such services as common carrier services.”).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*; see also Norman I. Silber, *Late Charges, Regular Billing, and Reasonable Consumers: A Rationale for a Late Payment Act*, 83 CHI.-KENT L. REV. 855, 857–58 (2008) (“State public utility commissions promulgate regulations and provide administrative guidance to address the acceptable period of time that must elapse before a water or electric company, a sewage company, or a gas company can consider the non-receipt of payment to constitute grounds for assessment of a late payment fee. Other laws address the length of time before Internet service providers, land line telephone operators, and other providers can consider payment overdue enough to warrant a late payment charge or eventually to disconnect or terminate services.”).

<sup>67</sup> Stephanie Rivera, *Is Internet Access Regulated Like Public Utilities?*, LONG BEACH MEDIA COLLABORATIVE (Nov. 22, 2017), <http://longbeachmc.org/is-internet-access-regulated-like-public-utilities/> [https://perma.cc/WR3S-KCWP] (“Broadband providers are not subject to utility-style rate regulation and are exempt from state and local taxation.”).

limited regulatory authority over information services that enhance a basic service, such as a telephone line.<sup>68</sup> Examples of information services include the Domain Name Service (“DNS”), the phonebook of the Internet,<sup>69</sup> or website caching.<sup>70</sup> These information services are defined as “the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing[.]”<sup>71</sup> Title I information services are functionally deregulated, meaning that they can offer paid prioritization of Internet traffic and can require additional payment from a user to use a competitor’s streaming service, amongst a host of other anti-competitive behaviors.<sup>72</sup>

### C. NET NEUTRALITY

A key concept to understanding the argument behind Title II reclassification is net neutrality. The Internet exists as an interconnected group of all devices that are on the network—everything from the servers that power Amazon Web Services to the smartphones that we use on a daily basis.<sup>73</sup> To communicate with each other, devices send packets of information across vast distances.<sup>74</sup> The time it takes for those packets to

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<sup>68</sup> See U.S. Telecom Ass’n v. FCC, 825 F.3d 674, 690–91 (D.C. Cir. 2016) (“Much of the structure of the current regulatory scheme derives from rules the Commission established in its 1980 Computer II Order. The Computer II rules distinguished between ‘basic services’ and ‘enhanced services.’ Basic services, such as telephone service, offered ‘pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information.’ Enhanced services consisted of ‘any offering over the telecommunications network which is more than a basic transmission service,’ for example, one in which ‘computer processing applications are used to act on the content, code, protocol, and other aspects of the subscriber’s information,’ such as voicemail. The rules subjected basic services, but not enhanced services, to common carrier treatment under Title II of the Communications Act.”) (citations omitted).

<sup>69</sup> Nat’l Cable & Telecomm. Ass’n. v. Brand X Internet Servs., 545 U.S. 967, 987 (2005). (describing the functionality of DNS in the context of information services).

<sup>70</sup> *Id.* at 999–1000 (describing the functionality of website caching in the context of information services).

<sup>71</sup> 47 U.S.C. § 153(24).

<sup>72</sup> See Kreuzberger et al., *infra* note 163 (describing anti-competitive behaviors that net neutrality laws are intended to combat).

<sup>73</sup> William C. Snyder & Ryan D. White, *The Nature of the Revolution: Rethinking Reno to Reflect the Reality That the Internet Is Part of the Physical World*, 28 ALB. L.J. SCI. & TECH. 45, 56–57 (2018). See generally Tim Wu, *Net Neutrality, Broadband Discrimination*, 2 J. TELECOMM. & HIGH TECH. 141 (2003) (describing the structure of the Internet).

<sup>74</sup> Snyder & White, *supra* note 73 at 57–58.

travel back and forth creates the network “lag” effect<sup>75</sup> that many have come to be so familiar with during the transition to online platforms like Zoom, that the pandemic has necessitated. This lag can be explained by a number of factors, including network congestion (how many users are on the network) and the total bandwidth of the network (how big the total “pipe” is for all the data to travel through).<sup>76</sup>

One important factor that can impact Internet speeds is “throttling”—artificial limitations placed on a user’s Internet connection.<sup>77</sup> Internet service providers, as a normal part of network management, are sometimes required to prioritize certain forms of network traffic over others. This makes sense when the network is viewed as a whole—it is reasonable to assume the packets of data for a critically necessary telehealth call should be prioritized over a user streaming YouTube clips. However, the extent to which an Internet service provider should be able to throttle a user’s Internet connection solely for profit is one of the first considerations in the debate over net neutrality.

The term “net neutrality” refers to network management practices that do not discriminate based on the origin, destination, or types of packets that are sent across the network.<sup>78</sup> What was largely a hypothetical concern at the time—“fast lanes” where certain packets are prioritized—has been shown in numerous instances to be industry practice within telecommunications providers.<sup>79</sup> Whether it is “packet sniffing”<sup>80</sup>

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<sup>75</sup> *Id.*

<sup>76</sup> *What is Network Congestion?*, AVNI NETWORKS, <https://avinetworks.com/glossary/network-congestion/> (“Bandwidth refers to the maximum rate that data can move along a path, or the total capacity of that path. Network congestion happens when there’s just not enough bandwidth to handle the existing amount of traffic.”).

<sup>77</sup> *ISP Throttling: What It Is and How to Stop It*, AVAST, <https://www.avast.com/c-how-to-stop-isp-throttling#> [<https://perma.cc/TZH3-6CFN>] (“ISP throttling is when your internet service provider (ISP) deliberately restricts your internet bandwidth or speed without telling you.”).

<sup>78</sup> Wu, *supra* note 73, at 144.

<sup>79</sup> Elyse Betters, *What Is Net Neutrality and Internet Fast Lanes, and Why Is Obama Stepping in Now?*, POCKET-LINT (Nov. 10, 2014), <https://www.pocket-lint.com/apps/news/129560-what-is-net-neutrality-and-internet-fast-lanes-and-why-is-obama-stepping-in-now> [<https://perma.cc/Z5R5-QR8E>] (“[ISPs] want to create two types of broadband speed lanes. The first lane would be a fast lane, and providers would charge technology companies like YouTube for access to this lane. YouTube would be forced to pay the premium in order to continue piping quality video and content at high speeds to users. If it didn’t pay, users would only be able to stream slow, choppy video.”).

<sup>80</sup> Rob Frieden, *Internet Packet Sniffing and Its Impact on the Network Neutrality Debate and the Balance of Power Between Intellectual Property Creators and Consumers*, 18 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 633, 652 (2008) (“Internet routing equipment provides operators the ability to ‘sniff’ and inspect specific packet streams . . . [s]uch packet inspection

(to look for copyright infringing content) or “zero rating”<sup>81</sup> content from the ISP’s own entertainment platform (so it does not count against a user’s monthly data allotment), ISPs have shown themselves to be opportunistic entities that are pursuing the maximum profit for their shareholders.<sup>82</sup> Barring a larger shift in corporate governance principles, these profit motivations are unlikely to change in the near future.

Critics of government-enforced net neutrality policies argue that it is an undue overreach of government authority to try to regulate and control the flow of the Internet network in such a manner.<sup>83</sup> However, the history of the development of the Internet reveals that an Internet free from government regulation has never truly existed. Even in its infancy, the Internet began as a research project that received funding from the U.S. military.<sup>84</sup> Major telecommunications carriers receive federal subsidies to operate and expand their networks (and are making record profits all the while).

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also provides ISPs with a greater ability to determine whether the traffic they carry respects all intellectual property rights of the content creator.”)

