No. 24-1179 (and consolidated cases)

In the United States Court of Appeals
for the Eighth Circuit

MINNESOTA TELECOM ALLIANCE, et al.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,
Respondents.

On Petition for Review from the
Federal Communications Commission
(No. 22-69, FCC 23-100)

BRIEF OF AMICUS CURIAE TECHFREEDOM IN SUPPORT OF INDUSTRY PETITIONERS

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TechFreedom has no parent corporation, it issues no stock, and no publicly held corporation owns a ten-percent or greater interest in it.

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INTEREST OF AMICUS CURIAE*

TechFreedom is a nonprofit, nonpartisan think tank based in Washington, D.C. It is dedicated to promoting technological progress that improves the human condition. It seeks to advance public policy that makes experimentation, entrepreneurship, and investment possible.

For more than a decade, TechFreedom has been deeply involved in the contentious debates around Internet regulation. In the proceeding below, TechFreedom urged the FCC not to use an obscure provision on digital discrimination, buried deep in an enormous infrastructure bill, to smuggle onerous common-carrier regulations onto the Internet. The FCC's order doing just that (and more) erroneously rejects TechFreedom's position, but tacitly acknowledges TechFreedom's expertise, mentioning the organization's comments some two-dozen times. FCC, *In re Implementing the IIJA: Prevention and Elimination of Digital Discrimination*, GN Dkt. No. 22-69 (Nov. 15, 2023), https://tinyurl.com/3kzyv7db.

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* No party's counsel authored any part of this brief. No one, apart from TechFreedom and its counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the brief's being filed.

SUMMARY OF ARGUMENT

Enacted in late 2021, the Infrastructure Investment and Jobs Act runs more than a thousand pages. The table of contents starts off well enough: early headings include "Bridge investment" and "National highway performance program." Scan down, though, and you can practically watch the legislators lose focus. Before long they drift into "Sport fish restoration," "Best practices for battery recycling," and "Limousine compliance with federal safety standards." But don't nod off. On page 10, you'll abruptly stumble on "Broadband." (If you hit "Indian water rights settlement completion fund" or "Bioproduct pilot program," you've gone too far.) This rather cryptic caption refers to a segment that begins on page 754. Start reading there, and you'll eventually arrive at the last section of Title V of Division F—Section 60506, to be precise, on pages 817 and 818—which contains about 300 words on "digital discrimination."

The relevant provision directs the FCC to adopt rules to prevent "digital discrimination of [broadband] access based on income level, race, ethnicity, color, religion, or national origin." (Now codified at 47 U.S.C. § 1754.) Note the phrase "based on": the Supreme Court has held that similar language, such as "on the ground of," refers to intentional discrimination—also known as disparate treatment. Everyone agrees

that the FCC's Section 60506 rules should bar deliberately withholding broadband service from an area out of animus against people in one of the protected classes.

But the FCC wants to go much further. In its order implementing Section 60506, *The Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, 89 Fed. Reg. 4128 (Jan. 22, 2024), the FCC concludes that the provision targets not only disparate treatment but also disparate impact. Under the disparate impact standard, liability can arise even when a disparity between two groups is entirely unintended.

The FCC doesn't stop there. Its new rule governs not only broadband providers, but all "entities that otherwise affect consumer access to broadband." 89 Fed. Reg. at 4141. Conceivably this means any entity that happens to provide broadband to its customers, employees, or tenants. And the FCC's rule governs not just the price or quality of broadband service, but installation, customer service, marketing, advertising, and more. *Id*. at 4144.

Under the ordinary standards of statutory construction, Section 60506 does not grant the FCC the authority it seeks. But the FCC's power grab is not ordinary; the usual standards do not apply. As we will explain, the FCC's rule triggers, but cannot satisfy, the major questions rule.

The major questions rule ensures that the people's representatives in Congress make all the important policy decisions themselves. The rule has two steps: A court determines (1) whether an agency is seeking to resolve a major policy question, and, if so, (2) whether Congress has clearly stated that that question should be resolved by the agency. After a brief discussion of the history of the major questions rule, we will show that, here, the answers are easy. Does the FCC's digital-discrimination rule tackle a major policy question? Yes. Has Congress clearly granted the FCC the authority to issue the rule at hand? No.

I. The FCC's reading of Section 60506 triggers the major questions rule three times over:

A. The FCC's rule is a matter of great economic significance. The rule seeks to transform the broadband industry. The FCC seeks to manage rates, mandate buildouts, and micromanage various aspects of broadband service, contracting, and even marketing. The rule would cripple private investment in broadband. Its overall economic impact is incalculable.

