

WHAT'S NEXT FOR BROADBAND AFFORDABILITY AFTER FCC V. CONSUMERS' RESEARCH?

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INTRODUCTION

Broadband is integral for accessing a multitude of aspects of modern life: education, healthcare, public information, economic growth, and participation in society. And yet, reliable, affordable access to broadband remains out of reach for many Americans. While we have long discussed the digital divide, people still face barriers to meaningful access. One of the areas where we have both made substantial progress and still have substantial work to do is in the realm of broadband affordability. In recent years, we have seen landmark new programs aimed at making broadband affordable, however the sunset of the Affordable Connectivity Program in 2024 highlights the need to establish a durable, reliable, and accessible modern broadband affordability program. The Supreme Court's recent decision in *FCC v. Consumers' Research* affirming the constitutionality of the Universal Service Fund is an opportunity for digital divide advocates to consider our next steps in advocating for affordable broadband.

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This paper will proceed in four parts. Part I lays out a brief overview of the digital divide, from the first use of the terminology to our current understanding of policy advocacy approaches to closing it. Part II discusses how the policy approach to ameliorating this issue shifted during the pandemic and describes where we are now that the Affordability Connectivity Program has wrapped. Part III will walk through the recent Supreme Court decision, *FCC v. Consumers' Research Ass'n*. Finally, Part IV will discuss what is next for broadband affordability after the Supreme Court has reaffirmed the constitutionality of the Universal Service Program.

I. THE DIGITAL DIVIDE

Part I lays out a brief overview of the digital divide. Tracing early uses of the terminology to our current understanding of the digital divide demonstrates that this is a multi-faceted problem requiring thoughtful and lasting policy interventions to closing it. Approaches to closing the digital divide have shifted from early Universal Service programs to challenges under Chairman Pai's leadership of the Federal Communications Commission ("FCC") in 2017–2021.¹ This foundation will set us up to discuss new approaches to broadband access precipitated by the COVID-19 pandemic in Part II, below.

A. Defining the Digital Divide

The exact origin of the term digital divide remains unclear,² with some crediting Los Angeles Times journalist Amy Harmon's 1996 article, *Daily Life's Digital Divide* as the first known usage.³ In this article, Harmon uses the term to describe a "widening rift" in attitudes towards the Internet as it was becoming more entwined in everyday life.⁴ Foreshadowing the modern meaning of the term, Harmon described how "uneven access to technology is deepening the divide between rich and poor."⁵ A 2003 effort to trace the origins of the term both notes Harmon's article and other usages in the

1. FCC, Biography of Former Chairman Ajit Pai, <https://www.fcc.gov/biography-former-chairman-ajit-pai> [https://perma.cc/8VCW-U6XE] (last updated Jan. 20, 2021).

2. David J. Gunkel, *Second Thoughts: Toward a Critique of the Digital Divide*, 5 NEW MEDIA & SOC. 499, 501 (2003).

3. Amy Harmon, *Daily Life's Digital Divide*, L.A. TIMES (July 3, 1996, 12:00 AM PT), <https://www.latimes.com/archives/la-xpm-1996-07-03-mn-20785-story.html> [https://perma.cc/Q7E9-RNUR].

4. *Id.*; see also Kevin Bulger, *A Brief History of the Digital Divide*, DIGIT. ARTS SERV. CORPS (Apr. 12, 2007, 12:57 MDT), <https://digitalartscorps.org/node/717> [https://perma.cc/FWM6-259A] (references Harmon's article but describes the subject of the article as a divorce precipitated by a disagreement over internet usage).

5. See Harmon, *supra* note 3.

period 1995-1998 to describe division in contexts from education to interoperability.⁶

While it may be impossible to track down the exact first instance when the words digital divide were committed to paper,⁷ the term entered public discussion in its modern sense in a 1998 National Telecommunications and Information Administration (“NTIA”) report.⁸ The report, *Falling Through the Net II: New Data on the Digital Divide*, discusses the differences between the experiences of people who have access to Internet infrastructure versus those who do not.⁹ The report notes the growing divide between people who own personal computers and have online access, and people who do not, noting factors such as geographic area, income, race, age, education, and household type.¹⁰ Finally, the report concludes with the implications of this divide and urges policymakers to continue focusing on the digital “have-nots”, noting the relevance of “electronic services to help people find jobs, housing, or other services.”¹¹ From here, the term digital divide caught on as advocates took on the project of connecting those without ready access to the Internet.¹²

During the following decade, in many ways the discourse about the digital divide took a back seat to questions about Net Neutrality and what rules were necessary for getting and keeping people connected. However, a survey of the 2015 Protecting and Promoting the Open Internet proceeding at the FCC reveals that some filers argued that these concepts were connected, and explained why the rules were necessary for combatting the digital divide.¹³ The FCC’s Order adopting the 2015 Open Internet rules acknowledges these comments: “The record before us also overwhelmingly supports the proposition that the Internet’s openness is critical to its ability to serve as a platform for speech and civic engagement, and that it can help close the digital divide by facilitating the development of diverse content, applications, and services.”¹⁴

6. See Gunkel, *supra* note 2, at 502–04.

7. *Id.* at 501.

