Before the
Federal Communications Commission
Washington, D.C. 20554

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

Comments of Lincoln Network

Lincoln Network appreciates the opportunity to provide comment to the Federal Communications Commission ("FCC" or the "Commission") concerning its proposed rules in the above-captioned proceeding.[1] Lincoln Network is a civil society organization that seeks to bridge the policy divide between Silicon Valley and Washington, D.C. to advance a more perfect union between technology and the American republic.[2] As an organization, we believe in a world of free people and competitive markets, and believe that fostering a robust innovation ecosystem is crucial to creating a better, freer, and more abundant future.

Lincoln Network focuses on three broad policy goals. They are: 1) strengthening American leadership in innovation, 2) securing the future from technological risks, and 3) leveraging technology and technical talent to solve governance and policy challenges. Lincoln Network, however, is not a monolith. Indeed, it allows for a myriad of voices (including mine) composed of our staff of experts on any particular topic. The undersigned strongly believes that every American must have access to affordable and reliable broadband irrespective of his or her

[1] *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69, Notice of Proposed Rulemaking, FCC 22-98 (2023) ("Digital Discrimination NPRM" or "NPRM"), available at https://www.fcc.gov/document/fcc-takes-next-steps-combat-digital-discrimination-0.
[2] "Lincoln Policy," Lincoln Network, accessed January 18, 2023, https://lincolnpolicy.org/.

socio-economic strata.[3] It is why I offer my views and guidance to the Commission in this proceeding.

In this comment, I express the following concerns: 1) the Commission's proposed rules at bar may be in conflict with its goals to close the digital divide, and 2) the proposed rules as drafted will most likely not survive judicial review. Additionally, this comment proposes avenues the FCC can take to avoid these concerns.

I. Closing the Digital Divide Is Preeminent, and the Commission's Digital Discrimination Rules Should Not Encumber Those Efforts

The Commission should be praised for its efforts to eliminate discrimination. No carrier should make a deployment decision based primarily on prohibited factors such as "income level, race, ethnicity, color, religion, or national origin."[4] The so-called disparate treatment test satisfies this standard, while the disparate impact test may have the unintentional consequence of causing discrimination.

Lack of broadband access can dramatically limit economic opportunities for those Americans falling on the wrong side of the digital divide. The Commission's Broadband Deployment Report demonstrated that almost 20 million Americans do not have access to high-speed broadband services.[5] The unfortunate reality is that businesses in today's economy

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[3] *E.g.,* Jonathon Hauenschild, "Federal and State Efforts to Close the Digital Divide," Lincoln Network, White Paper (2022), available at https://lincolnpolicy.org/wp-content/uploads/2022/10/Lincoln-Policy_Federal-and-State-Efforts-to-Close-the-Digital-Divide.pdf; see also Joel Thayer, "Options to Give the Universal Service Fund a Much-Needed Upgrade," Lincoln Network, White Paper (2021), available at https://lincolnpolicy.org/2021/options-to-give-the-universal-service-fund-a-much-needed-upgrade/.

[4] Infrastructure Investment and Jobs Act, § 60506(b)(1), Pub. Law No. 117–58, 135 Stat. 429 (2021).

[5] *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, GN Docket No. 20-269, Fourteenth Broadband Deployment Report, 36 FCC Rcd 836, 857, Fig. 3b (2021) (reporting that 19.2 million Americans did not have access to both 25/3 Mbps fixed broadband as well as 10/3 Mbps mobile broadband).

are reluctant to either relocate or enter into a market in places without broadband, which means fewer job options for those 20 million Americans. Lack of internet access also means that people are limited even when applying for the best jobs and colleges, doing homework, or accessing healthcare services via telehealth capabilities. For those on the wrong side of the digital divide, any access to digital opportunity is wholly out of reach.

Thankfully, Congress and the Commission have already taken steps to address this disparity. The Infrastructure Investment and Job Act's ("IIJA") $65 billion investment is the single largest federal investment in broadband infrastructure to date.[6] Additionally, the Commission's Rural Digital Opportunity Fund, its agreement to increase funding for some small rural broadband providers, and its open proceeding to reform and update its Universal Service Fund ("USF") programs are all steps in the right direction.

