

**A KNIFE IN A GUNFIGHT: EMPOWERING NORTH CAROLINA  
MUNICIPALITIES TO CLOSE THE DIGITAL DIVIDE**

*Pearson Cost\**

*The COVID-19 pandemic has significantly intensified the problem of broadband accessibility in North Carolina. Although broadband had already become essential infrastructure before the pandemic, it is now an imperative instrument for all aspects of life, including work, education, and health. In North Carolina, over a million residents lack access to that necessity, primarily concentrated in rural areas of the State. In response to the amplifying crisis, all levels of government have risen to the challenge: The federal government passed the Infrastructure Investment and Jobs Act (“IIJA”) with \$65 billion allocated for broadband; North Carolina has coordinated efforts through a central office and earmarked prior federal funds, and local governments are attempting novel solutions to their unique broadband issues.*

*This Article analyzes the efficacy of the recently-approved IIJA funding through specific limitations that the North Carolina General Assembly has imposed on municipal approaches to providing broadband. Specifically, legislation passed by the General Assembly in 2011 prevents municipalities from providing their own broadband service or partnering with private entities to do so. Ultimately, this Article encourages the General Assembly to rescind such limitations so municipalities can bear the ultimate responsibility of deciding on the best course of action because they*

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*are uniquely situated to understand how to increase access to broadband within their limits.*

## TABLE OF CONTENTS

<b>I.</b>	<b>INTRODUCTION</b> .....	<b>559</b>
<b>II.</b>	<b>BROADBAND FUNDING IS INDISPENSABLE BUT INSUFFICIENT</b> .....	<b>564</b>
	<i>A. Federal Funding from the IIJA</i> .....	564
	<i>B. North Carolina Appropriations and Broadband Scheme</i> .....	569
<b>III.</b>	<b>MUNICIPAL RESTRICTIONS: STATE REJOINER TO GREENLIGHT</b> .....	<b>571</b>
<b>IV.</b>	<b>PROVEN, REPLICABLE SOLUTIONS TO THE DIGITAL DIVIDE</b> .....	<b>577</b>
	<i>A. Municipal Broadband</i> .....	579
	<i>B. Public-Private Partnerships</i> .....	582
<b>V.</b>	<b>EMPOWER MUNICIPALITIES TO BE PRIMARY DECISION- MAKERS</b> .....	<b>586</b>
	<i>A. State Legislative Approach</i> .....	586
	<i>B. Federal Approach: Regulation or Preemption</i> .....	589
<b>VI.</b>	<b>CONCLUSION</b> .....	<b>595</b>

## I. INTRODUCTION

In 2005, the late U.S. Senator John McCain (R-AZ) sponsored unsuccessful federal legislation that would have authorized municipalities to create broadband service for their residents, saying of the legislation, “[w]hen private industry does not answer the call because of market failures or other obstacles, it is appropriate and even commendable, for the people acting through their local governments to improve their lives by investing in their own future.”<sup>1</sup> Almost two decades later, 27% of North Carolina households lack broadband (i.e., high-speed internet),<sup>2</sup> and less than

<sup>1</sup> Mikhail Guttentag, *A Light in Digital Darkness: Public Broadband After Tennessee v. FCC*, 20 YALE J.L. & TECH. 311, 344 (2018).

<sup>2</sup> While the contemporary use of “broadband” has different definitions, Encyclopedia Britannica defines it as “[i]nternet speeds faster than those that

40% of the State has access to fiber technology, the preferred method of providing high-speed internet.<sup>3</sup> North Carolina population centers have some of the best internet connections in the country because of the profitable urban infrastructure, while rural areas have complex geographies for laying fiber and unprofitable cost margins.<sup>4</sup> Even if broadband were available to every home in the State, half a million North Carolinians would be unable to afford it.<sup>5</sup> Although access to the internet may once have been a luxury, it is now an essential element for individuals to function in society—needed to conduct transactions, acquire information and news, and communicate with others.<sup>6</sup> The internet’s importance has been

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could be achieved through dial-up.” Erik Gregersen, *Broadband*, BRITANNICA (Feb. 20, 2022), <https://www.britannica.com/science/broadband> [https://perma.cc/XF3M-3QFK].

<sup>3</sup> See *The Digital Divide*, N.C. DEP’T INFO. TECH.’S DIV. BROADBAND & DIGIT. EQUITY [hereinafter *Digital Divide*], <https://www.ncbroadband.gov/digital-divide#measuring-success> [https://perma.cc/F44D-37D3] (last visited Mar. 4, 2022); see also *Broadband Technologies: A Primer on Access and Solutions*, UNIV. OF MO. (June 2021), <https://extension.missouri.edu/media/wysiwyg/Extensiondata/Pub/pdf/commdm/dm0601.pdf> [https://perma.cc/9HNU-KERU] (“Fiber is currently the preferred internet delivery technology because it carries the greatest potential for reliably transmitting large amounts of information.”); Tom Wheeler, *Striking a Deal to Strengthen Broadband Access for All*, BROOKINGS INST. (May 14, 2021), <https://www.brookings.edu/research/striking-a-deal-to-strengthen-broadband-access-for-all/> [https://perma.cc/JYZ4-MLEC] (reasoning that fiber is “future proof”); see also Zachery Eanes, *Biden Infrastructure Bill Gives NC Chance to Expand Broadband*, NEWS & OBSERVER (Nov. 14, 2021) [hereinafter *Expand Broadband*], <https://www.newsobserver.com/news/politics-government/article255729396.html> [https://perma.cc/P8LS-XZ72].

<sup>4</sup> See Liora Engel-Smith, *In North Carolina’s Mountains, Broadband Isn’t a Given*, N.C. HEALTH NEWS (July 7, 2021), <https://www.northcarolinahealthnews.org/2021/07/07/in-north-carolinas-mountains-broadband-isnt-a-given/> [https://perma.cc/4546-EL9D]. The mountainous geography in the west and marshy coastline in the east make it difficult to lay fiber. Zachery Eanes, *North Carolina Could Have a ‘Generational Opportunity’ to Expand Broadband Across State*, NEWS & OBSERVER (Nov. 14, 2021), <https://www.newsobserver.com/news/politics-government/article255729396.html> [https://perma.cc/P8LS-XZ72].

<sup>5</sup> *North Carolina’s Broadband Vision – Closing the Digital Divide*, N.C. DEP’T INFO. TECH.’S DIV. BROADBAND & DIGIT. EQUITY [hereinafter *Closing*], <https://www.ncbroadband.gov/media/249/open> [https://perma.cc/RFX7-6VT6].

<sup>6</sup> See Stan Adams, *In the Middle of COVID-19: Can We All Agree Now That Internet Access Is a Necessity?*, CTR. FOR DEMOCRACY & TECH. (April 2, 2020),

substantially amplified in recent years by the COVID-19 pandemic. Nationwide, 87% of adults say the internet has been essential or important to them during the pandemic, with 21% of parents worried their children will be unable to complete homework virtually, and 52% of low-income families worried about paying their broadband bills.<sup>7</sup>

The problem of broadband accessibility in North Carolina can be characterized by three distinct issues: geography, cost, and restrictive state laws. First, the geography of mountainous and coastal regions of North Carolina, which is disproportionately rural, creates significant difficulties when laying fiber, resulting in profitability concerns for private entities.<sup>8</sup> This physical limitation is particularly significant given that 95% of North Carolinians without high-speed internet live in rural areas, and the State has the second-highest number of rural residents in the country at 3.2 million.<sup>9</sup> Second, the cost of broadband is unaffordable for low-income individuals in rural areas.<sup>10</sup> For instance, in rural North Carolina, where the above-mentioned difficulties arise in laying broadband cable, 87% of households with an income of less than \$75,000 lack access to high-speed internet.<sup>11</sup> A similar problem

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<https://cdt.org/insights/in-the-middle-of-covid-19-can-we-all-agree-now-that-internet-access-is-a-necessity/> [https://perma.cc/VA7M-BCL4].

<sup>7</sup> Emily A. Vogels et al., *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/7KXJ-BGRC].

<sup>8</sup> Engel-Smith, *supra* note 4 (“Much of the mountain region is far too sparse for internet service providers to want to expand there. And ISPs who do want to expand may find it difficult because of the exorbitant cost of laying fiber in the mountains.”).

<sup>9</sup> Erin Wynia & Joanne Hovis, LEAPING THE DIGITAL DIVIDE, N.C. LEAGUE OF MUN. 15 [hereinafter LEAPING], <https://www.nclm.org/resource/library/Shared%20Documents/PGA%20Reports%20%26%20Files/Broadband%20Whitepaper%20-%20FINAL%20Email%20Friendly.pdf> [https://perma.cc/U5HS-FYAT] (last visited Feb. 20, 2022).

<sup>10</sup> See Lea Efir, *Rural Broadband – Yancey and Mitchell Counties*, UNC SCH. OF GOV.: FACTS THAT MATTER BLOG, <https://ncimpact.sog.unc.edu/2020/07/rural-broadband-yancey-and-mitchell-counties/> [https://perma.cc/39RP-V5UG] (last visited Feb. 19, 2022).

<sup>11</sup> *Id.*

arises in urban communities with minority groups. In Charlotte, North Carolina, access to broadband is disproportionately higher for Asian and white residents (81%) than for Hispanics (56%) and African Americans (55%).<sup>12</sup> To make matters worse, low-income individuals are incentivized to move to more populated areas with more affordable broadband but are obstructed from doing so by other factors, such as an intensifying real estate market.<sup>13</sup> The issues of geography and affordability create a significant barrier to broadband access, but they are more easily addressed than the third issue, restrictive state laws. Broadband accessibility will not be solved by market forces, as providers are incentivized to serve areas that can pay the most and where the geography allows for the cheapest connection, leading to accessibility problems highest in “counties with the lowest median household incomes, lowest population densities, highest rural population rates, and highest poverty rates.”<sup>14</sup> Thus, the third and most critical barrier to broadband access is a restriction on governmental action, namely a North Carolina law that functionally prohibits municipalities’ ability to operate their own broadband networks or form public-private partnerships.<sup>15</sup>

This Article posits that, to close the digital divide, the North Carolina General Assembly must rectify regressive changes made

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<sup>12</sup> DIGITAL INCLUSION PLAYBOOK, CHARLOTTE DIGIT. INCLUSION ALL. 17 (Aug. 19, 2017), <https://www.charlottedigitalinclusionalliance.org/playbook.html> [<https://perma.cc/947Q-EDEU>].

<sup>13</sup> Kimberly Cataudella & Aaron Sánchez-Guerra, *Hot Housing Markets: See How Durham Home Prices Compare to Other NC Cities* (Feb. 1, 2022), NEWS & OBSERVER, <https://www.newsobserver.com/news/business/article257921818.html> [<https://perma.cc/M8LR-6U6Q>]. The incentive to move to urban areas is one example of a substantial impact on economic mobility for low-income individuals, for whom broadband is difficult to access but necessary for “educational attainment, skills for the job market, access to public safety alerts, household income, and healthcare options.” Lea Efird, *Urban Broadband – Mecklenburg County*, UNC SCH. OF GOV.: FACTS THAT MATTER BLOG, <https://ncimpact.sog.unc.edu/2020/07/urban-broadband-mecklenburg-county/> [<https://perma.cc/8PRC-3K6Q>] (last visited Feb. 19, 2022).

<sup>14</sup> Guttentag, *supra* note 1, at 325; see Patrick Gray, *Disconnected: The State of Rural Broadband*, 25 DRAKE J. AGRIC. L. 403, 406 (2020).