8. NTIA, *FALLING THROUGH THE NET II: NEW DATA ON THE DIGITAL DIVIDE* (1998) <https://www.ntia.gov/files/ntia/publications/falling-through-net-ii.pdf> [<https://perma.cc/6HKL-FBE8>].

9. *Id.*

10. *Id.* at 2–5.

11. *Id.* at 6.

12. See Gunkel, *supra* note 2, at 499–505.

13. See, e.g., Letter from Harold Feld, Public Knowledge, to Marlene H. Dortch, Secretary, FCC, *Protecting and Promoting the Open Internet, Framework for Broadband Internet Serv.*, GN Docket Nos. 14-28, 10-127, 6 n.26 (filed Dec. 19, 2014), <https://www.fcc.gov/ecfs/document/60001006068/1> [<https://perma.cc/3B47-J2W9>].

14. *Protecting and Promoting the Open Internet*, GN Dkt. No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601, 27 ¶ 77 (2015),

However, when the COVID-19 pandemic hit in 2020, a new emphasis on questions about the importance of online access thrust the digital divide into the spotlight.¹⁵ In the aftermath, new affordability programs were launched, new research conducted, and we gained a greater understanding of the scope of the problem.¹⁶

Our current understanding of the scope of the digital divide encompasses the vital role that access to the Internet plays in society. In 2021, the Journal of Human Rights and Social Work published an article by Cynthia K. Sanders and Edward Scanlon framing the digital divide as a human rights issue and calling for an interdisciplinary approach to closing the gap.¹⁷ Sanders and Scanlon define the digital divide as: “A high-speed Internet connection, also known as broadband, is an essential infrastructure for functioning in today’s society. Those without access or adoption are in the digital divide.”¹⁸

The access and adoption framework is a common taxonomy of the digital divide. Access refers to whether the necessary infrastructure exists for potential subscribers, that is, whether broadband service is available.¹⁹ While broadband deployment has increased since the publication of *Falling Through the Net II*, there remain many areas, rural, urban, and suburban where reliable service is not readily available.²⁰ While the Broadband Equity Access and Deployment (“BEAD”) program, discussed in Part II below, aims to close the digital divide by ensuring infrastructure is deployed to all Americans, there remains significant work to be done to fulfill this promise.²¹

https://transition.fcc.gov/Daily_Releases/Daily_Business/2015/db0312/FCC-15-24A1.pdf
[<https://perma.cc/E4V8-8SGQ>].

15. Alec Tyson et al., *5 Years Later: America Looks Back at the Impact of COVID-19, Ch. 4. How COVID-19 impacted Americans’ relationship with technology*, PEW RSCH. CTR. (Feb. 12, 2025) <https://www.pewresearch.org/politics/2025/02/12/how-covid-19-impacted-americans-relationship-with-technology/-the-homework-gap> [<https://perma.cc/KX4E-2JUB>].

16. *Id.* This shift will be discussed in more detail in Part II.

17. Cynthia K. Sanders & Edward Scanlon, *The Digital Divide Is a Human Rights Issue: Advancing Social Inclusion Through Social Work Advocacy*, 6 J. HUM. RTS. & SOC. WORK 130–143 (2021), <https://pmc.ncbi.nlm.nih.gov/articles/PMC7973804/> [<https://perma.cc/F3MR-M7UN>].

18. *Id.* at 130.

19. See, e.g., COLBY LEIGH RACHFAL, CONG. RSCH. SERV., R47506, THE PERSISTENT DIGITAL DIVIDE: SELECTED BROADBAND DEPLOYMENT ISSUES AND POLICY CONSIDERATIONS (2023).

20. *Id.* at 1 (“The continuing lack of broadband access in some areas can be attributed to several factors, including terrain, population density, demography, and market characteristics. Rural and tribal areas are most affected, but urban areas can also be.”).