B. The FCC's rule is a matter of great political significance. Broadband regulation has been the subject of intense debate in Congress, at the FCC, and beyond. What's more, Congress has repeatedly

considered and rejected bills related to broadband regulation—a sign that the FCC is trying to evade the legislative process.

C. The FCC's rule raises grave constitutional issues. Because it lacks the guardrails that normally accompany a disparate-impact liability scheme, the rule could push private entities to adopt racial quotas, in violation of the Equal Protection Clause.

II. Congress has not granted the FCC clear authority to enact its sweeping rule:

A. The FCC's rule defies statutory text and context at every turn. First, the FCC's reading of Section 60506 assumes that Congress silently repealed huge chunks of the Communications Act of 1934, the statute that actually governs the broadband industry. Second, Section 60506 neither authorizes disparate-impact liability directly nor contains the burden-shifting structure one would expect to accompany such a liability scheme. Third, Section 60506 neither invokes the Communications Act's enforcement mechanism—indeed, Congress chose not to place Section 60506 in the Communications Act—nor contains an enforcement mechanism of its own. Fourth, Section 60506 is a few lines of text buried in a thousand-page spending bill: If it overhauled the broadband industry, it would be the ultimate elephant in a mousehole.

B. A statute that passes legislative power to an agency, in contravention of Article I of the Constitution, violates the nondelegation rule. To comply with that rule, a statute must contain, at minimum, an "intelligible principle." Suppose the FCC is correct that Section 60506 effectively grants the FCC the power to write a new Communications Act for broadband from scratch. If so, Section 60506 contains no "intelligible principle" to guide that effort. If accepted, therefore, the FCC's reading of Section 60506 would violate the nondelegation rule. Indeed, this case, if decided in the FCC's favor, would likely become the vehicle by which the Supreme Court *strengthens* the nondelegation rule—as a majority of the justices have signaled they intend to do.

ARGUMENT

Though its name may be new, the major questions rule is deeply rooted. The rule's presence in Supreme Court jurisprudence "can be traced to at least 1897." *W. Va. v. EPA*, 142 S. Ct. 2587, 2618 (2022) (Gorsuch, J., concurring) (discussing *ICC v. Cincinnati, N. O. & T. P. R. Co.*, 167 U.S. 479 (1897)). The rule reflects a fundamental constitutional principle: that "the hard [policy] choices … must be made by the elected representatives of the people." *Indus. Union Dep't v. Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring). The major questions

rule exists because it is "an important function of the courts" to "ensur[e] … that major policy decisions by the legislature are deliberately and openly made." Robert Bork, *The Goals of Antitrust Policy*, 57 Am. Econ. Rev. 242, 244 (1967). See Stephen G. Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370, 376 (1986) (courts should assume Congress "focused upon, and answered, major questions").

If the major questions rule has grown in prominence lately, that is simply a side effect of "the explosive growth of the administrative state since 1970." *W. Va.*, 142 S. Ct. at 1619 (Gorsuch, J., concurring). As Congress has increasingly passed open-ended power to agencies, the Supreme Court has increasingly had occasion to remind Congress to do its job properly. See, e.g., *Util. Air Reg. Group v. EPA*, 573 U.S. 302, 324 (2014); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000); *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994).

The Court has repeatedly made clear that it will not find "extraordinary grants of regulatory authority" in a statute's "modest words, vague terms, or subtle devices." *W. Va.*, 142 S. Ct. at 2609 (cleaned up). In the last two terms alone, the Court has invoked the major questions rule when:

- Blocking the Environmental Protection Agency's attempt to use an obscure provision of the Clean Air Act to shut down coal-fired power plants, *W. Va.*, 142 S. Ct. 2587;
- Striking down the Centers for Disease Control's push to restrict evictions during the Covid-19 pandemic, *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485 (2021);
- Rebuffing the Occupational Safety and Health Administration's effort to force the American workforce to get Covid-19 vaccines (or comply with a strict test-and-mask regiment), *NFIB v. OSHA*, 142 S. Ct. 661 (2022);
- Rejecting the Department of Education's attempt to implement a sweeping "emergency" (yet post-pandemic) federal student-loan forgiveness program, *Biden v. Nebraska*, 143 S. Ct. 2355 (2023).