Unfortunately, the Commission's proposals here may arrest progress on ameliorating the divide. For example, it is considering both adopting a private right of action and enabling state attorneys general to bring lawsuits to enforce its rules. Additionally, it is seeking comment to impose a disparate impact standard, which indicates that the FCC believes it has *ex ante* authority to hold carriers accountable for aspects of their businesses that are neither discriminatory nor within the scope of their control. Both of these proposals will cause providers to reduce their investments in infrastructure, bringing future progress to a standstill.

The Commission itself has long acknowledged that deploying broadband services is extremely complicated and mired with inconvenient economic realities. Indeed, carriers seeking to deploy broadband networks and services have much to consider, such as the population size of a particular community, the amount of capital expenditures required to reach those communities,

[6] IIJA at § 60102.

terrain, and state and local government permitting.[7] There is scant evidence that digital discrimination, as defined in the Commission's NPRM, is occurring at all.[8] Indeed, in the previous Notice of Inquiry round for this proceeding, not one commenter could demonstrate a cognizable instance of discrimination as described in the statute at issue.

These rules, if promulgated with a disparate impact standard, would force carriers to divert funds away from rural communities and push funds toward urban areas, exacerbating the so-called last-mile problem. As the Brookings Institution defines it, the last-mile problem acknowledges that "[i]n sparsely populated areas … the return on investment from user fees aren't enough to cover private providers' costs of building out their networks."[9] Applying the disparate impact standard and the associated enforcement mechanisms can only make deploying services in those sparsely populated areas more difficult, for two reasons. First, most carriers will forego new markets if at any time the Commission, a state attorney general, or a locality retroactively finds that the place in which they build, or the rates they charge, violate the Commission's rules. Second, the cost of compliance will shift funds away from areas where

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[7] U.S. Department of Commerce, National Telecommunications and Information Administration, *Economics of Broadband Networks* (March 2022), https://broadbandusa.ntia.doc.gov/sites/default/files/2022-03/Economics%20of%20Broadband%20Networks%20PDF.pdf.

[8] See, e.g., Information Technology and Innovation Foundation (ITIF) Comments at 2 n.3 (citing Joe Kane and Jessica Dine, "Broadband Myths: Do ISPs Engage in "Digital Redlining?", ITIF (Apr. 13, 2022), available at https://www2.itif.org/2022-broadband-myths-redlining.pdf); International Center for Law and Economics (ICLE) Comments at 4–12 (citing Geoffrey A. Manne, Kristian Stout, and Ben Sperry, "A Dynamic Analysis of Broadband Competition: What Concentration Numbers Fail to Capture" (ICLE White Paper, June 2021), available at https://laweconcenter.org/wp-content/uploads/2021/06/A-Dynamic-Analysis-of-Broadband-Competition.pdf; Michelle Connolly and James E. Prieger, "A Basic Analysis of Entry and Exit in the US Broadband Market, 2005-2008," 12 *Rev. Network Econ.* 229 (2013); and Steve G. Parsons and James Stegeman, "Rural Broadband Economics: A Review of Rural Subsidies," CostQuest Associates (July 13, 2018), available at https://www.ustelecom.org/wp-content/uploads/2018/11/Rural-Broadband-Economics-A-Review-of-Rural-Subsidies-final-paper-1.pdf (arguing that "neither economic theory nor evidence provide support for a claim that disparate broadband deployment is the result of animus toward any protected class").

[9] Sophia Campbell, Jimena Ruiz Castro, and David Wessel, "The Benefits and Costs of Broadband Expansion," Brookings Institution, August 18, 2021, https://www.brookings.edu/blog/up-front/2021/08/18/the-benefits-and-costs-of-broadband-expansion/.

carriers do not operate—primarily rural, low-income areas—to areas where they already operate —primarily largely urban areas.

