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

REPLY COMMENTS OF TECHFREEDOM

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EXECUTIVE SUMMARY

The initial round of comments has not changed the facts in the record. There remains no evidence showing any pattern of digital discrimination meriting regulation. Nor does evidence of systemic discrimination warrant any measure against specific corporations or second-guessing of their build-out strategies. Evidence of past discrimination elsewhere in the economy or structural forms of bias in American society are unacceptable as a legal justification for broadband regulation.

Section 60506 of the Infrastructure Investment and Jobs Act cannot establish liability on the basis of disparate impact. Arguments for such liability assume that courts will grant broad deference to the Commission's interpretation of Section 60506, as they would for interpretations of any ambiguous provision of the Communications Act. But Congress chose not to place Section 60506 in the Act. Arguments to the contrary are specious. This means the FCC will be limited in its ability to make and implement a rule in this proceeding; the agency will have to rely on ancillary jurisdiction. There is no clear evidence that Congress intended the Commission to impose disparate-impact liability; just the opposite, such a concept is inconsistent with the text of Section 60506. In any event, the Commission cannot impose full-blown common carriage status upon non-common carriers, which is precisely what disparate impact liability would do—and more.

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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 Reply 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

Commenters could not be farther apart on what Section 60506 means. Some argue that, in 304 words buried in 1,039 pages of an appropriation bill, Congress created one of the most sweeping civil rights laws ever enacted, granting the FCC powers never before afforded the Commission, and effectively overruling vast portions of both the 1934 Communications

[1] Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, Notice of Proposed Rulemaking, FCC 22-98 (Dec. 22, 2022), codified at 47 U.S.C. § 1754 [hereinafter NPRM]; 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). Reply comments are to be filed by April 20, 2023. These Comments are timely filed.

Act and the 1996 Telecommunications Act. Broadband providers would have duties to build out service that not even common carriers bear.[2] They claim that Section 60506 creates liability on the basis of disparate impact such that the FCC can find "digital discrimination" or "deployment discrimination" whenever broadband is not available, not affordable, or doesn't meet the customer service standards that people would like, including "speeds, data caps, throttling, late fees, equipment rentals and installation, contract renewal or termination, customer credit or account history, promotional rates, or price."[3]

Others, including TechFreedom,[4] argue that Section 60506 is far more measured because the language Congress used differs fundamentally from traditional civil rights statutes, and especially from those statutes that have been interpreted to establish disparate impact liability.[5]

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[2] *See, e.g.*, Comments of Public Knowledge et al. on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/10221096795641/1 [hereinafter PK Comments]; Lawyers' Committee for Civil Rights Under Law on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/1022130736466/1; Comments of Free Press on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/102211504317983/1.

[3] *See* NPRM, *supra* note 1, at ¶ 32; *see also* PK Comments at 57; Comments of American Library Association on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 6, https://www.fcc.gov/ecfs/document/10221012023614/1; Comments Of National Digital Inclusion Alliance and Common Sense Media on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 7, 8 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/10221104887094/1.

[4] *See* Comments of TechFreedom on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/10222163901358/1.

[5] *See* Comments of AT&T on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 57 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/10221638803518/1.

Commenters also differ greatly in how the FCC should adjudicate discrimination complaints, and in what defenses providers can raise. Some argue that any defense should be viewed with skepticism as nothing more than pretext to hide digital discrimination.[6] We and others point to real-world impediments to deployment such as natural barriers,[7] regulatory burdens, like the inability to obtain rights-of-way or zoning clearances, or the fact that deployment is just not economically feasible.[8]

Some commenters even argue that Section 60506 allows the FCC to impose de facto common carrier status upon broadband providers without the FCC having to bother to formally reclassify them as such. In their view, the distinction between "information services" (subject to Title I) and "telecommunications services" (Title II) at the heart of the Communications Act[9] would no longer matter. They argue that the FCC can implement the equivalent of the 2015 Open Internet Order,[10] but without any of the provisions forbearing[11]

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[6] PK Comments at 44.

[7] Comments of TechFreedom, *supra* note 4, at 47-48; NPRM, *supra* note 1, at ¶ 84.

[8] Comments of Verizon on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 26-29 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/10222329018930/1.

[9] National Cable Telecom. Assn. v. Brand X Internet Services, 545 U.S. 967, 975 (2005) ("The Act regulates telecommunications carriers, but not information-service providers, as common carriers.").

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

[11] Comments of Electronic Frontier Foundation et al. on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 35 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/10221167617633/1.

from the most onerous aspects of common carriage regulation.[12] Many call for direct or indirect rate regulation of broadband offerings, something the FCC, to date, has recognized would have a devastatingly negative impact on further deployment and the Internet ecosystem as a whole.

In these Reply Comments, we address many of the ill-founded claims made by commenters and attempt to put the 304 words of Section 60506 into proper context for the Commission.

II. Commenters Again Provide No Substantial Evidence of Current "Digital Discrimination," Relying on Arguments Based in Discrimination by Analogy

Section 60506 was enacted in November 2021 under the assumption that some degree of digital discrimination currently exists, yet the NPRM points to extremely weak evidence of such digital discrimination.[13] Commenters, despite having 17 months since passage of Section 60506, and more than five months from when the draft NPRM was first circulated,[14] offer no new evidence of actual digital discrimination in their comments,

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[12] Protecting and Promoting the Open Internet, Report and Order on Remand, *Declaratory Ruling and Order*, 30 FCC Rcd 5601 ¶ 51 (2015) ("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.").

[13] *See* Comments of TechFreedom, *supra* note 4, at 6-8, citing Declaration of Glenn Woroch, attached to Reply Comments of AT&T on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination (June 30, 2022), https://www.fcc.gov/ecfs/document/1063001686231/1 (hereinafter the "Woroch Declaration").

[14] The draft was circulated in November of 2022. *See* FED. COMMC'NS COMM'N, FCC FACT SHEET: PREVENTING DIGITAL DISCRIMINATION (Nov. 30, 2022), https://www.fcc.gov/document/preventing-digital-discrimination-access-broadband.

instead doubling down on prior studies that are based on outdated data or flawed methodology.[15]

It is not enough merely to cry digital discrimination and point to "systemic racism" or a "history" of "redlining" or discrimination in other parts of the national economy.[16] The Commission can't adopt such broad and disruptive rules without something more than mere anecdotal evidence or unsubstantiated claims. More and more, courts have constrained

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[15] *See supra* note 13.

[16] *See, e.g.*, Reply Comments of the California Emergency Technology Fund on Preventing Digital Discrimination of Access at 1, 3 (Mar. 21, 2023), https://www.fcc.gov/ecfs/document/103210082500997/1 ("The Digital Divide is another facet of the Economic Divide, stemming from concentrated and persistent poverty, rooted in systemic racism.") ("Digital Equity will not be achieved without strategic actions to overcome systemic racism and the root causes of concentrated and persistent poverty."); Comments of the National Urban League on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 6 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/102220494629442/1 ("Discrimination is systemic and is entrenched in the institutions of the United States, of which states have historically been and presently are perpetrators of such acts."); PK Comments at 8-9 ("Unsurprisingly, these specific populations overlap with traditionally marginalized communities—the poor and those who have suffered systemic discrimination—as evidenced by the strong overlap between the digitally excluded and historically "redlined" communities."); Comments of Lawyers' Committee for Civil Rights Under Law, *supra* note 2, at 34 ("In order to eliminate existing discrimination, it is important to recognize the history of systematic discrimination, segregation, and redlining that brought us to this point."); Comments of Multicultural Media, Telecom and Internet Council and The U.S. Black Chambers on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 3 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/102210428302274/1 ("Although there are certainly instances of intentional discrimination that can arise between and among people on an individual-to-individual basis, in practice, digital discrimination often occurs unintentionally at the institutional and structural levels through the perpetuation of pre-existing discrimination and biases that are built into the way organizations and governments operate. This phenomenon is evidenced clearly, for example, by the continuing harmful effects of urban redlining on communities of color, long after such practices were outlawed."); Comments of Next Century Cities et al. on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 4 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/102211346300840/1 ("For instance, communities like Brownsville and Harlingen in the Rio Grande Valley of Texas and many Tribal communities across the United States face persistent poverty because of the history of land seizures by the US government.").