21. *Id.* at summary page (“The digital divide puzzle is complex and has many pieces. Additional funding for broadband deployment may not alone be enough to close it.”); See also SILICON FLATIRONS, ROUNDTABLE OUTCOMES REPORT: A LOOK AHEAD TO ACCESS

Adoption refers to whether, once the infrastructure is available, people subscribe to broadband services. A cluster of factors inform adoption. Can people afford the service, or is it priced out of reach?²² Can people afford the devices needed to get online?²³ And once subscribers afford the service and have a device that can connect, the digital skills or digital literacy to make effective use of these services remain critical.²⁴

These sub-issues of affordability, device access, and digital skills have gained increased visibility since the policy interventions during the COVID-19 pandemic. While photos of students sitting in fast food parking lots to complete homework assignments were widely circulated in the discussions of broadband access during the pandemic,²⁵ other impacts like lack of access to telemedicine, lack of civic engagement, barriers to accessing social services, and even social exclusion are also important facets of this issue.²⁶

Sanders and Scanlon also identify factors that predict that someone will be adversely affected by the digital divide both on access and adoption.²⁷ Echoing the findings of Falling through the Net II two decades earlier, geographic location, income, ethnicity/race, age, education level, are all mentioned again.²⁸ In addition however, Sanders and Scanlon also identify language and disability, and point out the particular barriers that Tribal

AND REGULATION IN THE NOT-TOO-DISTANT BROADBAND FUTURE (2023), at 2, https://siliconflatirons.org/wp-content/uploads/2024/05/Outcomes-Report_Broadband-Roundtable_2023-12-01.pdf [https://perma.cc/TBV2-4N23] (“In short: infrastructure investment alone is insufficient. Necessary programs to accompany BEAD should promote digital equity and inclusion, promote network maintenance and cybersecurity, and provide access to the devices necessary to use broadband networks.”).

22. Infographic, *Cost and smartphone capabilities remain the most important reasons non-broadband users do not subscribe*, PEW RSCH. CTR. (June 2, 2021), https://www.pewresearch.org/internet/2021/06/03/mobile-technology-and-home-broadband-2021/pi_2021-06-03_mobile-broadband_0-06-png/ [https://perma.cc/WCX8-C358].

23. *Id.*

24. See Tyson et al., *supra* note 15.

25. See, e.g., Josh Copitch, *Photo showing 2 Salinas girls doing homework outside Taco Bell goes viral*, KSBW, (Aug. 28, 2020, 12:11 PDT), <https://www.ksbw.com/article/photo-showing-2-salinas-girls-doing-homework-outside-taco-bell-goes-viral/33834659> [https://perma.cc/YSV3-8PMT].

26. Chukwuma N. Eruchalu et al., *The Expanding Digital Divide: Digital Health Access Inequities During the COVID-19 Pandemic in New York City*, 98 J. URB. HEALTH 183 (2021); NEXT CENTURY CITIES, CUT OFF FROM THE COURTHOUSE: HOW THE DIGITAL DIVIDE IMPACTS ACCESS TO JUSTICE AND CIVIC ENGAGEMENT (2022), at 4, <https://nextcenturycities.org/wp-content/uploads/2021/05/cut-off-from-the-courthouse.pdf> [https://perma.cc/YA2L-FVJS]; see also Sanders & Scanlon, *supra* note 17.

27. See Sanders & Scanlon, *supra* note 17.

28. *Id.*; see also NTIA, *supra* note 8.

communities face to access.²⁹ In summation, the confluence of these factors creates the scope of the problem that is the digital divide.

B. Approaches to Closing the Digital Divide

One of the fundamental principles undergirding American communications policy is Universal Service.³⁰ Universal Service is the idea that everyone should have access to communications services.³¹ The Communications Act of 1934 established the FCC and modern communications regulation.³² The preamble to the Act described its purpose as “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 a rapid, efficient, Nation-wide, and world-wide wire and radio communications service with adequate facilities at reasonable charges.”³³ Communications services benefit by having more people on them and the fabric of society itself is improved by having a widely connected populace.

Universal Service is also the name of a category of FCC programs and policies designed to implement this principle: (1) Connect America Fund (formally known as High-Cost Support) supports services for rural areas; (2) E-rate, provides programs for connecting schools and libraries; (3) Rural Health Care, which funds telemedicine; and (4) Lifeline which is an affordability program for low-income consumers.³⁴ The funding for these programs is based on mandatory contributions from communications providers.³⁵

As the Internet became part of the communications system, questions arose about how to integrate broadband into these programs.³⁶ For example, the Lifeline program started as a

29. See Sanders & Scanlon, *supra* note 17, at 130–143 (“Nowhere is digital divide more extreme than on tribal lands.”).

30. 47 U.S.C. § 151.

31. FCC, *Universal Service*, <https://www.fcc.gov/general/universal-service> [<https://perma.cc/TM2J-DXMA>] (last updated Dec. 2, 2025) [hereinafter *FCC Universal Service*].

32. 47 U.S.C. § 151.

33. 47 U.S.C. § 151.

34. 47 U.S.C. § 254; see also *FCC Universal Service*, *supra* note 31.

35. 47 U.S.C. § 254 (b)(4).