Broadband providers currently have many considerations when deploying their networks. They often strike a balance among deploying resources to those who currently lack connectivity (the unserved), deploying resources to those who lack adequate access (the underserved), and maintaining or upgrading existing infrastructure.[10] Closing the digital divide is a priority, for both the country and many carriers. The divide significantly affects lower income households and rural communities, with 43 percent of households making less than $30,000 not having broadband services and nearly 20 percent of rural areas not subscribing to broadband services.[11]

Through conditions placed on broadband grants in the IIJA, Congress recognized the need to prioritize infrastructure deployment to unserved and underserved communities.[12] It decided to allocate funds based on a formula dividing the number of unserved locations in a state by the total number of such locations in the United States and then multiplying the quotient by the total amount of funding available.[13]

As discussed below, courts have historically limited disparate impact analysis to questions of whether a practice or policy has a disproportionate effect on the basis of race and age in employment and housing circumstances. Rather than promoting the goal of eliminating discrimination, the disparate impact test tends to encourage companies to focus on prohibited

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[10] FCC, FCC 20-50, 2020 Broadband Deployment Report (2020), https://docs.fcc.gov/public/attachments/FCC20-50A1.pdf.
[11] Emily A. Vogels, "Digital Divide Persists Even As Americans With Lower Incomes Make Gains In Tech Adoption," Pew Research Center, June 22, 2021, https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/, Michael Martin, *Computer and Internet Use in the United States: 2018*, U.S. Census Bureau, ACS-49, April 21, 2021, https://www.census.gov/content/dam/Census/library/publications/2021/acs/acs-49.pdf.
[12] IIJA at § 60102 (codified at 47 U.S.C. § 1702).
[13] Ibid., at § 60102(c).

criteria.[14] Put simply, as carriers seek to close the digital divide, making deployment determinations comes down to a simple question: does it make economic sense for deployment?[15] Prohibited concerns rarely factor into deployment considerations.

Disparate impact would change carriers' focus. It would, for the first time, require carriers to identify the income level, race, ethnicity, color, religion, national origin, and other factors of a targeted deployment area and compare those same factors in other areas.[16] A disparate impact test would require carriers to ask whether a planned deployment affects, improperly, disproportionately, and negatively, a community not receiving a deployment if that community has a high percentage of individuals in a prohibited-factor community.

If the Commission expands the disparate impact test to telecommunications, there is little evidence that the test's impact would be any different from what it is in the employment context. More importantly, since carriers prioritize deployment on a number of business factors, adopting the test would mean non-business considerations come to the forefront of any deployment decision. Congress recognized many of these business factors that carriers use and sought to allay carriers' concerns through other provisions of the Infrastructure Act, even conditioning the use of government funds upon the prioritization of closing the digital divide.

Adopting the disparate impact test would present a significant statutory construction issue for the Commission in the event of a court challenge. Congress, in other provisions of IIJA, required the government to prioritize unserved and underserved communities. The vast majority of unserved communities in the United States are rural.[17] Rural areas are populated primarily by

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[14] Richard A. Primus, "Equal Protection and Disparate Impact: Round Three," *Harv. L. Rev.* 117, no. 2 (2003): 494–587, https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1526&context=articles.
[15] Carriers do not want to lose money. Deploying to rural areas, particularly, would require significant outlays of capital in exchange for relatively low subscriptions. Carriers, thus, tend to rely on government subsidies to facilitate deployment and ensure that they do not *lose* money.
[16] Primus, "Equal Protection and Disparate Impact: Round Three," *Harv. L. Rev*. 117, no. 2 at 509–536.
[17] Martin, *Computer and Internet Use in the United States: 2018*, 8–11.

non-minority, yet lower income-level, households.[18] Courts will presume that Congress did not intend to nullify its closing the digital divide priority, yet adopting a disparate impact test will require carriers to first ask for a community's race, income level, ethnicity, and so on before determining if the community is unserved or underserved.

Ultimately, adopting a disparate impact test would cause carriers to choose between prioritizing deployment based on closing the digital divide, as required by Congress, and paralyzing deployment for fear that a regular, common business decision may disproportionately affect a minority community. It is far better, for purposes of eliminating discrimination, that the Commission adopt a disparate treatment standard asking whether a carrier chose not to deploy to an area *because* of a prohibited factor.