<sup>15</sup> An Act to Protect Jobs and Investment by Regulating Local Government Competition with Private Business, 2011 N.C. Sess. Laws 84.

in recent years that functionally prohibit municipalities from addressing broadband access through public solutions. In 2011, the General Assembly passed An Act to Protect Jobs and Investment by Regulating Local Government Competition with Private Business (“Level Playing Field Bill”) that promotes private telecommunications companies at the expense of severely restricting communities from investing in their own broadband service.<sup>16</sup> The legislation limited the types of investments that a local government can make in broadband infrastructure and how money can be raised for that infrastructure.<sup>17</sup> The repeal of the Level Playing Field Bill would allow substantial federal and state funding to be utilized by either developing and operating municipal broadband networks or forming public-private partnerships contingent on affordable rates for their citizens.<sup>18</sup> An unambiguous authorization for municipalities to build and lease infrastructure would allow North Carolina communities to replicate public-private partnerships that have recently been successful around the country.<sup>19</sup> Without these changes, the potentially sufficient federal and state funding will be futile.

This Article proceeds in four Parts. Part II analyzes various appropriations of broadband funding, specifically examining the Infrastructure Investment and Jobs Act (“IIJA”) recently passed by Congress, as well as the North Carolina General Assembly’s appropriation of American Rescue Plan Act (“ARPA”) funding. Part

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<sup>16</sup> *Id.* North Carolina is not alone in their broadband restrictions, as over twenty states have similar restrictions on creating and operating their own broadband networks. Edyael Casaperalta, *Achieving Universal Service in Developing Area: Three Policies from Latin America and What They Can Teach the United States*, 16 COLO. TECH. L.J. 399, 422 (2018).

<sup>17</sup> 2011 N.C. Sess. Laws 84.

<sup>18</sup> See generally Tyler Cooper, *Municipal Broadband Is Restricted in 18 States Across the U.S. in 2021*, BROADBANDNOW (April 6, 2021), <https://broadbandnow.com/report/municipal-broadband-roadblocks/> [<https://perma.cc/AXR8-TBL6>] (summarizing North Carolina restrictions on municipal broadband networks and public-private partnerships).

<sup>19</sup> See, e.g., Joanne Hovis et al., THE EMERGING WORLD OF BROADBAND PUBLIC-PRIVATE PARTNERSHIPS, BENTON FOUND. 19–21 (Feb. 2016), [https://www.benton.org/sites/default/files/partnerships\\_0.pdf](https://www.benton.org/sites/default/files/partnerships_0.pdf) [<https://perma.cc/5X55-RYFU>].

III discusses the origins and consequences of the Level Playing Field Bill, a direct response to the success of a municipal broadband project in Wilson, North Carolina. Part IV proposes that municipalities are uniquely equipped to solve the specific broadband-access issues their constituents face, but federal and state funding is still indispensable to overcome these issues. Accordingly, this Part analyzes two municipal approaches: municipal broadband and public-private partnerships. Part V proposes two methods to specifically empower municipalities in the broadband fight: statutory changes by the General Assembly or federal pressure on State restrictions. Lastly, Part VI concludes that the General Assembly should take an all-encompassing approach by rescinding earlier restrictions and promoting the municipal control of broadband, thereby empowering local communities to collectively provide an essential service to all North Carolinians.

## II. BROADBAND FUNDING IS INDISPENSABLE BUT INSUFFICIENT

While municipalities are uniquely situated to close the digital divide, they are not equipped to fund the endeavor. Thus, this Part examines (a) the federal government's funding from the IJJA and (b) North Carolina's appropriations and broadband scheme to establish the potentially sufficient foundation in which municipalities assess broadband accessibility.

### *A. Federal Funding from the IJJA*

The IJJA, signed into law by Congress in November of 2021, allocated nearly \$65 billion for broadband coverage and adoption throughout the United States, affording North Carolina the opportunity to close the digital divide if it reconsiders its current legal structure that hinders municipal ability to efficiently expend funding on broadband.<sup>20</sup> The IJJA underscored the magnitude of broadband accessibility in the United States, finding that the lack of broadband access is “a barrier to the economic competitiveness of the United States” and “disproportionately affects communities of

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<sup>20</sup> See Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429, § 60101 [hereinafter IJJA].

color, lower-income areas, and rural areas.”<sup>21</sup> The Department of Commerce explained that the IJA’s allocation of funds will “create more low-cost [broadband] service options, subsidize the cost of service for low-income households,” and “address the digital equity and inclusion needs in our communities.”<sup>22</sup>

The IJA grants the Department of Commerce considerable deference in appropriating the broadband funds.<sup>23</sup> Out of the total IJA appropriations, \$48 billion will go to the Commerce Department’s National Telecommunications and Information Administration (“NTIA”) to administer various public funding programs.<sup>24</sup> The majority of that funding is earmarked for states and territories to fund broadband access through the Broadband Equity, Access, and Deployment Program, with a detailed need-based formula to decide how those funds are to be administered.<sup>25</sup> Under the Program, every state receives \$100 million,<sup>26</sup> and the remaining funds will be allocated based on the number of “unserved locations” within each state.<sup>27</sup> An “unserved location” either has no access to broadband service or lacks access to service with minimum internet speed “sufficient to support real-time, interactive applications,” leaving NTIA with the ability to maneuver within those vague constraints.<sup>28</sup>

A rough estimate is that North Carolina could receive \$800 million of IJA funding according to the State’s Department of

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<sup>21</sup> *Id.*

<sup>22</sup> *Fact Sheet: Department of Commerce’s Use of Bipartisan Infrastructure Deal Funding to Help Close the Digital Divide*, U.S. DEP’T OF COM. (Nov. 10, 2021), <https://www.commerce.gov/news/fact-sheets/2021/11/fact-sheet-department-commerces-use-bipartisan-infrastructure-deal-funding> [<https://perma.cc/33YD-NB85>].

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

<sup>24</sup> *Id.*

<sup>25</sup> IJA § 60102(b).

<sup>26</sup> *Id.* § 60102(c)(2)(A). \$100,000,000 is also divided equally between the United States Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. *Id.* § 60102(c)(2)(B).

<sup>27</sup> *Id.* § 60102(c)(3)(B) (“The amount allocated to an eligible entity under subparagraph (B) shall be calculated by . . . dividing the number of unserved locations in the eligible entity by the total number of unserved locations in the United States and . . . multiplying the quotient obtained . . . by the amount made available . . .”).

<sup>28</sup> *Id.* § 60102(a)(1)(A)(i)–(ii).

Information Technology (“DIT”), but the ultimate number depends on how NTIA defines “unserved locations.”<sup>29</sup> The determination of what qualifies as an unserved location is based on data maps, originally created by the Federal Communications Commission (“FCC”) pursuant to a mandate in the Communications Act of 1934.<sup>30</sup> Unfortunately, these maps are outdated and have long been criticized for being inaccurate, and rightfully so.<sup>31</sup> According to BroadbandNow, a research organization that publishes accessibility data on broadband, the FCC underestimates North Carolina’s broadband availability by 5.3%, or 540,000 people.<sup>32</sup> The significant variance is primarily due to the FCC’s erroneous assumption that an entire census block has broadband availability if merely one household within the area is served, even though a census block can potentially cover hundreds of square miles in rural areas.<sup>33</sup> Other factors that lead to inaccurate maps include the unregulated reporting of internet service providers’ (“ISPs”) advertised speeds, rather than their actual speeds, and reporting of non-rush hour speeds, rather than when a large number of customers are using the network.<sup>34</sup> These factors create an inaccurate picture that misinforms the federal government as to where funding should be allocated and

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<sup>29</sup> *Expand Broadband*, *supra* note 3.

<sup>30</sup> IIA § 60102(a)(2)(C) (“The term ‘broadband DATA maps’ means the maps created under section 802(c)(1) of the Communications Act of 1934 (47 U.S.C. 642(c)(1)).”).

<sup>31</sup> John Hendel, *Why Billions in Broadband Money May go to the Wrong Places*, POLITICO (November 29, 2021), <https://www.politico.com/news/2021/11/29/fcc-broadband-maps-biden-523425> [<https://perma.cc/M7WL-7CW3>].

<sup>32</sup> *Id.* In a Mississippi county, FCC projections of broadband availability are off by 80%. *Id.*

<sup>33</sup> *See id.*; see also Cat Zakrzewski & Chris Alcantara, *Biden’s Ambitious Broadband Funding Has a Key Impediment: an Outdated Map of Who Needs It*, WASHINGTON POST (Dec. 14, 2021), <https://www.washingtonpost.com/technology/2021/12/14/bidens-ambitious-broadband-funding-has-key-impediment-an-outdated-map-who-needs-it/> [<https://perma.cc/42M7-RKYX>]; Katy Rossiter, *What Are Census Blocks?*, U.S. CENSUS BUREAU (July 11, 2011), <https://www.census.gov/newsroom/blogs/random-samplings/2011/07/what-are-census-blocks.html> [<https://perma.cc/L2G4-BLK8>].

<sup>34</sup> *Leaping*, *supra* note 9, at 6.

underscores the argument that the federal government is too far-removed to be the primary decision-maker.<sup>35</sup>

While legislation was signed in March of 2020 that required the FCC to acquire more detailed data on the issue of broadband availability, there is not a clear timeline on when these updated maps will be completed.<sup>36</sup> With billions of dollars in broadband funding distributed based on faulty data, unserved locations will not get the necessary funding needed to overcome internet inaccessibility. North Carolina, like other states, is developing its own maps instead of relying on the FCC to do so.<sup>37</sup> While these more accurate maps will help the State administer federally-granted funds, IJA allocation may nonetheless depend on the potentially faulty FCC maps.<sup>38</sup>

By the terms of the IJA, states are afforded a great deal of discretion in determining how they can use the funding, constrained only in their use of funds for planning and pre-deployment activities (no more than 5%) and administrative expenses (no more than 2%).<sup>39</sup> With these limited restrictions, states may use the funding to subgrant to other eligible entities within the state for the following:

- (1) [U]nserved service projects and underserved service projects;
- (2) connecting eligible community anchor institutions;
- (3) data collection, broadband mapping, and planning;
- (4) installing internet and Wi-Fi infrastructure or providing reduced-cost broadband within a multi-family residential building . . .
- (5) broadband adoption, including programs to provide affordable internet-capable devices; and
- (6) any use determined necessary by the Assistant Secretary to facilitate the goals of the Program.<sup>40</sup>

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<sup>35</sup> Even Jessica Rosenworcel, FCC Chair, “told lawmakers at a November confirmation hearing that the federal government’s maps ‘stink’ and that improving them is an urgent priority.” Zakrzewski & Alcantara, *supra* note 33.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> IJA § 60102(d)(2). There are certain exceptions to the prohibition on matching with federal funds, like those coming from the Families First Coronavirus Response Act, the CARES Act, the Consolidated Appropriations Act, and the American Rescue Plan Act. *Id.* § 60102(B)(iii).

<sup>40</sup> *Id.* § 60102(f).

Subgrantees that are distributing federal funds for the deployment of a broadband network must match those funds for at least 25% of projected costs, but the match may come from any non-federal unit of government or non-governmental entity.<sup>41</sup> Moreover, subgrantees must provide high-speed internet service, defined as 100 megabits per second for downloads and 20 megabits per second for uploads, to ensure the service can handle technology's growing demand for broadband capacity.<sup>42</sup>

In addition to building broadband infrastructures in rural areas, the IIJA also helps communities utilize the internet.<sup>43</sup> The Digital Equity Act ("DEA") within the IIJA provides \$2.75 billion "to promote digital inclusion and equity for communities that lack the skills, technologies[,] and support needed to take advantage of broadband connections."<sup>44</sup> The DEA includes various programs, including one that funds state programs to achieve digital equity and another that funds community anchor institutions, such as libraries, non-profits, and local governments.<sup>45</sup> However, even with the DEA's worthy objectives, digital equity cannot be achieved without the effective use of funds to create the necessary broadband infrastructure.