agency efforts to rectify broad claims of historical systemic racism without specific findings of past discrimination within the relevant market. As the Sixth Circuit said in striking down a provision of the American Rescue Plan Act of 2021, which allocated nearly $29 billion for grants to help restaurant owners meet payroll, but gave processing priority to a limited supply of money to "socially and economically disadvantaged" restaurants:

> The government has a compelling interest in remedying past discrimination only when three criteria are met: First, the policy must target a specific episode of past discrimination. It cannot rest on a "generalized assertion that there has been past discrimination in an entire industry." J.A. Croson Co., 488 U.S. at 498; see also Adarand, 515 U.S. at 226; Aiken v. City of Memphis, 37 F.3d 1155, 1162–63 (6th Cir. 1994) (en banc) (explaining that societal discrimination is not enough to justify racial classifications and that there must be prior discrimination by the governmental unit involved). Second, there must be evidence of intentional discrimination in the past. J.A. Croson Co., 488 U.S. at 503 (requiring an "inference of discriminatory exclusion"). Statistical disparities don't cut it, although they may be used as evidence to establish intentional discrimination. See Aiken, 37 F.3d at 1163; United Black Firefighters Ass'n v. City of Akron, 976 F.2d 999, 1011 (6th Cir. 1992). Third, the government must have had a hand in the past discrimination it now seeks to remedy. So if the government "show[s] that it had essentially become a 'passive participant' in a system of racial exclusion practiced by elements of [a] local . . . industry," then the government can act to undo the discrimination. J.A. Croson Co., 488 U.S. at 492 (plurality opinion). But if the government cannot show that it actively or passively participated in this past discrimination, race-based remedial measures violate equal-protection principles.[17]

[17] Vitolo v. Guzman, 999 F.3d 353, 361 (6th Cir. 2021). *See also* Eng'g Contractors Ass'n v. Metro, Dade, 122 F.3d 895, 906-07 (11th Cir. 1997) ("A strong basis in evidence cannot rest on an amorphous claim of societal discrimination, on simple legislative assurances of good intention, or on congressional findings of discrimination in the national economy.").

This is true even if the government has had some hand in past discrimination.[18] Nor can the government rely on old data to support its new policies.[19]

The reliance on past "systemic discrimination" in other sectors of the economy is especially problematic here. An overall buildout strategy is the product of complex decision-making on the part of broadband providers, who must either justify such deployment to their shareholders, or bid on government subsidies based on the actual cost of deployment—thus leaving some areas without service, even under generous government grants.[20] Providers' decisions are also governed by other realities of deployment, from insufficient spectrum,[21]

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[18] *See* Wynn v. Vilsack, 545 F. Supp. 3d 1271, 1279 (M.D. Fla. 2021). (Order granting preliminary injunction striking down statute allowing debt relief for historically disadvantaged minority farmers) ("It is undeniable—and notably uncontested by the parties—that USDA had a dark history of past discrimination against minority farmers.").

[19] *Id.* at 1280 ("The Government also cites to a recent report from 2021, but that report does not add any new evidence as it merely echoes the findings of the two 2019 reports as part of a more general discussion of minority owned businesses' limited access to credit. Thus, from an evidentiary standpoint, these reports do little to move the needle in the Government's favor.").

[20] *See* Comments of NTCA—The Internet & Television Association on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 25 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/1022108466107/1 ("The prospect of the Commission inserting itself into the complex business decisions of firms is fraught with significant concerns. As described above, numerous factors, including actual costs, opportunity costs, projected returns, and alternative investment opportunities, drive decisions."); Comments of USTelecom—The Broadband Association on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 2 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/10221138523959/1 ("As the Commission well knows, broadband deployment is an inherently complex and resource-intensive process, particularly for providers that must construct new, modern facilities, such as state-of-the-art fiber networks, in order to deliver next-generation services. This network deployment takes place over years, not weeks and months, and it is a continuous endeavor.").

[21] *See* Comments of T-Mobile on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 22 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/1022132797714/1 ("To keep pace with demand for new fixed and mobile 5G use cases, the U.S. needs to release additional spectrum for broadband deployment, especially licensed mid-band spectrum—from roughly 2 to 14 GHz—a "sweet spot" of spectrum innovation and key factor for 5G deployments.").

to physical barriers,[22] to the inability to gain the necessary regulatory and business approvals[23] (including access to multi-tenant buildings),[24] zoning laws and approvals,[25] easements, rights-of-way, and pole attachments.[26] While there are many barriers to closing

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[22] *See* Comments of TechFreedom, *supra* 4, at 8.

[23] *See* T. Randolph Bear & George S. Ford, *Digital Discrimination: Fiber Availability and Speeds by Race and Income* 29 (Phoenix Center Policy Paper Number 58, Sept. 2022) (submitted for the record by Americans for Tax Reform), https://www.fcc.gov/ecfs/document/1022137100185/1 ("Likewise, there may be patterns in deployment unrelated to race or income, such as regulatory barriers or an area's provider using a different technology, that may be correlated with race and income."); Comments of USTelecom—The Broadband Association, *supra* note 20, at 11 ("While some states and localities act to encourage deployment by streamlining processes and working in partnership with providers, others maintain barriers to deployment such as time-consuming permitting processes, onerous regulatory requirements, and prohibitions on eliminating copper networks—even when they have been overbuilt by competitors operating modern networks.").

[24] *See* Comments of WISPA on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 25 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/102210947306537/1 ("Equal access issues related to MTEs are very important given many consumers in the Infrastructure Act's protected classes are renters in private and public MTEs.").

[25] *See* Comments of AT&T, *supra* note 5, at 23 ("demographic disparities in broadband deployment might result from confounding factors outside the control of any broadband provider, including local zoning rules or landlord prohibitions on access to units in large apartment buildings, which may be disproportionately located in low-income urban areas").

[26] *See* Comments of U.S. Chamber of Commerce on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 8 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/1022176172320/1 ("The Chamber urges the Commission to review existing permitting and regulatory barriers that inhibit wireline and wireless deployment."); Comments of ACA Connects on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 21-22 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/102212557729822/1 ("The specific steps that commenters recommend to advance this goal [of reducing barriers] include changes to subsidy programs, permitting reforms, and expanding rights-of-way access to reduce the enormous fixed costs of deploying and upgrading broadband networks."); Comments of the Free State Foundation on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 24 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/102212765029016/1 ("the Commission should adopt the CEDC's report recommendation that states and local governments ensure non-discrimination and promote broadband deployment through the exercise

the digital divide from the consumer's side of the equation,[27] the FCC can't downplay the

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of their powers in managing public property, including public rights-of-way."); Comments of NCTA—The Rural Broadband Association on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 18 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/1022153675981/1 ("In many instances it may be effectively impossible to deploy an integral network facility without overcoming access to Federal lands, railroad rights-of-way, or utility poles."); Comments of Pelican Tech & Innovation Center on Implementation of the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 2, https://www.fcc.gov/ecfs/document/10221231206842/1 ("Access to public right-of-way can be a large expense for broadband providers, often causing some areas with similar characteristics not to be served purely due to this cost. Government agencies should collaborate together to reduce these costs to ensure that taxpayer dollars are utilized to reach as many residents as possible, rather than simply being used to benefit those who charge the fees to access the rights-of-way."); Comments of Verizon, *supra* note 8, at 29 ("Issues such as building access, access to poles, access to rights-of-way from public and private entities, and other factors outside of a provider's control all play a role in determining whether deployment in a particular area or to a particular building is technically feasible.").