The Commission also floats the idea that this gives it some rate-regulation authority.[19] Rate regulations have the unintended effect of disrupting the market forces that force broadband providers to carefully pick and choose where to spend their capital to build out their networks. Economist Thomas Hazlett and former Federal Trade Commission Commissioner Joshua Wright found that infrastructure is distributed far more equitably when rate regulation is not present.[20] Their study also found that investments overall went in a "significantly upward shift" when the FCC shielded broadband services from rate regulation.[21] If the FCC decides that the statute permits it to regulate rates under this digital discriminatory framework, it will stifle investment

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[18] Ibid. and Vogels, "Digital Divide Persists Even As Americans With Lower Incomes Make Gains In Tech Adoption."
[19] Digital Discrimination NPRM, at ¶ 32.
[20] Thomas W. Hazlett and Joshua D. Wright, "The Effect of Regulation on Broadband Markets: Evaluating the Empirical Evidence in the FCC's 2015 'Open Internet' Order," 50 *Rev. Indus. Org.* 487 (2017).
[21] Ibid. at 499; see also Patrick Brogan, "U.S. Broadband Investment Continued Upswing in 2018," USTelecom Research Brief, July 31, 2019, https://www.ustelecom.org/wp-content/uploads/2019/07/USTelecom-Research-Brief-Capex-2018-7-31-19.pdf, ("[T]he decline in [broadband investment] in 2015 and 2016, followed by a return to growth in 2017 and 2018 after the FCC had indicated its intention to repeal the Title II classification, suggests that expectations regarding common carrier regulation were likely a factor."); Larry Downes, "Why the Public Utility Model Is the Wrong Approach for Internet Regulation," *Harvard Bus. Review*, Nov. 11, 2016, https://hbr.org/2014/11/why-the-public-utility-model-is-the-wrong-approach-for-internet-regulation.

into these networks and, in turn, widen the digital divide, ultimately leaving low-income communities on the wrong side of it. What is more, rate-regulation does not help the communities that the statute at issue seeks to protect.

Hence, the Commission's goal here, while laudable, would widen the digital divide.

II. The Commission's Draft Rules Are Unlikely to Pass Judicial Review

There are glaring concerns regarding the Commission's proposed rules. This comment acknowledges that § 60506 of the IIJA mandates that the FCC issue rules by November 15, 2023, to "facilitate equal access to broadband internet access service, taking into account the issues of technical and economic feasibility presented by that objective, including . . . preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin."[22]

While the statute provides the FCC with a narrow role, some of the proposals in this NPRM attempt to use this language to exercise unprecedented authority over the broadband market. Some proposals even go beyond what the Obama-era FCC did in the 2015 Title II rules to regulate broadband internet access services ("BIAS") as a public utility. As previously mentioned, the FCC considered using 2015 Title II Order to impose broadband rate regulation and interrogate providers' business practices under a "disparate impact" standard.[23] Through this NPRM, the Commission is asking if it can hold carriers liable even when they had no discriminatory intent as described in the statute. Such a result goes beyond the Commission's rather small role on the issue of digital discrimination as devised by the statute.

[22] IIJA § 60506(b).
[23] *West Virginia v. EPA*, 597 U.S. __, 142 S.Ct. 2587 (2022).

Recently, the Supreme Court clarified the application of the major questions doctrine to agencies in *West Virginia v. EPA*. The major questions doctrine requires courts to reject an agency's claim of regulatory authority when: 1) the underlying claim of authority concerns an issue of "vast 'economic and political significance'"; and 2) Congress has not clearly empowered the agency with authority over the issue.[24] As the late Justice Antonin Scalia put it, Congress "does not … hide elephants in mouseholes.[25] In other words, if Congress thought that an agency's regulatory authority over an issue was important, it clearly granted the authority through the controlling law, scheme, or other statutory provisions.

Prior to *West Virginia*, courts treated the major questions doctrine as an exception to the *Chevron* doctrine, which requires courts to defer to an agency's reasonable interpretation of an ambiguous statute governing that agency.[26] Now courts must apply the major questions doctrine before analyzing a case pursuant to *Chevron*.[27] Practically, this means that the Court will no longer assume that the mere existence of an ambiguous statute means Congress intended agencies to fill in the gaps. The onus will be on the FCC to show that a regulation either is consistent with Congress's clear grant of authority or is not otherwise an economically or politically significant question. If a regulation *is* one of economic or political significance, then the agency must point to clear statutory text for the authority to regulate.

In general, some of the FCC's proposals, discussed below, exceed the scope of Congress's delegation of authority and are, without a doubt, major questions. Moreover, even in the cases where there may be ambiguous terms, such proposed rules, if promulgated as they are,

[24] *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014).
[25] *Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).
[26] *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).
[27] Prior to *West Virginia*, some commentators referred to the major questions doctrine as *Chevron* step zero. At least one effect of the Court's decision is to pull the doctrine from the rubric of *Chevron*, requiring agencies to affirmatively prove Congress clearly granted regulatory authority without the benefit of deference.

ignore the expressed limit in § 60506(b) preventing any rules not taking into account "issues of technical and economic feasibility."