The federal government's recent appropriation has afforded states and municipalities the necessary funding to cover the high costs of building broadband infrastructure—expenses state and local governments would otherwise be unable to pay independently.<sup>46</sup> Moreover, the federal government has appropriately given states broad discretion to appropriate the funds as the states see fit because the broadband solutions cannot be generalized across different

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<sup>41</sup> *Id.* § 60102(h)(3).

<sup>42</sup> *Id.* § 60102(h)(4)(A)(i). Subgrantees are also required to provide service "with a latency that is sufficiently low to allow reasonably foreseeable, real-time, interactive applications . . . with network outages that do not exceed, on average, 48 hours over any 365-day period. *Id.*

<sup>43</sup> U.S. DEP'T OF COM., *supra* note 22.

<sup>44</sup> *Id.*

<sup>45</sup> Zack Quaintance, *Infrastructure Bill Promises Historic Boost for Digital Equity*, GOV'T TECH. (Nov. 16, 2021), <https://www.govtech.com/network/infrastructure-bill-promises-historic-boost-for-digital-equity> [<https://perma.cc/2M59-SVN2>].

<sup>46</sup> *See id.*

regions.<sup>47</sup> However, the IJA's prerequisite of quality data mapping has not been met.<sup>48</sup> The federal government must address the data issue promptly to guide the appropriate allocation of federal funds to the states that should then deploy those funds to municipalities based on need according to the new data.

### *B. North Carolina Appropriations and Broadband Scheme*

North Carolina has made significant efforts to address broadband problems in recent years by creating state programs and policies, as well as utilizing federal government aid. For example, in 2018, the General Assembly created the Growing Rural Economies with Access to Technology ("GREAT") Program, which was designed to provide internet access to businesses and individuals in rural counties throughout North Carolina.<sup>49</sup> In May of 2019, the GREAT Program administered \$10 million in awards to small businesses, telephone cooperatives, and an electric membership cooperative.<sup>50</sup> Through the GREAT Program, the State has provided internet access to nearly 9,800 homes and 600 businesses in 19 rural counties throughout the State.<sup>51</sup>

In 2019, the General Assembly made several other statutory and regulatory changes to increase broadband access for North Carolina residents.<sup>52</sup> For instance, the Electric Co-Op Rural Broadband Services Bill removed restrictions that prohibited electric

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<sup>47</sup> See Blair Levin, *Steps the States Should Take to Achieve the Infrastructure Bill's Broadband Goals*, BROOKINGS INST. (Jan. 21, 2022), <https://www.brookings.edu/2022/01/21/steps-the-states-should-take-to-achieve-the-infrastructure-bills-broadband-goals/> [<https://perma.cc/PZN5-W2M5>].

<sup>48</sup> See Zakrzewski & Alcantara, *supra* note 33.

<sup>49</sup> *NCDIT GREAT PROGRAM*, CAROLINA LINK, <https://www.carolinalink.org/advocacy-article/name/ncdit-great-program> [<https://perma.cc/WUB2-V35B>] (last visited Feb. 5, 2022).

<sup>50</sup> See *id.*

<sup>51</sup> Zachery Eanes, *One Challenge in Expanding Broadband in NC? Knowing Who Doesn't Actually Have It*, NEWS & OBSERVER (Aug. 10, 2019) [hereinafter *Challenge*], <https://www.newsobserver.com/news/technology/article233656882.html> [<https://perma.cc/YS4P-K4L8>].

<sup>52</sup> See Jon Sanders, *Expanding Rural Broadband Access in North Carolina*, JOHN LOCKE FOUND. (Mar., 2021) <https://www.johnlocke.org/wp-content/uploads/2021/03/Rural-Broadband.pdf> [<https://perma.cc/35R3-Z7VB>].

cooperatives from seeking federal funding and authorized the use of electrification easements to supply broadband services.<sup>53</sup> Electric cooperatives are nonprofit, consumer-owned utilities that provide affordable electricity by reinvesting revenue into their service.<sup>54</sup> These cooperatives are well-suited to provide broadband in rural areas because their parallel electric services already provide utilities to those areas.<sup>55</sup>

The State also recently initiated a pilot program to connect students to the internet through Space Exploration Technologies Corporation's ("SpaceX") Starlink internet service after the Broadband Infrastructure Office determined that satellite technology could be a viable option for broadband in remote areas.<sup>56</sup> Funded by roughly \$264,000 in federal and state grants, this pilot program is being tested on Ocracoke Island and Swain County, which are currently two of the most difficult geographies in the State for ISPs to reach.<sup>57</sup> While satellite internet service is a rapidly changing field that has begun to allow some rural areas access to the internet, it is currently more expensive and slower than broadband.<sup>58</sup>

In the recent budget, signed in November of 2021, the North Carolina General Assembly appropriated additional funds for

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<sup>53</sup> 2019 N.C. Sess. Laws 17, S.B. 310.

<sup>54</sup> *Advantages of an Electric Cooperative*, BARRY ELEC. COOP., <https://www.barryelectric.com/advantages-of-an-electric-cooperative> [<https://perma.cc/5BQS-8NMJ>] (last visited Feb. 5, 2022).

<sup>55</sup> Eric Cody, *Electric Cooperatives Bring High-Speed Communications to Underserved Areas*, NAT'L RURAL ELEC. COOP. ASS'N, <https://www.cooperative.com/programs-services/bts/Documents/Reports/Report-Broadband-Case-Studies-Summary-Updated-Feb-2020.pdf> [<https://perma.cc/45X7-N97U>].

<sup>56</sup> N.C. DEP'T OF INFO. TECH.'S DIV. OF BROADBAND AND DIGIT. EQUITY, *New Satellite Internet Pilot Program to Connect Students in Two N.C. Counties*, (Mar. 4, 2021), <https://www.ncbroadband.gov/news/press-releases/2021/03/04/new-satellite-internet-pilot-program-connect-students-two-nc-counties> [<https://perma.cc/PZ6H-GWFR>]. Starlink "provides high-speed internet service via Low Earth Orbit satellite technology," technology that had previously been unable to provide the high-speed internet that modern usage requires. *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Ry Crist, *Starlink Explained: Everything to Know About Elon Musk's Satellite Internet Venture*, CNET (Feb. 28, 2022), <https://www.cnet.com/home/internet/starlink-satellite-internet-explained/> [<https://perma.cc/6XCA-6LT4>].

several broadband initiatives.<sup>59</sup> Notable expenditures, totaling over \$900 million, include: (1) internet access improvement for 25 community colleges; (2) GREAT grant funding; (3) Completing Access to Broadband Fund for broadband grants; (4) targeted grants for underserved and unserved households; (5) infrastructure to support rapid deployment of broadband in rural areas; (6) awareness and digital literacy campaigns; (7) DIT's administrative costs in support of high-speed internet; and, (8) preparation of new broadband maps.<sup>60</sup> Recognizing the urgent issue of broadband, the State is rightfully and creatively dispersing federal and state funds to address internet inaccessibility. As of February of 2022, North Carolina is administering funds from ARPA.<sup>61</sup> The State has a goal of increasing the number of households who have high-speed internet from 73% to 80% by 2025.<sup>62</sup> Moreover, the State has committed to addressing the fundamental issue of flawed data, aware that the FCC's suggestion that 94% of North Carolina households have broadband access is inaccurate.<sup>63</sup> However, the overall effect of this effort is impeded by constraints placed on municipalities by the very same legislature.

### III. MUNICIPAL RESTRICTIONS: STATE REJOINER TO GREENLIGHT

Within North Carolina, the General Assembly is but one governmental body with the authority and ability to significantly improve broadband access; municipalities are the others. North Carolina municipalities are uniquely situated to address local issues like the digital divide but are significantly limited due to legislative restrictions. Aside from these restrictions, the North Carolina

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<sup>59</sup> See JOINT CONFERENCE COMMITTEE REPORT ON THE CURRENT OPERATIONS APPROPRIATIONS ACT OF 2021, N.C.G.A. (Nov. 15, 2021), <https://webservices.ncleg.gov/ViewBillDocument/2021/53458/2/S105-BD-NBC-9279#page=35> [<https://perma.cc/V3E7-UHVP>].

<sup>60</sup> *Id.*

<sup>61</sup> GOV. COOPER, *Governor Cooper Releases American Rescue Plan Investment Recommendations* (May 19, 2021), <https://governor.nc.gov/news/press-releases/2021/05/19/governor-cooper-releases-american-rescue-plan-investment-recommendations> [<https://perma.cc/V8UA-2TCK>].

<sup>62</sup> *Digital Divide*, *supra* note 3.

<sup>63</sup> *Challenge*, *supra* note 51.

legislature authorizes municipalities to provide the public with various public enterprises, including water, sewer, natural gas, and electric services.<sup>64</sup> In *Madison Cablevision v. Morgantown*,<sup>65</sup> the North Carolina Supreme Court held that municipalities may provide these services without violating the public purpose, exclusive emoluments, or monopoly clauses of the North Carolina Constitution, which typically restrict municipal governments from financially backing private ventures.<sup>66</sup> Then, in *BellSouth Telecommunications v. Laurinburg*,<sup>67</sup> the Court held that the same statutory authority extended to municipal broadband.<sup>68</sup> In interpreting the authorizing legislation, the Court found the legislature intended to “enable the municipality’s public enterprise to grow in reasonable stride with technological advancements which marks the ever-approaching horizon of necessity.”<sup>69</sup> Thus, without a legislative abrogation of authority, North Carolina municipalities would have broad legal authority to provide broadband.<sup>70</sup>

Receiving endorsements from President Obama, the *New York Times*, and other national influencers,<sup>71</sup> government representatives of Wilson, North Carolina, addressed broadband access for their residents by building and operating their own municipal broadband network, known as Greenlight.<sup>72</sup> Since 2009, Greenlight has operated through a local utility company, providing broadband to all residents, regardless of income level.<sup>73</sup> The Court of Appeals for the

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<sup>64</sup> N.C. Gen. Stat. §§ 160A-311, 160A-312 (2021).

<sup>65</sup> 325 N.C. 634, 386 S.E.2d 200 (1989).

<sup>66</sup> *Id.* at 214; *see also* Kara Millonzi, *New Municipal Broadband Limitations*, COATES’ CANONS NC LOCAL GOV. (July 7, 2011), <https://canons.sog.unc.edu/2011/07/new-municipal-broadband-limitations/> [<https://perma.cc/X8VJ-GVNL>].

<sup>67</sup> 168 N.C. App. 75 (2005).

<sup>68</sup> *Id.* at 87; *see also* Millonzi, *supra* note 66.

<sup>69</sup> *BellSouth Telecommunications*, 168 N.C. App. at 86–87.

<sup>70</sup> *See* N.C. Gen. Stat. § 143-128.1C (2021).

<sup>71</sup> *See* Christopher S. Yoo & Timothy Pfenninger, *Municipal Fiber in the United States: An Empirical Assessment of Financial Performance*, U. PA. L. SCH. CTR. FOR TECH., INNOVATION, & COMPETITION 19, <https://www.law.upenn.edu/live/files/6611-report-municipal-fiber-in-the-united-states-an> [<https://perma.cc/3VX5-H389>].