<sup>81</sup> Ellen P. Goodman, *Zero-Rating Broadband Data: Equality and Free Speech at the Network’s Other Edge*, 15 *COLO. TECH. L.J.* 63, 63 (2016) (“When broadband providers ‘zero-rate’ data, they offer certain services or buckets of data for free without counting consumption against the user’s data caps.”).

<sup>82</sup> Nilay Patel, *The Internet Is Fucked (but We Can Fix It)*, *VERGE* (Feb. 25, 2014, 12:30 PM) <https://www.theverge.com/2014/2/25/5431382/the-internet-is-fucked> [<https://perma.cc/99ZF-U2UX>] (“Massive companies like AT&T and Comcast have spent the first two months of 2014 boldly announcing plans to close and control the internet through additional fees, pay-to-play schemes, and sheer brutal size—all while the legal rules designed to protect against these kinds of abuses were struck down in court for basically making too much sense.”).

<sup>83</sup> Jenni Bergal, *Net Neutrality Fight Shifts to the States*, *PEW CHARITABLE TRUSTS* (Jan. 24, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/01/24/net-neutrality-fight-shifts-to-the-states> [<https://perma.cc/L4UP-EG3Z>] (“I support access to the internet. Everyone should have it. . . [b]ut it’s a marketplace decision. Government should not always be the solution or the arbitrator.”).

<sup>84</sup> Vint Cerf, *A Brief History of the Internet & Related Networks*, *INTERNET SOC’Y*, <https://www.internetsociety.org/internet/history-internet/brief-history-internet-related-networks/> [<https://perma.cc/UWD9-JZ72>] (“In 1973, the U.S. Defense Advanced Research Projects Agency (DARPA) initiated a research program to investigate techniques and technologies for interlinking packet networks of various kinds. . . . In 1986, the U.S. National Science Foundation (NSF) initiated the development of the NSFNET which, today, provides a major backbone communication service for the Internet.”).



D. JUDICIAL INTERPRETATIONS OF THE ENFORCEMENT OF THE 1996  
TELECOMMUNICATIONS ACT

The divergence between Title I and Title II regulation has created a push-and-pull regulatory environment that has left the Lifeline Program imperiled between administrations. Even as its budget has grown significantly,<sup>85</sup> its future has been at the center of major litigation.<sup>86</sup> Initially, the FCC classified broadband Internet as a telecommunications service, and thus subject to common carrier regulation, but the FCC changed course in 2002 and reclassified it as an information service.<sup>87</sup>

This reclassification was challenged in the Ninth Circuit, in *National Cable & Telecommunications Association v. Brand X Internet Services*.<sup>88</sup> Brand X, a small ISP that benefited from the categorization of broadband as a common carrier under Title II, sought to challenge the FCC's reclassification by arguing that the plain meaning of telecommunications was any communication that occurred at a distance, and thus would require the inclusion of broadband Internet.<sup>89</sup> The National Cable & Telecommunications Association opposed this and argued that the definition of information services was more apt because broadband service providers offered a variety of services, and thus the FCC's decision should be given the deference outlined in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>90</sup> After the Ninth Circuit ruled in favor of Brand X, the Supreme Court reversed that ruling and sided with the cable companies, finding that the provisions regarding

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<sup>85</sup> See Lifeline and Link Up Reform and Modernization, 30 F.C.C. Rcd. 7818, 7954 (2015) ("The reality is this: adjusting for inflation, the Lifeline program is over twenty-three times as large today as it was at the end of the Reagan Administration. And soon, it'll be even larger.").

<sup>86</sup> See *Mozilla Corp. v. FCC*, 940 F.3d 1, 68–69 (D.C. Cir. 2019).

<sup>87</sup> See Emily R. Roxberg, *FCC Authority Post-Comcast: Finding a Happy Medium in the Net Neutrality Debate*, 37 J. CORP. L. 223, 234–35 (2011) ("George W. Bush's administration issued the 2002 Cable Modem Order, declaring cable modem service an unregulated information service and not a cable or separate telecommunications service.").

<sup>88</sup> See *Nat'l Cable & Telecomm. Ass'n. v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

<sup>89</sup> *Id.* at 968–69.

<sup>90</sup> See *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984) ("When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."). In *Chevron*, the National Resource Defense Council petitioned the review of the Environmental Protection Agency's decision regarding a provision of the Clean Air Act, a decision that Chevron found to be favorable. *Id.* at 840. The Court granted deference to the decision-making process of the EPA and held that a challenge to an agency's policy must rise above arguments about the wisdom of the policy decision. *Id.* at 865–66.

telecommunications were vague and ambiguous, and as such, the FCC deserved deference in determining their meaning.<sup>91</sup> In particular, the offerings of DNS<sup>92</sup> and website caching<sup>93</sup> were found to sufficiently fit the definition of “information service.”<sup>94</sup> However, the Court specifically said that these classifications were not set in stone<sup>95</sup> and instructed the FCC to “consider varying interpretations and the wisdom of its policy on a continuing basis,”<sup>96</sup> including “in response to changed factual circumstances.”<sup>97</sup>

During the Obama administration, broadband Internet service was reclassified by the FCC as a telecommunications service under Title II, as a part of the 2015 “Open Internet Order.”<sup>98</sup> This change was challenged in *United States Telecom Association v. FCC*.<sup>99</sup> Here, the D.C. Circuit found that the logic of the Supreme Court’s ruling in *Brand X*, granting deference to the FCC in reclassifying ISPs, was appropriate and allowed the reclassification to Title II to stand.<sup>100</sup>

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<sup>91</sup> *Brand X*, 545 U.S. at 1000 (“We therefore conclude that the Commission’s construction was reasonable.”).

<sup>92</sup> *Id.* at 999 (“A user cannot reach a third-party’s Web site without DNS, which (among other things) matches the Web site address the end user types into his browser (or ‘clicks’ on with his mouse) with the IP address of the Web page’s host server. . . . It is at least reasonable to think of DNS as a ‘capability for . . . acquiring . . . retrieving, utilizing, or making available’ Web site addresses and therefore part of the information service cable companies provide.”) (citations omitted) (alterations in original).

<sup>93</sup> *Id.* at 999–1000 (“Internet service provided by cable companies facilitates access to third-party Web pages by offering consumers the ability to store, or ‘cache,’ popular content on local computer servers. Caching obviates the need for the end user to download anew information from third-party Web sites each time the consumer attempts to access them, thereby increasing the speed of information retrieval. In other words, subscribers can reach third-party Web sites via ‘the World Wide Web, and browse their contents, [only] because their service provider offers the ‘capability for . . . acquiring, [storing] . . . retrieving [and] utilizing . . . information.’”) (citations omitted) (alterations in original).

<sup>94</sup> *Id.* at 999.

<sup>95</sup> *Id.* at 981.

<sup>96</sup> *Id.* (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863–64 (1984)).

<sup>97</sup> *Brand X*, 545 U.S. at 981 (citation omitted).

<sup>98</sup> See Protecting & Promoting the Open Internet, 30 F.C.C. Rcd. 5601 (2015) (regulating broadband under Title II); see also Larry N. Zimmerman, *Net Neutrality: The Sequel*, 86 J. KAN. BAR ASS’N 14 (2017) (“The model . . . [under Title II] would treat the Internet as a public utility. This is, essentially, what the United States did when reclassifying broadband access as a telecommunications service in 2015.”).

<sup>99</sup> *U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 689 (D.C. Cir. 2016).

<sup>100</sup> *Id.* (“For the third time in seven years, we confront an effort by the Federal Communications Commission to compel internet openness . . . [and] [f]or the reasons set forth in this opinion, we deny the petitions for review.”).