It is in this light that we must consider the FCC's attempt to use a few obscure lines in the Infrastructure Act to impose a government command-and-control regime on the Internet.

I. The FCC's Reading of Section 60506 Triggers the Major Questions Rule.

During the rulemaking process, many commenters warned the FCC that reading Section 60506 broadly would trigger the major questions rule. The FCC adopted an audaciously broad reading of Section 60506 anyway. The agency denied that its reading triggers the major questions rule, but it offered almost no support for that position. It merely cited some supportive comments in a footnote, 89 Fed. Reg. at 4137, and made a few naked assertions, *id*. at 4148-49.

The FCC simply ducked one of the key issues in this case. It is perhaps unsurprising that it did this—because its position is indefensible. The major questions rule is unmistakably triggered by the economic significance of, the political significance of, and the constitutional problems raised by the FCC's order.

A. Economic Significance.

The FCC seeks to remold the broadband market in much the way that the EPA sought, in *West Virginia v. EPA*, to remold the energy market. Like the EPA's rule in *West Virginia*, the FCC's rule "would force an aggressive transformation" of an industry that is large and "link[ed] to every other sector" of the economy. *W. Va.*, 142 S. Ct. at 2622 (Gorsuch, J., concurring). Cf. *UARG*, 573 U.S. at 324 (stating that great economic

significance is implicated when an agency seeks to regulate "a significant portion of the American economy").

Telecom firms have invested more than $2 trillion in Internet infrastructure since 1996. Jonathan Spalter, *America's Broadband Providers Invested $86 B in Networks in 2021*, US Telecom (July 18, 2022), https://tinyurl.com/2dr9uvz7. They invested $86 billion in 2021 alone. *Id*. Even a mere dent in that investment, as a result of new government regulation, would qualify as the sort of "economic significance" that triggers the major questions rule. See *Verizon v. FCC*, 740 F.3d 623, 634 (D.C. Cir. 2014) (observing that "the question of net neutrality"—rules against blocking or throttling Internet traffic that were far less invasive than the rule at hand—"implicates serious policy questions").

What's more, the order makes clear that the FCC intends to regulate rates. 89 Fed. Reg. at 4144 (asserting power over "pricing" and "discounts"). Rate regulation alone is a matter of great economic significance. *MCI Telecomms Corp.*, 512 U.S. at 231 ("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."). Rate regulation of an industry as large and important as the broadband industry is of greater significance still.

As if that weren't enough, the FCC also claims the power to mandate buildouts. 89 Fed. Reg. at 4144 (asserting power over "infrastructure deployment"). And it asserts the power to close disparities in (among other things) network reliability, network upgrades and maintenance, installation, customer service, marketing or advertising, account termination, and service suspension. *Id*.

How does the FCC defend this economic power grab? For the most part, it doesn't. The agency simply denies, for instance, that it seeks to regulate rates or mandate buildouts. *Id.* at 4137. It can maintain that position, however, only by clinging to abysmally constricted definitions of the terms in question. To the FCC, a rate is regulated, or a buildout mandated, only if the FCC acts on its own initiative, ex ante. Yet under its reading of Section 60506, the FCC will do the *exact same thing*—tell providers what rates to charge and where to build—whenever someone complains about almost any statistical disparity, between two areas, in rates, coverage, service, etc.

Indeed, the FCC plainly *wants* to mandate buildouts: the logic of its order pushes it toward that result. "The record in this proceeding," the FCC states, "contains substantial evidence of gaps in access among persons in some low-income, rural, Tribal, and minority communities." *Id.* at 4135. Yet "there is little or no evidence," the agency acknowledges,

"that impediments to broadband Internet access service are the result of intentional discrimination." *Id.* The agency therefore "conclude[s]" that "such impediments are more likely driven by neutral policies or practices (i.e., business decisions) that have discriminatory effects." *Id.* It is a desire to overcome *those* (unintentional) "impediments," the agency concedes, that "drives [the agency's] actions"—i.e., imposing disparate-impact liability. And how are the "impediments" to be "overcome"? Presumably not with winks and nudges. No, mandated buildouts are the surest way to fill in "gaps in access" being "driven by neutral policies or practices."

B. Political Significance.

Government regulation of how people communicate—and, in particular, of a means of communication as pervasive and powerful as the modern Internet—is self-evidently a matter of deep political importance. FCC Chair Jessica Rosenworcel, for her part, agrees that broadband is "essential" to modern discourse. See Statement of Chairwoman Jessica Rosenworcel, FCC (Oct. 19, 2023), https://tinyurl.com/4n4f34rj.

