BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, DC 20554

In the Matter of	)	
	)	
Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination	)	GN Docket No. 22-69

COMMENTS OF TECHFREEDOM

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EXECUTIVE SUMMARY

Section 60506 of the Infrastructure Investment and Jobs Act authorizes the FCC to regulate "digital discrimination" and "deployment discrimination" only where discriminatory intent can be established. It is therefore like Title IX but unlike Title VII, the Age Employment Discrimination Act, or the Fair Housing Act, which the Supreme Court has interpreted to create disparate-impact liability. If Congress had intended Section 60506 to create disparate-impact liability, it could have followed the consistent structure of those statutes. Instead, it wrote a very different statute. Congress established a goal of "equal access" for the FCC to "promote" or "facilitate" but did not make deprivation of equal access—the "equal opportunity to subscribe to an offered [broadband] service"—an element of the discrimination to be "prevented" or "prohibited."

Multiple commenters propose reading into Section 60506 language that Congress chose not to place there, or rearranging the language Congress drafted to make the statute appear more like civil rights laws that create disparate-impact liability. These proposals violate basic principles of statutory construction. Worse, they invite the FCC to impose core aspects of common carriage regulation—a prohibition on discrimination divorced from intent—on providers of broadband Internet access service without bothering to reclassify BIAS as a common carrier service. In effect, these proposals would erase a distinction fundamental to the structure of the Communications Act. They would find, in a terse provision tucked into an infrastructure bill, new authority for the Commission to decide

questions of "vast economic and political significance."[1] Courts will not accept such interpretations, for Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not … hide elephants in mouseholes."[2]

Ironically, such proposals would be deeply chilling to attempts to close the digital divide—yet they all rest on empirical claims about for which there is no hard evidence. A Further Notice of Proposed Rulemaking should address digital discrimination within the framework of powers that Congress has clearly delegated to the FCC. This comment concludes with recommendations to that end and with suggestions for how to structure a complaint process, especially if the FCC chooses to issue a rule creating disparate-impact liability.

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[1] West Virginia v. EPA, No. 20-1530, *21-22 (June 30, 2022) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-60 (2000)).

[2] Whitman v. American Trucking Assns., Inc., 531 U.S. 457, 468 (2001).

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TechFreedom, pursuant to Sections 1.4 and 1.405 of the Commission's rules (47 C.F.R. §§ 1.4 & 1.405), hereby files these Comments in response to the Notice of Proposed Rulemaking (NPRM), issued by the Commission in the above-referenced proceeding on December 22, 2022 to implement Section 60506 of the Infrastructure Investment and Jobs Act (Infrastructure Act).[1] TechFreedom submits the following comments.

I. Introduction

The NPRM and many commenters make an astounding claim. In just 304 words, in a single section within a 1039-page infrastructure appropriations bill, they say, Congress gave the Commission the FCC the power to most sweeping regulatory powers over a key part of

[1] Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, Notice of Proposed Rulemaking, FCC 22-98, December 22, 2022, *codified at* 47 U.S.C. § 1754; Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429, 1245-46 (2021) (codified at 47 U.S.C. 1754). The NPRM was published in the Federal Register on January 20, 2023, 88 Fed Reg 3681 (Jan. 20, 2023). Comments were to be filed by February 21, 2023, and reply comments by March 21, 2023. These Comments are timely filed.

America's private communication system the agency's nearly 100-year history.[2] The power to "facilitate[] equal access to broadband internet access service" (BIAS), and to "prevent[] digital discrimination" includes, the claim goes, the power to prohibit any practices that the FCC concludes have a disparate impact along categories enumerated by Section 60506. This power supposedly includes FCC authority to regulate:

a. Deployment decisions of private companies,[3] including impacting deployment schedules of subsidy programs that are not even implemented by the FCC;[4]

b. The rates BIAS providers charge;[5]

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[2] *See* NPRM ¶ 32 for a list of all of the aspects of the provision of BIAS the FCC seeks to sweep into what it could determine to be digital discrimination ("speeds, data caps, throttling, late fees, equipment rentals and installation, contract renewal or termination, customer credit or account history, promotional rates, or price").

[3] *See* NPRM ¶ 16 ("Under a disparate treatment approach, by contrast, how difficult would it be to discern a broadband provider's intent for particular service and deployment decisions?"); ¶ 31 ("In the record developed in response to the Notice of Inquiry, some commenters suggest we consider policies and practices related to broadband infrastructure deployment . . . [and] service provider use of algorithms to make decisions about deployment and other aspects of providing internet service."); ¶ 33 ("What are the limitations, if any, on our ability to include policies and practices that impact technical aspects of existing service, and the decision to deploy service in the first instance?"); n. 257 (TURN Comments urges the FCC to "establish a process in which the broadband internet access service provider would have the burden of production and the burden of proof to show that broadband service deployment to a target area is not economically or technically feasible").

[4] *Id.* ¶ 23 ("AT&T warns that broadband deployment efforts funded through other provisions in the Infrastructure Act "might skew [a provider's] deployment ratios for households inside and outside of protected classes," and thus increase that provider's risk of liability under a rule that includes a disparate impact standard. Do others agree with this assertion that there is a tension between a disparate impact approach and the Infrastructure Act's deployment objectives?").

[5] *Id.* ¶ 32 ("For example, can practices and policies related to certain terms and conditions of service, such as . . . promotional rates, or price, constitute or lead to digital discrimination?" (footnotes omitted); ¶ 47 ("How should we consider the practice of price discrimination (i.e., charging different consumers different prices for the identical service)?"); ¶ 45 ("Other commenters agree that we should consider the barriers that affordability and a lack of digital literacy present to adoption of services, even where available.")

c. The profits BIAS providers (and possibly even other service providers) earn;[6]

d. Provider customer service standards and network maintenance practices;[7]

e. Provider marketing materials;[8]

f. Provider privacy and security practices;[9]

g. Providers of services beyond BIAS;[10] and

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[6] *Id.* ¶ 66 ("In particular, we seek comment on how subsection 60506(b)(1)'s inclusion of "income level" as a listed characteristic fits into this framework. For example, should a provider be permitted to defend a claim of income-based intentional discrimination by offering projections showing that deploying to a particular community would likely produce a lower-than-normal rate of return on investment? How are we to determine whether a proffered economic justification, such as rate of return, is a pretext for income-based discrimination? Some commenters argue that a smaller-than-normal profit margin should not be a sufficient reason to claim economic infeasibility and that the Commission should rarely excuse discrimination on such grounds.").

[7] *Id.* ¶ 31; ¶ 32 ("We seek comment on what policies and practices should be covered by our definition. Do commenters agree that the practices and policies suggested in response to the Notice of Inquiry can differentially impact consumers' access to broadband? What specific practices and policies related to broadband infrastructure deployment, network upgrades, marketing or advertising, service provision, network maintenance, customer service, sales, and ongoing technical support can do so?"); ¶ 33 ("Does this language give us discretion to include any practices that relate to quality of service, including non-technical aspects of service, such as customer service, marketing or advertising, or terms and conditions related to contract renewal, account history, or price?"); ¶ 44 ("Commenters in response to the Notice of Inquiry suggest comparing technical metrics such as speed, capacity, and network outages, as well as non-technical factors such as caliber of customer service."); ¶ 45 ("How can we determine when, for example, customer service, late fees, equipment rentals and installation policies, access to specific service plan offerings or speeds, contract renewal or termination policies, availability of customer credit or account history practices, and prices are meaningfully better or worse for certain consumers?").

[8] *Id.* ¶¶ 31-33; ¶ 51 ("If we undertake new data collections, what data should we collect? Should we collect data on broadband adoption not captured by other collections; on marketing and advertising practices; on broadband usage and adoption; on technical and non-technical quality of service; pricing and service plan availability; or on other subjects?").

[9] *Id.* ¶ 31.

[10] *Id.* ¶ 26 ("Commenters to the Notice of Inquiry differ on whether we should extend our definition of "digital discrimination of access" to broadband internet service provided over a variety of technologies, both fixed and mobile, other communications services, and services delivered over

h. An expansion of the protected classes specified by Congress to include a myriad of new categories.[11]

This interpretation of Section 60506 would mark a radical change in how broadband is deployed and delivered in the United States.[12] It would impose de facto common carrier status upon broadband providers without the FCC having to bother to formally reclassify them as such. Indeed, the implications of this theory would extend far beyond what the FCC's 2015 Open Internet Order did.[13] At least that Order purported to "forbear" from the most onerous aspects of common carriage regulation.[14] The FCC's 2018 Restoring Internet

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broadband. These commenters argue that consumers should not be excluded from enjoying certain civil rights protections by virtue of the service they are using, and that some consumers and communities cannot enjoy the benefits broadband has to offer without having non-discriminatory access to services accessed over broadband."); ¶ 29, n. 103 (TURN supports applying the rules to " those doing the deployment of physical infrastructure, those providing the subscription service and those responsible for equipment/infrastructure maintenance" of broadband").

[11] *Id.* ¶ 40 ("Other commenters argue that the Commission should include additional characteristics such as disability status, age, sex, sexual orientation, gender identity and expression, familial status, domestic violence survivor status, homelessness, and English language proficiency.").

[12] *See* Rakeen Mabud & Marybeth Seitz-Brown, *Wired: Connecting Equity to a Universal Broadband Strategy*, ROOSEVELT INSTITUTE (Sept. 2017), https://rooseveltinstitute.org/wp-content/uploads/2017/09/RI-Wired-201709.pdf; *see also Net Neutrality: What You Need to Know Now*, FREEPRESS (Feb. 16, 2023), https://www.freepress.net/issues/free-open-internet/net-neutrality/net-neutrality-what-you-need-know-now; *OTI Praises Broadband Nutrition Label Order, Urges Stronger FCC Requirements*, NEW AMERICA (Nov. 18, 2022), https://www.newamerica.org/oti/press-releases/oti-praises-broadband-nutrition-label-order-urges-stronger-fcc-requirements.

[13] Protecting and Promoting the Open Internet, Report and Order on Remand, Declaratory Ruling and Order, 30 FCC Rcd 5601 (2015).

[14] *Id.* ¶ 51 ("In finding that broadband Internet access service is subject to Title II, we simultaneously exercise the Commission's forbearance authority to forbear from 30 statutory provisions and render over 700 codified rules inapplicable, to establish a light-touch regulatory framework tailored to preserving those provisions that advance our goals of more, better, and open broadband. We thus forbear from the vast majority of rules adopted under Title II.").