However, under the Trump administration, the FCC made “Restoring Internet Freedom” a priority, through deregulation.<sup>101</sup> The “Restoring Internet Freedom” (“RIF”) order was issued in 2018, and reclassified broadband Internet back to Title I with the intent of “[e]nding [p]ublic-[u]tility [r]egulation of the [i]nternet.”<sup>102</sup> The RIF order also included a preemption directive stating that it would “preempt any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order.”<sup>103</sup>

Continuing the pattern of cases challenging the decision of the FCC to change the classification of the Internet, Mozilla Corporation (makers of the web browser Firefox) filed suit in *Mozilla Corporation v. FCC*, seeking to enjoin the RIF order.<sup>104</sup> Mozilla and the other plaintiffs claimed that the RIF order had misinterpreted the law, and further, that the FCC’s lack of consideration of the impact of the order on certain policy areas was evidence of an arbitrary and capricious decision-making process that violated the Administrative Procedures Act.<sup>105</sup> The D.C. Circuit Court reviewed in part and vacated in part, applying a deferential standard of judgement to the FCC’s actions<sup>106</sup> and relying on the Supreme Court’s decision in *Brand X* to determine that the FCC had acted reasonably in classifying broadband as an information service.<sup>107</sup> Specifically, ISPs’ offering of DNS and caching services was once more found to be

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<sup>101</sup> See generally Restoring Internet Freedom, 33 F.C.C. Rcd. 311 (2018) (reclassifying broadband Internet to Title I).

<sup>102</sup> *Id.* at 318.

<sup>103</sup> *Id.* at 427.

<sup>104</sup> *Mozilla Corp. v. FCC*, 940 F.3d 1, 17 (D.C. Cir. 2019).

<sup>105</sup> See Joint Brief for Petitioners at 1, *Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2018) (No. 18-1068) 2018 WL 5282022, at \*1 (“[T]he *Order*’s reclassification of broadband Internet access service as an ‘information service,’ and mobile broadband Internet access service as a ‘private mobile service,’ misinterprets or violates the law; and the FCC’s failure to consider the evidence, abandonment of the open Internet rules, and denial of motions to introduce additional evidence, violates the APA . . . .”) (emphasis in original).

<sup>106</sup> See *Mozilla*, 940 F.3d at 19 (citations omitted) (“Our review is governed by the familiar *Chevron* framework in which we defer to an agency’s construction of an ambiguous provision in a statute that it administers if that construction is reasonable.”).

<sup>107</sup> *Id.* at 35 (“We conclude, under the guidance of *Brand X*, that the Commission permissibly classified broadband Internet access as an ‘information service’ by virtue of the functionalities afforded by DNS and caching.”).

important to the classification of broadband Internet service as an information service.<sup>108</sup>

However, the D.C. Circuit Court's decision in *Mozilla* provided three notable points that provide useful insights into the ways that Title II reclassification and subsequent expanded protections for the low-income could be sought in the future. First, the court held that the FCC had acted in an arbitrary and capricious manner when failing to consider the impact that removing broadband from Title II would have on the ability for Lifeline to be offered from broadband-only providers.<sup>109</sup> Second, the FCC's ability to preempt state legislature's net neutrality laws was vacated.<sup>110</sup> Third, major concerns were expressed by the Circuit Court judges, which signals a potential Supreme Court challenge in the future. Judge Millet's concurrence recognized the binding precedent of the Supreme Court's ruling in *Brand X*, but still expressed a concern "that the result [in *Mozilla*] is *unhinged from the realities of modern broadband service*" in its classification of broadband as an information service.<sup>111</sup> Judge Millet noted that:

*Brand X* faced a "walled garden" reality, in which broadband was valued not merely as a means to access third-party content, but also for its bundling of then-nascent information services like private email, user newsgroups, and personal webpage development. Today, none of those add-ons occupy the significance that they used to . . . . In a nutshell, a speedy pathway to content is what consumers value. It is what broadband providers advertise and compete over. And so, under any natural reading of the statute, the technological mechanism for accessing third-party content is what broadband providers "offer."<sup>112</sup>

However, Judge Millet recognized that "it is the Supreme Court's sole 'prerogative' . . . to require the Commission to bring the law into

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<sup>108</sup> *Id.* at 87 (finding that *Brand X* "compels [the Court] to affirm as a reasonable option the agency's reclassification of broadband as an information service based on its provision of Domain Name System ('DNS') and caching") (Millet, C.J., concurring).

<sup>109</sup> *Id.* at 69 ("The Commission completely fails to explain how its 'authority' . . . could extend to broadband . . . now that broadband is no longer considered to be a common carrier.").

<sup>110</sup> *Id.* at 86 ("At bottom, the Commission lacked the legal authority to categorically abolish all fifty States' statutorily conferred authority to regulate intrastate communications. For that reason, we vacate the Preemption Directive . . .").

<sup>111</sup> *Id.* at 87 (Millet, C.J. concurring) (emphasis added).

<sup>112</sup> *Mozilla*, 940 F.3d at 87.

harmony with the realities of the modern broadband marketplace. Until it does—or until Congress steps up to the legislative plate—I am bound to concur in sustaining the Commission’s action.”<sup>113</sup>

When considering the remand, the FCC (voting along party lines) marginally altered the RIF order in response to the D.C. Circuit Court’s decision in *Mozilla*. The FCC vacated part of the RIF order and issued a clarifying statement on October 27, 2020, that allegedly addressed the concerns raised by the D.C. Circuit but “found no basis to alter the FCC’s conclusions in the *Restoring Internet Freedom Order*.”<sup>114</sup> When addressing the subject of Lifeline, the FCC asserted that because broadband providers generally also provide phone service, which remains categorized under Title II, the impact on Lifeline service would be “minimal,” even if providers who solely offer broadband would arguably not qualify due to their Title I status.<sup>115</sup> Regarding these broadband-only ISPs FCC Commissioner Geoffrey Starks stated, “the *Remand Order* blithely suggests that they could receive FCC protection if they simply began providing video or telecom services, notwithstanding their own business plans or financial circumstances. . . . I fail to see how such a response will satisfy the D.C. Circuit.”<sup>116</sup> In his dissent, Commissioner Starks laid the stakes out plainly:

The *Remand Order* ultimately concludes that, even if its legal reasoning [justifying the RIF] falls short, “the benefits of reclassification would outweigh the removal of broadband Internet access service from the Lifeline program[.]” Given that the *Remand Order* acknowledges that those benefits [for those receiving service from a broadband-only provider] remain in dispute, this statement is chilling. The majority would rather disconnect nearly 8 million Americans from a critically needed service during a pandemic than subject ISPs to any form of FCC oversight.<sup>117</sup>

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<sup>113</sup> *Id.* at 94 (emphasis added).

<sup>114</sup> FCC Press Release, *supra* note 5 (emphasis in original).

<sup>115</sup> Restoring Internet Freedom Bridging the Digital Divide for Low-Income Consumers Lifeline and Link Up Reform and Modernization, 35 F.C.C. Rcd. 12328, 12413 (Oct. 27, 2020) (“Under the Communications Act, it is the ‘common-carrier status’ of the *provider*, not the *service*, that governs whether the provider is eligible to receive Lifeline support for services provided over its network. Thus, if a common carrier offers voice service and qualifies as an ETC, the Lifeline program can support affordable broadband Internet access service.”) (emphasis in original).

<sup>116</sup> *Id.* at 12423.

<sup>117</sup> *Id.* (emphasis in original).