Nor could anyone doubt that, in recent years, Internet regulation has been the subject of enormous controversy. Debate has raged over whether to regulate broadband providers under Title I (light-touch

regulation) or Title II (heavy regulation) of the Communications Act. In 2014, President Obama made an unprecedented public statement urging the FCC to "reclassify consumer broadband service under Title II." See "November 2014: The President's message on net neutrality," in *Net Neutrality*, Obama White House (Nov. 10, 2014), http://tinyurl.com/2v4wawfb. The FCC complied by issuing its 2015 Open Internet Order, which imposed on broadband a Title II designation. During that process, the FCC received almost four million comments—at the time a record. See *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 423 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

It was a short-lived benchmark. The FCC switched course in 2017, issuing the Restoring Internet Freedom Order, and that proceeding received over 22 million comments. *Restoring Internet Freedom*, 83 Fed. Reg. 7852, 7913 (Apr. 23, 2018), http://tinyurl.com/mr3h7nu8. And there were many other signs of the proceeding's contentiousness. The FCC officials who repealed the Open Internet Order were ridiculed on late-night television. Last Week Tonight with John Oliver, *Net Neutrality II*, YouTube (May 7, 2017), https://tinyurl.com/4rj49je3. Prominent celebrities equated them with Nazis. Alyssa Milano (@Alyssa_Milano), Twitter (Nov. 29, 2017), http://tinyurl.com/3zcv2nbr. They were accused of wanting online censorship and "digital serfdom." Kaleigh Rogers,

Democrats Officially Introduce Bills to Restore Net Neutrality, Vice (Feb. 27, 2018), https://tinyurl.com/442b5fk7. There were street protests denouncing them. Amelia Holowaty Krales & Michael Zelenko, *Photos from Inside the Protect Net Neutrality Protests*, The Verge (Dec. 8, 2017), https://tinyurl.com/4667zcmz. A man was sentenced to prison for vowing to kill then-FCC Chair Ajit Pai and his family. Cecilia Kang, *Man Charged with Threatening to Kill Ajit Pai's Family*, N.Y. Times (June 29, 2018), https://tinyurl.com/5n7zkksv. A bomb threat interrupted an FCC vote on the repeal. Jon Brodkin, *Bomb Threat Temporarily Disrupts FCC Vote to Kill Net Neutrality Rules*, Ars Technica (Dec. 14, 2017), https://tinyurl.com/mwkuceu2. If this isn't a "politically significant" issue, hardly anything could be.

A further sign of "political significance" arises "when Congress has considered and rejected bills authorizing something akin to the agency's course of action." *W. Va.*, 142 S.Ct. at 2621 (Gorsuch, J., concurring). "That too," after all, "may be a sign that an agency is attempting to work around the legislative process[.]" *Id*. By 2017, around the time the FCC repealed the Open Internet Order, there had been at least 13 failed congressional bills related to broadband regulation. *U.S. Telecom*, 855 F.3d at 423 (Kavanaugh, J., dissenting). After that, a number of bills tried, and failed, to revive the Open Internet Order through legislation.

See, e.g., H.R. 1644, 116th Cong. (2019), http://tinyurl.com/yj8wektw; S. 4676, 117th Cong. (2022), http://tinyurl.com/ywhj9x8d. (Indeed, the failure to impose Title II rules through legislation is an especially telling sign of Section 60506's narrow scope. It would make no sense for legislators to reject heavy-handed broadband regulation, only to turn around and enact the same measures through "vague terms" and "subtle devices" buried deep in the Infrastructure Act. *W. Va.*, 142 S. Ct. at 2609. We will return to this important point.)

Since Section 60506's enactment, members of Congress have continued to make the political significance of broadband regulation clear. Last November, 28 Senators signed a letter to Chair Rosenworcel, in which they complained about the FCC's overbroad reading of Section 60506. Sen. Ted Cruz, et al., Letter to Chairwoman Jessica Rosenworcel, FCC (Nov. 10, 2023), http://tinyurl.com/mrxsbsrp. That reading, they objected, would "turn" the law "into a sweeping mandate for heavy-handed Internet regulation and expose every nook and cranny of the broadband business to liability." *Id*. That reading, they warned, would "create crippling uncertainty for the U.S. broadband industry, chill broadband investment, and undermine Congress's objective of promoting broadband access for all Americans." *Id*. Clearly, broadband regulation remains as politically significant as ever.