[27] *See, e.g.*, Comments of National Asian/Pacific Islander American Chamber of Commerce and Entrepreneurship on Implementation of the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 1 (Feb. 17, 2023), https://www.fcc.gov/ecfs/document/10217858322607/1 ("Language barriers also keep [Asian American, Native Hawaiian, and Pacific Islander] households from accessing the internet, with nearly 1 in 4 AA/NHPIs facing unmet language access needs."); Comments of the American Association of Peoples with Disabilities on Prevention and Elimination of Digital Discrimination at 3 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/1022264161861/1 ("Working-age adults with disabilities (ages 25 to 64) also reported that cost or affordability was their household's primary barrier to home internet use at higher rates than working-age adults without disabilities (22.3 percent vs. 18.9 percent)."); Comments of American Foundation for the Blind on Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 2 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/10222565214560/1 ("because there are benefits and barriers related to broadband access that are unique to people with disabilities regardless of race, income, national origin, or other categories, we most strongly encourage the Commission to add a dedicated category for disability to the definition of 'digital discrimination of access' as one step to ensure that people with disabilities 'benefit from equal access to broadband internet services'."); Comments of the American Library Association, *supra* note 3, at 6 ("The Commission should also consider barriers like how the lack of digital literacy skills impacts the adoption of broadband services, especially for those individuals and communities that have been historically marginalized and underserved."); Comments of Electronic Frontier Foundation, *supra* note 11, at 32, https://www.fcc.gov/ecfs/document/10221167617633/1 ("People with disabilities are also more likely to live in multifamily housing, which the FCC has

barriers that broadband providers face in trying to deploy to all areas of the nation.

Thus, the record in this proceeding continues to show that broadband deployment in the United States is a highly complex process, driven by (1) market factors, such as the availability of private financing (requiring demonstrated returns on investment to the investors), and the ability of potential new consumers to afford broadband; (2) the availability of government subsidies for broadband deployment; and (3) government impediments to deployment, including zoning, permitting, rights-of-way, and pole attachments, among a myriad of other regulatory hurdles. Deployment decisions are not based on discrimination, intentional or unintentional. Given the state of the record, the Commission should adopt a generalized rule prohibiting discrimination, and stop there.

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

Those proposing a disparate-impact liability rule insist that the FCC will enjoy broad discretion in implementing Section 60506 because this provision is part of the Communications Act. This simply is not so. Because Congress clearly placed Section 60506 outside that Act, and provided no mechanism for enforcement within Section 60506 itself, the Commission could look only to ancillary jurisdiction to enforce any rules it issues. In doing so, the FCC would be sharply limited. Even when the FCC applies its direct authority,

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already recognized as a barrier to digital equity."); Comments of Jeffrey Westling on Implementation of the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination at 11 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/10221826900877/1 ("the FCC should continue to explore why many individuals can access broadband, and with the variety of subsidy programs afford broadband, but still choose not to subscribe. As the Phoenix Center has explained, interest remains a major barrier to broadband adoption, and targeting this interest gap could be a worthwhile avenue for the FCC.").

it cannot impose per se common carriage requirements upon non-common carriers. The disparate-impact theory of liability would not merely impose per se common carriage status upon broadband providers, which are still classified as non-common carrier providers of information services.[28] Disparate-impact liability would go far beyond even traditional common carriage, imposing buildout requirements on providers and forcing them to operate without even the protections afforded to traditional common carriers to enjoy reasonable rates of return.

None of this can be borne by the text of Section 60506. "Congress," says Public Knowledge, "explicitly instructed the Commission to achieve the goal of universal service by protecting populations that 25 years of evidence demonstrated will not have 'equal access to broadband' by creating rules."[29] In fact, Congress required the FCC to do nothing more than "facilitate" and "promote" "equal access."[30] The FCC can make some rules, but it has limited tools to implement them, and no rule predicated upon disparate impact will survive judicial review.

A. Section 60506 Is Plainly *Not* Part of the Communications Act

Our comments explained in detail why the Supreme Court's *Inclusive Communities* decision forbids the imposition of disparate-impact liability unless the operative prohibition in a statute focuses on effects—and why no such language exists in Section 60506.[31] Public

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[28] Restoring Internet Freedom, WC Docket No. 17-108, *Declaratory Ruling, Report and Order, and Order*, 33 FCC Rcd 311 (2018).

[29] PK Comments at 31.

[30] Comments of TechFreedom, *supra* note 4, at 12.

[31] *See id*. at 9-22.

Knowledge dismisses the case as irrelevant: "The Commission must bear in mind that this is the Communications Act, and Communications Act law and precedent governs."[32] "While cases such as *Inclusive Communities* and *McDonnell Douglas* may provide useful information, they do not govern."[33]

"First and foremost," Public Knowledge insists, "Section [60506] is clearly part of the Communications Act."[34] Public Knowledge cites, without further explanation, to Paragraph 71 of the NPRM, which merely *asks whether* "section 60506 was not enacted 'as part of the Communications Act even though [Congress] explicitly [took] that step with other Infrastructure Act provisions.'"[35] Public Knowledge's argument turns on this assertion, which is clearly mistaken.

Public Knowledge seems to have fallen into a common trap: thinking that codification of statutory language within Title 47 makes that language part of the Communications Act. In fact, "the United States Code is maintained by the Office of the Law Revision Counsel [(OLRC)] of the United States House of Representatives and, if a section of the United States Code is in conflict with Statutes at Large, the latter governs."[36] Codification by the OLRC has

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[32] PK Comments at 35.

[33] *Id.* at 35.

[34] *Id.* at 32 (referring to 47 U.S.C. § 1754).

[35] *Id.* at 96.

[36] 2 U.S.C. § 285b(4) ("The functions of the Office shall be as follows: . . . To classify newly enacted provisions of law to their proper positions in the Code where the titles involved have not yet been enacted into positive law.").

no force of law.[37] The Supreme "Court does not give much weight to where a law is located within the United States Code in determining the meaning of a statute because Congress votes on particular bills rather than the United States Code."[38] It is easy to tell when Congress adds new language to the Communications Act: the bill will say so explicitly.

In any event, Section 60506 is plainly missing any instruction from Congress that its language be incorporated into the Communications Act. It reads, from the top:

> SEC. 60506. <<NOTE: 47 USC 1754.>> DIGITAL DISCRIMINATION.
> Statement of Policy.—It is the policy of the United States that, insofar as technically and economically feasible—
> . . .

If Congress had intended to place Section 60506 into the Communications Act, that provision would have begun as follows (with the additional highlighted language):

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[37] In re Methyl Tertiary Butyl Ether Prods. Liab. Litig., 522 F. Supp. 2d 557, 567 n. 66 (2007); *see* United States v. Welden, 377 U.S. 95, 98 n. 4 (1964) (a "change of arrangement" made by a codifier without the express approval of Congress "should be given no weight"); *see also* North Dakota v. United States, 460 U.S. 300, 310 n. 13 (1983) ("Although the codifiers of the United States Code chose to place the gubernatorial-consent provision in the midst of the Conservation Act's provisions, that choice, 'made by a codifier without the approval of Congress should be given no weight'" (citing United States v. Welden, 377 U.S. 95, 98 n. 4 (1964))); *see* United States v. Zuger, 602 F. Supp. 889, 891 (1984) (noting that "In construing a provision of such a title, a court may neither permit nor require proof of the underlying original statutes. Where, however, a title, as such, has not been enacted into positive law, then the title is only *prima facie* or rebuttable evidence of the law. If construction of a provision to such a title is necessary, recourse may be had to the original statutes themselves.").