36. *Federal-State Joint Board on Universal Service*, CC Dkt. No. 96-45, Report and Order, 12 FCC Rcd. 8776, ¶83 (May 8, 1997), <https://docs.fcc.gov/public/attachments/FCC-97-157A1.pdf> [<https://perma.cc/6HM3-CW2P>] [hereinafter *Joint Board Universal Service Order*] (declining to extend USF programs to broadband internet services); *Lifeline and Link Up Reform and Modernization*, WC Dkt. Nos. 11-42, 09-197, 10-90, Third Report and Order, Further Report and Order, and Order on Reconsideration, FCC 16-38, ¶5 (released Apr. 27, 2016),

telephony subsidy program.³⁷ In 2016, the FCC adopted the Lifeline Modernization order, expanding the Lifeline program to broadband.³⁸ Then under Chairman Pai's deregulatory agenda, the FCC undertook several proceedings to limit the scope of Lifeline, which effectively limited the availability of broadband service under the program.³⁹ This is the state of digital divide policy when the COVID-19 pandemic started, which significantly shifted our understanding of this issue and the approaches to closing it.

II. THE SHIFT—THE DIGITAL DIVIDE DURING THE PANDEMIC

The pandemic changed discourse about the digital divide in a very real and substantial way. While access to a wide range of opportunities and services had increasingly been moving online before the pandemic, many more essential parts of daily life moved online, and concurrently, in-person alternatives were eliminated, drawing attention to the problems lack of connectivity caused for many people. These changed circumstances created political pressure for addressing the digital divide.

On December 27, 2020, Congress passed the Consolidated Appropriations Act, an omnibus funding bill, which directed the

https://docs.fcc.gov/public/attachments/FCC-16-38A1_Rcd.pdf [<https://perma.cc/2QAF-QP6N>] [hereinafter *Lifeline Modernization Order*].

37. See *Joint Board Universal Service Order*, *supra* note 36.

38. See *Lifeline Modernization Order*, *supra* note 36.

39. *Telecomm. Carriers Eligible for Universal Serv. Support*, WC Dkt. Nos. 09-197, 11-42, Order on Reconsideration, DA 17-128 (released Feb. 3, 2017), https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0203/DA-17-128A1.pdf [<https://perma.cc/R7WN-WGEN>]; see Ajit Pai, *Setting the Record Straight on the Digital Divide*, MEDIUM (Feb. 7, 2017), <https://ajitpai.medium.com/setting-the-record-straight-on-the-digital-divide-615a9da1f2d1> [<https://perma.cc/JRW7-Q8CR>]; Jon Brodkin, *Ajit Pai defends decision to revoke low-cost broadband designations*, ARS TECHNICA (Feb. 7, 2017), <https://arstechnica.com/tech-policy/2017/02/ajit-pai-defends-decision-to-revoke-low-cost-broadband-designations/> [<https://perma.cc/XYL6-JBTv>]. The FCC issued a notice of proposed rulemaking in December of 2017 considering further changes to the program which would have substantially limited its scope and availability. See *Bridging the Digit. Divide for Low-Income Consumers*, WC Dkt. Nos. 17-287, 11-42, 09-197, Fourth Report and Order, Order on Reconsideration, Memorandum Opinion and Order, Notice of Proposed Rulemaking, and Notice of Inquiry, 32 FCC Rcd. 10475 (2017). While many of these specific proposals were not ultimately adopted, questions about the eligibility of broadband under the program were raised as part of the repeal of the 2015 Open Internet Rules. A full discussion of net neutrality is beyond the scope of this piece, but relevant here, in the subsequent appeal of the Restoring Internet Freedom Proceeding (“RIF”), which repealed the 2015 Open Internet rules, the D.C. Circuit remanded the issue of how to treat the Lifeline program under the rules to the FCC on the basis that the agency's decision in the RIF order as to Lifeline was inadequately supported. Mozilla Corp. v. FCC, 940 F.3d 1, 109 (D.C. Cir. 2019) (per curiam) (“The Governmental Petitioners challenged the 2018 Order on the ground that reclassification would eliminate the statutory basis for broadband's inclusion in the Program...The Commission brushed off their concern. That was straightforward legal error which requires remand.”).

FCC to set-up an emergency program to subsidize broadband to help people stay connected during the pandemic.⁴⁰ With the emergency nature of the program, the FCC was given a statutory deadline of 60 days after the enactment of the statute to establish the program.⁴¹ Despite the relatively short timeline, broadband providers, Tribal, state and local government entities, public interest organizations, and members of the general public participated in the docket.⁴² Many of the filings in this docket focused on the importance of affordable access to reliable broadband service and the devices necessary to make effective use of these services.⁴³