C. Constitutional Issues.

We know that questions of great economic or political significance are major questions because the Supreme Court has told us so. But those "triggers may not be exclusive." *W. Va.*, 142 S. Ct. at 2621 (Gorsuch, J., concurring). In this case, another factor should obviously matter as well, and confirm the need for a major questions analysis. In this case, the FCC's interpretation of the statute would create serious constitutional problems.

"Disparate-impact liability" cannot be "imposed based solely on a showing of a statistical disparity." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 540 (2015). On the contrary, "a robust causality requirement" is needed, so that "racial imbalance does not, without more, establish a prima facie case of disparate impact." *Id.* at 542. Otherwise, private entities would be unable "to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system." *Id.* at 533. They would be pressured into "adopt[ing] … racial quotas" that raise "serious constitutional concerns" under the Equal Protection Clause. *Id.* at 542-43. It is imperative, therefore, that disparate-impact liability target only entities that "*arbitrarily* creat[e] discriminatory effects." *Id.* at 540 (emphasis added).

The FCC has cast these principles aside. Far from implementing a "robust" causality requirement, the agency aspires to eliminate virtually all "racial imbalance." See 89 Fed. Reg. at 4147 (prohibiting any "policy or practice" that "differentially affects access to broadband service," when any "less discriminatory options were available"). Far from protecting businesses' ability to make "profit-related decisions," the agency explicitly *rejects* insufficient profitability as a defense to disparate-impact liability. Compare *id.* at 4137 (business must show that avoiding disparate impact was not merely less profitable, but "prohibitively expensive") with *Wexler v. White's Furniture, Inc.*, 317 F.3d 564, 591 (6th Cir. 2003) ("... profitability decline independently justified the subject adverse employment action, thereby dissipating any purported discriminatory taint.").

Normally, an entity can avoid disparate-impact liability by establishing a "business justification" for its conduct. "Before rejecting a business justification," 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." *Inclusive Communities*, 576 U.S. at 533 (emphasis added). Under the FCC's test, however, a covered entity must establish not only a business justification for doing what it did, but the "technical or economic infeasibility" of doing

what the plaintiff wants it to do. 89 Fed. Reg. at 4135, 4140. Under the FCC's test, moreover, the covered entity bears the burden of showing that *no* less discriminatory alternatives are available. *Id* at 4140. All of this will push private entities toward adopting constitutionally suspect racial quotas. 576 U.S. at 532-33.

It is only reasonable to assume that Congress would speak clearly if it wanted the FCC to implement rules that raise such grave constitutional concerns.

II. Section 60506 Does Not Clearly Authorize the FCC's Rule.

Statutory text and context confirm the obvious: the roughly 300 words of Section 60506 do not grant the FCC the authority to create a new, stricter Communications Act that imposes disparate-impact liability. And if the court *accepted* the FCC's reading of the statute, that would force the court into making a potentially drastic constitutional ruling—a result the major questions rule exists to prevent.

A. Statutory Text and Context.

1. Section 60506 Does Not Repeal the Communications Act (or Let the FCC Write a New One).

The Communications Act of 1934, as amended by the Telecommunications Act of 1996, "defines two categories of regulated entities relevant [here]: telecommunications carriers and information-service providers." *NCTA v. Brand X Internet Servs.*, 545 U.S. 967, 975 (2005). Telecommunications carriers are regulated under Title II, information-service providers under Title I. Title II services, but not Title I services, are treated as common carriers. Title II services, "for example, must charge just and reasonable, nondiscriminatory rates to their customers." *Brand X*, 545 U.S. at 975. The FCC "must forbear from applying" Title II rules to a Title II service when "it determines that the public interest requires" that it do so. *Id*. Title I services are subject only to light-touch regulation under the FCC's "ancillary jurisdiction." *Id*. at 976.

Should broadband providers be regulated under Title I or Title II? That is the question at the heart of the long-running and dramatic debates (see Sec. I.B, supra) behind the Open Internet Order and the Restoring Internet Freedom Order—and, recently, a *new* Open Internet Order, *Safeguarding and Securing the Open Internet*, 88 Fed. Reg. 76048

(Nov. 3, 3023). Regardless of who is right, both sides have at least been arguing over *the correct question*. Congress has created a comprehensive telecom statute. Broadband providers fall within it somewhere. Where they fall is the key determinant of how they will be regulated.