[38] In re Methyl, 522 F. Supp. 2d at 567 n. 66 (citing United States v. Welden, 377 U.S. 95, 98 n. 4 (1964) ("Indeed, the United States Code is maintained by the Office of the Law Revision Counsel of the United States House of Representatives and, if a section of the United States Code is in conflict with Statutes at Large, the latter governs.")).

SEC. 60506. <<NOTE: 47 USC 1754.>> DIGITAL DISCRIMINATION.
(a) In General.—Part [___] of title -___] of the Communications Act of 1934 (47 U.S.C. [__] et seq.) is amended by adding at the end the following:
``(a) Statement of Policy.—It is the policy of the United States that, insofar as technically and economically feasible—
. . .´´

Congress used exactly this formula when it amended the Communications Act in 1938, for example.[39] The Infrastructure Act did so three times:

SEC. 60503. COORDINATION WITH CERTAIN OTHER FEDERAL AGENCIES.
Section 804(b)(2) of the ***Communications Act of 1934*** (47 U.S.C. 644(b)(2))…
is amended—

(1) in subparagraph (A), by adding ``and´´ at the end; and

(2) by striking subparagraphs (B) and (C) and inserting the following:

And:

SEC. 60103. <<NOTE: 47 USC 1703.>> BROADBAND DATA MAPS.
(d) Availability of Census Data.—

(1) In general.—Section 802(b)(1) of the ***Communications Act of 1934*** (47 U.S.C. 802(b)(1)) ***is amended*** by adding at the end the following:
. . . .
(e) Publication of Broadband DATA Maps on Internet.—Section 802(c)(6) of the Communications Act of 1934 (47 U.S.C. 642(c)(6)) is amended, in the matter preceding paragraph (6), by inserting ``, including on a publicly available website,´´ after ``make public´´.

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[39] Act of May 31, 1938, Pub. L. No. 75-561, 52 Stat. 588 ("To amend the Act approved June 19, 1934, entitled the 'Communications Act of 1934.'"), https://govtrackus.s3.amazonaws.com/legislink/pdf/stat/52/STATUTE-52-Pg588.pdf.

Congress uses this formula not only when it amends an existing section of the Communications Act but also when it adds an entirely new section to the Act. It did just that in the Infrastructure Act. Note the highlighted provisions:

> SEC. 60602. TELECOMMUNICATIONS INTERAGENCY WORKING GROUP.
> (a) In General.—Part I of title III of the ***Communications Act of 1934*** (47 U.S.C. 301 et seq.) ***is amended*** by adding at the end the following:
> ``SEC. 344. <<NOTE: 47 USC 344.>> TELECOMMUNICATIONS INTERAGENCY WORKING GROUP.
> ``(a) Definition.—In this section, the term 'telecommunications interagency working group' means the interagency working group established under subsection (b)(1).
> . . .´´

Not only did Congress omit the "is amended" language from Section 60506, it also did not demarcate text to be inserted into the Communications Act with double quotation marks, as has long been its practice for making amendments to existing acts.[40] Because Congress provided that "only Chapter 5 may be cited as the 'Communications Act of 1934,'"[41] the OLRC placed these new provisions into new Chapter 16 ("Broadband Access") of Title 47 of the U.S. Code. The Commission understands this: when the Commission issued the NPRM in this

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[40] *Drafting Legislation: Distinguishing material "outside the quotes" from material "inside the quotes,"* House Office of the Legislative Counsel, https://legcounsel.house.gov/holc-guide-legislative-drafting#VB (last visited Apr. 20, 2023) ("Material that is being added to an existing statute is shown in quotation marks.").

[41] 47 U.S.C. § 609.

proceeding, it clearly distinguished between its own sources of authority to conduct rulemakings in the Communications Act and this provision of the Infrastructure Act.[42]

B. Other Supposed Examples Are Either Not Parts of the Communications Act, or They Are Irrelevant

"Congress has, on other occasions," claims Public Knowledge, "passed statutes not explicitly designated as amendments to the Communications Act that the Commission and the courts have understood as amendments to the Communications Act and enforceable by the Commission in its usual manner."[43] Public Knowledge cites three examples, misunderstanding each.

1. CALEA Isn't Part of the Communications Act

First, argues Public Knowledge, "the Communications Assistance to Law Enforcement Act (CALEA) is expressly designated as 'an Act to Amend Title 18 of the United States Code.'"[44] Yet, Public Knowledge says, "[t]his did not stop codification of various provisions in Title 47."[45] Again, Public Knowledge fails to understand that codification into the U.S. Code is a ministerial decision made by the OLRC, which has no force of law.[46]

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[42] NPRM, *supra* note 1, at ¶ 103 ("Accordingly, it is so ordered, pursuant to sections 1, 2, 4(i)-(j), 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. 151, 152, 154(i) through (j), 303(r), and section 60506 of the Infrastructure Investment and Jobs Act, Public Law 117-58, 135 Stat. 429, 1245-46 (2021), codified at 47 U.S.C. 1754, that the Notice of Proposed Rulemaking is adopted.").

[43] PK Comments at 37.

[44] *Id.* at 38.

[45] *Id.*

[46] *See supra* note 37 and associated text. *See also* Welden, 377 U.S. at 98 n. 4 (noting that a "change of arrangement" made by a codifier without the express approval of Congress "should be given no weight").

Public Knowledge continues, "the FCC has always treated CALEA as it has treated any other provision of the Communications Act, creating and enforcing rules and receiving *Chevron* deference for the same."[47] Public Knowledge relies on *American Council on Education v. FCC* (D.C. Cir. 2006), but misses its point. The court deferred to the FCC's interpretation of the definition of a "telecommunications carrier" subject to the statute not because CALEA was part of the Communications Act but because "CALEA expressly provides that the Commission may extend [that] definition . . . to the extent that *the Commission finds* that [a] service is a replacement for a substantial portion of the local telephone service and that it is in the public interest to deem such a person or entity to be a telecommunications carrier . . . ."[48]

In other words, CALEA expressly delegated to the Commission the task of defining an ambiguous term. The case simply did not turn on whether CALEA was part of the Communications act (plainly, it was not) or whether it should be "treated any other provision of the . . . Act," as Public Knowledge claims. In general, the Court has held, "administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority."[49] Clearly, CALEA was *a* statute that the FCC had been "entrusted to administer. . . ."[50]—but that did not make it part of the Communications Act.

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[47] PK Comments at 38.

[48] 451 F.3d 226, 232 (emphasis original in the decision) (citing 47 U.S.C. § 1001(8)(B)(ii)).

[49] United States v. Mead Corp., 533 U.S. 218, 226-27 (2001).