Freedom Order (RIFO) concluded that such heavy-handed regulation of BIAS reduced private investment in broadband deployment in 2015-2018[15]—a conclusion the FCC has yet to withdraw. That trend was reversed only by the 2018 RIFO, which returned BIAS to a Title I information service and provided the regulatory stability necessary for further private sector investment in deployment. As demonstrated below, it was this burst of private investment between 2018 and today that has erased virtually all of the anecdotal evidence of alleged digital redlining that may have existed.[16]

Massive regulatory expansion to solve a problem for which there is no hard evidence is bad public policy. But the Commission's NPRM is far more than that; it is also a gross misinterpretation of the statutory language of Section 60506. Indeed, the Commission's reading of Section 60506 cannot be countenanced under the Supreme Court's precedent of *West Virginia v. EPA*,[17] or the D.C. Circuit's recent decision in *NAB v. FCC.*[18]

The Commission is not free to rewrite Section 60506 to create "disparate-impact" liability. Nearly 40 percent of the substantive paragraphs of the NPRM discuss disparate impact or its synonyms. This fact reveals just how flawed the NPRM is. If, on appeal, the FCC loses on this fundamental question (indeed, on this "major question"), the Commission will

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[15] *See* Restoring Internet Freedom, 83 Fed. Reg. 7852, ¶ 87 (Feb. 22, 2018) ("We find the Title II classification likely has resulted, and will result, in considerable social cost, in terms of foregone investment and innovation."). *See also* Federal Communications Commission, 2018 Broadband Deployment Report, FCC 18-10 (rel. Feb. 2, 2018).

[16] *See, e.g.*, Mike Saperstein, *2020: Broadband Providers Pump Another $79.4 Billion Into America's Connectivity Infrastructure*, USTELECOM (Sept. 22, 2021), https://ustelecom.org/2020-broadband-providers-pumpanother-79-4-billion-into-americas-connectivity-infrastructure/.

[17] *See* West Virginia v. Env't Prot. Agency, No. 20-1530, slip op. (S. Ct. 2021 June, 30, 2022).

[18] *See* Nat'l Ass'n of Broad. v. Fed. Commc'ns Comm'n, No. 21-1171 (D.C. Cir. 2022).

have to start over. It will have wasted the two years Congress gave it to implement Section 60506. Further, it will have delayed the implementation of rules that would actually "facilitate equal access" to broadband, and "prevent[] digital discrimination of access."

To the extent such discrimination actually exists, the NPRM ends where it should have begun—by looking at impediments to broadband deployment and the ways the FCC can alleviate those hurdles in a variety of proceedings.[19] It is in those proceedings where the FCC should focus, using its clear statutory authority to break down regulatory barriers to broadband deployment, and implementing subsidy programs that can help close the business case for deployment to underserved communities.

II. There Is Virtually No Evidence of Current "Digital Discrimination"

Section 60506 was enacted under the assumption that some degree of digital discrimination exists. The record in this proceeding points the other way. The studies placed in the record claiming digital discrimination are either based on highly outdated data, or do not demonstrate what the authors claim.[20] Instead, the study submitted by Glenn Woroch, former FCC Chief Economist, shows that any discrepancies in deployment are isolated at best, and that nationwide deployment patterns of wireline broadband services are virtually identical among racial and ethnic groups, and among higher and lower income levels.

Many of the studies put in the record rely on significantly outdated data. It is as if the authors of those studies forgot all about the RIFO, and the fact that private investment in

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[19] *See* NPRM, ¶¶ 83-85.

[20] *See* Declaration of Glenn Woroch, attached to AT&T Reply Comments, submitted June 30, 2022, https://www.fcc.gov/ecfs/document/1063001686231/1 (hereinafter the "Woroch Declaration").

broadband deployment increased by some $79 billion in 2020 alone.[21] The FCC's RDOF program is investing $20.4 billion in deployment to rural areas over the next decade,[22] and $65 billion more has been appropriated under the IIJA[23] and BEAD[24] programs. All of this has gone a long way to closing the digital divide, and it renders any study based on pre-2018 deployment data virtually useless.[25] These studies fail to analyze broadband *deployment* on the basis of the classes protected by Section 60506.[26] In short, this entire proceeding rests

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[21] Mike Saperstein, 2020: Broadband Providers Pump Another $79.4 Billion Into America's Connectivity Infrastructure, USTELECOM (Sept. 22, 2021), https://ustelecom.org/2020-broadband-providers-pumpanother-79-4-billion-into-americas-connectivity-infrastructure/.

[22] *Auction 904: Rural Digital Opportunity Fund*, FEDERAL COMMUNICATION COMMISSION (last visited Feb. 21, 2023), https://www.fcc.gov/auction/904/factsheet#budget.

[23] *NTIA's Role in Implementing the Broadband Provisions of the 2021 Infrastructure Investment & Jobs Act*, BROADBAND USA (Feb. 21, 2023), https://broadbandusa.ntia.doc.gov/news/latest-news/ntias-role-implementing-broadband-provisions-2021-infrastructure-investment-and#:~:text=The%20IIJA%20sets%20forth%20a,of%20Internet%20Connectivity%20and%20Growth.

[24] *Notice of Funding Opportunity: Broadband Equity, Access, and Deployment Program*, BROADBAND USA, https://broadbandusa.ntia.doc.gov/sites/default/files/2022-05/BEAD%20NOFO.pdf (providing $42.25 billion).

[25] The National Digital Inclusion Alliance (NDIA) study of Cleveland, Ohio was based on June 2016 deployment data. *See* Woroch Declaration at 8-9. Updating the study to current data shows that deployment as between white and non-white (99.9% vs. 98.7%), and between higher and lower income (99.6% vs. 98.9%) are within close to a single percentage point. *Id.* at 19 (Table 3). Similar results occur regarding deployment in Detroit and Chicago, if more recent data is used. *Id.* at 11 (Tables 4 and 5). The USC Annenberg Study relies on data from 2014-2017, the Dark Ages of broadband deployment, when many providers pumped the brakes on further deployment in light of the crippling Title II regime imposed by the FCC. Updated data again shows that there is virtually no deployment disparity as between whites and non-whites (99.0 vs. 99.6%—indicating better deployment to non-whites), and zero deployment separation as between lower and higher income households (99.4% deployment to both). *Id.* at 14-15 (Table 7). The Free Press study is based on 2014 data. *Id.* at 17.

[26] *See id.* at 11-13. The Greenlining Institute study relies on adoption rather than deployment, and merely superimposes old bank redlining maps against a "heat map" of a gobbledygook data related to such things as "internet adoption rates" and whether "internet costs are reasonable relative to

on a foundation of old data and apples-to-oranges comparisons. Yet the NPRM hastily concludes that digital discrimination exists, and that therefore the FCC must interpret Section 60506 to claim the broadest powers Congress has ever given the agency.

The record in this proceeding actually shows that broadband deployment in the United States is a highly complex process, driven by economics, the availability of private financing (requiring demonstrated returns on investment to the investors), the availability of government subsidies for broadband deployment, the ability of consumers to afford broadband, physical limits to deployments, and government impediments to deployment, including zoning, permitting, rights-of-way, pole attachments, and a myriad of other regulatory hurdles. Given the competitiveness of the marketplace, it is not rational to expect participants to discriminate—not when the cost to acquire a new subscriber, according to Forbes, is $315, "one of the most expensive industries when it comes to customer acquisition costs (CAC)."[27] With providers competing so vigorously to acquire and hold customers against churn, there is zero economic incentive to systematically choose not to provide service to entire classes of subscribers.

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household income." Again, however, when current data on actual broadband deployment are used, any alleged disparity evaporates. *Id.* at 14-17. The JCPES study compares deployment in rural areas with at least 35 percent Black populations against nationwide broadband deployment. It does not control for the rural vs. urban deployment situation which exists, regardless of whether the proposed protected classes are involved.

[27] Amir Kotler, *Acquiring Subscribers Is Only Half The Battle*, FORBES (Oct. 30, 2020), https://www.forbes.com/sites/forbestechcouncil/2020/10/30/acquiring-subscribers-is-only-half-the-battle/?sh=7a0c73161821.

III. Section 60506 Cannot Be Read as Creating Disparate-Impact Liability

Congress knows how to write civil rights laws. It knows that courts will interpret such laws to create liability only for intentional discrimination (differential treatment) unless the statute clearly focus on effects rather than intentions. In this crucial respect, Section 60506 is fundamentally different from the laws that the Supreme Court has interpreted to support disparate-impact liability. Congress knew what it was doing when it wrote Section 60506; it knew it was writing a differential-treatment statute akin to Title IX of the Education Amendments of 1972[28] rather than a disparate-impact statute like Title VII of the Civil Rights Act of 1964.[29]

A. "Equal Access" Is a Policy Goal, Not Part of What Is Prohibited

To start, consider what the Supreme Court said in its most recent decision on how to interpret antidiscrimination statutes. In *Texas Dep't of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015), the Court ruled that "antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose."[30] The Court pointed to the same consequence-oriented "catchalls" in the Fair Housing Act, the law at issue in that case, and in the laws at issue in the two earlier cases the Court discussed:[31] Title VII and the Discrimination in Employment Act

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[28] *See infra* note 51 and associated text.

[29] *See* 42 U.S.C. § 2000e–2.

[30] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 520 (2015).

[31] Griggs v. Duke Power Co., 401 U.S. 424 (1971); Smith v. City of Jackson, 544 U.S. 228 (2005).

of 1975 (ADEA).[32] These catchall phrases, explained the *Inclusive Communities* Court, played "an identical role in the structure common to all three statutes," using "the word 'otherwise' to introduce the results-oriented phrase. 'Otherwise' means 'in a different way or manner,' thus signaling a shift in emphasis from an actor's intent to the consequences of his actions."[33] The same phrase occurred in a third case cited by *Inclusive Communities*, which involved aid to schools.[34]

No such "catchall" appears in Section 60506. Undeterred by this omission, the Multicultural Media, Telecom and Internet Council (MMTC) argues that other language in Section 60506 serves the same purpose:

> The definition of "equal access" from subsection 60506(a) … should be interpreted the same way "otherwise" is in the Fair Housing Act and shift the statute to capture digital discrimination where intent may not be evidenced. That is, "equal access" is framed from the subscriber's perspective as the "equal opportunity to subscribe."[35]

The word "opportunities" in Subsection 60506(a)(2) does *sound* "results-oriented," like the phrase "otherwise adversely affect"[36] in the ADEA. And while the Fair Housing Act's

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[32] 576 U.S. at 533. ("Title VII's and the ADEA's 'otherwise adversely affect' language is equivalent in function and purpose to the FHA's 'otherwise make unavailable.'").