On Feb. 26, 2021, the FCC released an order adopting final rules for the Emergency Broadband Benefit Program (“EBBP”).⁴⁴ “In this Order, we establish the Emergency Broadband Benefit Program to support broadband services and devices to help low-income households stay connected during the COVID-19 pandemic.”⁴⁵ The EBBP was structured to provide subsidies to Internet Service Providers (“ISPs”) on behalf of low-income customers for broadband service and a one-time device subsidy.⁴⁶ Given the emergency nature of the EBBP, it relied on some of the structure of the Lifeline program to get up and running quickly, such as the National Verifier Database.⁴⁷

The EBBP was designed as an emergency measure, not a permanent program.⁴⁸ Congress appropriated 3.2 billion dollars to fund the program, which would sunset once the money was

40. *Emergency Broadband Benefit Program*, WC Dkt. No. 20-445, Report and Order, 36 FCC Rcd. 4612, ¶2 (2021), <https://docs.fcc.gov/public/attachments/FCC-21-29A1.pdf> [<https://perma.cc/64LM-TLEJ>] [hereinafter *Emergency Broadband Benefit Order*]; see also Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, 134 Stat. 1182 (2020) [hereinafter Consolidated Appropriations Act 2021].

41. See *Emergency Broadband Benefit Order*, *supra* note 40; see also Consolidated Appropriations Act 2021, *supra* note 40.

42. See *Emergency Broadband Benefit Order*, *supra* note 40.

43. See, e.g., Comments of AT&T Serv. Inc., *Emergency Broadband Benefit*, WC Dkt. No. 20-445 (Jan. 25, 2021), <https://www.fcc.gov/ecfs/document/1012567002301/1> [<https://perma.cc/A974-3HJ7>]; Comments of the Navajo Nation Telecomm. Regul. Comm'n, *Emergency Broadband Benefit Program*, WC Dkt. No. 20-445 (Jan. 25, 2021), <https://www.fcc.gov/ecfs/document/1012587054557/1> [<https://perma.cc/V73V-TCCS>]; Comments of Telecomm. for the Deaf and Hard of Hearing, Inc. et al., *Emergency Broadband Connectivity Fund*, WC Dkt. No. 20-445 (Jan. 25, 2021) <https://www.fcc.gov/ecfs/document/1012653462036/1> [<https://perma.cc/NBG8-LH2C>]; Comments of Gail Magenau Hire, *Emergency Broadband Benefit Program*, WC Dkt. No. 20-445 (received Jan. 25, 2021), <https://www.fcc.gov/ecfs/search/search-filings/filing/101252535728533> [<https://perma.cc/DF65-VCZ9>].

44. See *Emergency Broadband Benefit Order*, *supra* note 40.

45. *Id.* ¶ 1.

46. *Id.* ¶¶ 4–5.

47. *Id.* ¶ 3.

48. *Id.* ¶¶ 86, 114–133.

expended.⁴⁹ However, as funding for the EBBP was expended, the pandemic continued, and broadband continued to have a vital role in keeping people connected. On November 15, 2021, the Infrastructure Investment and Jobs Act (“Infrastructure Act”) became law.⁵⁰ Another omnibus bill, the Infrastructure Act contained provisions for several new broadband programs.⁵¹ These include the Broadband Equity, Access, and Deployment Act, a \$42.45 billion federal grant program aimed at building out comprehensive broadband infrastructure, new programs aimed at digital skills training and access to devices, and established a successor program to the EBBP, the Affordable Connectivity Program (“ACP”).⁵²

In November, the FCC started the process of transitioning the EBBP into the new ACP program.⁵³ In January of 2022, the FCC officially adopted rules for the new ACP program.⁵⁴ The program built on the foundation of the EBBP, including funding based on congressional appropriations. There were some changes, for example, the benefit amount of the monthly subsidy was slightly lower under the ACP, but overall, the program remained focused on helping people afford their monthly broadband bills and a one-time device subsidy.⁵⁵

In June of 2024, the final funding for ACP was expended and Congress did not act to renew the program or create a successor program.⁵⁶ Instead, the FCC directed former ACP recipients to ask if their ISP has a low-income plan, or transition to the Lifeline program.⁵⁷ However, households transitioning from ACP to Lifeline ran into the stark differences in the subsidy between these two programs.⁵⁸ While the ACP provided \$30 dollars a month towards

49. *Id.*

50. Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, §§ 60101–60506 (2021) [hereinafter Infrastructure Act].

51. *Id.* §§ 60101–60506.

52. *Id.* § 60502.

53. *Emergency Broadband Benefit Program*, WC Dkt. Nos. 20-445, 21-450, Order, 36 FCC Rcd. 16484 (2021), https://docs.fcc.gov/public/attachments/DA-21-1477A1_Rcd.pdf [https://perma.cc/AH93-4CFJ].

54. *Affordable Connectivity Program Emergency Broadband Benefit Program*, WC Dkt. Nos. 21-450, 20-445, Report and Order and Further Notice of Proposed Rulemaking, 37 FCC Rcd. 484 (2022), <https://docs.fcc.gov/public/attachments/FCC-22-2A1.pdf> [https://perma.cc/SY9Q-PZ83].