<sup>72</sup> Catherine L. Schwarze, *We Want Wi-fi: The FCC’s Intervention in Municipal Broadband Networks*, 58 WASH. U. J.L. & POL’Y 199, 208 (2018).

<sup>73</sup> Yoo & Pfenninger, *supra* note 71, at 22–23.

Sixth Circuit applauded Wilson's broadband services while reviewing the Level Playing Field Bill (discussed, *infra*), summarizing Greenlight's benefits as follows:

Greenlight has provided benefits for Wilson. Wilson states that its 'triple play' services—phone, Internet, and cable—are cheaper than its competitors' and that it offers its Gigabit Internet while maintaining a positive cash flow. Wilson also provides free Wi-Fi to its entire downtown area, which in turn frees up money that downtown businesses would normally spend for Internet. Each of the top seven employers in Wilson is a customer of the fiber network. Local schools benefit from using Greenlight, as does the City's main public library.<sup>74</sup>

Greenlight was so successful that neighboring communities, like Pinetops, North Carolina, asked Wilson to expand its service to their residents.<sup>75</sup> The then-Interim Town Manager of Pinetops stated that "[c]urrent providers haven't made significant upgrades to our broadband service through the years . . . They haven't found us worth the investment."<sup>76</sup>

In response to the success of Wilson's project and the court's approval of municipal broadband, cable companies successfully lobbied North Carolina legislators to pass the Level Playing Field Bill.<sup>77</sup> This legislation significantly limited city-owned communication services, like Greenlight, or public-private partnerships by prohibiting them from expanding past municipal boundaries.<sup>78</sup> While the statute grandfathered in Wilson by allowing

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<sup>74</sup> Tennessee v. FCC, 832 F.3d 597, 602 (6th Cir. 2016) (citations omitted).

<sup>75</sup> Tom Ernste, *Wilson Moves to Expand Greenlight Network to Neighboring Town*, CMTY. NETWORKS (Dec. 16, 2015), <https://muninetworks.org/content/wilson-moves-expand-greenlight-network-neighboring-town> [<https://perma.cc/WGF7-P497>].

<sup>76</sup> Lauren Ohnesorge, *FCC Decision's Impact on Wilson's Greenlight 'Unclear,' Exec Says*, TRIANGLE BUS. J. (Aug. 12, 2016), <https://www.bizjournals.com/triangle/blog/techflash/2016/08/fcc-decisions-impact-on-wilsons-greenlight-unclear.html> [<https://perma.cc/7W8L-R8E4>].

<sup>77</sup> N.C. Gen. Stat. § 160A-340.1 (2021); see Denise Roth Barber, *Dialing Up the Dollars: Telecommunication Interests Donated Heavily to NC Lawmakers*, FOLLOWTHEMONEY.ORG (March 20, 2012), <https://www.followthemoney.org/research/institute-reports/dialing-up-the-dollars-telecommunication-interests-donated-heavily-to-nc-lawmakers> [<https://perma.cc/6EDG-5LNB>].

<sup>78</sup> N.C. Gen. Stat. § 160A-340.1(a)(3); Schwarze, *supra* note 72.

Greenlight to expand service up to county limits,<sup>79</sup> these restricted city-owned communication services would be subject to costly obligations that would make Greenlight unprofitable if they expanded past their boundaries.<sup>80</sup> With these state-level limitations, it is often unprofitable to replicate Wilson's project throughout the State, despite the proven effectiveness of such a course of action.<sup>81</sup>

The winning argument to pass the Level Playing Field Bill may not have been entirely policy driven.<sup>82</sup> "Three-quarters of North Carolina's 2011 legislature (131 of 170 legislators) received money from the [telecommunications] PACs [(Political Action Committees)] in 2010–2011: 87 of 120 representatives; 44 of 50 senators."<sup>83</sup> These contributions included an average of \$3,768 contributed to each lawmaker that voted for the legislation, which was 76% more than that received by those legislators who voted against the legislation.<sup>84</sup> Even more straightforward, the four primary sponsors of the Level Playing Field Bill received a total of \$37,750, an average of \$9,438 each.<sup>85</sup>

After the success that Comcast and AT&T had in lobbying the North Carolina General Assembly, telecommunication companies replicated their North Carolina efforts nationwide. Comcast and AT&T, for instance, successfully introduced a bill in Kansas to prohibit municipal broadband and killed a bill in Tennessee that would allow municipalities to expand their broadband services

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<sup>79</sup> Schwarze, *supra* note 72.

<sup>80</sup> *Id.*

<sup>81</sup> See Joanne Hovis et al., *Public Infrastructure/Private Service: Shared-Risk Partnership Model for 21<sup>st</sup> Century Broadband Infrastructure 19*, BENTON FOUND. (Oct. 2020) [hereinafter *Shared-Risk*], [https://www.benton.org/sites/default/files/PPP3\\_final.pdf](https://www.benton.org/sites/default/files/PPP3_final.pdf) [<https://perma.cc/5L6W-WE5X>]; see also CORNING, *Understand the Risks of Municipal Broadband* (Oct. 2017), <https://www.corning.com/catalog/coc/documents/white-papers/CRR-749-AEN.pdf> [<https://perma.cc/66KC-K66C>].

<sup>82</sup> Barber, *supra* note 77.

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* Thom Tillis, former North Carolina Speaker of the House and current United States Senator, received \$37,000 from telecommunications donors from 2010 to 2011; Phil Berger, Senate President Pro Tempore, received \$19,500; Harry Brown, Senate Majority Leader, received \$9,000. *Id.* All three voted in favor for the legislation. *Id.*

outside of their communities.<sup>86</sup> Additionally, the American Legislative Exchange Council provided state legislators with model legislation comparable to the Level Playing Field Bill.<sup>87</sup> In 2012, following the successful North Carolina campaign, AT&T's political action committee gave \$13.6 million to state legislators "instead of investing in improving infrastructure in these communities."<sup>88</sup>

The Level Playing Field Bill imposed various other restrictions on municipal broadband.<sup>89</sup> First, a municipality may not subsidize its services with other revenue sources and may not charge below the cost of providing those services.<sup>90</sup> The Bill even requires municipalities to calculate so-called "phantom costs" (i.e., fabricated charges to replicate taxes) into their rates to ensure private entities are still able to compete.<sup>91</sup> Second, a municipality may not go into debt or enter contracts for the purchase of property—such as the property needed to build broadband infrastructure—without voter approval through a referendum process.<sup>92</sup> Third, vague procedural requirements—such as having to hold two separate public hearings to solicit input—burden municipalities' ability to

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<sup>86</sup> Michael Hiltzik, *Column: Cable and Telecom Firms Score a Huge Win in Their War to Kill Municipal Broadband*, L.A. TIMES (Aug. 12, 2016), <https://www.latimes.com/business/hiltzik/la-fi-hiltzik-cable-municipal-broadband-20160812-snap-story.html> [<https://perma.cc/MHM4-CGFG>].

<sup>87</sup> *Id.*

<sup>88</sup> Allan Holmes, *How Big Telecom Smothers City-Run Broadband*, CTR. FOR PUB. INTEGRITY (Aug. 28, 2014), <https://publicintegrity.org/inequality-poverty-opportunity/how-big-telecom-smothers-city-run-broadband/> [<https://perma.cc/SW9X-ZAAH>].

<sup>89</sup> See An Act to Protect Jobs and Investment by Regulating Local Government Competition with Private Business, 2011 N.C. Sess. Laws 84.

<sup>90</sup> Millonzi, *supra* note 66.

<sup>91</sup> Cooper, *supra* note 18 (discussing the requirement to "impute (i) the cost of the capital component that is equivalent to the cost of capital available to private communications service providers in the same locality and (ii) an amount equal to all taxes, including property taxes, licenses, fees, and other assessments that would apply to a private communications service provider, including federal, State, and local taxes; rights-of-way, franchise, consent, or administrative fees; and pole attachment fees." N.C. Gen. Stat. § 160A-340.1 (2021)).

<sup>92</sup> N.C. Gen. Stat. § 160A-340.4 (2011).

efficiently create the service.<sup>93</sup> While the Legislation allows for *unserved* areas to petition the North Carolina Utilities Commission to be exempted, there is no such automatic exemption for *underserved* areas.<sup>94</sup> The other exceptions are severely limited, as the Legislation only allows three forms of municipal broadband: (1) internal government networks; (2) reading utility or parking meters; and, (3) free public service.<sup>95</sup> Thus, the law makes it “nearly impossible for municipalities to build out new broadband networks to serve residents.”<sup>96</sup>

Lawrence Lessig, a renowned Harvard Law Professor, wrote a letter to North Carolina Governor Bev Perdue imploring her to veto the Legislation, stating it is “terrible public policy” that would continuously supply second-rate service to communities relying on private companies.<sup>97</sup> By functionally prohibiting municipalities from replicating Greenlight, the General Assembly has forced them to seek out private entities that are unwilling to take on the financial risk of laying fiber for the slim profits available in rural areas of North Carolina.<sup>98</sup> This restriction has resulted in at least 1.1 million individuals lacking access to broadband within the State.<sup>99</sup>

The merits of Wilson’s network are clear, increasing affordability and offering flexibility to deal with varying geographic concerns; however, other impediments prevent some municipalities from following a similar course of action, even if the Level Playing Field Bill were rescinded.<sup>100</sup> Nationwide, municipal fiber networks are not an option for 86% of municipalities that do not own and

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<sup>93</sup> *Id.* § 160A-340.3.

<sup>94</sup> *Id.* § 160A-340.2. While every state defines these terms differently, a common definition of “unserved areas” is an area where at least 90% of the population does not have access to 25 Mbps within the home, leaving those below that line outside of the exemption. Wheeler, *supra* note 3.

<sup>95</sup> N.C. Gen. Stat. § 160A-340(3) (2021).

<sup>96</sup> Cooper, *supra* note 18.

<sup>97</sup> Lawrence Lessig, *An Open Letter to North Carolina Gov. Bev Perdue: Support Community Broadband*, HUFFPOST (May 20, 2011), [https://www.huffpost.com/entry/an-open-letter-to-north-c\\_b\\_864562](https://www.huffpost.com/entry/an-open-letter-to-north-c_b_864562) [<https://perma.cc/92DW-565U>].

<sup>98</sup> See *Shared-Risk*, *supra* note 81, at 6; see also CORNING, *supra* note 81.

<sup>99</sup> See *Closing*, *supra* note 5; *Expand Broadband*, *supra* note 3.

<sup>100</sup> See Yoo & Pfenninger, *supra* note 71, at 23.

operate their own power utility companies.<sup>101</sup> In a study on twenty municipal fiber projects conducted by the University of Pennsylvania, eleven projects generated negative cash flow.<sup>102</sup> While significant federal funding can support those projects for now, that funding is not a sustainable source. Of the other projects, five are projected to take more than 100 years to recover their costs.<sup>103</sup> Importantly, Wilson's project was an outlier in the study's dataset.<sup>104</sup>

#### IV. PROVEN, REPLICABLE SOLUTIONS TO THE DIGITAL DIVIDE

Rather than geography or affordability, the primary obstacle facing broadband access in North Carolina is the Level Playing Field Bill's limitations on municipal ability to provide broadband. While the IJA's prerequisite of quality data is unresolved, the significant funding is an indispensable element in closing the digital divide.<sup>105</sup> Meanwhile, municipalities like Wilson are eagerly attempting to provide the essential service to their residents.<sup>106</sup> Thus, the main obstacle lies within the State's role as the intermediary.<sup>107</sup> Instead of promoting varying approaches that consider community factors while distributing funds, statutory limitations to municipal broadband networks and public-private partnerships passed by the General Assembly in 2011 act as a bottleneck that impedes potential solutions. To solve the problem of broadband inaccessibility, these limitations must be removed, and the principles embodied in

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<sup>101</sup> *Id.* Municipalities that own their own utilities are well-suited to create broadband service because they “own utility poles, have field technicians to maintain the equipment and provide customer service and have staff in place to manage billing and collection and provide 24/7 customer support.” *An in Depth Guide to Municipal Broadband*, OTELCO, <https://www.otelco.com/resources/a-municipal-broadband-guide/> [<https://perma.cc/JWN3-4JGM>] (last visited Feb. 6, 2022).