[33] *Id*.

[34] Board of Education, New York City v. Harris, 444 U.S. 130, 133 (1979) (under Section 706(d)(1) of the 1972 Emergency School Aid Act, "educational agency was expressly declared ineligible for assistance if it … 'otherwise engaged in discrimination'").

[35] MMTC NOI Comments at 15.

[36] *City of Jackson*, 544 U.S. at 238 n.6 ("In reaching a contrary conclusion, Justice O'Connor ignores key textual differences between § 4(a)(1), which does not encompass disparate-impact liability, and § 4(a)(2). Paragraph (a)(1) makes it unlawful for an employer "to fail or refuse to hire . . . *any individual* . . . because of *such individual's* age." (Emphasis added.) The focus of the paragraph is on the employer's actions with respect to the targeted individual. Paragraph (a)(2), however, makes it

operative provision says nothing about "opportunities," both the ADEA and Title VII's operative provisions do. In *Smith v. City of Jackson* (2005), when a plurality of the Court concluded that the "text [of the ADEA] focuses on the *effects* of the action on the employee rather than the motivation for the action of the employer," it pointed both to the word "opportunities" *and* to the phrase "otherwise adversely affect."[37] Clearly, a reference to "opportunities" can *sometimes* suffice as a basis for disparate-impact liability. But in what circumstances?

The answer lies in how the text of a statute is written. The Court focused squarely on text of the ADEA in *Smith*[38] and on the text of the Fair Housing Act in *Inclusive Communities*.[39] So must the FCC focus on the text of Section 60506 here. In the ADEA, as in Title VII, Congress followed a consistent formula. The ADEA provides:

> It shall be an unlawful employment practice for an employer … to limit, segregate, or classify his employees in any way which would *deprive or tend to*

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unlawful for an employer "to limit . . . his *employees* in any way which would deprive or tend to deprive *any individual* of employment opportunities or otherwise adversely affect *his* status as an employee, because of *such individual's* age." (Emphasis added.) Unlike in paragraph (a)(1), there is thus an incongruity between the employer's actions—which are focused on his employees generally—and the individual employee who adversely suffers because of those actions. Thus, an employer who classifies his employees without respect to age may still be liable under the terms of this paragraph if such classification adversely affects the employee because of that employee's age—the very definition of disparate impact.").

[37] *Id.* at 235-36.

[38] *Id.* at 235 ("While our opinion in *Griggs* relied primarily on the purposes of the Act, buttressed by the fact that the EEOC had endorsed the same view, we have subsequently noted that our holding represented the *better reading of the statutory text* as well.") (emphasis added). Even in *Griggs*, the Court emphasized the text of Title VII: "The objective of Congress in the enactment of Title VII is plain from the language of the statute." 401 U.S. at 429.

[39] 576 U.S. at 533 (2015) ("Together, *Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims *when their text refers* to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose.") (emphasis added).

> deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's age.[40]

The relevant provision of Title VII is essentially identical:

> It shall be an unlawful employment practice for an employer … to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or *otherwise adversely affect* his status as an employee, because of such individual's race, color, religion, sex, or national origin."[41]

In both cases, Congress prohibited discrimination that denies employment "opportunities," or "otherwise affects" individuals, on the basis of protected characteristics. The Fair Housing Act's structure is identical, minus the word "opportunities":

> it shall be unlawful …. to refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or *otherwise make unavailable* or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.[42]

Section 60506 has a completely different structure. Instead of opening with a prohibition on discrimination, and unlike the three civil rights laws discussed above, each of the statute's two key subsections merely commands the FCC to "facilitate" or "promote … equal access to broadband internet access service."[43] True, the term "equal access" is defined in terms of "opportunity," but such opportunities are a policy end to be "promoted" or "facilitated": "equal access" is clearly the object the verbs "facilitating" and "promoting." Unsurprisingly, the definition of "equal access" falls among two other "statement[s] of policy" in Subsection 60506(a). If Congress had intended Section 60506 to create disparate-impact

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[40] 29 U.S.C. § 623(a)(2).

[41] 42 U.S.C. § 2000e–2(a).

[42] 42 U.S.C. § 3604(a).

[43] 47 U.S.C. §§ 1754(b)-(c).

liability, "equal access" would not be relegated to a mere policy goal; it would be a requirement for providers, an integral part of what is prohibited, as is the deprivation of "opportunity" in the ADEA and Title VII. But in neither operative subsection is this—or anything equivalent to it—the case, as we shall see.

B. Subsection (b) Creates Liability only for Intentional Discrimination

Subsection 60506(b) commands the FCC to "adopt final rules to *facilitate equal access* to broadband internet access service." This "includes" "*preventing digital discrimination of access* based on income level, race, ethnicity, color, religion, or national origin."

Lawmakers could have indicated their intention to create disparate-impact liability here in multiple ways. Congress could have used the language common to both the ADEA and Title VII: "preventing digital discrimination *in any way which would deprive or tend to deprive any individual of equal access*."[44] It did not. Congress could have defined "digital discrimination" in terms of "equal access." It left that term undefined. Congress could have included "otherwise affect," the "catchall phrase" so crucial in *Inclusive Communities*. It did not. Congress could have found some other way to place "equal access" (the defined term that speaks clearly to "opportunities") within this operative phrase. It did not. Instead, Congress referred here—and only here—to something different: "digital discrimination *of access*." Let us break down those two terms in turn.

"Digital discrimination" appears four times in Section 60506, including once in its title. The Lawyers' Committee for Civil Rights argues that "the statute urges the Commission to interpret 'digital discrimination' as a comprehensive concept that refers to all practices by

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[44] 29 U.S.C § 623(a)(2), 42 U.S.C. § 2000e–2(a)(2).

all entities that disrupt an individual's capacity to enjoy equal access—defined as comprehensively as possible—to broadband."[45] Such a rule might borrow relevant language from Title VII and the ADEA and look like this:

> Digital discrimination that deprives or tends to deprive any individual of equal access based on income level, race, ethnicity, color, religion, or national origin is prohibited.

Alternatively, the FCC might simply prohibit "digital discrimination based on income level, race, ethnicity, color, religion, or national origin" but define "digital discrimination" as any practice "that deprives or tends to deprive any individual of equal access." Whatever the precise phrasing, the result would be the same. Such rules would require reading the statute as if Congress had written the following:

> The Commission shall… prevent[] digital discrimination ***that deprives or tends to deprive any individual of equal access*** of access based on income level, race, ethnicity, color, religion, or national origin;

The highlighted redundancy illustrates why Lawyers Committee's reading cannot be right: it requires dropping the words "of access"—or perhaps reading "of access" as if it said "of equal access." The former treats "of access" "as stray marks on a page—notations that Congress regrettably made but did not really intend."[46] This would violate the canon against surplusage. The Supreme Court's "practice … is to 'give effect, if possible, to every clause and word of a statute.'"[47] The latter would violate the "duty to refrain from reading a phrase into the statute when Congress has left it out."[48] As the Supreme Court has said, "'where Congress

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[45] Lawyers' Committee NOI Comments at 25.

[46] Advocate Health Care Network v. Stapleton, 137 S. Ct. 1652, 1659 (2017).

[47] *Id.* (quoting Williams v. Taylor, 529 U.S. 362, 404 (2000)).

[48] Keene Corp. v. United States, 508 U.S. 200, 207 (1993).

includes particular language in one section of a statute but omits it in another…, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'"[49] The FCC must presume that the decision to omit the word "equal" from "of access," and also from any definition of "digital discrimination," was intentional, *i.e.,* that Congress chose not to do precisely what the Lawyers Committee proposes: define the (unintentional) deprivation of broadband opportunities (however worded) as unlawful discrimination.

The rest of Paragraph (b)(1)—"discrimination … based on income level, race, ethnicity, color, religion, or national origin"[50]—is essentially equivalent to the language of Title IX: "[n]o person . . . shall, on the basis of sex, be . . . subjected to discrimination under any education program . . . receiving Federal financial assistance."[51] The Supreme Court has interpreted that language to support liability only for intentional discrimination, rejecting arguments that it allows for disparate-impact liability.[52]

Thus, any argument that Paragraph (b)(1) supports disparate-impact liability would have to show that the word "access" in "prohibiting digital discrimination of *access*" was by itself sufficient, under *Inclusive Communities*, "to refer[] to the consequences of an action rather than the actor's intent."[53] We could find no such argument in NOI comments. This is

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[49] *Id*. (quoting Russello v. United States, 464 U.S. 16, 23 (1983)).

[50] § 60506.

[51] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a).

[52] Jackson v. Birmingham Bd. of Ed., 544 U.S. 167, 174 (2005); *see also* Verizon NOI Reply Comments at 7.

[53] 576 U.S. 519, 534 (2015).

not surprising; it would be a remarkably thin reed on which to ground so sweeping a power. It would also be inconsistent with the ordinary meaning of "access."

Consider the other way Section 60506 uses the word "access": it relies on Section 60501,[54] which incorporates the definition of "broadband internet access service" adopted by the FCC in its Open Internet proceeding:

> Broadband internet access service is a mass-market retail service by wire or radio that provides the capability to transmit data to and receive data from all or substantially all internet endpoints, including any capabilities that are incidental to and enable the operation of the communications service, but excluding dial-up internet access service.[55]

In this context, the word "access" has a purely technical meaning: it is the technological "capability to transmit … and receive data" enjoyed by the user. This is precisely what Merriam-Webster means when it defines "access" as the "freedom or ability to obtain or make use of something."[56] Merriam-Webster's example could hardly be more apt: "paying for *access* to the Internet."[57] To speak of access, in this sense, is like speaking of housing under the Fair Housing Act: it refers to the service itself. Hence the term "broadband internet *access* service."