[50] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

2. Title 18's Indecency and Gambling Prohibitions *Are* Parts of the Communications Act—Because Congress Said So Clearly

Second, Public Knowledge claims that:

> the Commission has enforced—or at least has enforcement authority—over relevant statutes that are not part of the Communications Act. For example, both the prohibition on broadcast indecency and on broadcasting advertisements for lotteries in states where they are illegal, are provisions of Title 18, not Title 47. This has not prevented the FCC from exercising its general authority to investigate violations and impose suitable penalties pursuant to its enforcement authority.[51]

The prohibition on broadcasting gambling or lotteries, 18 U.S.C. § 1304, is indeed found in Title 18. And in the case Public Knowledge cites, the Supreme Court does indeed treat this provision as the Communications Act despite where it was codified:

> After the advent of broadcasting, Congress extended the federal lottery control scheme by prohibiting, in § 316 of the Communications Act of 1934, 48 Stat. 1064, 1088, the broadcast of "any advertisement of or information concerning any lottery, gift enterprise, or similar scheme." 18 U.S.C. § 1304.[52]

Why the Court did so is easily explained, though:

> This language first appeared in the 1909 amendments to the federal lottery laws. . . . It was adopted verbatim in § 316 of the Communications Act of 1934,which was the first federal statute to ban the broadcasting of lotteries. With only slight modifications not material here, § 316 became § 1304 of the Criminal Code in the 1948 revision of Title 18.[53]

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[51] PK Comments at 38.

[52] United States v. Edge Broadcasting Co., 509 U.S. 418, 422 (1993).

[53] Fed. Commc'ns Comm'n v. American Broadcasting Co., 347 U.S. 284, 292 n.9 (1954).

This is why the *Edge Broadcasting* Court, decades later, still referred to the prohibition on broadcasting gambling or lotteries as Section 316 of the Communications Act: Congress, rather than the OLRC, had simply decided to move this provision into another part of the U.S. Code. The same goes for 18 U.S.C. § 1464, the statutory prohibition on "broadcasting obscene language." Section 326 of the original Communications Act originally contained equivalent language,[54] but that provision was moved to Title 18 in 1948.[55]

In both cases, the Commission's enforcement authority under Section 312 remained unaffected: the FCC could revoke broadcast licenses.[56] So Public Knowledge is correct that this reorganization did not prevent the Commission "from exercising its general authority to investigate violations and impose suitable penalties pursuant to its enforcement authority"[57] —but misunderstands why this was so.

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[54] Communications Act of 1934, § 326, Pub. L. No. 73-416, 48 Stat. 1064 ("No person within the jurisdiction of the United States shall utter any obscene, indecent, or profane language by means of radio communication.").

[55] Act of June 25, 1948, ch. 645, 62 Stat. 769.

[56] 47 U.S.C. § 312(a)(4) ("The Commission may revoke any station license or construction permit for … willful or repeated violation of, or willful or repeated failure to observe any provision of this chapter or any rule or regulation of the Commission authorized by this chapter."). *See* Greater New Orleans Broadcasting Ass'n, Inc. v. U.S., 527 U.S. 173, 177 (1999) (explaining that despite § 1304's classification as a criminal statute under Title 18, the statute has been traditionally enforced by the FCC through administrative sanctions for violating its implementing regulations); 47 C.F.R. § 73.1211 (2021).

[57] PK Comments at 38.

3. Section 60504, BDIA, and Ancillary Jurisdiction

Public Knowledge cites two more examples: Section 60504 of the Infrastructure Act[58] and the Broadband Data Improvement Act (BDIA) of 2008.[59] Both, Public Knowledge claims, "have likewise been included in Title 47."[60] This is, as we have seen, irrelevant; what matters is that *Congress* placed neither provision into the Communications Act.[61] Public Knowledge further claims both 60504 and BDIA have been "treated as ordinary provisions of the Act, enforceable by the Commission's standard powers:"[62] Unhelpfully, Public Knowledge does not elaborate or cite anything further for this claim. In implementing both laws, the FCC implicitly recognized that these provisions are *not* part of the Communications Act, and so, far from invoking any "standard" power to implement "ordinary provisions of the Act," the FCC fell back on a very exceptional power: Section 4(i) has been called the "'necessary and

[58] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, § 60504, 135 Stat. 429 (2021) (codified at 47 U.S.C. § 1753).

[59] Broadband Data Improvement Act of 2008, Pub. L. No. 110-385, 122 Stat. 4096 (codified at 47 U.S.C. §§ 1301-1304), https://www.congress.gov/bill/110th-congress/senate-bill/1492/text.

[60] PK comments at 38.

[61] Like Section 60506, *see infra* at 11-16, Section 60504 contains no prefatory language framing its text as an amendment to the Communications Act. BDIA contained two relevant provisions. Section 106 was free-standing. Section 103 was inserted as an amendment to Section 706 of the Telecommunications Act of 1996. Broadband Data Improvement Act, Pub. L. No. 110-385, 122 Stat. 4096 (2008) (codified at 47 USC § 1303). Further, "Section 706 is not part of the Communications Act…." Brief for Respondents at 24, Cellco Partnership v. Fed. Commc'ns Comm'n, 700 F.3d 534 (D.C. Cir. 2012) (No. 11-1135 & 11-1136), https://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0110/DOC-311901A1.pdf;.https://transition.fcc.gov/Daily_Releases/Daily_Business/2012/db0110/DOC-311901A1.pdf. Accordingly, OLRC codified Section 706 not in Chapter 5 of Title 47 with the rest of the Communications Act, but in Chapter 12.

[62] PK Comments at 38.

proper clause' of the Act."[63] It grants the Commission authority to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this chapter, as may be necessary in the execution of its functions."[64]

Unlike other provisions of the Communications Act, which authorize rulemaking to implement provisions of the Act,[65] Section 4(i), like Section 4(j), allows the Commission to execute *other* duties conferred upon it. Because it is an extraordinary power, a form of "ancillary jurisdiction," its use is, as we shall see, appropriate only in extraordinary circumstances, and subject to special limitations.

To avoid triggering those limitations, Public Knowledge insists that the "Commission has routinely cited Section 4(i) not as 'ancillary authority,' but as direct authority to issue rules (including rules on enforcement)."[66] In fact, courts have clearly recognized the use of Section 4(i) to implement provisions outside the Communications Act as exercises of ancillary jurisdiction.[67] Before considering the limitations imposed by courts on the use of ancillary jurisdiction, let us consider the two examples Public Knowledge offers. What is most significant about these two examples is how different they are from Public Knowledge's theory of Section 60506.

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[63] Mobile Communications Corp. of Am. v. Fed. Commc'ns Comm'n, 77 F.3d 1399, 1404 (D.C. Cir. 1996) (quoting New England Tel. Tel. v. Fed. Commc'ns Comm'n, 826 F.2d 1101, 1108 (D.C. Cir. 1987)).

[64] 47 U.S.C. § 154(i).

[65] *See, e.g.*, 47 U.S.C. § 201(b).

[66] PK Comments at 39.

[67] *See, e.g.*, Verizon v. Fed. Commc'ns Comm'n, 740 F.3d 623, 632 (D.C. Cir. 2014); EchoStar Satellite LLC v. Fed. Commc'ns Comm'n, 704 F.3d 992, 998 (D.C. Cir. 2013).

Section 60504 authorizes "regulations to require the display of broadband consumer labels."[68] When the FCC issued such rules, based on ancillary jurisdiction, it said its "current transparency enforcement procedures are appropriate, and that [its] existing forfeiture authority and other remedies are sufficient to deter noncompliance and to hold accountable those providers that do not comply with the label requirements."[69] No one questioned its legal authority to do so.[70]

BDIA, like Section 60504, involved transparency. BDIA aimed to improve broadband mapping by requiring that "Demographic Information for Unserved Areas" and international comparisons on broadband service availability be included in the FCC's annual reports FCC. It was up to the FCC to implement rules by allowing broadband providers to "make requests for Commission non-disclosure of provider-specific data"[71] and defining "aggregate data."[72]

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[68] Broadband Data Improvement Act of 2008, Pub. L. No. 110-385, 122 Stat. 4096 (codified at 47 U.S.C. §§ 1301-1304).