The FCC's digital-discrimination rule scrambles all that. The FCC doesn't know yet whether its separate effort to reclassify broadband providers as Title II services will survive legal challenge. Under its reading of Section 60506, however, the agency needn't wait to find out. Instead, the agency can (it believes) short-circuit the statutory system. As far as broadband providers are concerned, the FCC has blown the Communications Act apart. Under the new rule, broadband providers, even if they remain subject to Title I, can be regulated more stringently than they would be even under Title II, even with no forbearance.

A Title II service must not discriminate among customers who purchase plans with the same rates and terms. A fully regulated (no forbearance) Title II service still sets its own rates, but they're subject to ex ante review by the FCC. See, e.g., *MCI Telecomms. Corp. v. FCC*, 561 F.2d 365, 374-75 (D.C. Cir. 1977). The FCC must not foreclose a Title II service from pursuing a reasonable rate of return. Cf. *Showtime Networks Inc. v. F.C.C*, 932 F.2d 1, 6-7 (D.C. Cir. 1991). A Title II service chooses where to build infrastructure and operate. If it wants to require a Title II

service to "extend its line," the FCC must conduct a hearing and find that the extension is a public "necessity." 47 U.S.C. § 214(d).

In the FCC's view, Congress junked this entire apparatus, including its safeguards, *sub silentio*, in a single page, buried among a thousand other pages, in a text that is not a telecom bill but an omnibus infrastructure-spending bill. Under the FCC's reading of Section 60506, Congress has wiped the slate clean and invited the FCC to start afresh.

What has the FCC done with that (illusory) "fresh start"? Under the FCC's digital-discrimination rule, the non-discrimination principle returns—but without the need to find that a regulated entity belongs under Title II. And the principle reaches a much wider array of activities, right down to advertising. But that's only the beginning. Under the rule, a finding of disparate impact—and since these are *unintentional* disparities, there will likely be many of them, Sec. I.C, supra—unlocks unheralded powers for the FCC. To remedy such a disparity, the FCC may assume plenary control over a provider's "prices." It may deprive the provider of a reasonable rate of return. And it may dictate the provider's "infrastructure deployment." 89 Fed. Reg. at 4137, 4144. To top it all off, the FCC may wield such power over a vast array of entities. Providers subject to Title II's full panoply of rules (i.e., no forbearance) were large, dominant telecom carriers. By contrast, the FCC can enforce its new

rules against small broadband providers—not to mention landlords, contractors, banks, and local governments (entities that "affect access to broadband," 89 Fed. Reg. at 4162).

This makes no sense, to put it mildly. If the FCC wants a new and stricter Communications Act, it must convince Congress to enact a new and stricter Communications Act.

2. Section 60506 Does Not Clearly Permit Disparate-Impact Liability.

Because the major questions rule has been triggered, the FCC needs *clear* authority to impose disparate-impact liability. Yet it is highly *unclear* whether Section 60506 grants the FCC such authority.

Statutes imposing disparate-impact liability contain language that "focuses on the *effects* of the action" of the defendant. *Inclusive Communities*, 576 U.S. at 533. The Supreme Court has found this bar to be met only three times, and, crucially, in each instance the statute in question contained "language like 'otherwise adversely affect' or 'otherwise make unavailable,' which refers to the consequences of an action rather than the actor's intent." *Doe v. BlueCross BlueShield of Tenn., Inc.,* 926 F.3d 235, 240 (6th Cir. 2019) (Sutton, J.); see POB 26-28

(discussing Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and the Fair Housing Act).

Conversely, the Court has found an *absence* of disparate-impact liability in Title VI of the Civil Rights Act of 1964, which contains no "effects" language, but which bars discrimination "on the ground of race, color, or national origin." *Alexander v. Sandoval*, 532 U.S. 275, 278, 280 (2001). Notably, Title IX of the Education Amendments of 1972 contains language almost identical to Section 60506, yet, since it "was patterned on Title VI," it probably "doesn't prohibit disparate-impact discrimination." *BlueShield of Tenn.,* 926 F.3d at 240; see, e.g., *Doe v. Rector & Visitors of George Mason Univ.*, 132 F. Supp. 3d 712, 731-32 (E.D. Va. 2015) (holding that Title IX does not provide for disparate-impact liability). Title IX bars discrimination "on *the basis of* sex," 20 U.S.C. § 1681(a) (emphasis added), while Section 60506 bars discrimination "*based on* income level, race, ethnicity, color, religion, or national origin," 47 U.S.C. § 1754(b)(1) (emphasis added).