It is precisely because "access" has this narrow ordinary meaning that it was necessary for Congress to define "equal access" with a special meaning in terms of the "opportunity to subscribe." When, to use Merriam-Webster's example, an individual is

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[54] 47 U.S.C. § 1751(1) ("the term 'broadband internet access service' has the meaning given the term in section 8.1 (b) of title 47, Code of Federal Regulations, or any successor regulation").

[55] 47 C.F.R. § 8.1(b).

[56] *Access*, MERRIAM-WEBSTER DICTIONARY (last visited Feb. 21, 2023) https://www.merriam-webster.com/dictionary/access.

[57] *Id.* (emphasis original).

"paying for *access* to the Internet," no one would say they are paying for the "opportunity to subscribe"; instead, they are *subscribing.* The "opportunity to subscribe" is the possibility of "paying for [*i.e.*, subscribing to] *access* to the Internet."[58] An "opportunity" is "a favorable juncture of circumstances,"[59] not a technical capability to do something.

That Congress chose to use the term "equal access"—a compelling slogan—rather than a clunkier term like, say, "equal broadband opportunity," is understandable. Congress is always free to attach special meaning to defined terms. "'When a statute includes an explicit definition,'" the Supreme Court has said, "'we must follow that definition,' even if it varies from a term's ordinary meaning."[60] Here, the term "equal access" clearly varies from the ordinary meaning of "access." That Congress chose to attach the concept of "equality" to the word "access," and define the combined term in terms of "opportunity" in Paragraph (a)(2), does not mean Congress understood "access," when unattached from the word "equal" in Paragraph (b)(2), to mean "opportunity" in the way that Title VII and the ADEA use this term. Indeed, if "access," in the context of broadband, ordinarily meant the "opportunity to subscribe" to a service rather than the underlying use of that service, it would hardly have been necessary for Congress to say so.

In short, if Congress had intended Paragraph (b)(1) to contemplate disparate-impact liability, it would have said more to "refer[] to the consequences of actions and not just to

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[58] *Id.*

[59] *Opportunity,* MERRIAM-WEBSTER DICTIONARY (last visited Feb. 21, 2023) https://www.merriam-webster.com/dictionary/opportunity.

[60] Digital Realty Trust, Inc. v. Somers, 138 S. Ct. 767, 776 (2018) (quoting Burgess v. United States, 553 U.S. 124, 130 (2008)).

the mindset of actors"[61] in the phrase of Paragraph (b)(1) that describes the "digital discrimination" to be "prevented." Because Congress did not do so, this provision can be understood only as creating liability for intentional discrimination.

C. Subsection (c) Creates Liability only for Intentional Discrimination

It is even easier to see why Subsection 60506(c)'s operative prohibition turns on intent, not effects. Subsection (c) begins with much the same formulation as Subsection (b); it alludes to the statute's overarching policy goal: "The Commission and the Attorney General shall ensure that Federal policies *promote equal access* to robust broadband internet access service by…." The following phrase—the operative part of the statute—looks more like civil rights laws than does Paragraph (b)(2): it "prohibit[s] deployment discrimination based on" specified factors. But if Congress intended Subsection (c) to be the basis for disparate-impact regulation, it could have placed the word "opportunity" directly into this phrase. It did not. Congress could have done the same thing indirectly by referring to "opportunity" in a definition of "deployment discrimination." But Congress left that term undefined, just as it left undefined "digital discrimination" in (b)(2). The only reference to "opportunity" in Subsection (c) comes indirectly—via the term "equal access"—in the "promote" clause, just as it comes only in the "facilitate" clause of Paragraph (b)(2).

Having asked the FCC to interpret "'digital discrimination' as a comprehensive concept that refers to all practices by all entities that disrupt an individual's capacity to enjoy equal access—defined as comprehensively as possible—to broadband,"[62] the Lawyers

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[61] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 520 (2015).

[62] Lawyers' Committee NOI Comments at 25.

Committee further proposes that the Commission "read deployment discrimination as a subset of digital discrimination."[63] That is, the FCC should read the concept of "opportunity" into "digital discrimination," as if Congress had written Subsection (c) to look like Title VII and the ADEA—something like this:

> The Commission and the Attorney General shall ensure that Federal policies promote equal access to robust broadband internet access service by prohibiting deployment discrimination ***in any way which would deprive or tend to deprive any individual of equal access*** based on—
>
> (1) … the income level of an area;
>
> (2) … the predominant race or ethnicity composition of an area …[64]

The Lawyers Committee would take its red pen to the statute and supply the very element needed to show that this provision can serve as the basis for disparate-impact liability. Again, the FCC, like courts, have a "duty to refrain from reading a phrase into the statute when Congress has left it out."[65]

One reason we know Congress could not have meant "equal access" implicitly when it said "deployment discrimination" is that the Congress said "equal access" explicitly earlier in the same sentence as the end to be "facilitated." Another reason is that Congress clearly intended these two terms to mean different things. "'Equal Access' … means the equal opportunity to subscribe to an *offered* service … *in a given area*."[66] Decisions about

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[63] *Id.* at 31.

[64] Both the ADEA and Title VII include the phrase "deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect." 29 U.S.C. § 623(a)(2); 42 U.S.C. § 2000e-2(a)(2).

[65] Keene Corp. v. United States, 508 U.S. 200, 207 (1993).

[66] § 60506(a)(2) (emphasis added).

deployment are, of course, about whether, where, and when to "offer" service to a "given area" in the first place.

The Lawyers Committee makes another argument: "subsection (c)(3) includes a broad residual clause that allows the Commission to prohibit discrimination on 'other factors [it] determines to be relevant.' This is similar to the consequence-oriented catchalls that the Supreme Court interpreted in *Griggs*, *Smith*, and *Inclusive Communities*."[67] In fact, those "catchall" provisions define modes of discrimination that are prohibited while Subsection (c)(3) does something completely different: it allows the FCC to define additional "factors" on which it may assess, and prohibit, "deployment discrimination."

The rationale underlying Paragraph (c)(3) is not hard to understand. Congress could not simply copy the factors enumerated in Paragraph (b)(1) ("digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin") because that provision focuses on access *by consumers*, while Subsection (c) focuses on "deployment discrimination" *by providers*, and thus must be assessed with respect to "an area." Congress made this explicit by appending "of an area" to two of the factors enumerated in Paragraph (b)(1): "income level" became "income level of an area" and "race [or] ethnicity" became "the predominant race or ethnicity composition of an area."[68] It makes sense that Congress gave the FCC some discretion in adapting the "factors" underlying Paragraph (b)(1)'s consumer-focused concept of discrimination to Subsection (c)'s provider-focused context.[69]

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[67] Lawyers' Committee NOI Comments at 26.

[68] *Compare* § 60506(b)(1) and §§ 60506(c)(1)-(2).

[69] *See infra* p. 34.

But Subsection (c)(3) does *not* give the FCC discretion to define the mode of discrimination covered by the statute. The distinction between what the statute prohibits and the "other factors" contemplated by Subsection (c)(3) would be obvious in the structure of any major civil rights law. For example, the Fair Housing Act declares it unlawful to "refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person" on the basis of specified factors: "because of race, color, religion, sex, familial status, or national origin."[70] What mattered in *Inclusive Communities*, and each of the cases it cites, was the placement of a "consequence-oriented catchall" in the *first* part of this sentence, in the part prohibiting certain modes of discrimination. Plainly, Subsection (c)(3) does something different; it allows the FCC to adapt the second part of the formula by considering additional factors.

Not only does Subsection (c)(3) not mean what the Lawyers Committee claims, its inclusion in the statute cuts in the precisely opposite direction. If Subsection (c) really did give the FCC the authority to impose disparate-impact liability for decisions not to deploy to certain areas, Congress would have empowered the FCC to mandate build-out requirements for broadband providers—if not beyond their "service area"[71] then at least to specific users within it. Such mandates would have represented the most quintessential form of common carriage regulation.[72] How likely is it that Congress would have combined such power with broad discretion to—in effect—define protected classes as the FCC saw fit?

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[70] 42 U.S.C. § 3604(a).

[71] § 60506(a)(1).

[72] *See supra* p. 24 and note 79.

Instead, Congress focused on what was most important: intentional discrimination based on "the income level of an area [or] the predominant race or ethnicity composition of an area." Such discrimination would undermine the policy goal set forth in Section 60506(a)(1): "subscribers should benefit from equal access to broadband internet access service within the service area of a provider of such service."

D. Courts Will Not Resolve Ambiguity in Favor of an Interpretation that Section 60506 Supports Disparate-Impact Liability

Because "this digital discrimination statute is a civil rights law intended to remediate inequity," argues the Lawyers Committee, it must be "interpreted generously to effectuate [its] broad remedial purposes," and "any exemptions [must be narrowly construed]."[73] For this proposition, the Committee cites *Monell v. Dept. of Social Serv. of City of New York*, 436 U.S. 658, 684 (1978), which quotes legislative history of Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983. This argument is circular. It presumes that Section 60506 is a "civil rights law," and therefore, it must be interpreted like those civil rights laws that allow for disparate-impact liability. In fact, Section 1983 is worded as broadly as any civil rights law ever could be—and for good reason: Its purpose was to create a private right of action for violations of the Fourteenth Amendment committed by anyone wielding state power in America, including the Ku Klux Klan. It provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

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[73] Lawyers' Committee NOI Comments at 2.

> injured in an action at law, suit in equity, or other proper proceeding for redress…[74]

Section 60506 is nothing like this statute. Section 1983 contains a "consequence-oriented catchall[]"[75] that is even broader than those in Title VII, the ADEA and the FHA. Like the first two, it speaks of "deprivation" a term conspicuously omitted from Section 60506. And just as Section 1983 is an extraordinary statute, *Monell* is an extraordinary case: the Court did not mention that decision in *Inclusive Communities*, *Smith*, or *Griggs.* If its holding—that all civil rights laws must be "interpreted generously"—were broadly controlling, surely it would have resolved each of these recent cases without the need for the Court to bother itself with careful textual analysis.

MMTC makes a more plausible argument when it writes that courts should defer to an interpretation by the FCC that Section 60506 supports disparate-impact liability under *Chevron*. MMTC relies entirely on Justice Antonin Scalia's concurrence in *Smith*: "This is an absolutely classic case for deference to agency interpretation," Scalia said, as the ADEA "confer[red] upon the EEOC authority to issue" rules and "the EEOC promulgated, after notice-and-comment rulemaking" a regulation that permitted disparate impact liability.[76] Yet no other justice joined Scalia. And his *Smith* concurrence barely merited a mention in

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[74] 42 U.S.C. § 1983.