<sup>102</sup> Yoo & Pfenninger, *supra* note 71, at 1.

<sup>103</sup> *Id.* at 23. This study includes urban municipal broadband networks, which do not present the problems that North Carolina is facing. *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> See Levin, *supra* note 47.

<sup>106</sup> See Yoo & Pfenninger, *supra* note 71, at 22–23.

<sup>107</sup> See Levin, *supra* note 47.

*Madison Cablevision* and *BellSouth Telecommunications* need to be recognized statutorily to clearly authorize such endeavors.

Not only will increased access to broadband help citizens within each community, but it will also aid the overall municipality, as broadband access is essential to the economic development of municipalities.<sup>108</sup> A recent study by the Fiber Broadband Association, an all-fiber trade association, showed that communities with quality broadband enjoy a 1.1% higher gross domestic product than similar communities without it.<sup>109</sup> Another study by Purdue University found that every dollar invested in broadband resulted in four dollars back into the state's economy.<sup>110</sup> The public understands the broader impact of broadband in a community, as 90% of Americans identified quality broadband as "very important" in their choice of a community to live.<sup>111</sup> Unfortunately, stalled markets make it evident that "private investment alone is not profitable enough to drive deployment of fiber to as many Americans as possible."<sup>112</sup> In rural North Carolina, like other rural areas around the country, capital costs per potential customer are too high to result in profitable returns on investment.<sup>113</sup> Without government subsidies, low-income individuals and those that live in difficult geographical terrain will be unable to attain the broadband necessary to live in the Internet age. This Part discusses two solutions to broadband accessibility that should be available to municipalities: (a) municipal broadband and (b) public-private partnerships.

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<sup>108</sup> See *Leaping*, *supra* note 9, at 6. See also *Economic Impact*, FIBER BROADBAND ASS'N, <https://www.fiberbroadband.org/page/economic-impact> [<https://perma.cc/YHD2-G4KA>] (last visited Mar. 1, 2022).

<sup>109</sup> FIBER BROADBAND ASS'N, *supra* note 108.

<sup>110</sup> PURDUE UNIVERSITY, REPORT: BROADBAND ACCESS WOULD BENEFIT RURAL AREAS, STATE (2018), <https://www.purdue.edu/newsroom/releases/2018/Q3/report-broadband-access-would-benefit-rural-areas,-state.html> [<https://perma.cc/YF9R-7Y82>].

<sup>111</sup> *Leaping*, *supra* note 9, at 6. Similarly, "[h]igh speed broadband has been shown to add nearly \$10,000 in value to a \$300,000 single-family residence. It is the number one amenity sought by multi-dwelling unit homeowners and the number two amenity sought in single-family homes." *Id.*

<sup>112</sup> *Shared-Risk*, *supra* note 81, at 10.

<sup>113</sup> See *id.*

### *A. Municipal Broadband*

Because private businesses are unable or unwilling to provide affordable internet service, it is essential for local governments to have wide authority to provide broadband services through municipal broadband.<sup>114</sup> In this sense, municipal broadband refers to internet service that is owned and operated by the local government, like Greenlight provided by Wilson.<sup>115</sup> Chattanooga, Tennessee, used the same approach as Wilson to develop its network infrastructure, retain ownership of it, and provide retail services to its community—all without a private partner.<sup>116</sup> Chattanooga’s network, proving its success, “has consistently ranked as one of the best broadband service providers in the world and in its first decade generated approximately \$2.69 billion in economic and social benefits, on an investment of about \$200 million,”<sup>117</sup> while offering service fifty times faster than the national average.<sup>118</sup> Thus, this proven approach should be replicated when possible.

Notwithstanding Wilson’s success, the risks may often outweigh the benefits of municipal broadband. When passing the Level Playing Field Bill, the General Assembly noted that municipalities do not have the financial capability to pay for broadband services and do not have the ability to bear such a high risk.<sup>119</sup> If municipalities like Wilson were able to take on the high-cost risks associated with the investment before the Legislation, the “fair-play” measures imposed by the Legislation, like phantom costs and prohibitions on debt, add to the hurdles that must be assessed in the cost-benefit analysis.<sup>120</sup> The decision whether or not to spend municipal capital on broadband should be left to the municipality directly confronting the difficulties, rather than the State making a

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<sup>114</sup> This Article uses “municipal broadband” to refer to incorporated municipalities and counties.

<sup>115</sup> See Yoo & Pfenninger, *supra* note 71, at 22–23.

<sup>116</sup> James Baller et al., *Broadband Partnerships: For Many Communities, a Good Option at a Good Time*, 62 *MUN. LAW.: J. LOC. GOV’T L.* 6, 7 (Sept./Oct., 2021).

<sup>117</sup> *Id.*

<sup>118</sup> Shayaan Raja, *The Not So Broad-Band: Public Policy Argument About Broadband Legislation in North Carolina and Tennessee and the Potential National Impact*, 16 *N.C. J.L. & TECH.* 106, 121–22 (2015).

<sup>119</sup> *Id.*

<sup>120</sup> See *id.*

blanket prohibition across a range of situations. Nevertheless, the decision to enter an industry that is “intensely competitive and replete with takeovers and bankruptcies” is one filled with risks and should be made with that consideration in mind.<sup>121</sup>

The primary argument behind the Level Playing Field Bill is that the entry of government into providing internet service brings unfair competition to the market.<sup>122</sup> When it passed the Bill, the legislature argued that the Legislation merely requires “fair-play” rules for municipalities that want to compete against private entities in the broadband market.<sup>123</sup> AT&T’s Chief Executive Officer, Randall Stephenson, summarized this argument: “The idea of private capital competing with taxpayer-provided capital just feels inconsistent to us with what a free-market system looks like.”<sup>124</sup> This concern is especially relevant given the considerable entry costs associated with broadband, as well as the fact that local governments do not pay taxes and can have their losses covered by taxpayers.<sup>125</sup> However, municipal governments will likely not be able to justify entering the field unless ISPs are unable, or unwilling, to provide meaningful, affordable service in their area.<sup>126</sup> Eric Mansfield, a former North Carolina State Senator, argued against the Level Playing Field Bill because Time Warner Cable has a monopoly over municipal broadband service in his home city of Fayetteville: “I just think a little competition from the city would go a long way in getting better service for everyone.”<sup>127</sup> Mansfield rightfully

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<sup>121</sup> *Id.* at 120.

<sup>122</sup> Jon Sanders, *The FCC’s Anticompetitive Greenlight: Commission is Wrong to Override North Carolina Law for Municipal Broadband*, JOHN LOCKE FOUND. (2015), <https://www.johnlocke.org/research/the-fccs-anticompetitive-greenlight-commission-is-wrong-to-override-north-carolina-law-for-municipal-broadband/> [<https://perma.cc/GG9Q-5ZQJ>]; see also T. Randolph Beard et al., *The Law and Economics of Municipal Broadband*, 73 FED. COMM. L.J. 1, 6 (2020) (arguing that the evidence of municipal broadband presents “near inevitable financial failure”).

<sup>123</sup> Raja, *supra* note 118, at 116.

<sup>124</sup> Holmes, *supra* note 88.

<sup>125</sup> *Id.*

<sup>126</sup> See Raja, *supra* note 118, at 121–22.

<sup>127</sup> Holmes, *supra* note 88.

understands municipal broadband is a competitive, rather than anti-competitive, force in areas without quality broadband.<sup>128</sup>

Moreover, the importance of broadband in daily life warrants its categorization as a utility, which is often serviced to the public.<sup>129</sup> For instance, more than 2,000 communities in forty-nine states have a public power utility company, and 88% of the country is served by public water utilities.<sup>130</sup> The categorization of broadband as a public utility is consequential because it can justify state control.<sup>131</sup> The Supreme Court first defined public utility as one “clothed with a public interest,” a phrase that has since been routinely employed to rationalize regulatory control.<sup>132</sup> While broadband has not been found to be a public utility, the parallel still holds: The anticompetitive concern of the Level Playing Field Bill does not justify restricting municipalities from exploring options to solve their communities’ broadband deficiencies when it is “clothed in the public interest.”<sup>133</sup> Criticisms of Greenlight fail to account for why the government should not supplement the private sector’s broadband in areas where servicing internet is not yet profitable, which is an approach that has consistently been done with similar

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<sup>128</sup> See *id.*

<sup>129</sup> See Meredith Whipple, *We Already Knew Broadband Should Be a Public Utility. The Pandemic Made It Obvious*, PUBLIC KNOWLEDGE (Mar. 15, 2021), <https://publicknowledge.org/we-already-knew-broadband-should-be-a-public-utility-the-pandemic-made-it-obvious/#:~:text=What%20Does%20That%20Mean%20for,important%20as%20water%20and%20electricity> [https://perma.cc/EAD9-4PTZ].

<sup>130</sup> See *Stats & Facts*, AM. PUB. POWER ASS’N, <https://www.publicpower.org/public-power/stats-and-facts> [https://perma.cc/MRB7-HV9H] (last visited Apr. 9, 2022); Andrea Kopaskie, *Public vs Private: A National Overview of Water Systems*, ENV’T FIN. BLOG (Oct. 19, 2016), <https://efc.web.unc.edu/2016/10/19/public-vs-private-a-national-overview-of-water-systems/> [https://perma.cc/SY4W-S8AW].

<sup>131</sup> Josh Simons & Dipayah Ghosh, *Utilities for Democracy: Why and How the Algorithmic Infrastructure of Facebook and Google Must Be Regulated*, BROOKINGS INST. (Aug. 2020), [https://www.brookings.edu/wp-content/uploads/2020/08/FP\\_20200908\\_facebook\\_google\\_algorithm\\_simons\\_ghosh.pdf](https://www.brookings.edu/wp-content/uploads/2020/08/FP_20200908_facebook_google_algorithm_simons_ghosh.pdf) [https://perma.cc/MRP7-DXJK].

<sup>132</sup> *Munn v. Illinois*, 94 U.S. 113, 141 (1876); see Simons & Ghosh, *supra* note 131, at 10; Meredith Doswell, *Amidst COVID-19, the Internet Is “Clothed in the Public Interest” – Should It Be a Public Utility?*, N.C. J.L. & TECH. BLOG, (Oct. 6, 2020), <https://ncjolt.org/blogs/amidst-covid-19-the-internet-is-clothed-in-the-public-interest-should-it-be-a-public-utility/> [https://perma.cc/S82F-QAP8].

<sup>133</sup> See *Munn*, 94 U.S. at 141.

utilities. Like those public utilities, broadband is now an essential service in which the government must play a role.

As mentioned, even when municipalities can replicate Greenlight's service practically and legally, there are high risks associated with doing so, including financial and operational risks.<sup>134</sup> While municipal broadband may only work for communities with the population, geography, and capital necessary to assume the risks associated with the process, the limitations in the Level Playing Field Bill make it ineffective for any local government to bear that risk.<sup>135</sup> As discussed in Part IV, *supra*, the Legislation mandates that local governments secure a referendum vote against the powerful lobbyists that restricted municipal broadband in the first place, which is just one of the many burdensome regulations.<sup>136</sup> With the necessary funds already appropriated by the federal government awaiting its use for this very purpose, the North Carolina General Assembly must reconsider this restriction.