The better reading, therefore, is that Section 60506 does not allow for disparate-impact liability. At the very least, Section 60506—which contains no "otherwise" phrasing and no explicit reference to disparate-impact liability—is an exceedingly "subtle device" for the expansive imposition of liability the FCC seeks. *W. Va.*, 142 S. Ct. at 2609.

"Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 2608.

Clinching the point, Section 60506 contains none of the *structure* that the Supreme Court has said must accompany disparate-impact litigation. Take the fact that the statute mentions "technical and economic feasibility" rather than "business justification." (Recall that a valid business justification is a defense to disparate-impact liability.) Reverse-engineering the outcome it wants, the FCC writes: "Congress's directive that the Commission take into account issues of technical and economic feasibility represents a formulation of [the] traditional [disparate-impact] test as tailored to the specific context of section 60506 and the issues it aims to address." 89 Fed. Reg. at 4138. This is wishful thinking. The FCC wants *x*, but Congress gave it *not x*. It is no response to say: "Actually, we got *x* but 'tailored to our specific context.'" "Technical and economic feasibility" is fundamentally not "business justification." It is a small subset of the universe of "business justification." The presence of a standard so different from "business justification" *confirms* that Section 60506 does not impose liability on mere disparate impact.

3. Section 60506 Contains No Mechanism for Enforcement.

Section 60506 *is not in the Communications Act*. (Congress incorporates a statute into the Communications Act by saying so expressly—which it did not do here. See *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 377-78 (1999).) The FCC's enforcement authority is (with inapplicable exceptions) limited to the provisions of the Communications Act. And Section 60506 contains no enforcement mechanism of its own. So when the FCC declares that, in enforcing Section 60506, it "will bring to bear its full suite of available remedies, including the possibility of monetary forfeitures." 89 Fed. Reg. at 4150-51, it is attempting to conjure that enforcement power out of thin air.

Compare Section 60506 with the Cable Communications Policy Act of 1984, Pub. L. No. 98–549, 98 Stat. 2779. The Cable Act prohibits a franchising authority from "deny[ing]" a cable franchise "because of" a group of cable subscribers' income. *Id.* § 621(a)(3), 98 Stat. 2786. Unlike Section 60506, the Cable Act was inserted into the Communications Act. See 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."). The Cable Act is a far more careful, thorough statute than Section 60506—it consists of 28 pages of detailed provisions, in contrast to Section 60506's 300 or so words of broad directives. Yet no matter how detailed and

important the Cable Act *looked*, Congress understood that, to vest the FCC with its preexisting enforcement authority, Congress had to place the Cable Act within the Communications Act.

Congress knows how to create enforcement authority when it wants to—and it didn't do so here. This is telling. Normally, "each antidiscrimination statute has its own highly reticulated set of enforcement rules adopted for the type of discrimination that each law targets." *BlueShield of Tenn.,* 926 F.3d at 239. The absence of a detailed enforcement mechanism here confirms the absence of clear authority to dish out the strong medicine of disparate-impact liability.

4. The FCC's Rule Is the Ultimate Elephant in a Mousehole.

Once the major questions rule is triggered, the way a given provision fits within a statute becomes an issue of overriding importance. See *Biden*, 143 S. Ct. at 2376 (Barrett, J., concurring) (major questions rule "emphasize[s] the importance of *context* when a court interprets a delegation to an administrative agency"). As the now-famous formulation has it, is the provision, as read by the agency, an elephant in a mousehole? *Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001) (Scalia, J.) ("Congress, we have held, does not alter the

fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes.").

Once more, with feeling: Section 60506 is less than a page long. It is buried more than 800 pages deep in a statute that runs more than a thousand pages in all. It is part of an infrastructure-spending bill. This alone shows that Section 60506 should not be presumed to effect any dramatic regulatory changes—and that to find otherwise would be to find the ultimate "elephant" in a "mousehole." *Whitman*, 531 U.S. at 468.

Another part of the Infrastructure Act confirms Section 60506's modest sweep. If Section 60506 all but nationalized the broadband market, the Act would not also appropriate $42.45 billion for broadband providers that voluntarily expand into underserved areas. 135 Stat. 1353. This subsidy program, not an investment-killing command-and-control scheme, is plainly Congress's chosen means for trying to bridge the digital divide.