## IV. AN FCC PROGRAM FOR SUBSIDIZED ACCESS: LIFELINE

The Lifeline Program, for subsidized telecommunications access, was imperiled by the RIF.<sup>118</sup> The Lifeline Program was created with the intention of providing discount phone service for low-income consumers, to “ensure that all Americans have the opportunities and security that phone service brings, including being able to connect to jobs, family and emergency services[]”<sup>119</sup> and is a program that provides subsidized telecommunications access for low-income households to expand access.<sup>120</sup> Lifeline was started in 1985 under the Reagan administration, and was incorporated into the Universal Service Fund (“USF”) alongside the Connect America Fund, Healthcare Connect Fund, and the E-rate Program for subsidized access for schools and libraries as part of the 1996 Act.<sup>121</sup> Lifeline was started as a program for wired telecommunications access but was expanded to include wireless cellular service under George W. Bush’s administration.<sup>122</sup> It was further expanded to include broadband service under the Obama presidency<sup>123</sup> but was subsequently restricted by the Trump administration.<sup>124</sup>

Low-income households qualify for Lifeline by satisfying one of several statutorily defined criteria.<sup>125</sup> They may qualify by already being enrolled in a specified list of programs (such as the Supplemental

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<sup>118</sup> See *Mozilla Corp. v. FCC*, 940 F.3d 1, 68 (D.C. Cir. 2019).

<sup>119</sup> See *Lifeline Program for Low-Income Consumers*, *supra* note 58 (describing the Lifeline Program’s organization).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*; see Briana McLeod, *Universal Service and Small-Dollar Loans*, 27 *GEO. MASON L. REV.* 615, 626 (2020) (describing the scope of the USF).

<sup>122</sup> See Mariani, *supra* note 8, at 557–58 (“In 2005, the Bush Administration expanded the program to include wireless phone service in addition to traditional landline service, recognizing the growing dominance of cell phones as a primary means of communication.”).

<sup>123</sup> *Id.* at 559 (“In March 2016, the FCC announced that it had voted 3-2 to adopt the proposal allowing Lifeline consumers to receive subsidized Internet.”); Jillian Kay Melchior, *Expanding the Lifeline Phone Subsidy—Here Comes Obamanet*, *NAT’L REV.* (June 1, 2015, 8:00 AM), <http://www.nationalreview.com/article/419123/if-abuse-obamaphones-werent-enough-fcc-wants-subsidize-broadband-jillian-kay-melchior> (describing opposition to this expansion).

<sup>124</sup> Jared Bennet & Ashley Wong, *Millions of Poor Lose Access to Cellphone Service Under Trump Administration Reforms*, *USA TODAY* (Nov. 5, 2019, 6:00 AM), <https://www.usatoday.com/story/news/investigations/2019/11/05/under-trump-millions-poor-lose-cellphone-service/2482112001/> (“Lifeline . . . is among the federal assistance programs being targeted by the Trump administration. Enrollment nationwide has dropped by 2.3 million people—about 21%—since 2017.”).

<sup>125</sup> 47 C.F.R. § 54.409.

Nutrition Assistance Program or Medicaid) or may qualify based on criteria that is set both at the state and federal level.<sup>126</sup> Lifeline benefits are distributed on a per-household basis, and an address is required in order to receive the benefit.<sup>127</sup>

After a household qualifies for the program, they select the company that provides the subsidized service. These providers are known as eligible telecommunications carriers (“ETCs”) or Lifeline broadband providers (“LBPs”).<sup>128</sup> The certification of ETCs and LBPs is done by both the FCC and the Public Utilities Commission in each state.<sup>129</sup> Lifeline eligibility must be renewed on an annual basis by the recipient, though renewal requirements have been suspended by the FCC as a result of the pandemic.<sup>130</sup>

Once a provider is selected, a \$9.25 monthly subsidy is dispersed to that provider by the Universal Service Administrative Company (“USAC”) on behalf of the household.<sup>131</sup> In return, the provider must give the household a minimum level of service, defined by the FCC.<sup>132</sup> The FCC regulates the implementation of Lifeline and requires that all ETCs make sure “that their Lifeline subscribers are eligible to receive Lifeline services.”<sup>133</sup> Low-income citizens must establish eligibility upon enrollment and must be annually recertified by their ETC in order to receive service.<sup>134</sup> Providers must remove any subscriber who fails to respond to the carrier’s attempts to obtain recertification.<sup>135</sup>

Lifeline is funded as part of the USF.<sup>136</sup> While the FCC has a mandate to set guidelines for maintenance of this fund, the actual funding mechanism is not a tax, but rather a contribution from telecommunications

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<sup>126</sup> *Id.*

<sup>127</sup> See *Schipke v. Tracfone Wireless, Inc.*, 146 F. Supp. 3d 455, 457–58 (D. Conn. 2015) (holding that a citizen experiencing homelessness was correctly denied receipt of Lifeline benefits for failing to provide an address).

<sup>128</sup> § 54.401 (defining the scope and definition of Lifeline providers).

<sup>129</sup> 47 U.S.C. § 214(e)(2)–(6).

<sup>130</sup> Press Release, FCC, FCC Waives Lifeline Program Rules to Help Low-Income Consumers During Coronavirus Pandemic (Mar. 17, 2020).

<sup>131</sup> See *Lifeline Program for Low-Income Consumers*, *supra* note 58.

<sup>132</sup> *Id.*

<sup>133</sup> 47 C.F.R. § 54.410(a).

<sup>134</sup> *Id.* § 54.410(f)(1).

<sup>135</sup> *Id.* § 54.405(e)(4).

<sup>136</sup> *Universal Service*, FCC, <https://www.fcc.gov/general/universal-service> [<https://perma.cc/RMH3-NC3Z>].

providers based on a percentage of quarterly revenue.<sup>137</sup> The burden to produce these contributions is passed along to consumers, and a contribution to this USF appears on the monthly surcharges on the bills of telecommunications subscribers.<sup>138</sup> These contributions were projected to represent 27.1% of all interstate telecommunications revenues, or \$2.2 billion, in the fourth quarter of 2020.<sup>139</sup> Notably, ISPs are not required to pay into this fund, but under a Title II regulatory regime they would likely be required to contribute.<sup>140</sup>

While the FCC is responsible for the budget of the programs funded by the USF,<sup>141</sup> the USAC is the not-for-profit corporation tasked with actually administering the fund.<sup>142</sup> The USAC is notably not a federal government agency, department, or government-controlled corporation.<sup>143</sup> The funding structure of the USAC and Lifeline program has made it unclear what due process (if any) is currently required for termination of the Lifeline benefit.<sup>144</sup> In *Daugherty v. SafeLink Wireless*, a low-income

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<sup>137</sup> *Id.* (“The Universal Service Fund is paid for by contributions from providers of telecommunications based on an assessment on their interstate and international end-user revenues.”).

<sup>138</sup> See *Contribution Methodology and Administrative Filings*, FCC, <https://www.fcc.gov/general/contribution-methodology-administrative-filings> [<https://perma.cc/V3Y4-AKVZ>].

<sup>139</sup> Proposed Fourth Quarter 2020 Universal Service Contribution Factor, 35 F.C.C. Rcd. 10271, 10271–73 (Sept. 14, 2020).

<sup>140</sup> Mariani, *supra* note 8, at 568 (“The FCC’s March 2016 Order does not appear to include any reforms to the current funding structure of the program. . . . [I]t is nonsensical to require long-distance interstate telephone carriers to be the principal contributors to the USF when the majority of consumers are moving away from landline phone service and toward wireless and broadband as their primary means of communication.”).