[69] Empowering Broadband Consumers Through Transparency ¶ 112., CG Docket No. 22-2, FCC 22-86, *Report and Order and Further Notice of Proposed Rulemaking* (2022), https://docs.fcc.gov/public/attachments/FCC-22-86A1.pdf.

[70] *Id.* at 36 n. 248. ("no commenter contends that we lack legal authority to adopt this approach to enforcement of the broadband label requirements, and we thus see no reason to question the adequacy of our authority in that regard. Indeed, given Congress' directive that "the Commission shall promulgate regulations to require the display of broadband consumer labels," it only makes sense that we would be able to enforce those rules.").

[71] Providing Eligible Entities Access to Aggregate Form 477 Data, WC Docket No. 07-38, FCC 10-71, *Order* (2013) (78 Fed. Reg. 45464, 45470), https://www.federalregister.gov/documents/2013/07/29/2013-17928/broadband-data-improvement-act-eligible-entities-aggregate-form-477-data; *see also* 47 CFR § 1.7001(d).

[72] *Id.* ¶ 12 ("we interpret "aggregate data" to mean data that are combined in a manner that involves providing utility to eligible entities in carrying out activities under section 106(e), while protecting the confidentiality interests of providers submitting the data").

This was important, lest "competitively sensitive information . . . be shared with eligible entities," and lest competitors "reverse engineer additional granularity for some data."[73]

Thus, the FCC invoked ancillary jurisdiction to ensure the accuracy of disclosures to consumers about the nature of their service, and to prevent the abuse of data collected by the FCC to improve broadband mapping. These were narrow uses of ancillary jurisdiction. Neither raised any significant legal or policy objection. Both aimed merely to enhance the availability of information about broadband. Neither attempted to wield ambiguous power conferred by Congress to significantly reshape broadband markets or to bypass the fundamental structure of the Communications Act. In short, these two uses of ancillary jurisdiction were nothing like what the FCC is now being urged to do with Section 60506.

C. The FCC's Enforcement Powers & the Limits of Ancillary Jurisdiction

Public Knowledge hedges: "even if Section [60506] were not part of the Communications Act, this would be no barrier to the Commission enforcing rules adopted under this section."[74] In fact, because Section 60506 lies outside the Communications Act, the FCC's standard enforcement provisions are unavailable.[75]

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[73] *Id.* ¶ 13.

[74] PK Comments at 97.

[75] Section 501 of the Act authorizes civil penalties only upon a "person who… does or causes or suffers to be done any act . . . *in this chapter prohibited or declared to be unlawful*, or who willfully and knowingly omits or fails to do any act, matter, or thing *in this chapter required to be done*." 47 U.S.C. § 501 ("Any person who willfully and knowingly does or causes or suffers to be done any act, matter, or thing, *in this chapter prohibited or declared to be unlawful*, or who willfully and knowingly omits or fails to do any act, matter, or thing *in this chapter required to be done*, or willfully and knowingly causes or suffers such omission or failure, shall, upon conviction thereof, be punished for such offense . . ."). Likewise, Section 502 authorizes penalties for violations of rules "made or

Public Knowledge next attempts to ground enforcement in the text of Section 60605 itself. Subsection 60506(e) requires the Commission to "revise its public complaint process to accept complaints from consumers or other members of the public that relate to digital discrimination."[76] Public Knowledge insists this sentence "conclusively demonstrate[s] Congress's intention for the FCC to address digital discrimination complaints and enforce rules prohibiting discrimination of access in the deployment of broadband infrastructure."[77] This argument conflates two distinct things: (1) the process by which consumers file complaints and (2) the process by which the FCC, based on such complaints, enforces the statute. Subsection 60506(e) directs the FCC to update the first; it says nothing about the second.

If the FCC cannot use its standard enforcement powers, and if Section 60506 itself does not provide for enforcement, the Commission could only rely on ancillary jurisdiction. But "ancillary jurisdiction is not 'unrestrained authority.'"[78] The Commission may only regulate under Section 4(i) of the Communications Act authority when: "(1) the Commission's general jurisdictional grant under Title I covers the subject of the regulations

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imposed by the Commission *under authority of this Act*," so of course it cannot apply to rules made under authorities other than the Act. 47 U.S.C. § 502. Section 503 authorizes forfeitures for those who violate the Act or provisions issued under it. 47 U.S.C. § 503(b)(1)(B).

[76] 47 U.S.C. § 1754(e).

[77] PK Comments at 97.

[78] EchoStar Satellite L.L.C. v. Fed. Commc'ns Comm'n, 704 F.3d 992, 999 (D.C. Cir. 2013) (citing Federal Communications Commission v. Midwest Video Corp., 440 U.S. 689, 706 (1979) (*Midwest Video II*)).

and (2) the regulations are reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[79]

Here, the first requirement is not at issue.[80] But where is the mandate in the Communications Act to which a disparate-impact theory of liability is reasonably ancillary? The FCC will have a difficult time answering this question, especially if it pursues any disparate-impact theory. Public Knowledge invokes language from Section 151: the FCC's purpose is to "regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex."[81] But this is explicitly hortatory; it is not a "statutorily mandated responsibilit[y]." And besides, it notably omits income, so it does not map fully onto Section 60506. The "statutory responsibilities" that Public Knowledge and other supporters of this theory point to are, in fact, the core common carriage provisions of the Act. This is a problem because no use of ancillary jurisdiction may violate any provision of the Act itself,[82] and what a disparate-impact theory of liability clearly would do is impose full-blown common carriage status on non-common carriers. Such a theory, "if accepted . . . would virtually free the Commission from its congressional tether."[83]

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[79] American Library Ass'n. v. Fed. Commc'ns Comm'n, 406 F.3d 689, 700 (D.C. Cir. 2005).

[80] Comcast Corp. v. Fed. Commc'ns Comm'n, 600 F.3d 642, 646-47 (D.C. Cir. 2010) ("Comcast concedes that the Commission's action here satisfies the first requirement because the company's Internet service qualifies as "interstate and foreign communication by wire" within the meaning of Title I of the Communications Act. 47 U.S.C. § 152(a).").

[81] 47 U.S.C. § 151.

[82] *Midwest Video II*, 440 U.S. at 708-09.

[83] *Comcast Corp.*, 600 F.3d at 655.

"Congress would not have needed to enact the digital non-discrimination provision," Public Knowledge says, "had broadband remained a Title II service and subject to Sections 201 and 202."[84] Given that it remained "deadlocked on the matter of Title II," Public Knowledge claims, Congress "clearly intended the agency to replicate the functions of Section 201 and 202 insofar as necessary to achieve the statutory purpose of universal service."[85] In other words, Public Knowledge wants the FCC to interpret Section 60506 to impose common carriage requirements on broadband providers precisely because they are *not* classified as common carriers. Public Knowledge wants the FCC to invoke ancillary jurisdiction to enforce those common carrier requirements—in other words, to supersede the Act's distinction between information and telecommunications services.

But "[t]he FCC is powerless to wield its ancillary jurisdiction . . . where there are strong indications that agency flexibility was to be sharply delimited."[86] Courts have already ruled that the FCC cannot use ancillary jurisdiction to impose common carriage status on non-common carriers.[87] The authority to "compel [non-common carriers] to provide common carriage . . . must come *specifically* from Congress."[88] Section 60506 is very far from being specific such a mandate.

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[84] PK Comments at 30.

[85] *Id.* at 31.

[86] EchoStar Satellite L.L.C. v. Fed. Commc'ns Comm'n, 704 F.3d 992, 999 (D.C. Cir. 2013).

[87] *Midwest Video II*, 440 U.S. at 709.

[88] *Id.* (emphasis added).