55. *Id.* ¶¶ 3–4.

56. FCC Consumer Fact Sheet, Affordable Connectivity Program (ACP) Has Ended for Now, <https://www.fcc.gov/sites/default/files/ACP-Fact-Sheet-Post-ACP-Ending.pdf> [https://perma.cc/8MEF-G6EC] (last updated June 3, 2024).

57. *Id.*

58. Press Release, *NaLA Releases Findings from Annual Consumer Survey*, Nat'l Lifeline Ass'n (Jan. 22, 2025), <https://nalalifeline.org/blog/nala-releases-findings-from->

a monthly service bill, Lifeline provides \$9.25.⁵⁹ Notably, not all ISPs participate in Lifeline.⁶⁰ And while some companies provide private affordability programs, that is, programs not directly supported by a federal affordability program, availability and services offered vary widely.⁶¹

Given the lapse of ACP at the federal level, some states are considering stepping in to prioritize broadband affordability. For example, New York's Affordable Broadband Act requires ISPs in New York to offer low-cost plans for low-income households.⁶² Despite legal challenges from industry groups, the Second Circuit upheld New York's broadband affordability law, and in December of 2024, the Supreme Court declined to review the case, leaving New York free to start enforcing the program.⁶³ While reportedly, other states are considering state-level legislation,⁶⁴ the Trump administration has updated its guidance on the BEAD program to indicate that while states are required to offer at least one low-cost broadband service option, states may not set specific rates for the low-cost service option under state law.⁶⁵ For most low-income consumers then, Lifeline remains the next best alternative to the ACP.

However, one of the most notable issues with the end of the ACP is not about the loss of funding, but the loss of trust and potential damage to the goodwill of any subsequent programs. Lifeline has long suffered from the trust gap, that is the difference between the number of eligible people and people ultimately subscribed, due to lack of trust in the program.⁶⁶ Advocates are

annual-consumer-survey/?ref=broadbandbreakfast.com [https://perma.cc/C2WU-DSEE] [hereinafter NaLA Press Release].

59. See FCC Consumer Fact Sheet, *supra* note 56.

60. *Id.*

61. *Id.*

62. A..6259, 2021-2022 Gen. Assemb., Reg. Sess. (N.Y. 2021).

63. N.Y. State Telecomm. Ass'n, Inc. v. James, 101 F.4th 135, 136 (2nd Cir. 2024), *cert. denied*, 145 S. Ct. 984 (2024); *see also* Jon Brodkin, *Big loss for ISPs as Supreme Court won't hear challenge to \$15 broadband law*, ARS TECHNICA (Dec. 17, 2024, 11:07 AM) https://arstechnica.com/tech-policy/2024/12/big-loss-for-isps-as-supreme-court-wont-hear-challenge-to-15-broadband-law/ [https://perma.cc/9BUB-JLF4].

64. Jon Brodkin, *ISPs fear wave of state laws after New York's \$15 broadband mandate*, ARS TECHNICA (Feb. 24, 2025, 05:00 AM), https://arstechnica.com/tech-policy/2025/02/isps-fear-wave-of-state-laws-after-new-yorks-15-broadband-mandate/ [https://perma.cc/22LY-Q6JT].

65. NTIA, Broadband, Equity, Access and Deployment (BEAD) FAQs Version 13, 3.29, https://broadbandusa.ntia.gov/sites/default/files/2025-08/BEAD_FAQs_v13.pdf [https://perma.cc/8WLW-6FR2]; Jon Brodkin, *Trump admin warns states: Don't try to lower broadband prices*, ARS TECHNICA (Aug. 5, 2025, 15:43), https://arstechnica.com/tech-policy/2025/08/trump-admin-warns-states-dont-try-to-lower-broadband-prices/ [https://perma.cc/47RJ-3AH2].

66. Vincent Le and Gissela Moya, *On the Wrong Side of the Digital Divide*, GREENLINING INST. (June 2, 2020), https://greenlining.org/publications/on-the-wrong-

reasonably worried that the end of ACP is going to damage trust in any communications affordability programs because they seem less reliable.⁶⁷

III. FCC v. CONSUMERS' RESEARCH

In June of 2025, the United States Supreme Court released its opinion in *FCC v. Consumers' Research*, a key decision ruling on the constitutionality of the Universal Service Fund ("USF") program.⁶⁸ Consumers' Research argued that the structure of the USF program and its funding model presented an unconstitutional delegation of legislative authority.⁶⁹ The Court, in a 6-3 decision, affirmed the constitutionality of the USF program.⁷⁰