<sup>141</sup> Lifeline and Link Up Reform and Modernization, 31 F.C.C. Rcd. 3962 (2016) (No. 09-197), 2016 WL 1706939, at \*4 (“This Order . . . directs the Bureau to submit a report to the Commission if Lifeline disbursements in a year exceed 90 percent of [the projected budget], with an expectation that the Commission will act within six months of this report.”).

<sup>142</sup> 47 C.F.R. § 54.701(a) (“The Universal Service Administrative Company is appointed the permanent Administrator of the federal universal service support mechanisms, subject to a review after one year by the Federal Communications Commission to determine that the Administrator is administering the universal service support mechanisms in an efficient, effective, and competitively neutral manner.”).

<sup>143</sup> *Procurement*, UNIV. SERV. ADMIN. CO., <https://www.usac.org/about/procurement/> [<https://perma.cc/7ACR-K2CU>] (“USAC is not a federal government agency or department or a government controlled corporation as that term is defined in sections 9101-02 of Title 31 of the United States Code.”).

<sup>144</sup> *Daugherty v. SafeLink Wireless*, No. 18-cv-3078-MDH, 2018 WL 3626194, at \*3 (W.D. Mo. July 30, 2018) (“Here, Plaintiff claims Defendants are acting under the color of state law with regard to his mobile phone service. Taking Plaintiff’s allegations as true for purposes of a motion to dismiss, the Court cannot rule on whether Defendants are state actors with regard to this cell phone service program. While at this stage of litigation it is unknown whether Plaintiff



citizen receiving the Lifeline benefit complained that the benefit had been improperly terminated by SafeLink Wireless, a subsidiary of Tracfone.<sup>145</sup> The plaintiff argued that the provision of mobile phone service was a sufficient nexus with the Lifeline benefit that the provision of that benefit constituted state action.<sup>146</sup> This argument was persuasive enough to survive a motion to dismiss, though the case was ultimately dismissed without prejudice, after a request from the low-income citizen (who was representing himself *pro se*) due to his deteriorating health, leaving open the question of whether these providers would be considered acting “under the color of state law” as the plan is presently constituted.<sup>147</sup>

## V. PROPOSED SOLUTIONS

### A. LEGISLATIVE TITLE II RECLASSIFICATION OF BROADBAND INTERNET

On balance, the reclassification of broadband Internet as a Title II utility service, under the 1996 Act, is the best advancement that would meaningfully expand access to the Internet for low-income citizens. One of the significant ways that reclassification would accomplish this goal would be by giving procedural due process protections from disconnection without the ability to appeal the decision. The Supreme Court has ruled that municipal public utilities must consider due process considerations when terminating the service of a customer<sup>148</sup>—a burden that cannot be placed upon an “information service” provider under Title I.<sup>149</sup> Additionally, each state’s Public Utility Commission would have expanded regulatory authority to provide shutoff protections in the same way they do for power and water.<sup>150</sup>

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will be able to succeed on his claims, the Court finds that he has plead enough to survive Defendants’ Motion to Dismiss.”).

<sup>145</sup> *Id.* at \*1.

<sup>146</sup> *See id.*

<sup>147</sup> Order on Motion to Dismiss at 2, *Daugherty v. SafeLink Wireless*, No. 18-cv-3078-MDH (W.D. Mo. Mar. 9, 2018) (“Plaintiff now moves to dismiss his claims [stating that his mental and physical health are not well]. . . . [T]he Court grants Plaintiff’s Motion and dismisses this case, in its entirety, without prejudice.”).

<sup>148</sup> *See Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978) (“Under the balancing approach outlined in *Mathews*, some administrative procedure for entertaining customer complaints prior to termination is required to afford reasonable assurance against erroneous or arbitrary withholding of essential services.”).

<sup>149</sup> *See U.S. Telecom Ass’n v. FCC*, 825 F.3d 674, 731 (D.C. Cir. 2016).

<sup>150</sup> *See, e.g., CPUC Acts to Ensure Essential Utility Services for Consumers at Risk of Disconnections*, CAL. PUB. UTIL. COMM’N (Oct. 7, 2021), <https://www.cpuc.ca.gov/news-and->

Legislative recognition of the Title II reclassification at the federal level is the only meaningful way to ensure that the regulatory environment surrounding broadband Internet classification does not continue to change drastically with each administration. There is currently a bill in the House, the “Save the Internet Act,”<sup>151</sup> that seeks to provide this remedy, but it has received little traction since its introduction in 2019.<sup>152</sup> The history of the regulatory fight over the topic shows that a purely administrative solution will likely not produce the lasting reform that is necessary, and Judge Millett’s assessment of the situation in *Mozilla* echoes that sentiment.<sup>153</sup> DNS and caching—the two biggest factors that the *Brand X* and *Mozilla* courts found to be relevant to the classification of broadband as an information service—are significantly less central to the use of broadband in 2020 than they were in 2005 because they are offered by a number of providers for free.<sup>154</sup> With a current six to three conservative majority in the Supreme Court, it is unlikely that the issue of broadband reclassification will have a dissimilar outcome if revisited in the foreseeable future. However, it is possible, given Justice Clarence Thomas’s recent comments about revisiting *Brand X* (a decision he helped author).<sup>155</sup> Regardless, given the current climate of COVID-19 and reconciliation in the country, a legislative compromise at the federal level could be feasible, but such a reclassification would be a major undertaking. The 1996 Act was considered “the mother of all lobbying

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updates/all-news/cpuc-acts-to-ensure-essential-utility-services-for-consumers-at-risk-of-disconnections [https://perma.cc/7T89-68XV].

<sup>151</sup> Lexi Hudson, *The Save the Internet Act: The Hero America Needs, but We Deserve Much Better*, 53 UNIV. ILL. CHI. J. MARSHALL L. REV. 607, 625–26 (2021) (“The STIA would also reclassify ISPs as common carriers, as they were under the 2015 Order, thus subject to Title II regulation under the purview of the FCC.”).

<sup>152</sup> Jason Schneiderman, *Save the Internet Act Languishes in Senate as Net Neutrality is Eroded*, NONPROFIT Q. (Oct. 3, 2019), <https://nonprofitquarterly.org/save-the-internet-act-languishes-in-senate-as-net-neutrality-is-eroded/> [https://perma.cc/JFS3-4PDQ] (“The Save the Internet Act is currently in the hands of the US Senate, where it lies stalled.”).

<sup>153</sup> See *Mozilla Corp. v. FCC*, 940 F.3d 1, 94 (D.C. Cir. 2019) (Millett, C.J., concurring) (asserting that Supreme Court or legislative intervention will be required to solve the Title II reclassification issue).

<sup>154</sup> See *id.* at 87 (“DNS is readily available, free of charge, and at a remarkably high quality, from upwards of twenty different third-party providers. And caching has been fundamentally stymied by the explosion of Internet encryption.”).