[75] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 534 (2015) ("Title VII's and the ADEA's 'otherwise adversely affect' language is equivalent in function and purpose to the FHA's 'otherwise make unavailable.'").

[76] Smith v. City of Jackson, 544 U.S. 228, 243 (2005).

Inclusive Communities. There, the majority opinion avoided discussion of *Chevron* deference entirely.[77]

The Supreme Court is highly unlikely to defer to an interpretation of Section 60506 that gives the FCC to a general impact-oriented discrimination power over non-common carriers comparable to that in Section 202(a) of the Communications Act, which makes it "unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services… ." Indeed, under a disparate-impact interpretation of Section 60506, the FCC could regulate rates, impose requirements to build-out service, and more.[78] As Public Knowledge has noted, "mandating service to all on a nondiscriminatory basis is the 'quintessential' common carrier obligation."[79] If Section 60506 were a basis for disparate-impact liability, the FCC could use it to impose many of the core features of common carriage status on BIAS providers without bothering to reclassify them as common carriers.[80] The fight over the classification of broadband, a fight that has raged for over a decade and that proved to be the most

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[77] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 565 (Alito, J., dissenting) (citing 42 U.S.C. § 3614a); *id.* at 576 n. 8 (Alito, J., dissenting). Justice Alito argued that *Chevron* "deference may be unwarranted" because of an "unusual pattern" in the FHA's rulemaking: the agency initiated the rulemaking only after the Court granted certiorari on the question in an earlier case. *Id.* at 575-76.

[78] *See supra* p. 2-4 and notes 3-11.

[79] In the Matter of Public Knowledge Petition for Declaratory Ruling That Facilities-Based Interconnected VoIP and Nomadic Interconnected VoIP Are Title II Services, FCC File No. RM-___ (Mar. 2, 2022), https://www.nasuca.org/wp-content/uploads/2022/03/VOIP-Declaratory-Ruling-Petition_03-02-22.pdf.

[80] *See infra* p. 36 and note 123.

controversial issue in the history of the FCC,[81] would be moot because the distinctions essential to the structure of the Communications Act since 1934[82] would no longer matter.

But Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not … hide elephants in mouseholes."[83] Even Justice Scalia, the staunchest advocate of *Chevron*, was careful to emphasize that he would not defer in such cases: "The implausibility of Congress's leaving a highly significant issue unaddressed (and thus 'delegating' its resolution to the administering agency) is assuredly one of the factors to be considered in determining whether there is ambiguity."[84] In "ordinary cases," explained the Court in *West Virginia v. EPA*, the "context" of "whether Congress in fact meant to confer the power the agency has asserted" "has no great effect on the appropriate analysis," but in "extraordinary cases," the "'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[85]

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[81] *See infra* p. 27.

[82] "The Act subjects telecommunications carriers, but not information-service providers, to Title II common carrier regulation." Verizon v. FCC, 740 F.3d 623, 650 (D.C. Cir. 2014) (citing 47 U.S.C. § 153(53)); *see also* Cellco P'ship v. FCC, 700 F.3d 534, 547 (D.C. Cir. 2012) ("If a carrier is forced to offer service indiscriminately and on general terms, then that carrier is being relegated to common carrier status.").

[83] Whitman v. American Trucking Assns., Inc., 531 U.S. 457, 468 (2001).

[84] *Id.* at 468-69 (quoting Christensen v. Harris County, 529 U.S. 576, 590, n. (2000) (Scalia, J., concurring in part and concurring in judgment)).

[85] West Virginia v. EPA, No. 20-1530, *21-22 (June 30, 2022) (quoting FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 159-60 (2000)).

Thus, courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance."[86]

This is clearly an "extraordinary case" in which courts will be "'reluctant to read into ambiguous statutory text' the delegation claimed to be lurking there."[87] The ability to impose disparate-impact liability is certainly an "elephant." The Supreme Court has already recognized that rate regulation alone is a "major" question: "It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion."[88] Nor is this just any industry: broadband providers have consistently made the largest capital expenditure in the United States of any industry sector for decades, totaling $79.4 billion in 2020 and over $2 trillion since 1996.[89] The rule at issue in *West Virginia v. EPA* implicated mere "billions of dollars of impact."[90] Few policy questions in America could have greater "economic significance" than whether broadband providers should be treated as common carriers.

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[86] *West Virginia* at *16; King v. Burwell, 576 U.S. 473, 485-86 (2015) ("Whether those credits are available on Federal Exchanges is thus a question of deep 'economic and political significance' that is central to this statutory scheme; had Congress wished to assign that question to an agency, it surely would have done so expressly."); Utility Air Regulatory Group v. EPA, 573 U.S. 302, 324 (2014).

[87] *Id*. at *23 (quoting *Utility Air,* 573 U.S., at 324).

[88] MCI Telecomm. Corp. v. AT&T Co., 512 U.S. 218, 231 (1994).

[89] USTelecom, *2021 Broadband Capex Report* (2021), https://ustelecom.org/wp-content/uploads/2022/07/2021-Broadband-Capex-Report.pdf.

[90] *West Virginia* at *16.

So too for that question's "political significance." The FCC's 2015 net neutrality rulemaking set a record for comments received by the FCC: nearly four million.[91] When the FCC repealed most of that order in 2017, the "Restoring Internet Freedom Order" proceeding received over 22 million comments.[92] Most commenters demanded not only net neutrality rules but that broadband providers be treated as common carriers. President Barack Obama himself urged the FCC to "reclassify consumer broadband service under Title II of the Telecommunications Act" in an unprecedented public statement.[93] When the rule was later challenged in court, then Judge Brett Kavanaugh called Obama's statement "an unusual presidential action when an independent agency is considering a proposed rule."[94] Republicans called his plan "Obamacare for the Internet."[95] For years, "Title II" was one of the most contentious issues in American politics. When the Senate finally ends the partisan deadlock at the FCC, the FCC will reinstate Title II status, and the fight will no doubt again become a central political battle.

Section 60506 is much too small a "mousehole" to contain the power to decide such intensely controversial questions: It's just 304 words, a single section within a 1039-page

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[91] *See* United States Telecomms. Ass'n v. FCC, 855 F.3d 381, 423 (Kavanaugh, J. Dissenting) (Noting that "when the issue was before the FCC, the agency received some 4 million comments on the proposed rule.")

[92] Restoring Internet Freedom, 83 Fed. Reg. 7852, 7913 (Apr. 23, 2018) (codified at 47 C.F.R. 1), https://www.federalregister.gov/d/2018-03464/p-348.

[93] *Net Neutrality*, OBAMA WHITE HOUSE (last visited Feb. 21, 2023), https://obamawhitehouse.archives.gov/net-neutrality.

[94] *U.S. Telecom II*, 855 F.3d at 423-24 (Kavanaugh, J. Dissenting) (citing Statement on Internet Neutrality, 2014 DAILY COMP. PRES. DOC. 841 (Nov. 10, 2014)).

[95] Brooks Boliek et al., *The New War Over Net Neutrality*, POLITICO (Nov. 10, 2014, 9:47 PM), https://www.politico.com/story/2014/11/barack-obama-net-neutrality-112759.

infrastructure appropriations bill, and it has no legislative history to explain its meaning. In the past, whenever Congress has granted the FCC new powers, it has done so by placing those provisions directly in the Communications Act of 1934.[96] If Congress had intended Section 60506 to grant sweeping new powers that fundamentally changed the structure of the Communications Act, it would, at a minimum, have placed those provisions into that Act, as it did with two other relatively minor powers the Infrastructure Act granted the FCC.[97] Instead, Congress left Section 60506 outside the Communications Act.[98] While Congress is not *required* to put all powers granted to an agency inside the "organic" statute that created the agency, it is highly unlikely the Congress would have chosen to grant major new powers to the Commission in so "oblique" a fashion.[99] Indeed, the "mousehole" purported to contain the basis for disparate liability is not even as large as the terse Section 60506: it is, depending

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[96] With the exception of three ancillary provisions, every provision of the Cable Act of 1984 was inserted directly into the Communications Act, most in a new Title VII for cable. Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (codified as amended at 47 U.S.C. §§ 521-573); *see infra* p. 29. The same goes for the Cable Act of 1992 and the Telecommunications Act of 1996. Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (codified as amended at 47 U.S.C. §§ 521, 609 (1994)); Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified in scattered sections of 47 U.S.C.).

[97] § 60602 adds a new provision to the Communications Act directing the Chair of the FCC to "establish within the Commission an interagency working group to develop recommendations to address the workforce needs of the telecommunications industry, including the safety of that workforce." 47 U.S.C. § 344(a)(1). § 60503 amends a provision of the Communications Act to require the FCC to coordinate with other federal agencies to collect better data for broadband mapping. 47 U.S.C. § 644(b)(2).

[98] § 60506 was codified within Title 47, but this decision was made at the discretion of the Office of the Law Revision Counsel.

[99] *Cf.* West Virginia v. EPA, No. 20-1530 at *23 ("Nor does Congress typically use oblique or elliptical language to empower an agency to make a 'radical or fundamental change' to a statutory scheme.") (quoting MCI v. AT&T., 512 U.S. 218, 229 (1994)).

on the argument, the words "equal access," "digital discrimination," "deployment discrimination," or "of access."

E. The 1984 Cable Act Demonstrates That Congress Knows How to Write a Statute Granting the FCC Extensive Regulatory Authority

Congress certainly knows how to write a statute granting the FCC extensive new jurisdiction and broad regulatory when it wants to—how to avoid "hiding elephants in mouseholes." Compare the 304 words of Section 60506 to the 1984 Cable Act.[100] The 1984 Cable Act was 28 pages, contained nine sections, and contained more than 25 new sections or revisions to the Communications Act, including the entirely new Title VI. The Cable Act granted the FCC limited regulatory authority over cable rates, services, facilities, equipment, subscriber privacy, and consumer protection.[101] In each section, Congress was very clear as to the extent and limits of the Commission's authority.[102] In Section 624, for example, Congress declared: "Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this title."[103] Similarly, Section 624 provided: "Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title."[104] Congress also made clear that the ability of a franchising authority to deny the renewal of a cable franchise was limited, and franchising authorities

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[100] Cable Communications Policy Act of 1984, Pub. L. No. 98–549, 98 Stat. 2779 (1984 Cable Act).