Justice Kagan, writing for the majority and joined by Justices Roberts, Sotomayor, Kavanaugh, Barrett, and Jackson, found that no impermissible delegation of authority occurred.⁷¹ Justice Kavanaugh filed a concurrence which focuses on the application of the intelligible principle test to congressional agencies vs. independent agencies.⁷² Justice Jackson also filed a brief concurrence to express skepticism of the viability of the private delegation doctrine.⁷³ Finally, Justice Gorsuch dissented, joined by Justices Thomas and Alito, on the basis that the USF should be considered a tax and an unconstitutional delegation of legislative authority.⁷⁴

As outlined above, the USF is the underlying funding mechanism for the four Universal Service programs: (1) Connect America Fund; (2) E-rate; (3) Rural Health Care; and (4) Lifeline.⁷⁵

side-of-the-digital-divide/ [https://perma.cc/3KHK-MNC5]; *see also* NEXT CENTURY CITIES, CUT OFF FROM THE COURTHOUSE: HOW THE DIGITAL DIVIDE IMPACTS ACCESS TO JUSTICE AND CIVIC ENGAGEMENT (2022), <https://nextcenturycities.org/wp-content/uploads/2021/05/cut-off-from-the-courthouse.pdf> [https://perma.cc/32FQ-39PS].

67. Joe Supan, *The Harsh Reality for the 23 Million Americans Hit by the End of ACP Support*, CNET (Sept. 5, 2024, 09:00 AM PT), <https://www.cnet.com/home/internet/the-harsh-reality-for-the-23-million-americans-hit-by-the-end-of-acp-support/> [https://perma.cc/PS9F-C6EE].

68. FCC v. Consumers' Rsch., 145 S. Ct. 2482 (2025).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 2517 (Kavanaugh, J., concurring). Justice Kavanaugh notes that his analysis of the nondelegation question would differ were the FCC to be an independent agency. Whether the FCC is an independent or congressional agency is not entirely clear. The FCC has been generally viewed as an independent agency, but it appears to lack the statutory removal protections that define an independent agency. In this case, the FCC argued that it was not an independent agency.

73. *Id.* at 2518 (Jackson, J., concurring).

74. *Id.* at 2518.

75. *See* discussion *supra* Part II.

The appeal arises from an *en banc* opinion in the Fifth Circuit.⁷⁶ Under the *en banc* opinion, which did find an unconstitutional structure,⁷⁷ the USF program would have faced significant restructuring if not outright elimination.⁷⁸ The amicus brief filed by the State of Colorado and 21 other states noted the consequences of losing the USF: “Each of the programs and the benefits they provide rely on the framework Congress created in directing the FCC to establish universal service. Their loss would be nothing short of catastrophic.”⁷⁹

In affirming the constitutionality of the USF, Justice Kagan, writing for the majority, reaffirms the vital role of universal service programs: “For nearly three decades, the work of Congress and the Commission in establishing universal-service programs has led to a more fully connected country. And it has done so while leaving fully intact the separation of powers integral to our Constitution.”⁸⁰

The dissent, authored by Justice Gorsuch, and joined by Justices Thomas and Alito, attempts to rebut the majority’s conclusions on nondelegation.⁸¹ But further, seems opposed to some of the longstanding interventions to close the digital divide such as providing Wi-Fi hotspot programs at libraries and schools.⁸² In addition, the dissent tries to outline a path for future challenges to the USF under certain subsections of the establishing statute: “As a result, respondents remain free on remand, or in a future proceeding, to renew their attack on the constitutionality of whatever contributions the FCC demands for its subsection (c)(3) and (h)(2) programs.”⁸³ However, the majority notes in a footnote that the parties did not raise any arguments about delegation issues under these sections of the statute, and further that the Fifth

76. Consumers’ Research filed appeals in the Sixth, Eleventh, and D.C. Circuits, as well as the Fifth Circuit. The Sixth and Eleventh Circuit upheld the USF as constitutional, while the *en banc* opinion in the Fifth Circuit found a violation of the nondelegation doctrine. The Court granted review in the Fifth Circuit appeal, but not the appeals from the Sixth (No. 230456) or Eleventh (No 23-743) Circuits. While the petitions for review in dockets 23-456 (Sixth Cir.), 23-743 (Eleventh Cir.), and 24-422 (Fifth Cir.) made arguments that review was necessary because of the circuit split on these decisions, the Court’s opinion does not discuss the circuit split.

77. Consumers’ Rsch. v. FCC, 109 F.4th 743, 748 (5th Cir.), *cert. granted*, 145 S. Ct. 587 (2024), *cert. granted sub nom.* Schs., Health & Librs. Broadband Coal. v. Consumers’ Rsch., 145 S. Ct. 587 (2024), and *rev’d and remanded*, 145 S. Ct. 2482 (2025).

78. *Consumers’ Rsch.*, 109 F.4th at 748.