B. Constitutional Avoidance.

"The [Supreme] Court has applied the major questions doctrine … to ensure that the government does not inadvertently cross constitutional lines." *W. Va.*, 142 S. Ct. at 2620 (Gorsuch, J., concurring). The main such "constitutional line" is the requirement that Congress "make the big-time

policy calls itself, rather than pawning them off to another branch." *Biden*, 143 S. Ct. at 2380 (Barrett, J., concurring). This is the bedrock Article I command that the legislature do the legislating. It is ultimately enforced not through the major questions rule, but through the nondelegation rule. See *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019).

These two rules plainly bleed together—as the Supreme Court has long understood. The Court has routinely enforced "the nondelegation doctrine" by "giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta v. United States*, 488 U.S. 361, 373, n. 7 (1989); see, e.g., *NCTA v. United States*, 415 U.S. 336, 342 (1974). The major questions rule is one way to give a statute a comparatively narrow construction, the better to avoid striking the statute down as unconstitutional.

If the FCC were to get its way, by reading into Section 60506 a vast expansion of its power, Section 60506 would run straight into the nondelegation rule. In the FCC's view, after all, Congress, in the few-hundred nebulous words of Section 60506, granted the FCC the authority to write itself a whole new Communications Act. The FCC seeks for itself the legislative power to rewrite, from the ground up, the Title II common-carrier rules. (And, not surprisingly, the FCC wants to make stricter

rules, while placing fewer restrictions on itself. Sec. II.A.1, supra.) For good measure, the agency seeks also to write its own mini-FTC Act—it wants to use Section 60506 to issue consumer protection rules for advertising, marketing, contract terms, and customer service.

At minimum, the nondelegation rule demands that Congress place in its legislation an "intelligible principle" by which an agency is to operate. The FCC seeks to use Section 60506 to assert authority over a vast array of entities (down to landlords and local governments), to regulate a vast array of activities (down to the quality of entities' customer service), and to impose hair-trigger liability (via the disparate-impact standard). Section 60506 contains no "intelligible principle" by which it could be read to allow any of this.

Making matters worse for the FCC, the Supreme Court is poised to strengthen the nondelegation rule. Three sitting justices have urged the Court to end its "intelligible principle misadventure," *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting); two more have called for the Court to reconsider the standard in an appropriate case, *id.* at 2130-31 (Alito, J., concurring); *Paul v. United States*, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J., respecting denial of certiorari); and a sixth has described the standard as "notoriously lax," Amy Coney Barrett, *Suspension and Delegation*, 99

Cornell L. Rev. 251, 318 (2014). So even if the FCC could point to an "intelligible principle," in Section 60506, governing all that it seeks to do, that barely-good-enough argument would simply tee up the Supreme Court decision that casts aside the intelligible principle test.

Accepting the FCC's interpretation of Section 60506 would do the FCC no favors. It would toss the FCC out of the major questions frying pan and into the nondelegation fire. Worse (from the FCC's perspective), it could lead to a Supreme Court decision that bolsters the nondelegation rule and hampers the FCC's discretion across the board. The major questions rule exists, in part, to head off this kind of drastic constitutional result. It enables this court to resolve this case on a narrow statutory ground, rather than a broad constitutional one.

* * *

"The legislative power of the United States is vested in the Congress, and the exercise of quasi-legislative authority by governmental departments and agencies must be rooted in a grant of such power by the Congress and subject to limitations which that body imposes." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). In short, "an agency literally has no power to act … unless and until Congress confers power upon it." *La. Pub. Svc. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

Congress, quite simply, has not granted the FCC the power it seeks. Among other problems with the FCC's reading of Section 60506, the statute (1) does not state that the FCC may impose disparate-impact liability, (2) does not set forth the proper legal process for assessing such liability, and (3) does not invoke the Communications Act's enforcement mechanism (or contain an enforcement mechanism of its own). Section 60506 "provides no authorization" for the FCC's rule "even when examined using the ordinary tools of statutory interpretation." *Biden*, 143 S. Ct. at 2375. The absence of "clear congressional authorization" for the rule—and its consequent failure to pass the major questions test—only confirms the rule's invalidity. *Id.*

CONCLUSION

The court should vacate the FCC's order.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify:

This brief complies with the type-volume limits of Fed R. App. P. 29(a)(5) because it contains 6,302 words, excluding the parts exempted by Fed. R. App. P. 32(f).

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On April 26, 2024, a copy of this brief was filed and served on all registered counsel through the Court's CM/ECF system.

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