1. Section 621(a)(3) of the 1984 Cable Act & Section 332(c)(1)(A) of the 1996 Telecommunications Act

Most of the cases involving ancillary jurisdiction involve cable, a service not explicitly addressed by the original Communications Act. Cable had been found not to be a common carrier service in the seminal case of *Midwest Video II*.[89] The Cable Act of 1984 codified this status: "Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."[90]

Yet, as Public Knowledge notes, another provision of that same section of the Cable Act "explicitly prohibited discrimination on the basis of income, in particular requiring service throughout a franchise area without regard to the income of the residents."[91] Section 621(a)(3) of the Cable Act provided:

> In awarding a franchise or franchises, a franchising authority shall assure that access to cable service is not denied to any group of potential residential cable subscribers because of the income of the residents of the local area in which such group resides.[92]

Public Knowledge equates this with Section 201(b)'s prohibition of "unjust and unreasonable" rates or practices, and with Section 202(a)'s prohibition of—Public Knowledge puts it, misleadingly—"any other discrimination, including on the basis of income."[93] In fact, Section 202(a) does not actually mention income; it merely bars "any

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[89] Midwest Video Corp. v. Fed. Commc'ns Comm'n, 571 F.2d 1025 (8th Cir. 1978), *aff'd*, 440 U.S. 689 (1979).

[90] 47 U.S.C. § 541(c).

[91] PK Comments at 33 (citing 47 U.S.C. § 541(c)). In fact, the relevant provision is 47 U.S.C. § 541(a)(3).

[92] 47 U.S.C. § 541(a)(3).

[93] PK Comments at 33 (citing 47 U.S.C. § 202(a)).

unjust or unreasonable discrimination."[94] Nor, indeed, does the general language added to Section 1 of the Communications Act by the 1996 Telecommunications Act.[95]

The Cable Act's Section 621(a)(3) is like Section 60506 in that it mentions income-based discrimination, but it is different in all the ways that matter. First, Section 621(a)(3) contains a clear prohibition, where Section 60506 commands the Commission only to "facilitate" and "promote" "equal access."[96] Second, the entire Cable Act was inserted into the Communications Act.[97] Thus, Congress did not need to specify how the Commission would ensure that franchising authorities would not grant franchises to cable providers that engaged in income-based discrimination; the agency could rely on other provisions of the Act as the basis for preempting state laws and enforcing the FCC's requirements. Public Knowledge and others, of course, ask the FCC to read into Section 60506 a requirement of universal buildout,[98] something the Commission rejected with respect to cable systems

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[94] 47 U.S.C. § 202(a).

[95] 47 U.S.C. § 151 (establishing the FCC "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex…").

[96] *See infra* note 30.

[97] Cable Communications Policy Act of 1984, Pub. L. No. 98-549, § 2, 98 Stat. 2779 ("The Communications Act of 1934 is amended by inserting after title V the following new title.").

[98] PK Comments at 45 ("the entire purpose of Section [60506] is to require providers to build out to areas where otherwise they would not").

(which now provide a substantial amount of the wired broadband infrastructure in the United States), and that rejection that has been affirmed by the courts.[99]

Public Knowledge also equates Section 621(a)(3) with what Congress did in the 1996 Telecommunications Act: "When Congress regulated mobile telephony, it again prohibited discrimination on the basis of income (and race) by classifying the new CMRS service as a Title II service and prohibiting the Commission from using its new forbearance authority on Sections 201 or 202."[100] But where Section 332(c)(1)(A) of the 1996 Act explicitly declared that a "commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier,"[101] Section 621(c) of the 1984 Act did the opposite: "Any cable system shall not be subject to regulation as a common carrier or utility by reason of

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[99] It is also critical to note that in implementing Section 621(a)(3), the FCC concluded that that statutory provision did not require buildout to everyone:

> But for present purposes, it has already been established that Section 621(a)(3) does not mandate universal build-out. As the Commission previously has stated, "the intent of [Section 621(a)(3)] was to prevent the exclusion of cable service based on income" and "this section does not mandate that the franchising authority require the complete wiring of the franchise area in those circumstances where such an exclusion is not based on the income status of the residents of the unwired area." The U.S. Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit") has upheld this interpretation in the face of an argument that universal build-out was required by Section 621(a)(3): The statute on its face prohibits discrimination on the basis of income; it manifestly does not require universal [build-out] [The provision requires] "wiring of all areas of the franchise" to prevent redlining. However, if no redlining is in evidence, it is likewise clear that wiring within the franchise area can be limited.

Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992, *Report and Order*, 22 FCC Rcd 5101, 5141 (2007) (quoting Implementing the Provisions of the Cable Communications Policy Act of 1984, MM Docket No. 84-1296, *Report and Order*, 58 Rad. Reg. 2d (P & F) 1, 62-63 (1985) and ACLU v. Fed. Commc'ns Comm'n, 823 F.2d 1554, 1580 (D.C. Cir. 1987) (emphasis in original)).

[100] PK Comments at 33.

[101] 47 U.S.C. § 332(c)(1)(A).

providing any cable service."[102] Yet Public Knowledge does have a point: Section 621(a)(3)'s prohibition of income-based discrimination is a *kind* of common carriage requirement. How could the same statute say that cable operators are not common carriers while also treating them as common carriers?

Both cases involved Congress amending the Communications Act. When it does so, of course it is not bound to respect the existing limits of the Act; it can moot or replace them. So Congress can, if it wishes, shield cable operators from full-blown common carrier status with one hand even while it imposes a particular common carrier requirement with the other—especially when it is explicit about doing both. But things are different when the *Commission* attempts to impose common carriage status upon non-common carriers based on ambiguous statutory language. The Commission would have even less discretion if it attempted to do so through the exercise of ancillary jurisdiction.

2. *Cellco* Illustrates That the Commission Can Impose Per Se Common Carriage Status Neither Through Direct Authority, Nor Through Ancillary Jurisdiction

The D.C. Circuit addressed the first, and easier, of these two cases in its recent *Cellco* decision: the FCC attempting using direct authority to impose common carriage requirements on non-common carriers. The distinction between "information services" (subject to Title I) and "telecommunications services" (Title II) is at the heart of the Communications Act.[103] The FCC has long understood these to be mutually exclusive

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[102] 47 U.S.C. § 541(c).

[103] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967, 975 (2005) ("The Act regulates telecommunications carriers, but not information-service providers, as common carriers.").

categories.[104] Because the FCC had classified broadband internet access as a non-common carrier service, and because Section 332(c)(2) said that "a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier,"[105] the court wrote that "mobile-data providers are statutorily immune, perhaps twice over, from treatment as common carriers."[106]

A mobile data provider challenged the FCC's data roaming regulations as unlawfully imposing common status on a private mobile service. "[C]ommon carriage is not all or nothing," the court explained, "—there is a gray area in which although a given regulation might be applied to common carriers, the obligations imposed are not common carriage *per se.*"[107] Only because the mobile roaming rule fell into that gray area did the FCC uphold the rule. If the FCC attempted to impose obligations upon broadband providers that amounted

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[104] Cellco Partnership v. Fed. Commc'ns Comm'n, 700 F.3d 534, 538 (D.C. Cir. 2012) ("the Commission has interpreted ['common carrier'] to exclude providers of 'information services,' defined as 'the offering of a capability for generating, acquiring, storing, transforming, processing, . . . or making available information via telecommunications.' [47 U.S.C.] § 153(24)"); *see also Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks,* 22 F.C.C.R. 5901, 5919 ¶ 50 (2007) ("The definition of 'telecommunications carrier' in section 3 of the Act states '[a] telecommunications carrier shall be treated as a common carrier under this Act *only to the extent that it is engaged in providing telecommunications service.*' Accordingly, under Section 3, that service provider is to be treated as a common carrier for the telecommunications services it provides, but it cannot be treated as a common carrier with respect to other, non-telecommunications services it may offer, including information services.") (emphasis original).