<sup>155</sup> See *Baldwin v. United States*, 140 S. Ct. 690, 695 (2020) (Thomas, J., dissenting) (“*Brand X* may well follow from *Chevron*, but in so doing, it poignantly lays bare the flaws of our entire executive-deference jurisprudence. Even if the Court is not willing to question *Chevron* itself, at the very least, we should consider taking a step away from the abyss by revisiting *Brand X*.”).

battles,”<sup>156</sup> affectionately earning the nickname the “Leave No Lobbyist Behind Act of 1996” by the late Senator John McCain.<sup>157</sup>

With the burden of federal legislation, efforts to reclassify broadband Internet at the state level could be more feasible while also having a meaningful impact on procedural protections that can be provided to low-income citizens. The ruling in *Mozilla* specifically vacated the FCC’s attempt at preempting state regulations, leaving room for states to experiment with expanding net neutrality protections.<sup>158</sup> In California, Senate Bill 822 enacted many of the net neutrality reforms of the Obama-era FCC’s 2015 Open Internet Order.<sup>159</sup> This included the banning of broadband providers blocking websites, paid prioritization of content, and the charging of extra fees to access certain websites.<sup>160</sup> Assembly Bill 1999,<sup>161</sup> another piece of net neutrality legislation from California, amended the government’s code to create a rule that “[e]xcept for reasonable network management, a local agency insofar as it is engaged in the provision of broadband Internet access service shall not unreasonably interfere with, or unreasonably disadvantage . . . [a]n end user’s ability to select, access, and use broadband Internet access service.”<sup>162</sup> This language could be used to invoke the regulatory protections that Tennessee provided in *Memphis* when arguing a bill had a legislative intent to provide protections from termination. While this list did not explicitly include procedural shutoff protections, the regulatory vacuum created by the FCC’s RIF order could allow state legislatures to enact enhanced regulations and protections for their state’s citizens.<sup>163</sup>

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<sup>156</sup> Kevin Werbach, *The Network Utility*, 60 DUKE L.J. 1761, 1778–79 (2011).

<sup>157</sup> *Id.* at 1779 n.82 (citing 149 Cong. Rec. 21,874 (2003) (statement of Sen. McCain) (calling the bill the “Leave No Lobbyist Behind Act of 1996”).

<sup>158</sup> See Daniel A. Lyons, *State Net Neutrality*, 80 UNIV. PITT. L. REV. 905, 906–07 (2019) (describing different state-level attempts to impose net neutrality and their limitations).

<sup>159</sup> Charles Kreuzberger, Thomas G. Routson, Negin Taleb & R.C. Fellmeth, *California Public Utilities Commission*, 24 CAL. REG. L. REP. 188, 226–27 (2019) [hereinafter *California Public Utilities Commission 2019*].

<sup>160</sup> See, e.g., S.B. 822, Reg. Sess. (Cal. 2018).

<sup>161</sup> A.B. 1999, Reg. Sess. (Cal. 2018).

<sup>162</sup> *Id.*

<sup>163</sup> Charles Kreuzberger, Thomas G. Routson, Negin Taleb & R.C. Fellmeth, *California Public Utilities Commission*, 24 CAL. REG. L. REP. 136, 165 (2018) [hereinafter *California Public Utilities Commission 2018*] (“This bill also include [sic] uncoded findings and declarations emphasizing the vital role the internet plays in all aspects of California’s economy, democracy, and society.”). *But see* Hudson, *supra* note 152, at 624 (noting that Senate Bill 822 “is a major win for proponents, but opponents argue that it creates a patchwork of irregular regulation that frustrates federal policy”).

However, reclassification would not be a complete solution. The first challenge would be to prove that the necessity of a broadband Internet connection was as vital as other utilities, like power or water. Much like the litigants in *Memphis*, it could be argued that broadband Internet is a “necessity of modern life” where deprivation for even “short periods of time may threaten health and safety.”<sup>164</sup> The COVID-19 pandemic has shown that broadband Internet has a renewed place of importance in our society, and the inclusion of specific language, denoting legislative intent, showing the importance of broadband access could be a major factor in a future court’s decision-making process.

The next hurdle would be in arguing that the utility providers offering broadband service would be acting under the “color of state law” and thus be required to offer procedural due process protections. The Supreme Court has found that state regulation does not inherently make a business a public utility, and thus due process protections would not clearly apply in all instances for termination of an Internet connection.<sup>165</sup> Private providers, which constitute a majority of broadband service providers in the United States,<sup>166</sup> would not require procedural protections unless it could be proven that their behavior constituted a state action, using the analysis discussed in *Jackson*, *Blum*, and *Brentwood*.<sup>167</sup> Legislative intervention in the form of guidelines for the termination of service would help bolster the case for procedural protections, but barring statutorily-defined guidelines, attorneys for low-income clients will need to bring impact litigation arguing that the link between the service providers and the government was sufficiently publicly intertwined that the termination of service by broadband providers would be considered an action done “under the color of state law.”

Compared globally to other countries, Title II reclassification is a very moderate compromise.<sup>168</sup> On balance, Title II reclassification of

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<sup>164</sup> *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 18 (1978).

<sup>165</sup> See *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 350 (1974); see also *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

<sup>166</sup> *The Complete List of Internet Companies in the US*, *supra* note 6 (describing internet service providers in the United States).

<sup>167</sup> See *Jackson*, 419 U.S. at 350–51; *Blum*, 457 U.S. at 1004; *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (stating that a “state action may be found if, though only if, there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself’”) (citation omitted).

<sup>168</sup> Cf. David Rothkopf, *Is Unrestricted Internet Access a Modern Human Right?*, FOREIGN POL’Y (Feb. 2, 2015, 11:26 AM), <http://foreignpolicy.com/2015/02/02/unrestricted-internet-access-human-rights-technology-constitution/> (describing governmental approaches in Estonia,

broadband Internet would likely increase the procedural protections from termination of service for low-income citizens. It would do so by creating a stable regulatory environment in which a framework for shutoff protections can be built. It would not produce an instant result but would be a necessary first step in arguing that procedural due process protections, such as an appeal, are necessary before terminating an individual's broadband Internet service.

#### B. UNIVERSAL ACCESS FOR ALL CITIZENS

Merely reclassifying the Internet would be an important first step in expanding protections for low-income citizens, but more can be done. The United Nations has recognized the right to the Internet as a necessity<sup>169</sup> and has argued that the internet serves a useful tool of social utility.<sup>170</sup>

In the European Union ("EU"), there is a universal service provision that provides a basic level of service to all citizens.<sup>171</sup> Within the boundaries of the EU, every person (including non-citizens) must be able to access good quality electronic communication services at an affordable price.<sup>172</sup> This specifically includes Internet access, which is regulated in

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Greece, Costa Rica, Spain, and France to providing an affirmative right to access the Internet); *see also Finland Makes Broadband a 'Legal Right'*, BBC NEWS (July 1, 2010), <http://www.bbc.com/news/10461048> [<https://perma.cc/KU3U-Y9CC>].

<sup>169</sup> Catherine Howell & Darrell M. West, *The Internet As a Human Right*, BROOKINGS (Nov. 7, 2016), <https://www.brookings.edu/blog/techtank/2016/11/07/the-internet-as-a-human-right/> [<https://perma.cc/LC8A-TN7X>] ("This summer, the UN declared that it considers the internet to be a human right. Specifically, an addition was made to Article 19 of the Universal Declaration of Human Rights (UDHR), which states: 'Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.' Section 32 adds 'The promotion, protection and enjoyment of human rights on the Internet' and another 15 recommendations that cover the rights of those who work in and rely on internet access.").

<sup>170</sup> Frank La Rue (Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression), Rep. on Promotion and Protection of the Right to Freedom of Opinion and Expression, U.N. Doc. A/HRC/17/27 (May 16, 2011) ("The Special Rapporteur underscores the unique and transformative nature of the Internet not only to enable individuals to exercise their right to freedom of opinion and expression, but also a range of other human rights, and to promote the progress of society as a whole.").

<sup>171</sup> European Parliamentary Research Service Briefing PE 581.977, *Broadband As a Universal Service* (Apr. 2016), [https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581977/EPRS\\_BRI\(2016\)581977\\_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/581977/EPRS_BRI(2016)581977_EN.pdf) [<https://perma.cc/5RQA-WA42>] ("Universal service is the principle that all citizens should be provided with a range of basic but good quality services at affordable prices so that they are able to participate fully in society. Since 2010, functional internet access has been included in EU legislation on universal telecommunications service.").