#### *B. Public-Private Partnerships*

For those municipalities unable to replicate Greenlight because of geographic, population, or cost barriers, the most effective approach to increasing broadband access is through public-private partnerships that leverage the vast funding (explained *supra*) with private companies' expertise in the market. A public-private partnership is a "long-term contract between a private party and a government entity, for providing a public asset or service, in which the private party bears significant risk and management responsibility and remuneration is linked to performance."<sup>137</sup> These partnerships are used in a wide range of sectors, with differing risks, funding sources and amounts, and structures, depending on the

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<sup>134</sup> See CORNING, *supra* note 81.

<sup>135</sup> *Leaping*, *supra* note 9, at 24.

<sup>136</sup> See An Act to Protect Jobs and Investment by Regulating Local Government Competition with Private Business, 2011 N.C. Sess. Laws 84.

<sup>137</sup> *What Is a PPP: Defining "Public-Private Partnership,"* PPP KNOWLEDGE LAB (Feb. 6, 2022), <https://pppknowledgelab.org/guide/sections/3-what-is-a-ppp-defining-public-private-partnership> [<https://perma.cc/H4JV-GQ35>].

agreed-to cooperation.<sup>138</sup> The division of risks, benefits, and control of the partnership can generally be categorized into three forms:

On one end of the risk spectrum, there is private investment with public facilitation—the lowest-risk model for the public partner and highest-risk model for the private partner. On the other end of the spectrum sits the traditional P3 model, whereby the public partner assumes all financial risk to pay for the infrastructure while the private partner builds and operates the network. The middle ground between these two models is one that shares the risks, rewards, and control, but the partners will only achieve success if they are able to accommodate each other's priorities and develop an agreement for a win-win outcome.<sup>139</sup>

Broadband partnerships will likely follow the latter two models with public capital because of the significant funding available via the IJA.<sup>140</sup> As a result of the normal business model that prevents ISPs from offering service because of the increased cost of rural broadband, these partnerships can be decisive in broadband accessibility by allowing municipalities to own the fiber infrastructure built and operated by the private entity.<sup>141</sup> Much like an airport, “the community finances the network (the airport), then leases the airports’ connections (gates) to private ISPs, who compete with each other over providing service to consumers.”<sup>142</sup> Funding from the various federal and state appropriations, discussed in Part II, *supra*, as well as certain advantages described *infra*, render the previously unprofitable and futile endeavor worthwhile.

Municipalities in North Carolina attract private partners with several particular assets. A municipality, for instance, can allow a private partner to use its vertical assets, like water towers or tall buildings, to fix wireless internet equipment without bearing the normal cost of installation.<sup>143</sup> The municipality can also lease its

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<sup>138</sup> *Id.*

<sup>139</sup> *Leaping*, *supra* note 9, at 24.

<sup>140</sup> *See id.*

<sup>141</sup> Steven Koltai, *Public-Private Partnerships Key to Providing High-Quality Broadband to All*, THE HILL (July 26, 2021), <https://thehill.com/opinion/finance/564860-public-private-partnerships-key-to-providing-high-quality-broadband-to-all?rl=1> [<https://perma.cc/526U-ATEL>].

<sup>142</sup> Guttentag, *supra* note 1, at 318.

<sup>143</sup> NC BROADBAND, *Public-Private Partnerships*, <https://www.ncbroadband.gov/technical-assistance/playbook/building-network/public-private#:~:text=The%20North%20Carolina%20Broadband%20Infrastructure,as%20many%20citize>

easements to the private partner.<sup>144</sup> Moreover, partners “can address such economic challenges through sharing capital cost” and “enhancing revenue potential (e.g., finding anchor tenants and aggregating community demand, and removing regulatory barriers to expedite deployment).”<sup>145</sup> Generally, “successful partnerships can leverage public financing, community assets and local leadership, in collaboration with private-sector expertise and capital, to expand broadband.”<sup>146</sup> In effect, these partnerships can rejuvenate local business rather than national companies that lobby against them. The North Carolina League of Municipalities (“NCLM”) advocates for the repeal of the Level Playing Field Bill to partner “the fiber backbone or existing infrastructure” of municipalities with “small, home-grown companies in North Carolina that would love to be on the private side of these partnerships.”<sup>147</sup> Thus, municipal assets can be used to promote local business instead of allowing large ISPs to form monopolies over underserved areas.

The advantages to these public-private partnerships are demonstrated by success stories elsewhere.<sup>148</sup> In 2015, the City of Santa Cruz, California, created a broadband partnership with Cruzio, a local ISP.<sup>149</sup> In the agreement, the City offered to build, own, and maintain a fiber network, while Cruzio was to migrate its current customers to the City’s broadband network and pursue additional customers for the new broadband service.<sup>150</sup> While Santa

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ts%20of%20broadband%20deployment [https://perma.cc/ML5G-RPSK] (last visited  
Feb. 6, 2022).

<sup>144</sup> *Id.*

<sup>145</sup> BROADBANDUSA, BROADBANDUSA: AN INTRODUCTION TO EFFECTIVE PUBLIC-PRIVATE PARTNERSHIPS FOR BROADBAND INVESTMENTS 3 (Jan. 2015), [https://www.ntia.doc.gov/files/ntia/publications/ntia\\_ppp\\_010515.pdf](https://www.ntia.doc.gov/files/ntia/publications/ntia_ppp_010515.pdf) [https://perma.cc/Y97X-UX9L].

<sup>146</sup> *Id.*

<sup>147</sup> Paul Meyer, *Broadband Would Close NC’s Digital Divide; Big Telecom Is Blocking It*, FAYETTEVILLE OBSERVER (Jan. 3, 2021), <https://www.fayobserver.com/story/opinion/columns/guest/2021/01/03/broadband-would-close-ncs-digital-divide-big-telecom-blocking/4087297001/> [https://perma.cc/46GY-BS3K].

<sup>148</sup> See, e.g., Hovis et al., *supra* note 19, at 21–27 (summarizing various approaches to public-private partnerships in broadband).

<sup>149</sup> See *Shared-Risk*, *supra* note 81, at 19.

<sup>150</sup> *Id.*

Cruz assumed added risk by partnering with the small, local ISP, the City was willing to bear that risk because of the benefits for local employees.<sup>151</sup> Supported by Santa Cruz, the local ISP was able to migrate from an outdated internet service to a modern fiber network and serve new customers.<sup>152</sup>

When Garret County, a rural community in western Maryland, was unwilling to physically update its outdated internet service to meet FCC benchmarks, the County incrementally built modern broadband infrastructure with a focus on specific private institutions.<sup>153</sup> Using the new infrastructure as an incentive for private entities, Garrett County partnered with Declaration Networks Group (“DNG”) to provide high-speed service to its residents.<sup>154</sup> DNG agreed to put its own capital towards the project and utilize its technical and operational expertise to manage the network.<sup>155</sup> The County was able to turn its \$750,000 investment (matched by both a grant and DNG) into high-speed internet for 3,000 homes, with more homes to be added as DNG builds out the infrastructure.<sup>156</sup>

The limitations of the Level Playing Field Bill also restrict public-private partnerships because the Legislation’s definition of “[c]ity-owned communication service provider” contains the material language of “directly [or] *indirectly*” providing service, and therefore, extends to public-private partnerships.<sup>157</sup> Without the Legislation, municipalities would have the general authority to enter public-private partnerships for other purposes.<sup>158</sup> Specifically, local governments may enter partnerships to “acquire, construct, own, lease as lessor or lessee, and operate or participate in the acquisition, construction, ownership, leasing, and operation of a public-private project, or of specific facilities within such a project, including the making of loans and grants from funds available to the governmental

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<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.* at 20.

<sup>154</sup> *Shared-Risk*, *supra* note 81, at 20.

<sup>155</sup> *Id.* at 20–21.

<sup>156</sup> *Id.*

<sup>157</sup> N.C. Gen. Stat. § 160A-340(1) (2021) (emphasis added).

<sup>158</sup> *Id.* § 143-128.1C.

entity for these purposes.”<sup>159</sup> This authority to enter public-private partnerships may not extend to broadband because it is limited to conventional contracting, which is a “significantly different business case” than what is needed for broadband.<sup>160</sup> Arguably, however, *BellSouth Telecommunications*’ authorization of municipal broadband may work together with the general contracting authority to permit public-private partnerships.<sup>161</sup> Nevertheless, it is crucial that the General Assembly rescind the Level Playing Field Bill and clearly authorize public-private partnerships for broadband.

## V. EMPOWER MUNICIPALITIES TO BE PRIMARY DECISION-MAKERS

When Senator John McCain introduced the Community Broadband Act, which would have prohibited states from restricting municipal broadband, he did so with a bipartisan group of senators.<sup>162</sup> A decade after the legislation failed to garner enough support to pass, Senator Cory Booker (D-NJ) reintroduced nearly identical legislation without bipartisan support, which likewise never became law.<sup>163</sup> Locally, however, the partisan obstacle to municipal broadband is not as stark, with three out of four cities with municipal broadband voting a majority Republican.<sup>164</sup> If legislation at the federal level is unlikely to happen, there are two solutions to authorizing municipal broadband: (A) enacting state legislation that authorizes municipal broadband or public-private partnerships, or (B) utilizing federal regulations to either compel changes or preempt state law.

### A. State Legislative Approach

The NCLM has presented three specific and necessary changes to current state laws in order for viable partnerships to move

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<sup>159</sup> *Id.* § 143-128.1C(b).

<sup>160</sup> *Leaping*, *supra* note 9, at 30.

<sup>161</sup> *See id.*; *BellSouth Telecommms. v. Laurinburg*, 168 N.C. App. 75, 86–87 (2005).

<sup>162</sup> Guttentag, *supra* note 1, at 344.

<sup>163</sup> *Id.*

<sup>164</sup> *Id.* at 345.

forward.<sup>165</sup> Specifically, the NCLM calls for unambiguous local authority to: (1) “raise money for broadband infrastructure, including taxes and borrowed funds”; (2) “spend money on broadband infrastructure”; and, (3) “lease infrastructure to the private and non-profit entities that will operate and profit from using the broadband infrastructure to provide internet service.”<sup>166</sup> This Article presents three solutions that would each independently address the proposals issued by the NCLM: The FIBER NC Act, the County Broadband Authority Act, and federal regulations to compel North Carolina to authorize public-private partnerships.

The FIBER NC Act, originally introduced in 2019 and again in 2021, would give municipalities and counties the authority to spend money on infrastructure and lease the infrastructure to private entities.<sup>167</sup> The legislation “eliminate[s] existing state restrictions and increase[s] the authority of local governments to build out broadband infrastructure and lease the fiber to internet service providers.”<sup>168</sup> Furthermore, it “encourages the creation of public-private partnerships to bring better broadband access to more areas of the [S]tate.”<sup>169</sup> Municipalities would be required to develop a business plan for leasing the infrastructure to the private partner, complete a feasibility study, and hold public hearings before the partnership is initiated.<sup>170</sup> Thus, along with other requirements, the Act allows municipalities to build their own networks as long as the municipalities allow ISPs to lease the network to provide private

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<sup>165</sup> It is important to note that the NCLM’s approach would authorize public-private partnerships but not necessarily municipal broadband. *See Leaping, supra* note 9, at 28–29.