[105] Section 332(d) defined "private mobile service" to mean "any mobile service (as defined in section 153 of this title) that is not a commercial mobile service or the functional equivalent of a commercial mobile service,

[106] *Cellco*, 700 F.3d at 538.

[107] *Id.* at 547.

to "common carriage *per se*," it would violate the Communications Act's prohibition on treating information services as common carriers.[108]

Cellco was a relatively easy case. Though the Commission also invoked ancillary jurisdiction, the court found solid jurisdiction in Title III of the Act.[109] Thus, the bar for using ancillary jurisdiction to implement disparate-impact liability under Section 60506 would be even higher: not only would the Commission have to satisfy *Cellco*; it would also have to show that its action was reasonably ancillary to its "effective performance of its statutorily mandated responsibilities." Importantly, the definitions found in Section 153 of the Act apply to any provision of the Act, including the provisions used to claim ancillary jurisdiction. Thus, if the FCC imposed common carrier status through ancillary jurisdiction, this would violate Section 153's prohibition on treating non-common carrier services as common carrier services[110] no less than if the Commission acted entirely under provisions found within the Act.

Cellco set forth a clear test: "If a carrier is forced to offer service indiscriminately and on general terms, then that carrier is being relegated to common carrier status."[111] Yet *Cello* upheld the FCC's mobile data roaming rule because:

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[108] *Id.* at 538 ("Although the Act's definition of "common carrier" is unsatisfyingly circular, *see id.* § 153(11) (defining a "common carrier" as "any person engaged as a common carrier for hire"), the Commission has interpreted it to exclude providers of "information services," defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, ... or making available information via telecommunications." (citing *Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks,* 22 F.C.C.R. 5901, 5919 ¶ 50 (2007)).

[109] *Id.* at 540.

[110] *See supra* note 108.

[111] *Cellco*, 700 F.3d at 547.

> The rule requires providers to "offer data roaming arrangements on commercially reasonable terms and conditions," but it permits them to "negotiate the terms of their roaming arrangements on an individualized basis." *Id.* at 5432 ¶ 43. As the Order explains, this means that providers may tailor roaming agreements to "individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms." *Id.* at 5433 ¶ 45. The Order also excuses providers from offering data roaming where it is not "technically feasible," *id.* at 5432 ¶ 43, and establishes a process for resolving disputes arising out of data-roaming negotiations that is "similar" to the voice roaming dispute resolution process. *Id.* at 5448 ¶ 74.[112]

Because the FCC's "rule expressly permits providers to adapt roaming agreements to 'individualized circumstances without having to hold themselves out to serve all comers indiscriminately on the same or standardized terms,' … the data roaming rule does 'not amount to a duty to hold out facilities indifferently for public use.'"[113] Critically, the court ruled, the rule's "'commercially reasonable' standard, at least as defined by the Commission, ensures providers more freedom from agency intervention than the 'just and reasonable' standard applicable to common carriers."[114] Thus, mobile providers would have "considerable flexibility for providers to respond to the competitive forces at play in the mobile-data market"; the FCC required them to "come to the table and offer a roaming agreement where technically feasible," but "[left] the terms of that agreement up for negotiation."[115]

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[112] *Id.* at 540.

[113] *Id.* at 548 (quoting *Midwest Video II*, 440 U.S. 689, 706 n. 16 (1979) (emphasis added)).

[114] *Id.* (comparing with Morgan Stanley Capital Group, Inc. v. Public Utility District No. 1 of Snohomish County, 554 U.S. 527, 532 (2008) (explaining that courts "afford great deference" to FERC's interpretation and application of "just and reasonable")).

[115] *Id.*

What Public Knowledge wants is, to put it mildly, the kind of "duty to hold out facilities indifferently for public use" that the mobile data roaming rule did *not* impose.[116] Indeed, Public Knowledge's proposed disparate impact theory of liability would go even further. Much as the FCC's mobile data roaming rule included technical feasibility among its sixteen factors, Section 60506 requires the FCC to "tak[e] into account the issues of technical and economic feasibility" when it adopts rules to "facilitate equal access to broadband internet access service."[117] Public Knowledge reads this requirement so narrowly that broadband providers could be required to do anything that technology could "support" and that would fall short of bankrupting them.[118] At least traditional common carriers have always been entitled to a reasonable rate of return on their investments.[119]

Public Knowledge makes its agenda clear when it claims that Congress "clearly intended the agency to replicate the functions of Section 201 and 202 insofar as necessary to achieve the statutory purpose of universal service."[120] Section 201(b) and Section 202(a)

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[116] *See* Reexamination of Roaming Obligations of Commercial Mobile Radio Service Providers and Other Providers of Mobile Data Services, WT Docket No. 05-265, *Second Report and Order*, 11 FCC Rcd 5411, 5414 (2011).

[117] 47 U.S.C. § 1754(b).

[118] *See* PK Comments at 41-42 ("The Commission should ensure that its rules or policies do not require that providers do things that the technology does not support. Neither should the Commission's rules require that providers undertake deployment that would drive them to insolvency.").

[119] *See* 47 U.S.C. § 201(b) (("All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable").

[120] PK Comments at 31. Anticipating that the FCC will soon reclassify broadband Internet access service providers under Title II, the Lawyers' Committee makes the same argument in reverse: "the types of discrimination prohibited in Section 60506 … also constitute an unjust or unreasonable practice under Section 202(a) if similar acts are taken by a common carrier." NPRM ¶ 24 n.89 (quoting Lawyers' Comm. for Civil Rights Under Law NOI Comments at 34-37) (internal quotation marks omitted).

are the heart of common carriage.[121] If "replicating" them to govern "digital discrimination" and "deployment discrimination" did not impose per se common carriage status on broadband providers, it is difficult to see what ever could. Public Knowledge explains: "The primary goal of [these] provisions is to ensure universal service for the benefit of the nation as a whole as well as for the benefit of the otherwise excluded individual." [122] In their view, "there is no exception for a 'standard' business reason."[123] (Hence their determination to read "technical and economic feasibility" right out of the statute.) If so, of course there could not be room for the provider to defend its practices as "commercially reasonable," either.

D. Section 60506(d) Does Not Fundamentally Change the Balance of State/Federal Regulatory Powers

Public Knowledge claims "Section [60506](d) reinstates the role of states and localities as partners to ensure 'timely deployment' of broadband to all Americans as Congress intended in 1996—and which the Commission has consistently thwarted through preemption designed to preempt state authority."[124] This is plainly not the case. Section 60506(d) means only what it says: "*The Commission shall develop model policies and best*

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[121] 47 U.S.C. § 201(b) ("All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful"); 47 U.S.C. § 202 (a) ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.").

[122] PK Comments at 35.

[123] *Id.* at 35.

[124] *Id.* at 32.

practices that can be adopted by States and localities to ensure that broadband internet access service providers do not engage in digital discrimination."[125] This provision says nothing at all about undoing preemption or increasing state authority. When Congress wants to address state authority, it does so explicitly.[126]

IV. 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.

Respectfully submitted,

___________/s/___________

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[125] 47 U.S.C. § 1754(d).

[126] *See, e.g.*, 47 U.S.C. § 213(g) ("Nothing in this section shall impair or diminish the powers of any State commission."); 29 U.S.C. § 667(a) ("Nothing in this chapter shall prevent any State agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under section 655 of this title.").