<sup>172</sup> *Id.*

an open manner.<sup>173</sup> This means that a user accessing the Internet within the EU has the right to access and distribute any online content or services of their choosing, with a few select exceptions including illegal content and network congestion, issues which critics of universal service often highlight.<sup>174</sup>

Other nations within the EU, like the United Kingdom, take that commitment one step further. The United Kingdom's Department for Digital, Culture, Media & Sport released a decision in 2017 announcing the creation of a universal service obligation that would guarantee a broadband Internet connection to any resident or business that did not previously have access, subject to certain terms.<sup>175</sup> This universal service obligation came into effect in March of 2020.<sup>176</sup> While the timeline was certainly nothing short of fortuitous, debates have centered around the sufficiency of the access provided, leading to calls for further action on part of the British government in expanding universal Internet access.<sup>177</sup>

Within the United States, the creation of a basic level of minimum service for all citizens is not only possible, but feasible, based on the current funding structure of the Lifeline Program and USAC. As of present, the Lifeline Program does not have a cap.<sup>178</sup>

Such a proposal would not be without a fair share of opposition, however. Those in favor of a light-touch approach to Internet regulation would see such a guarantee as an overreach of government intervention.<sup>179</sup>

<sup>173</sup> *All You Need to Know About the Open Internet Rules in the EU*, BODY EUR. REGULATORS ELEC. COMMC'N, [https://berec.europa.eu/eng/open\\_internet/](https://berec.europa.eu/eng/open_internet/) [<https://perma.cc/T3XN-CD5T>] (noting that in the EU, "ISPs are prohibited from blocking or slowing down of internet traffic. . . . [E]xceptions are limited to: traffic management to comply with a legal order, to ensure network integrity and security, and to manage exceptional or temporary network congestion, provided that equivalent categories of traffic are treated equally").

<sup>174</sup> *Id.*

<sup>175</sup> This includes requirements that they do not already have access, or that the access is priced at too high of a rate (and the resident or business is not a part of a public rollout of broadband internet access in the next twelve months). See GEORGINA HUTTON, *THE UNIVERSAL SERVICE OBLIGATION (USO) FOR BROADBAND* 4-7 (2022), <https://researchbriefings.files.parliament.uk/documents/CBP-8146/CBP-8146.pdf>.

<sup>176</sup> *Id.* at 4 ("The USO opened for requests on 20 March 2020.").

<sup>177</sup> *Id.* at 21-25 (detailing "[c]omment and criticism on the USO," including discussions about connection speeds and data caps).

<sup>178</sup> FCC, Notice of Proposed Rulemaking In the Matter of Universal Service Contribution Methodology (May 15, 2019), <https://docs.fcc.gov/public/attachments/FCC-19-46A1.pdf> [<https://perma.cc/C2XD-F3XP>] (describing a proposed cap to the Lifeline program, which was never implemented).

<sup>179</sup> Vinton G. Cerf, *Internet Access Is Not a Human Right*, N.Y. TIMES (Jan. 4, 2012), <https://www.nytimes.com/2012/01/05/opinion/internet-access-is-not-a-human-right.html> [<https://perma.cc/6MBR-2VEA>] ("Improving the Internet is just one means, albeit an important

However, on balance, the introduction of a universal service obligation is a feasible legislative priority for a future administration. The FCC does not appear to be primed to make any drastic shifts under the Biden administration, but there is promise for such a proposal to take root amongst the more progressive wings of the Democratic Party.<sup>180</sup> Senator Bernie Sanders has discussed at length the need for such a program,<sup>181</sup> and younger members of the party like Alexandria Ocasio Cortez have made overtures towards expanding internet access.<sup>182</sup> Compared to other aspects of the United States' budget, directing funding towards a universal service obligation would serve as a relatively small portion of potential budget of a future administration.<sup>183</sup>

### C. ESTABLISHMENT OF LIFELINE AS AN ENTITLEMENT VOUCHER

Another possible way to ensure that procedural protections cover a low-income citizen's broadband connection would be to reframe the Lifeline benefit as a voucher paid directly to individuals, as opposed to a subsidy paid to the service providers. Due to Lifeline's partnership between the FCC, USAC, and private industry,<sup>184</sup> the program exists in a

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one, by which to improve the human condition. It must be done with an appreciation for the civil and human rights that deserve protection—without pretending that access itself is such a right.”).

<sup>180</sup> See Victoria Song, *Bernie Sanders Has a \$150 Billion 'Internet for All' Plan*, GIZMODO (Dec. 6, 2019, 12:15 PM), <https://gizmodo.com/bernie-sanders-has-a-150-billion-internet-for-all-plan-1840262776> [<https://perma.cc/H9AX-2A6T>].

<sup>181</sup> *Id.*

<sup>182</sup> Patrick Sisson, *Alexandria Ocasio-Cortez's Latest Legislation? Housing Justice for All*, CURBED (Sept. 25, 2019, 6:30 AM), <https://archive.curbed.com/2019/9/25/20882120/aoc-alexandria-ocasio-cortez-just-society-legislation-housing> (describing Ocasio-Cortez's poverty guideline, the “Recognizing Poverty Act[.]... [which proposes] a new official poverty guideline that factors in geographic variation, health insurance, child care, and ‘new necessities’ such as internet access”).

<sup>183</sup> *Compare Federal Spending: Where Does the Money Go*, NAT'L PRIORITIES PROJECT, <https://www.nationalpriorities.org/budget-basics/federal-budget-101/spending/> [<https://perma.cc/QW6F-C3QG>] (outlining the total budget of the U.S. Federal government, which includes \$7 trillion in total spending and \$1.6 trillion in discretionary spending), with Daniel A. Hanley, *Universal Broadband, Now More Than Ever*, AM. PROSPECT (Oct. 2, 2020), <https://prospect.org/economy/universal-broadband-now-more-than-ever/> (“According to FCC data, the cost for universal broadband would be \$80 billion, or about 2 percent of the federal budget.”).

<sup>184</sup> See *Lifeline Program for Low-Income Consumers*, *supra* note 58.

liminal space for due process requirements, and the boundary of that limit has yet to be firmly established.<sup>185</sup>

The FCC has considered the idea of a voucher in the past, though the idea failed to gain momentum when it was first considered for comment in 2012.<sup>186</sup> The benefit could be distributed directly to consumers in a method similar to other programs.<sup>187</sup> In some states, multiple benefits are distributed on the same prepaid debit card; this approach would streamline the process for low-income citizens if the Lifeline Program were to include it as well.<sup>188</sup> Bundling program benefits onto a single card can ease the burden of accessing social programs for many low-income citizens.<sup>189</sup>

However, this plan would not be without its drawbacks. Putting the power to choose service plans in the end users' hands can create other problems for low-income citizens.<sup>190</sup> While they may have increased

<sup>185</sup> See generally *Daugherty v. SafeLink Wireless*, No. 18-cv-3078-MDH, 2018 WL 3626194 (W.D. Mo. July 30, 2018) (detailing a case in which a pro se litigant was able to survive a motion to dismiss because the court believed that due process could potentially have been required in the termination of the litigant's benefits).

<sup>186</sup> *Lifeline and Link Up Reform and Modernization*, 27 F.C.C. Rcd. 6656, 6857 (2012) (seeking comment on changing Lifeline to a voucher program).