<sup>166</sup> *Id.*

<sup>167</sup> *See* H.B. 431, 2019 Gen. Assemb., Reg. Sess. (N.C. 2019); S.B. 547, 2021 Gen. Assemb., Reg. Sess. (N.C. 2021).

<sup>168</sup> Sarah Langer Hall, *What Is the FIBER NC Act?*, N.C. STATE UNIV. INST. FOR EMERGING ISSUES (May 14, 2020), <https://iei.ncsu.edu/2020/what-is-the-fiber-nc-act/> [<https://perma.cc/3FNA-JBR3>].

<sup>169</sup> Press Release, N.C. League of Muns., FIBER NC Act Will Help Close North Carolina’s Digital Divide (Mar. 21, 2019), <https://www.nclm.org/resource-library/Pages/News%20Releases/FIBER-NC-Act-Will-Help-Close-North-Carolina%E2%80%99s-Digital-Divide.aspx#:~:text=%E2%80%8Bdddddd%2021%2C%202019&text=HB%20431%20FIBER%20NC%20Act,more%20areas%20of%20the%20state> [<https://perma.cc/G7S6-UF22>].

<sup>170</sup> Hall, *supra* note 168.

operation.<sup>171</sup> It is important to note that the FIBER NC Act is more politically viable—but more restrictive—than completely rescinding the Level Playing Field Bill because the FIBER NC Act would authorize municipalities to operate broadband networks as retail service providers, meaning municipalities would still not be able to replicate Greenlight by providing the service directly to customers.<sup>172</sup> Thus, the Act would allow partnerships between municipalities and private entities to bring broadband where it is not economically feasible for purely private forces.<sup>173</sup> The FIBER NC Act failed to make it out of committee partly because of strong opposition by cable and telecommunications companies that argued it would hamper their ability to compete on a level playing field.<sup>174</sup>

The County Broadband Authority Act (“CBAA”), a more limited proposal in the North Carolina General Assembly, would also make productive changes to current broadband law for county governments.<sup>175</sup> First, the Act authorizes counties to use property taxes “[t]o provide grants to high-speed internet access service providers or to build facilities and equipment of a broadband service.”<sup>176</sup> Second, the CBAA authorizes counties to provide grants to private or nonprofit ISPs without regard to the current accessibility of broadband within the county.<sup>177</sup> And third, the Act authorizes counties to “construct Internet technology infrastructure capable of delivering high-speed Internet access service . . . [and] lease or sell the technology infrastructure to a private or nonprofit provider of high-speed Internet.”<sup>178</sup> However, the Act still prohibits counties from providing the internet service themselves.<sup>179</sup>

Although the CBAA does not go as far as the FIBER NC Act since it only applies to county governments, its passage would

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<sup>171</sup> See Cooper, *supra* note 18.

<sup>172</sup> See Hall, *supra* note 168.

<sup>173</sup> See *id.*

<sup>174</sup> See *id.*

<sup>175</sup> See S.B. 689, 2021 Gen. Assemb., Reg. Sess. (N.C. 2021).

<sup>176</sup> *Id.* § 2(c)(38).

<sup>177</sup> *Id.* § 3(a).

<sup>178</sup> *Id.* § 3(b).

<sup>179</sup> *Id.* § 3(c) (“Nothing in this section authorizes a county to provide high-speed Internet broadband service.”).

unshackle counties from some of the more restrictive impediments under current law. The North Carolina Association of County Commissioners supports the Act because counties need more flexibility to leverage their assets and infrastructure to partner with private industry.<sup>180</sup> North Carolina State Senator Kevin Corbin, one of the CBAA's sponsors, asserts that the Act is "intended to help county governments cut through the red tape that has prevented them from offering incentives and programs to expand the broadband infrastructure in their respective areas," even mentioning that the "legislation is the perfect example of private-public partnership."<sup>181</sup> With around 45% of North Carolina's population living outside a municipality but within a county, county governments are the most effective level of government to provide broadband in rural areas of the State.<sup>182</sup>

#### *B. Federal Approach: Regulation or Preemption*

A second path towards increasing broadband access in North Carolina is for the federal government to encourage unrestricted public-private partnerships. This federal facilitation falls into two general approaches: (1) regulating IJA funds to be contingent on municipalities' ability to enter public-private partnerships, or (2) preempting the State's Level Playing Field Bill through the federal Telecommunications Act (federal preemption).

First, the NTIA could compel North Carolina to rescind restrictive legislation in order to receive federal funds because the IJA explicitly directs the NTIA to "issue such regulations . . . as may be necessary or appropriate to carry out the [broadband grant]

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<sup>180</sup> See Press Release, N.C. Ass'n of Cnty. Comm'rs, NCACC Supports Legislation to Authorize Counties to Expand Broadband Access and Maximize Federal Funding (Apr. 9, 2021), <https://www.ncacc.org/press-releases/ncacc-supports-legislation-to-authorize-counties-to-expand-broadband-access-and-maximize-federal-funding/> [<https://perma.cc/VHX7-T4J7>].

<sup>181</sup> Brittney Lofthouse, *Senator Corbin Sponsors Bill to Give Rural Counties the Ability to Provide Broadband*, S. SCOOP (Apr. 12, 2021), <https://thesouthernscoopnews.com/business/senator-corbin-sponsors-bill-to-give-rural-counties-the-ability-to-provide-broadband> [<https://perma.cc/T99C-AR89>].

<sup>182</sup> See David M. Lawrence, *An Overview of Local Government*, in CNTY. & MUN. GOV'T N.C. 3, 6 (2014), <https://www.sog.unc.edu/sites/www.sog.unc.edu/files/cmg2014excerptch1.pdf> [<https://perma.cc/B9S6-D2DP>].

programs.”<sup>183</sup> As directed, the NTIA “welcomed input from all interested parties, conducted extensive stakeholder outreach, and received comments reflecting a diverse range of backgrounds and stakeholder groups.”<sup>184</sup> Notably, the IJA specifically prohibits states from excluding public-private partnerships from the use of federal funding; however, the language may not extend to significant limitations on partnerships that functionally prohibit them, like what the Level Playing Field Bill created.<sup>185</sup> With this authority, NTIA may be able to enforce the IJA terms in a manner that either preempts the Level Playing Field Bill or compels North Carolina to rescind the Bill to receive the federal funds. In response to NTIA’s request for public comments, some stakeholders specifically called for NTIA to include functional prohibition of partnerships within their regulations.<sup>186</sup> For instance, Congresswoman Anna Eshoo recommended that NTIA take advantage of its “ability to preempt such state laws.”<sup>187</sup>

Similar to past grants where NTIA has favored public-private partnerships, the NTIA should use its delegated authority via the IJA to promulgate regulations that prohibit restrictions on the use of public-private partnerships.<sup>188</sup> To do so, NTIA would simply

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<sup>183</sup> See Infrastructure Investment & Jobs Act, Pub. L. No. 117-58, § 60102(i), 135 Stat. 429 (2021); see also *id.* § 60102(a)(2)(A) (defining “Assistant Secretary”).

<sup>184</sup> *NTIA Receives More than 550 Comments on Broadband Programs in Bipartisan Infrastructure Law*, NAT’L TELECOMM. & INFO. ADMIN. (Feb. 14, 2022), <https://www.ntia.doc.gov/blog/2022/ntia-receives-more-550-comments-broadband-programs-bipartisan-infrastructure-law> [<https://perma.cc/33AQ-XZ7Y>].

<sup>185</sup> See Infrastructure Investment & Jobs Act, Pub. L. No. 117-58, § 60102(h)(1)(A)(iii), 135 Stat. 429 (2021) (noting that states “may not exclude cooperatives, nonprofit organizations, *public-private partnerships*, private companies, public or private utilities, public utility districts, or local governments from eligibility for such grant funds” (emphasis added)).

<sup>186</sup> See, e.g., Anna Eshoo, Comment Letter on Proposed Rules Under the Infrastructure Investment & Jobs Act (Feb. 4, 2022), <https://www.regulations.gov/comment/NTIA-2021-0002-0009> [<https://perma.cc/N7K7-UAYX>].

<sup>187</sup> *Id.*

<sup>188</sup> See Ty Perkins, *States Should Be Encouraged to Form Public-Private Partnerships for Federal Broadband Funds*, BROADBAND BREAKFAST (June 10, 2021), <https://broadbandbreakfast.com/2021/06/states-should-be-encouraged-to->

interpret the language—“may not exclude”—to include functional exclusion.<sup>189</sup> Because the Level Playing Field Bill is fundamentally discouraging these partnerships, the General Assembly would be compelled to rescind the Level Playing Field Bill in order to receive IJJA funding.<sup>190</sup>

Forcing states to change their laws in exchange for federal funding is similar to the pressure allowed in *South Dakota v. Dole*<sup>191</sup> but prohibited in *National Federation of Independent Business v. Sebelius*.<sup>192</sup> In *Dole*, the Court affirmed congressional authority to pass legislation that threatened to withhold 5% of highway funds from states that refused to change their legal drinking age.<sup>193</sup> The Court reasoned that the congressional inducement was not coercion because it gave states a legitimate choice, “not merely in theory but in fact.”<sup>194</sup> In *Sebelius*, the Court struck down part of the Affordable Care Act that threatened states with a loss of Medicaid funding.<sup>195</sup> The Court found that Congress did not provide states with a legitimate choice, going as far to call the Medicaid expansion “a gun to the head.”<sup>196</sup> Instead of making considerable funds contingent upon state action and thus forcing states to act, NTIA’s regulation would be more similar to *Dole* because the IJJA funds are new and not already relied upon by states.<sup>197</sup> Moreover, NTIA would receive considerable deference in their broad interpretation of the Statute.<sup>198</sup>

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form-public-private-partnerships-for-federal-broadband-funds/ [https://perma.cc/K76J-YU9X].

<sup>189</sup> See Kery Murakami, *Biden’s Municipal Broadband Push Clashes with State Restrictions*, ROUTE FIFTY (Feb. 27, 2022), <https://www.route-fifty.com/infrastructure/2022/02/municipal-broadband-ttk/362498/> [https://perma.cc/BM2E-CV9U].

<sup>190</sup> See *id.*

<sup>191</sup> 483 U.S. 203, 203 (1987).

<sup>192</sup> 567 U.S. 519, 581 (2012).

<sup>193</sup> *Dole*, 483 U.S. at 203.

<sup>194</sup> *Id.* at 211–12.

<sup>195</sup> *Sebelius*, 567 U.S. at 581.

<sup>196</sup> *Id.*

<sup>197</sup> See *id.* at 211.

<sup>198</sup> See generally *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984) (holding that courts must defer to permissible agency interpretations of statutes unless Congress has directly and unambiguously expressed a contrary intent).

Second, the FCC may be able to preempt North Carolina law through the Telecommunications Act of 1996 (under either section 253 or section 706), but this route has failed before.<sup>199</sup> Section 253 of the Telecommunications Act preempts state and local laws “prohibiting the ability of any entity” to provide telecommunications services.<sup>200</sup> Section 706 states that the FCC should “encourage the deployment . . . of advanced telecommunications . . . by utilizing . . . price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.”<sup>201</sup> The legislative history of the Telecommunications Act weighs heavily in favor of FCC’s preemption.<sup>202</sup> Eager to lift regulatory burdens for telecommunications, Congress passed the Act “to promote competition, reduce regulation, and encourage deployment of new telecommunications technologies, including the Internet.”<sup>203</sup> After a minority of senators expressed concern over the preemption provision, the majority felt confident that the provision was necessary because states would not usher in the changes needed to promote access.<sup>204</sup>

In 2004, municipalities in Missouri asked the FCC to specifically preempt a State law that prohibited the ability of municipalities to provide telecommunications services using section 253.<sup>205</sup> The FCC refused to preempt the Missouri law but said the public policy underlying the State law “substantially disserved the policy behind the Telecommunications Act.”<sup>206</sup> On appeal, in *Nixon v. Missouri Municipal League*,<sup>207</sup> the Supreme Court held that the Telecommunications Act does not extend to state prohibitions over their own political subdivisions.<sup>208</sup> The Court relied on precedent

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<sup>199</sup> See Murakami, *supra* note 189.