[101] *Id.* §§ 623, 624, 631, 632.

[102] There are twenty examples in the 1984 Cable Act of specific limitations included which begin with the language "Nothing in this title shall be construed to affect . . .." *See, e.g.*, § 621(d)(2); 621(e).

[103] 47 U.S.C. § 544(a).

[104] 1984 Cable Act § 624(f)(1), codified at 47 U.S.C. § 544(f)(1).

were not allowed to place unreasonable build-out demands that are uneconomical.[105] Another provision "prohibit[ed] discrimination among customers of basic cable service."[106]

Most important, the 1984 Cable Act went through the normal legislative process of a stand-alone bill; hearings were held, amendments were made (19 of them), floor debates ensued, and finally a reconciliation process produced the language we now know as the 1984 Cable Act.[107] We can fully understand Congress intent from this statute, and in litigation that followed on various provisions of that Act, courts had a full record on which to determine the metes and bounds of Congressional delegation to the FCC.[108]

In contrast, we have none of that in Section 60506. There is no legislative history for this Section, which was simply thrown into an appropriations bill. There was no discussion of the extent of the new regulatory authority Congress bestowed upon the FCC. More

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[105] § 626(c)(1)(B) (renewal is warranted where "the quality of the operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix, quality, or level of cable services or other services provided over the system, has been reasonable in light of community needs."), codified at 47 U.S.C. § 546(c)(1)(B).

[106] § 623(f)(1), codified as amended at 47 U.S.C. § 543(e)(2).

[107] For the full legislative history of the 1984 Cable Act, *see* https://www.congress.gov/bill/98th-congress/senate-bill/66/all-actions?overview=closed#tabs.

[108] *See* New York v. FCC, 486 U.S. 57 (1988) (noting that "the legislative history makes clear that the Cable Act was not intended to work any significant change", and that the court is wary to "disturb [the current rule] unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned.") (quoting United States v. Shimer, 367 U.S. 374 (1961)); Spectrum Ne., LLC v. Frey, 22 F.4th 287, 298-299 (1st Cir. 2022) (discussing in depth the legislative history and founding its holding that "preemption of 'rates for the provision of cable service' does not extend to the regulation of termination rebates.'"); Centel Cable Television Co. v. Admiral's Cove Assocs., 835 F.2d 1359, 1362 (11th Cir. 1988) (conducting a legislative history analysis as to Congress' intent "to encourage growth of cable industries"); Warner Ent. Co. v. FCC, 93 F.3d 957 (1996) (discussing the legislative history of the 1984 Cable Act and its requirement that cable operators carry local broadcast stations, as well as the FCC's authority to regulate the terms and condition of such carriage).

importantly, there are none of the limitations that a carefully crafted statute would contain. Instead, as is evident in many of the filings in this proceeding, the provision has been treated as an exercise in wish fulfillment for those who have long wanted common carriage regulation of broadband.

IV. The NPRM's Heavy Reliance on a Disparate-Impact Framework Dooms This Proceeding

Because Section 60506 contemplates only liability for disparate treatment or intentional discrimination, and not disparate impact, the NPRM and this proceeding both fail to get the Commission any closer to implementing the statute in a way that can withstand judicial scrutiny. By our count, fully 33 of the 85 substantive paragraphs in the NPRM are based on a disparate-impact framework.[109] Disparate impact is so fundamental to the way that the NPRM was constructed that, were a court to find that the FCC lacked the statutory authority to promulgate rules on that framework, the Commission would have to start completely over with a new NPRM. Any enforceable rules would have to wait years to be implemented.

V. The Complaint Process Must Not Make "The Process the Punishment"

It is possible the Commission could adapt its current complaint procedures[110] to create a system whereby the agency could adjudicate legitimate claims of digital discrimination—but it will not be easy. It would be harder still if the FCC's rules encompass

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[109] *See, e.g.*, NPRM ¶¶ 12, 14, 15, 16, 17, 18, 19, 20, 21,22, 23, 24, 26, 29, 31, 32, 33, 37, 44, 45, 46, 47, 48, 49, 50, 51, 60, 61, 62, 63, 75, 82, 84.

[110] *See Consumer Inquiries and Complaint Center*, FEDERAL COMMUNICATIONS COMMISSION, https://consumercomplaints.fcc.gov/hc/en-us.

disparate-impact liability. The system proposed in the NPRM, as well as other systems urged by commenters, would create a wide-open playfield for mischief; providers could be forced to respond to unquantified, unverified, and unsupported claims of discrimination. As proposed, the new complaint process would create a system where the "process is the punishment."[111] Anyone with a grievance against a broadband provider could subject that provider to the hassle, publicity, and expense of a discrimination complaint.

Consider the current FCC complaint system. "Each week the FCC receives thousands of informal consumer complaints."[112] The current dataset of consumer complaints contains 2.56 *million* complaints.[113] Of the ten years of data that is currently downloadable, consumer complaints to the FCC break down into categories shown on the next page.

In the vast majority of cases, what users of various communications services (including broadcast, cable, telephone, and broadband) are complaining about is unwanted intrusions in their lives in the form of robocalls, unwanted calls, telemarketing, and junk faxes (1,137,781, or 70.00% of all complaints). Complaints concerning availability of service lag far behind at 7.68% (124,778 total). If providers spend, on average, $1,000 per complaint in internal costs and external legal fees, these complaints, however virtuous, have drained $1.6 billion from the communications ecosystem over the last decade. Whatever the exact

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[111] Malcom M. Feeley, THE PROCESS IS THE PUNISHMENT: HANDLING CASES IN A LOWER CRIMINAL COURT (2d ed., 1992).

[112] *Consumer Complaint Data Center*, FEDERAL COMMUNICATIONS COMMISSION, https://www.fcc.gov/consumer-help-center-data.

[113] *CGB – Consumer Complaints Data*, FCC OPEN DATA (last visited Feb. 21, 2023), https://opendata.fcc.gov/Consumer/CGB-Consumer-Complaints-Data/3xyp-aqkj.

number, the cumulative cost has certainly impacted the ability of communications providers to increase or enhance their service offerings.

Type	Percent	Total Complaints
Robocalls, telemarketing, junk faxes, and unwanted calls	70.00%	1,137,781
Billing	9.58%	155,673
Availability	7.68%	124,778
Equipment	2.77%	45,015
Broadcasting (Closed captioning, indecency, and loud commercials)	2.36%	38,344
Interference	1.85%	30,148
Privacy	1.43%	23,188
Speed	1.31%	21,262
Open Internet	1.05%	17,019
Number portability	1.02%	16,583
Slamming and Cramming	0.49%	7,905
Uncategorized	0.31%	5,058
TRS	0.05%	858
Other	0.04%	583
Phone	0.03%	508
Rural Call Completion	0.01%	219
Tower	0.01%	218
Emergency Info	0.01%	109
Hearing Aid	0.01%	86
Total	100.00%	1,625,335

Now envision a system where complaints will flood in based on ill-defined definitions of "digital discrimination" and denial of "equal access" untethered from demonstrable metrics of availability of service. Such a system could be easily overwhelmed and require providers to spend billions more in legal defense. That money could otherwise be spent on

further deployment of broadband.[114] To keep the system from collapsing under its own weight, the Commission must establish legitimate guardrails against abuse.

A. The Protected Classes Are Limited by the Statute

The statute sets forth those classes on whose behalf digital discrimination may be alleged. It instructs the FCC to prevent "digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin."[115] Subsection (c)(3) gives the FCC some discretion to adapt the "factors" enumerated in Paragraph (b)(2)—"income level, race, ethnicity, color, religion, or national origin"—which govern "access" *by consumers* to the context of its evaluation of deployment discrimination *by providers*. The Commission may consider deployment discrimination "within an area"—just as Congress adapted "income level" into "income level of an area" in (c)(1) and "race [or] ethnicity" into "the predominant race or ethnicity composition of an area" in (c)(2).[116] But the agency's discretion is limited: the Commission is not free to expand those classifications to entirely new, unenumerated factors.[117] Such an expansion would clearly be a "major question" that Congress cannot

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[114] *See* NPRM ¶ 16 ("[Alternatively, would a definition centered on disparate impact chill investment and deployment? If so, why, and what is the likely scope of any disinvestment effect that considering disparate impact might cause, and would the harms of disinvestment (if any) outweigh the benefits of adopting such an approach, including but not limited to potentially greater access to broadband services?").

[115] 47 U.S.C. § 1754(b)(1).

[116] *See supra* note 68.

[117] *See* NPRM ¶ 43 ("Does the Commission have discretion to include additional characteristics for purposes of implementing section 60506, or does the presence of specific listed factors in subsection 60506(b)(1) demonstrate Congressional intent to limit our focus to those factors?").

reasonably have been assumed to delegate to the Commission.[118] Thus, suggestions that "additional characteristics such as disability status, age, sex, sexual orientation, gender identity and expression, familial status, domestic violence survivor status, homelessness, and English language proficiency" should provide the basis for claims of digital discrimination are not supported by Section 60506, and would create an entirely unworkable system.[119]

Consider how a claim of lack of access to broadband based on homelessness might be adjudicated. A complaint is filed saying "I've been discriminated against because I'm homeless." What then? To which provider would the Commission address the complaint? Without a residential address, how is a wireline provider supposed to provide broadband? Without some sort of geographic location of the homeless person, how is a wireless provider to know whether that person generally is located within their serviced area?

B. Complaints Must Be Limited to a Denial of Access, Not Relate to Affordability, Digital Literacy, or Bad Customer Service

While the statute itself is far from a model of clarity, it is clear that any complaint must, under Paragraph (b)(1) establish "digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin." The rules the FCC adopts to implement that provision must "facilitate equal access," defined as "the equal opportunity to subscribe to an offered service that provides comparable speeds, capacities, latency, and

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[118] West Virginia v. Env't Prot. Agency, No. 20-1530, slip op. (S. Ct. 2021 June, 30, 2022); Nat'l Ass'n of Broad. v. Fed. Commc'ns Comm'n, No. 21-1171 (D.C. Cir. 2022).