79. Brief of Colorado and 21 States and the Maine Office of the Public Advocate as Amici Curiae in Support of Petitioners at 23, *Consumers’ Rsch. v. FCC*, 145 S. Ct. 2482 (2025) (Nos. 24-354 and 24-422).

80. *FCC v. Consumers’ Rsch.*, 145 S. Ct. 2482, 2511 (2025).

81. *Id.* at 2518 (Gorsuch, J., dissenting).

82. *Id.* at 2531 (Gorsuch, J., dissenting).

83. *Id.*

Circuit did not address any such arguments.⁸⁴ While the dissent seems to take this as grounds for a future challenge,⁸⁵ a 6-3 decision affirming the constitutionality of the USF program as a whole seems to make future litigation on these two statutory subsections unlikely to succeed.

With this opinion, the Supreme Court has reaffirmed not only the constitutionality of USF, but the vital role that these programs play in connecting our country.

IV. NEXT STEPS FOR BROADBAND AFFORDABILITY

Many people experience the digital divide in some form or other, even if they don't always have the words to call it that at the time. Whether lack of home broadband access means going to the local library after school to access the Internet, or having to make hard choices about household budgets to afford a broadband connection, the digital divide remains a pressing issue for many Americans. In the wake of the end of the ACP, various groups have started collecting data on the aftermath.

In 2025, the AARP interviewed former ACP recipients in the 50 plus age bracket about their experiences.⁸⁶ In addition to noting the many positives that Internet access contributed to these individual's lives, interviewees described the increased monthly costs after the end of the program as a burden.⁸⁷ Two of those interviewed initially cancelled their service, but then reconnected, describing broadband Internet service as a necessity akin to running water or electricity.⁸⁸ And older Americans aren't the only ones impacted.

A broad survey identified several concerning trends. The National Lifeline Association ("NaLA") conducted a consumer survey of over 68,000 respondents and found that without the ACP, "40% reported cutting food spending to afford their monthly Internet bills, 36% indicated they discontinued telehealth without the ACP and 64% said they could not maintain regular contact with friends and family."⁸⁹ Key findings also include that adults were having trouble finding work, children struggled to complete homework, and a majority of respondents were using broadband subsidies for essential services like healthcare, education, and

84. *Id.* at 2505 n.9 (majority opinion).

85. *Id.* at 2531 (Gorsuch, J., dissenting).

86. Brittne Kakulla, *Life After ACP Means Tough Choices to Stay Online*, AARP RSCH. (Aug. 20, 2025) <https://doi.org/10.26419/res.00978.001> [<https://perma.cc/S2LQ-GVSH>].

87. *Id.*

88. *Id.*

89. NaLA Press Release, *supra* note 58.

access to government services.⁹⁰ David B. Dorwart, the Chairman of the NaLA Board, also described receiving “thousands of heartbreaking testimonies from consumers since ACP funding ran out.”⁹¹

Generally, the ACP is viewed as a successful program with bipartisan backing. By one estimate, “the ACP helped roughly one in every six U.S. households stay connected in the wake of the COVID-19 pandemic.”⁹² Calls for Congress to reinstate the ACP persist. A recent survey by *U.S. News & World Report* found that 87 percent of respondents supported reinstating the ACP.⁹³ However, policy advocates working in this space remain cautious about funding models for any future broadband affordability programs based on congressional appropriations, given the damage to public trust incurred when funding runs out and Congress declines to renew it.⁹⁴

With the constitutionality of the Lifeline program reaffirmed, we have an opportunity to build on it. To close the digital divide, we can learn from the successes of the Lifeline, EBBP, and the ACP, and from the harms people face now that the ACP has ended. We need a reliable, modernized broadband affordability program. It should be widely available and reflect the current costs of broadband service. And whatever funding mechanism it is based upon, we must ensure that the program will last year over year so as to avoid eroding public trust.

90. *Id.*

91. *Id.*

92. Jericho Casper, *One Year Without the Affordable Connectivity Program*, BROADBAND BREAKFAST (May 31, 2025), <https://broadbandbreakfast.com/one-year-without-the-affordable-connectivity-program/> [<https://perma.cc/4T5D-Z959>].

93. Jericho Casper, *EducationSuperHighway Unveils New ACP Approach*, BROADBAND BREAKFAST (Dec. 4, 2024), <https://broadbandbreakfast.com/educationsuperhighway-unveils-new-acp-approach/> [<https://perma.cc/PCE8-EPSF>].

94. See SILICON FLATIRONS, *supra* note 21, at 20–21 (“Feld argued, that it is ‘very perilous to rely on appropriations.’ He added that despite the ‘enormous success’ of the ACP, with numerous state governors ‘begging their members to re-up the program,’ the future of an appropriations-backed universal service fund seems bleak.”).