<sup>200</sup> *Nixon v. Missouri Mun. League*, 541 U.S. 125, 128 (2004).

<sup>201</sup> 47 U.S.C. § 1302(a).

<sup>202</sup> See Guttentag, *supra* note 1, at 346.

<sup>203</sup> *Id.*

<sup>204</sup> *Id.* at 347.

<sup>205</sup> *Nixon*, 541 U.S. at 129.

<sup>206</sup> *Id.* at 131.

<sup>207</sup> *Id.* at 125.

<sup>208</sup> *Id.* at 140–41.

from *Gregory v. Ashcroft*,<sup>209</sup> which requires an “unmistakably clear” intent of Congress in the statute to constrain traditional state authority over political subdivisions.<sup>210</sup> Opponents have heavily criticized this decision, arguing that the Court failed to take legislative history into account, disregarded the benefits of municipal broadband, and failed to follow established federalism precedent.<sup>211</sup> Still, the Court did not reject Congress’ ability to preempt state law when stated clearly.<sup>212</sup>

Even after the General Assembly significantly limited Greenlight’s expansion, Wilson attempted to override the State Law in court.<sup>213</sup> In July of 2014, Wilson filed a petition with the FCC asking the agency to use its regulatory powers, this time through section 706.<sup>214</sup> By reasoning that the “Tennessee and North Carolina statutes do not implicate core attributes of state sovereignty but rather regulate interstate communications services that are at the heart of the [FCC]’s jurisdiction,”<sup>215</sup> the FCC temporarily issued an order preempting North Carolina’s prohibition on the expansion of Wilson’s network, claiming that the State’s restrictions “thwarted competition.”<sup>216</sup>

Following the FCC’s order, the State of North Carolina appealed to the Sixth Circuit.<sup>217</sup> In a combined decision, *Tennessee v. FCC*,<sup>218</sup> the court held that the FCC did not have statutory authority to preempt state statutes through section 706.<sup>219</sup> The court based its decision on the fact that the section did not have a clear statement granting preemption power to the FCC, a necessary ingredient where the federal government attempts to inject itself into a state

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<sup>209</sup> 501 U.S. 452 (1991).

<sup>210</sup> *Id.* at 460; *see Nixon*, 541 U.S. at 125.

<sup>211</sup> Guttentag, *supra* note 1, at 348.

<sup>212</sup> *Gregory*, 501 U.S. at 461.

<sup>213</sup> *See generally* *Tennessee v. FCC*, 832 F.3d 597 (6th Cir. 2016).

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 611–12.

<sup>216</sup> Schwarze, *supra* note 72, at 209.

<sup>217</sup> *Tennessee v. FCC*, 832 F.3d at 600.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at 613–14 (“Section 706 does not contain a clear statement authorizing preemption of Tennessee’s and North Carolina’s statutes that govern the decisions of their municipal subdivisions . . . . [T]he FCC’s order is reversed.”).

and municipal relationship.<sup>220</sup> While the decision was a clear win for states' rights, it was a troubling loss for accessible broadband in North Carolina. Interestingly, the court reasoned that the municipal broadband networks worked as competitive forces within the private market by forcing "established Internet providers to lower rates while increasing the quality of their services," arguing against the policy considerations behind the Level Playing Field Bill.<sup>221</sup>

Given the opposition to the two decisions of *Tennessee v. FCC* and *Missouri Municipal League*, their legal precedent should be reconsidered. To do so, the FCC should again try to grant municipalities preemption under section 253, reasoning that increased reliance on broadband may pressure the Court to revisit the issue.<sup>222</sup> Similarly, the FCC may now have the ability to preempt because of changes to federal broadband definitions in a similar fashion to the FCC's enforcement of net neutrality.<sup>223</sup> Even if the Court decides not to, a public campaign for municipal broadband may be able to pressure states to provide greater municipal authority or Congress to amend the Telecommunications Act to provide clear authority for the FCC to preempt state law.<sup>224</sup>

Nonetheless, federal preemption of state law may not independently authorize municipalities to provide broadband in states where state subdivisions may act only when specifically authorized to do so.<sup>225</sup> While North Carolina falls into that category of states, *BellSouth Telecommunications'* authorization of municipal broadband and the general contracting prerogative, discussed in Part IV, *supra*, arguably provides the necessary authority.<sup>226</sup> For those states that do not have such authority, or if the authority in North Carolina is deficient, the federal government may

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<sup>220</sup> *Id.* See Schwarze, *supra* note 72, at 212–13, for a more detailed discussion on the clear statement rule as it relates to Wilson.

<sup>221</sup> *Tennessee v. FCC*, 832 F.3d at 600.

<sup>222</sup> Guttentag, *supra* note 1, at 349–50.

<sup>223</sup> See Kevin Hotchkiss, *Feeding the Beast: Addressing the Internet's Insatiable Power Consumption*, 32 GEO. ENV'T L. REV. 123, 139 (2019).

<sup>224</sup> Guttentag, *supra* note 1, at 350.

<sup>225</sup> See RICHARD BRIFFAULT ET AL., *CASES AND MATERIALS ON STATE AND LOCAL GOVERNMENT LAW*, 171 (9th ed. 2022).

<sup>226</sup> See *Leaping*, *supra* note 9, at 13; *BellSouth Telecomm. v. Laurinburg*, 168 N.C. App. 75, 86–87 (2005).

be able to authorize municipal authority.<sup>227</sup> The Supreme Court has never explicitly addressed this issue, but the Court has implicitly allowed such authorization in other instances.<sup>228</sup> In *Lawrence County v. Lead-Deadwood School District*,<sup>229</sup> the issue was whether the Payment in Lieu of Taxes Act, which compensated local governments for their losses of revenue due to tax-immune federal land within their jurisdictions and allowed the payments to be used “for any governmental purpose,” preempted a South Dakota law that 60% of all federal payments must be used on school districts.<sup>230</sup> The Court reasoned that Congress was concerned with both compensating local governments with adequate amounts of money and ensuring municipalities have the flexibility to spend the money as they want, finding that the state law impeded the operation of the federal law.<sup>231</sup>

Thus, federal preemption of restrictive state laws could be an alternative path to repeal of the Level Playing Field Bill. Particularly, the IJJA’s directive to include public-private partnerships and the increased demand for broadband may provide the necessary prerogative to the Telecommunications Act that it failed to possess independently. Working together, the FCC and NTIA could provide greater access to broadband by preempting restrictive state prohibitions on municipal authority.

## VI. CONCLUSION

After Franklin Delano Roosevelt campaigned for the presidency on public power, he created the Tennessee Valley Authority to supply affordable electricity to rural areas.<sup>232</sup> Like public power, high-speed broadband today is unquestionably an indispensable asset for communities to thrive, or even survive.<sup>233</sup> According to the

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<sup>227</sup> See BRIFFAULT, *supra* note 225, at 171–73.

<sup>228</sup> See *Lawrence Cty. v. Lead-Deadwood Sch. Dist.*, 469 U.S. 256, 258 (1985).

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 256.

<sup>231</sup> *Id.* at 263.

<sup>232</sup> Guttentag, *supra* note 1, at 315.

<sup>233</sup> *Leaping*, *supra* note 9, at 13; see also Guttentag, *supra* note 1, at 315 (explaining that today, more than 2,000 communities in the United States provide

Pew Research Center, 70% of Americans are in favor of municipal broadband, with little difference with respect to political party affiliation.<sup>234</sup> With 27% of North Carolina households lacking broadband, North Carolina faces a significant obstruction to individual and community success that must be addressed.<sup>235</sup>

The private incentives to deploy universal broadband are low compared to the immense social benefits that it can offer, obliging government to close the gap between private incentives and social benefits.<sup>236</sup> To close that gap, North Carolina earmarked ARPA funds, and the federal government appropriated IJA funds, enabling various costly solutions to address the geographic and affordability issues. Beyond capital, North Carolina is leading the way in many important endeavors to close the digital divide, including instituting a state broadband office and investing in new technologies like satellite broadband. However, those endeavors are all ill-fated if the State continues to constrain municipalities in how to best use funding to address broadband accessibility, forcing them to utilize the allocated funds inefficiently.<sup>237</sup> Eight years after lawmakers suggested that government should not compete with the private sector by passing the Level Playing Field Bill, broadband has yet to become accessible in many parts of North Carolina.<sup>238</sup> Representative Josh Dobson, one of the main sponsors of the FIBER NC Act, underscored the problem: “Folks, what we’re doing is not working. Government is failing, the private sector is failing rural areas of this state. That’s just a fact.”<sup>239</sup>

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their own electricity, including cities like Seattle, San Antonio, and Los Angeles, which results in one in four Americans utilizing government services for power).

<sup>234</sup> *Leaping*, *supra* note 9, at 20.

<sup>235</sup> *See Digital Divide*, *supra* note 3.

<sup>236</sup> Beard et al., *supra* note 122, at 10.

<sup>237</sup> *See* John Cassidy et al., CLOSING THE DIGITAL DIVIDE, DELOITTE (Dec. 1, 2021), <https://www2.deloitte.com/us/en/insights/industry/public-sector/state-broadband-access-digital-divide.html> [<https://perma.cc/7BRE-HX9M>].

<sup>238</sup> *See* Laura Leslie, *Plan to Allow Municipal Broadband Systems in Rural NC Clears First Hurdle*, WRAL (Aug. 7, 2019), <https://www.wral.com/plan-to-allow-municipal-broadband-systems-in-rural-nc-clears-first-hurdle/18555959/> [<https://perma.cc/WM78-9A65>].

<sup>239</sup> *Id.*

Wilson's Greenlight program proves that, while carrying risks, municipal broadband can be as beneficial and affordable as other public utilities. And for those local governments unable to take on the challenges that municipal broadband presents, public-private partnerships can be constructive solutions, by dispersing risk and cost between public and private entities. For these two paths to succeed, the General Assembly must rescind the Level Playing Field Bill and clearly authorize public-private partnerships so that municipalities can utilize their assets to address broadband accessibility. Rescinding the Level Playing Field Bill is the only approach that would allow municipalities to create municipal broadband and form public-private partnerships. Short of rescinding the Level Playing Field Bill, alternative solutions that would authorize public-private partnerships include passing the FIBER NC Act or the CBAA, as well as utilizing federal regulations that compel changes or preempt state law.

Senator Angus King (I-ME) emphasized the importance of broadband, saying, "[f]ailure to provide broadband in rural areas of America is a death sentence for those communities. They cannot compete economically without access to broadband."<sup>240</sup> The critical problem of broadband accessibility is too local of an issue to hamper the level of government most directly facing the death sentence that failure produces. North Carolina must enable municipalities to bring their assets to the table, allowing them the full array of solutions to address the problem and make decisions based on local need. Instead of permitting powerful lobbyists to control access to broadband, North Carolina should allow municipalities the chance to close the digital divide that is a daily barricade to schooling, telemedicine, and work for nearly 27% of North Carolinians.

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<sup>240</sup> Guttentag, *supra* note 1, at 314.