[119] NPRM ¶ 40.

other quality of service metrics in a given area, for comparable terms and conditions."[120] But it is "access" that is the operative term. As we explained above, that means the technical capability to connect.[121]

Claims that a person can't afford a particular service (unless the complainant can demonstrate non-comparable rates), or does not subscribe to broadband because of a "lack of digital literacy,"[122] aren't about a *denial* of access, but rather a broader systemic problem that has nothing to do with digital discrimination. How is a claim of lack of affordability to be adjudicated? Beyond pointing potential subscribers to subsidy programs such as Lifeline and ACP, what more is a provider supposed to do, other than demonstrate that its prices are in line with comparable services, and therefore that it has not engaged what would be considered in unreasonable discrimination under Section 202(a)—as if it were a common carrier subject to Title II?[123] How could the FCC possibly respond to a broad complaint that an entire community cannot afford a premium broadband service?[124] Require a provider to lower rates throughout the community? Is that where the Commission wants to go here, deep into the world of rate setting for broadband? Where, possibly, in Section 60506 does the Commission think Congress has granted broad rate regulation powers? It is not there,

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[120] § 60506(a)(2).

[121] *See supra* pp. 16-17.

[122] *Id.* ¶ 45.

[123] *See supra* p. 24.

[124] *See* NPRM ¶ 45, n. 174 (quoting Comments of National Digital Inclusion Alliance, arguing that "equal access" must mean "affordable for the average household," noting that even if a service costs the same amount in a given area, that amount represents a "larger proportion of a low-income household's budget compared to that of a higher income household's budget.").

and any attempt to "bank shot" a rate regulation regime under Section 60506 would surely fail in court.

Finally, the NPRM seems to support a claim of "digital discrimination" based on poor customer service.[125] How could such a complaint ever be framed in a way that allows providers to offer a defense? Unlike in the Cable Act, where Congress expressly granted the FCC limited regulatory authority over cable customer service standards,[126] Section 60506 does nothing of the sort. In fact, the statute makes no mention whatsoever of customer service standards. How could the Commission possibly create a complaint system without any underlying standards? Would a complaint require providers to endure the time and cost of defending by merely alleging dissatisfaction? Compared to what? It is easy to see how non-quantifiable aspects of the provider/subscriber relationship could be weaponized against providers to cost them millions, if not billions, to defend against.[127]

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[125] *Id.* ¶ 31; ¶ 32 ("We seek comment on what policies and practices should be covered by our definition. Do commenters agree that the practices and policies suggested in response to the Notice of Inquiry can differentially impact consumers' access to broadband? What specific practices and policies related to broadband infrastructure deployment, network upgrades, marketing or advertising, service provision, network maintenance, customer service, sales, and ongoing technical support can do so?").

[126] *See* 47 U.S.C. § 552(a) ("A franchising authority may establish and enforce— (1) customer service requirements of the cable operator.").

[127] NPRM ¶ 74 & n. 298 ("How could we design any complaint process to ensure it is not abused," citing TechFreedom Comments in response to the NOI).

C. Complaints Must be Directed to BIAS Providers, not a Myriad of "Service Providers"

Some commenters argue that not only should the FCC police discrimination in access to broadband, but also as to services that flow over broadband connections.[128] It is far from clear how far the commenters wish to go. Can someone file a complaint for digital discrimination because they cannot afford a Netflix subscription?

Once again, we must return to the language of Subsection 60506(b): Congress directed the Commission to "adopt final rules to facilitate equal access to broadband internet access service, taking into account the issues of technical and economic feasibility presented by that objective."[129] Congress could not have been more clear that the "service" it was referring to was "broadband internet access service;" Section 60503 says so explicitly.[130] The Commission is not free to expand that definition to other "services."[131]

As TechFreedom has repeatedly stated, the Commission has no authority over edge providers or others within the Internet ecosystem that provide "services" beyond those

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[128] NPRM ¶ 26 ("Commenters to the Notice of Inquiry differ on whether we should extend our definition of "digital discrimination of access" to broadband internet service provided over a variety of technologies, both fixed and mobile, other communications services, and services delivered over broadband. These commenters argue that consumers should not be excluded from enjoying certain civil rights protections by virtue of the service they are using, and that some consumers and communities cannot enjoy the benefits broadband has to offer without having non-discriminatory access to services accessed over broadband."); ¶ 29, n. 103 (TURN supports applying the rules to "those doing the deployment of physical infrastructure, those providing the subscription service and those responsible for equipment/infrastructure maintenance" of broadband).

[129] § 60506(b).

[130] 47 USC § 1751(1); *see supra* note 54.

[131] *See* West Virginia v. Env't Prot. Agency, No. 20-1530, slip op. (S. Ct. 2021 June, 30, 2022); Nat'l Ass'n of Broad. v. Fed. Commc'ns Comm'n, No. 21-1171 (D.C. Cir. 2022).

regulated by the Communications Act.[132] The Commission's "ancillary jurisdiction," goes only so far. As the D.C. Circuit warned the Commission:

> Great caution is warranted here, because the disputed [] regulations rest on no apparent statutory foundation and, thus, appear to be ancillary to nothing. Just as the Supreme Court refused to countenance an interpretation of the second prong of the ancillary jurisdiction test that would confer "unbounded" jurisdiction on the Commission, Midwest Video II, 440 U.S. at 706, 99 S.Ct. 1435, we will not construe the first prong in a manner that imposes no meaningful limits on the scope of the FCC's general jurisdictional grant.[133]

Any attempt to sweep in "services" beyond BIAS is beyond the scope of Section 60506 and cannot be reconciled with the language of the statute.[134]

D. Complaints Must Show a Nexus Between Specific Providers and Specific Potential Subscribers

The NPRM contemplates a separate complaint system that would entertain complaints filed not by individuals claiming digital discrimination, but rather by organizations alleging digital discrimination.[135] Here is where the good intentions of Section

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[132] *See* Comments of TechFreedom in Assessment and Collection of Regulatory Fees for Fiscal Year 2021, MD Docket No. 21-190 (Oct. 21, 2021), https://techfreedom.org/wp-content/uploads/2021/10/TechFreedom-Comments-on-Regulatory-Fees.pdf.

[133] American Library Ass'n v. FCC, 406 F.3d 689, 692 (D.C. Cir. 2005).

[134] *See* NPRM ¶ 28 ("Does section 60506 give us authority to include these types of services in our definition? If not, can we rely on other sources of authority to do so?"). The answer to both of these questions is a resounding "no."

[135] NPRM ¶ 54 ("We seek comment on our proposal to establish a pathway for organizations representing communities experiencing digital discrimination of access to submit digital discrimination complaints. We propose establishing a complaint pathway for state, local, Tribal, and community-based organizations, which would include separate processes for individual and organizational filers. Commenters who support this proposal argue that it will ensure that organizations can advocate on behalf of disenfranchised and marginalized individuals who are either unserved or underserved as a result of digital discrimination of access; and that it will enable the Commission better to identify and respond to substantive complaints and collaborate with

60506 could go quickly off the rails. Without a requirement that complaints be tied to specific providers and specific potential subscribers, it would be easy to abuse the system and subject providers to monumental burdens. Such an approach would throw the concept of standing out the window.[136]

Instead, the Commission should require any organization filing a complaint to show a nexus between itself and the areas wherein it is alleging digital discrimination. It should be required to show that it represents at least some de minimis percent of the residents in the area covered by the complaint—the bare minimum of meaningful standing in this context. Otherwise, there will nothing to stop groups from filing broad complaints, covering vast areas of the country, that are lack any meaningful ties to the communities involved.

E. The Key Components to a Workable Complaint System

The *Inclusive Communities* Court declared that "disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business

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State, local and Tribal governments. What specific improvements can be made to the current informal consumer complaint process to make it more accessible for submission by organizations on behalf of groups of individuals? In what ways would a digital discrimination of access complaint from a community-based organization be different from an individual consumer's digital discrimination complaint, and how could we account for those differences in our consumer complaint system?").

[136] *See, e.g.*, Applications for Consent to Transfer of Control from License Subsidiaries of Allbritton Communications Co. to Sinclair Television Group, Inc., MB Docket No. 13-203, Memorandum Opinion and Order, 29 FCC Rcd 9156, 9162 (MB 2014) (petitioners to deny broadcast license renewal must show that they are viewers of the station); Liberman Broadcasting, Inc., DA 16-972 (Aug. 26, 2012) (program complaint denied for lack of standing since the complainant was not a "video programming vendor"); IHM Licenses, LLC, DA 22-203 (Mar. 1, 2022) (standing existed for a radio contest complaint where the complainant was a regular listener to the station); Tribune Media Company, FCC 19-89 (Sept. 16, 2019) (petitioners lacked standing to bring a formal petition to deny against the transfer of broadcast license because they were not a party in interest).

choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system."[137] The Court was clear about how to implement such a principle: "before rejecting a business justification—or, in the case of a governmental entity, an analogous public interest—a court must determine that a plaintiff has shown that there is 'an available alternative . . . practice that has less disparate impact and serves the [entity's] legitimate needs.'"[138] To create such a framework for analyzing disparate impact, the Commission should include in any complaint system it might adopt several components, including easy "off ramps" for dismissing complaints before requiring providers to expend vital resources in defense.

1. Complaint Requirements

In order for the FCC to entertain a complaint (and thus subject providers to the expense of responding), the FCC should require each complaint to contain the following:

1) Name of complainant;
2) Basis of claim of protected status under Section 60506 (e.g., "income level, race, ethnicity, color, religion, or national origin;
3) Address (or specific geographic location) at which the complainant alleges that he/she is being denied access to broadband;
4) The specific provider(s) the complainant is alleges are digitally discriminating;
5) The specific denial of access (e.g., "I requested services on 12/12/23 and was told that service was not available to my location.")

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[137] 576 U.S. 519, 520 (2015).

[138] *Id.* (quoting Ricci v. DeStefano, 557 U.S. 577, 578 (2009)).

Each complaint should be signed under penalty of perjury pursuant to Section 1.16 of the Commission's rules.[139] The Commission should review each complaint first to determine whether it contains this information, and summarily dismiss (or return to the complainant) any complaint that lacks any of this information.[140] Those complaints that meet these requirements could then be forwarded to providers for response.

2. Provider Responses: First-Level Defenses

For certain types of complaints, providers should be able to respond simply, and the complaint should be dismissed. These should not be the types of "safe harbor" defenses contemplated by the NPRM,[141] but rather should be procedural safeguards akin to a federal motion to dismiss under Rule 12(b)(6).[142] It is important that such a quick avenue to dismissal be available, lest providers be required to expend substantial time, effort, and attorney's fees in defending what are facially defective complaints. These procedural defenses should include:

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[139] 47 C.F.R. § 1.16 ("I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).").