<sup>187</sup> See Daniel A. Lyons, *Narrowing the Digital Divide: A Better Broadband Universal Service Program*, 52 U.C. DAVIS L. REV. 803, 846 (2018) (discussing one potential implementation of a voucher program); see also INTERNET INNOVATION ALLIANCE, *BRINGING THE FCC'S LIFELINE PROGRAM INTO THE 21ST CENTURY 4* (2014) (arguing to "[m]ake the Lifeline Program more consumer-focused by providing eligible consumers with a 'Lifeline Benefit Card' that can be used as a voucher to buy a range of communications services, including broadband, wireline, or voice service"); Lynne Holt & Mark Jamison, *Re-Evaluating FCC Policies Concerning the Lifeline & Link-Up Programs*, 5 J. TELECOMM. & HIGH TECH. L. 393, 409 (2007) (describing another proposal for a voucher program).

<sup>188</sup> See *Lifeline & Link Up Reform & Modernization*, 30 F.C.C. Rcd. 7818, 7858–59, 7858 n.223 (2015) (citing *Restrictions on Use of Public Assistance Electronic Benefit (EBT) Cards*, NAT'L CONF. STATE LEGIS., <https://www.ncsl.org/research/human-services/eft-electronic-benefit-transfer-card-restrictions-for-public-assistance.aspx> (last updated Dec. 12, 2019) ("At least 37 states issue Temporary Assistance to Needy Families (TANF) cash benefits through electronic benefit transfer (EBT) cards.")).

<sup>189</sup> JB Donaldson, *Simplifying Payments: Multiple Benefits on One Card*, CONDUENT (Jan. 28, 2015), <https://insights.conduent.com/insights-for-government-agencies/simplifying-payments-multiple-benefits-on-one-card> [<https://perma.cc/CT99-E6RE>] ("Recurring payments—like child support, unemployment insurance, TANF, adoption subsidies and many others—can all be placed on *one* card, so deposits are routed to *one* central account—making the process faster, safer and more convenient not only for the agency but the cardholder as well.").

<sup>190</sup> Greenlining Inst. et al., *Opening Comments of the Greenlining Institute et al. In the Matter of Lifeline and Link Up Reform and Modernization* 32 (Aug. 31, 2015), <http://civilrightsdocs.info/pdf/telecom/Greenlining-Lifeline-Comments.pdf> [<https://perma.cc/HQH9-D28A>] ("Joint Commenters urge the Commission to monitor providers



options in how they want to use their benefit, some may value the convenience of having the funding directly sent to the service provider. Most citizens (of any income bracket) do not regularly search for new plans or enjoy contacting their cable provider.

Furthermore, such a change could potentially increase the avenues for fraud and abuse on behalf of the providers.<sup>191</sup> With the current Lifeline system, some users have been disconnected from their Lifeline wireline service after being convinced to sign up for a new wireless Lifeline plan.<sup>192</sup> In another instance, AT&T was redirecting consumers seeking traditional, Lifeline-eligible phone services to websites where the only option was to purchase a more expensive phone service.<sup>193</sup> Ensuring fair competition and fair business practices will be central to ensuring that a shift to a voucher-based Lifeline program would be successful.

Finally, the increased bargaining power that a collective program can bring to low-income citizens is a benefit of the current system. By having Lifeline providers receive disbursements directly from the FCC, and requiring them to qualify for the program, the FCC creates a market that is arguably more favorable to the citizen. Freeing up consumers to take the Lifeline benefit and shop individually for a plan atomizes and reduces their bargaining power as a consumer. There may be benefits to the freedom and protection from termination that such a change would offer, but the reduction in bargaining power is a factor that simply cannot be ignored.

Overall, these concerns would likely not outweigh the benefits that such a change in Lifeline would bring, due to the increased protection from termination of service that Lifeline recipients would receive. However, the funding structure of the USAC may pose a challenge when arguing that termination of the Lifeline benefit would require procedural due process considerations. On the one hand, the benefit is being regulated by a federal agency, the FCC, which is ultimately responsible for the regulation and approval of the administration of the benefit, as well as justifying its budget.<sup>194</sup> They have an annual responsibility to assess the provider of the USF,<sup>195</sup> but have selected the same provider since the

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to detect and prevent any use of a ‘Lifeline-only’ brand that may result in a substandard, ‘poor person’s service.’”).

<sup>191</sup> *Id.* at 33.

<sup>192</sup> *See id.*

<sup>193</sup> *See id.*

<sup>194</sup> 47 C.F.R. § 54.701(a).

<sup>195</sup> *Id.*

program's inception.<sup>196</sup> This level of interconnectedness could be the kind of relationship that would satisfy the state action requirements of *Brentwood* and *Jackson*; if compelling evidence could be shown that the two were sufficiently intertwined, then the actions of the USAC in denying a benefit would be considered a state action.

On the other hand, the structure of the USAC and the method with which it gains funds for the USF could cut against the argument that a termination of the benefit, even if structured as a voucher, would constitute an act under the color of state law, that would require procedural due process protection. The USF is funded directly from the bills of existing telephone subscribers, as opposed to tax revenues from the government itself. Therefore, it could be argued that the USAC is sufficiently distanced from the government (like the private electric utility in *Jackson*) and its actions would not require procedural due process protections. This is a hurdle that, while not insurmountable, poses a great challenge for proponents of expanded access to the Internet.

In a similar fashion to how the nursing homes in *Blum*, predominantly subsidized by Medicaid, were found to be sufficiently distanced from the federal government and were not considered a governmental actor when changing nursing home care levels, so too could the USAC terminating a benefit be considered sufficiently distanced from the FCC, thus making this termination the action of a private entity.<sup>197</sup>

However, the direct provision of the funds to low-income citizens—as opposed to the administration of a service involving the use of medical judgment, as was the case in *Blum*—would likely be enough of a differentiating factor to indicate that the FCC's involvement with the USAC would be distinguishable from Medicaid and the provider who was delivering the actual service. Furthermore, *Brentwood* stands for the proposition that a fact-specific inquiry would be required rather than merely deferring to any statutory or agency definition.<sup>198</sup>

Overall, the Lifeline benefit would be one in which a low-income citizen has a recognizable property interest if the program was structured as a voucher distributed directly to the citizen. It may increase complexity in some areas of administration but would increase the protections against termination of Lifeline, an increasingly vital service.

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<sup>196</sup> *FAQs*, UNIVERSAL SERV. ADMIN. CO., <https://www.usac.org/about/universal-service/faqs/general/> (“Under the authority of the 1996 Telecom Act, the FCC put USAC in charge of administering the collection and disbursement of universal service funds. In 2020, universal service disbursements totaled over \$8.3 billion.”).

<sup>197</sup> *Blum v. Yaretsky*, 457 U.S. 991, 1011–12 (1982).

<sup>198</sup> *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 288–90 (2001).

## VI. CONCLUSION

The COVID-19 pandemic has shown that what was once a hypothetical digital divide<sup>199</sup> is very real and cannot be ignored. This divide impacts low-income citizens in all aspects of their lives, from schooling to searching for jobs. Now, more than ever, attention must be paid to the systemic barriers that prevent the most marginalized members of our community from engaging with society.

Ensuring that, at the very least, a low-income citizen can meaningfully appeal a decision to terminate their broadband Internet service or a decision to terminate their benefits, will be the first step in helping bridge that divide. Title II reclassification of broadband Internet and the transition of the Lifeline program to a direct payment model would be two ways to take the first steps towards ensuring that citizens have procedural due process protections. Furthermore, creating a universal service obligation for future administrations is essential in order to combat the digital divide. No matter what course of action is pursued, there is simply no reason that the status quo should be maintained.

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<sup>199</sup> Doppelt, *supra* note 7, at 602 (defining digital divide).