[140] *See* NPRM ¶ 55 ("Given the temptation to make frivolous, malicious or prank complaints, and the ease of machine generation of such complaints, should complainants be required to provide enough information about themselves to enable the commission to verify the existence of the complainant?").

[141] *See* NPRM ¶¶ 34, 35 ("We seek comment on whether to adopt safe harbors, establish a case-by-case standard for infeasibility, or both. As an initial matter, we seek comment on what the legal significance of any such safe harbor should be, in terms of shifting the burden of proof or otherwise. What would be the practical implications of adopting safe harbors generally or a case-by-case standard? Would a bright line safe harbor approach be more likely to excuse conduct that, on an individualized review, may not be justified? Are there ways we could design the safe harbor or safe harbors to increase the odds that we successfully identify cases of digital discrimination while excluding only non-meritorious claims or charges?").

[142] *See* FED. R. CIV. P. 12(b)(6).

1) The claimant's name and address (or geographic location) do not match readily available public records;
2) The claimant's basis of class protection is not within the statutory categories;
3) The provider is not correctly specified in the complaint;[143]
4) The claimant previously filed a complaint which was dismissed and has submitted no new evidence to support a claim of digital discrimination;
5) The provider is not currently authorized to provide service to the address in the complaint (e.g., outside a franchise area) or the complainant otherwise is outside the service area of the provider;[144]
6) The provider (if a wireless provider) lacks spectrum at the address provided in the complaint to be able to provide service;
7) The provider has been denied access to the area by landowners/landlords;[145]
8) The claimant's prior service from that provider was legitimately cut off for failure to pay;
9) The claimant resides in an area subject to build-out requirements under a merger approval or government programs (e.g., RDOF, BEAD, High Cost).[146]

The last five are the kind of "business justifications" the *Inclusive Communities* Court said were necessary to ensure that, under disparate-impact liability, "regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and

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[143] Obviously, the complaint process should not require "letter perfect" naming of providers, but the complainant should at least be required to name a provider with sufficient accuracy to allow the provider to respond.

[144] § 60506(a)(1) itself indicates that Congress did not intend the FCC's inquiry into digital discrimination to go beyond "the service area of a provider of such service." *See also* NPRM ¶ 48 & n. 196.

[145] *See* NPRM ¶ 84 (noting disputes regarding access to multiple tenant environments (MTEs)).

[146] *Id.* ¶ 36. Allowing complaints from individuals who are set to be served under any of these programs pursuant to a fixed build-out schedule makes no sense. Otherwise, recipients of these funds would be required to either defend their approved deployment schedule or bump those complaints to the front of the line, at huge costs compared to an orderly deployment using those subsidies.

dynamic free-enterprise system."[147] All of these types of responses could be prepared in-house by providers, cutting down significantly the cost of compliance with the complaint process. Similarly, Commission staff could process and dismiss (or return) these complaints in a timely fashion and without significantly burdening Commission staff. These procedural safeguards could go far to save the complaint system from collapsing under its own weight, and to protect the "dynamic free-enterprise system" that has led private companies to invest over $2 trillion in deploying broadband.[148]

3. Provider Responses: Safe Harbor for Technical Infeasibility

Next, providers should be able to provide substantive ("safe harbor") defenses to complaints that would require a concrete showing but would then shift the burden back to the complainant to establish "that there is 'an available alternative . . . practice that has less disparate impact and serves the [entity's] legitimate needs."[149] These safe harbors for "business justifications" would include a *prima facie* showing that:

1) There are natural geographic impediments between the provider's current plant (or coverage area) and the complainant's address (e.g., bodies of water, mountain ranges, etc.);[150]
2) There are man-made impediments between the provider's current plant (or coverage area) and the complainant's address (e.g., highways, railroads);[151]

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[147] *Inclusive Communities*, 576 U.S. 519, 520 (2015).

[148] *See supra* p. 26.

[149] *Id.*; *see* NPRM ¶ 35 (discussion of burden-shifting in the complaint process).

[150] *See* NPRM ¶ 48 & n. 196 (citing TechFreedom's comments in response to the NOI). Simple maps submitted showing the physical impediment should suffice as evidence of inability to provide service—"technical infeasibility."

[151] Again, maps and relatively simple declarations can provide sufficient evidence to resolve these types of complaints. *See* NPRM ¶ 49 & n. 199 (quoting TechFreedom Comments in response to the NOI).

3) There are regulatory impediments to providing service to claimant's address (or geographic location), that provider has not been able to overcome (e.g., zoning issues, gaining rights-of-way, pole attachment problems, etc.).

Again, in each case, a complaint could be processed and dismissed in short order, without a massive expenditure by providers or Commission staff.[152]

4. Provider Responses: Safe Harbor for Economic Infeasibility

The final defense under Section 60506 for failure to provide access to broadband is economic infeasibility. These will be the most difficult complaints to adjudicate, as recognized in the NPRM.[153] Given the complex and highly competitive environment in which providers operate, establishing generalized standards for "economic feasibility" is nearly impossible. Moreover, it would be highly prejudicial for the Commission to second-guess (and indeed fine[154]) providers based on the "practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system."[155] The NPRM asks the legitimate question, "should a provider be permitted to defend a claim of income-based

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[152] In each of these cases, once the complaint is returned or dismissed, the complainant should be allowed to resubmit the complaint with additional new information demonstrating a prime facie case of digital discrimination.

[153] NPRM ¶ 35 ("Would requiring an individualized analysis for each case of alleged infeasibility place an unreasonable burden on providers or create uncertainty that could chill network investment?"). *Id.* ¶ 63 ("Would proof that the challenged practice or procedure was necessitated by genuine technical and economic feasibility concerns provide the necessary showing to rebut the prima facie case? Are there any substantial business justifications that we should recognize in this context other than genuine technical and economic feasibility concerns? Are there other ways that we might incorporate the consideration of technical and economic feasibility into this step of the traditional, three-step analysis?").

[154] NPRM ¶ 70.

[155] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 520 (2015).

intentional discrimination by offering projections showing that deploying to a particular community would likely produce a lower-than-normal rate of return on investment?"[156] In response, some commenters argue that providers should be forced to deploy, even where they would receive a lower rate of return on their investment, presumably without any evidence of disparate treatment.[157] The NPRM suggests a number of other mechanisms for determining economic feasibility, all of which place the legitimate business decisions of providers in jeopardy.[158] If the complaint process becomes nothing more than second-guessing the business decisions of providers in choosing where and when to deploy broadband networks, then this proceeding will surely have a devastating chilling effect on new deployments;[159] it would do precisely what the *Inclusive Communities* Court warned against: America would no longer have "vibrant and dynamic free-enterprise system"[160] for broadband. As USTelecom stated in its comments: "The Commission should not attempt to step into the shoes of experienced providers and second-guess their business judgment.

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[156] NRPM ¶ 66.

[157] *Id.* nn. 261-2.

[158] *See* NPRM ¶ 36 ("Should economic infeasibility require a showing that providing service was unprofitable based on marginal cost, average cost, or some other basis? On what time horizon should we consider profitability or analyze claims of technical or economic infeasibility?141 Should we establish a bright line 'standard where a profit margin reduction between neighboring areas . . . does not constitute [economic] infeasibility'?").

[159] NPRM ¶ 15 ("U.S. Chamber of Commerce further assert that a rule defining digital discrimination based on disparate impact alone would chill broadband investment and harm competition."); *id.* ¶ 35 ("Would requiring an individualized analysis for each case of alleged infeasibility place an unreasonable burden on providers or create uncertainty that could chill network investment?");

[160] 576 U.S. 519, 520 (2015).

Should the Commission do so, it risks chilling investment in contravention of the Infrastructure Act's goal of driving broadband deployment to every American."[161]

Such a subjective, open-ended inquiry into the decisions of broadband providers would not just slow investment, as when BIAS was placed under Title II,[162] it would lead to the to an immediate chilling of future deployment while providers were hauled in front of the FCC to defend their past deployment decisions. Perversely, a statute that commanded the FCC to "promote" and "facilitate" broadband deployment would achieve the exact opposite. Stringing wires and building towers will soon give way to hiring lawyers and economists to defend providers' business decisions. The casualties of this process will be the very people Section 60506 are designed to protect: those on the other side of the digital divide.

VI. The FCC Should Begin Where the NPRM Ends: Addressing Actual Impediments to Closing the Digital Divide

The saddest part of the NPRM is where it ends: in a frank and critical discussion of what steps the FCC should take to close the digital divide and "prevent" digital discrimination. Paragraphs 83-85 frame the proceeding properly: "we first seek comment on actions we could take to promote infrastructure deployment in furtherance of our goal to address digital discrimination."[163] It is a shame that this analysis, which should have been the NPRM's focus, is buried at the end. Commenters have highlighted significant areas where Congress has delegated authority to the Commission that the agency can use to remove impediments to broadband deployment. From reviewing its rules related to access to

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[161] NPRM n. 132 (quoting Comments of USTelecom at 13, 15, 17).

[162] *See supra* note 15.

[163] NPRM ¶ 84.

multiple tenant environments (MTEs),[164] to assisting states and localities related to "expediting government permitting and facilitating access to poles and public and private rights-of-way,"[165] to completing its pending rulemaking on pole replacements,[166] to making 5G deployment easier,[167] to better spectrum policy,[168] and administering the various funding programs it administers,[169] there is much positive work the FCC could be doing to close the digital divide. Focusing instead on creating a new complaint system that no doubt will be abused and weaponized against broadband providers will have the opposite effect, and that is truly unfortunate.

VII. Conclusion

Courts will not uphold any interpretation of Section 60506 that imposes liability on the basis of disparate impact. The Commission should accept this reality and issue a Further Notice of Proposed Rulemaking focused on liability for intentional discrimination. Failing that, if the FCC proceeds to issue a disparate-impact rule, it must craft a rule and a complaint process that are "limited so … regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system."[170]

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[164] *Id.*

[165] *Id.* n. 320.

[166] *Id.*

[167] *Id.* n. 321.

[168] *Id.*

[169] *Id.* ¶ 85.

[170] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 520 (2015).

Respectfully submitted,

_____/s/_____

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