The FCC should root its rules in explicit instructions from Congress and should not skip a major-questions analysis. Broadband regulation, especially as the FCC has articulated it in this NPRM, has vast political and economic significance. Hence, it is incumbent upon the Commission to ensure that any interpretation is stated explicitly in the statute.

A. The statute does not support the FCC applying rate regulation.

Notably, the statute defines "equal access" as "equal opportunity to subscribe to an offered service that provides comparable speeds, capacities, latency, and other quality of service metrics in a given area, for comparable terms and conditions."[28] Because the statute only speaks of "terms and conditions" and omits the word "rates," no clear statutory language exists under § 60506 giving the FCC authority to regulate or review rates charged by BIAS providers, on either an *ex ante* or an *ex post* basis. Indeed, if Congress wanted the FCC to regulate rates, it would have explicitly stated as much, as it has in other statutes governing the Commission. For example, §§ 201 and 202 of the Communications Act of 1934 (the "Communications Act") say explicitly that the Commission "may prescribe rules and regulations"[29] to ensure rates are not a form of "unjust or unreasonable discrimination."[30]

Nothing in § 60506 comes even reasonably close to the language in §§ 201 and 202. Instead, § 60506 merely asks the FCC to act as a facilitator of equal access to BIAS. Moreover, the § 60506 even maintains a limiting principle to "tak[e] into account the issues of technical and economic feasibility" of its actions.[31] As noted earlier, rate regulation schemes will add a high

[28] IIJA, § 60506(a)(2).
[29] 47 U.S.C § 201(a).
[30] 47 U.S.C. § 202(b).
[31] IIJA at § 60506.

cost to BIAS providers. This limiting principle demonstrates that Congress had no intention of delegating to the FCC the authority to regulate rates.

The issue of imposing rate regulations on BIAS providers is profoundly political, as the Commission well knows through its experience with imposing so-called "net neutrality" rules. A significant aspect of the net neutrality debate centered on whether Congress intended to give the Commission the ability to impose Title II rate-regulatory authority over BIAS providers. Senator Edward Markey, Senator Ron Wyden, and Representative Doris Matsui introduced just last Congress the Net Neutrality and Broadband Justice Act of 2022 to give the Commission rate regulation authority.[32] Senators introducing such a bill should make clear to the Commission that imposing rate regulation on BIAS is still a significant political issue and, hence, requires explicit statutory guidance to impose such measures. Additionally, given that there is nothing in § 60506's legislative history that lends itself to the Commission having rate-regulatory authority, it would be most peculiar to assume that Congress gave the Commission that authority while the Senate debated the same issue.

The Court "expects Congress to speak clearly if it wishes to assign to an agency decision of vast economic and political significance."[33] Indeed, Congress does not delegate authority over such matters through "modest words," "vague terms," or "subtle device[s]."[34] It also does not use such language to allow an agency to "radical[ly] or fundamental[ly] change" the nature of the statutory scheme.[35] Given that a measure such as what the Commission proposes here in its NPRM has economic and political significance with no basis in the statute, outside of a reference to "terms and services," it is unlikely to pass judicial review.

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[32] Net Neutrality and Broadband Justice Act of 2022, S. 4676, 117th Cong. (2022).
[33] *Utility Air Regulatory Group*. 573 U.S. at 324.
[34] *Whitman v. American Trucking Ass'n* , 531 U.S. 457, 468 (2001).
[35] *MCI Telecommunications Corp. v. AT&T*, 512 U.S. 218, 229 (1994).

B. The statute supports the adoption of a disparate treatment framework.

The NPRM seeks comments about whether it may adopt a disparate impact test or if it should adopt a disparate treatment standard.[36] Congress provided a clear answer: the Commission may only adopt a disparate treatment standard. Adopting a disparate impact standard would be an atextual reading of the statute, run afoul of the major questions doctrine, and give the Supreme Court the opportunity either to limit the disparate impact standard to employment and housing or to strike it down altogether.

As discussed above, Congress defined "equal access" as "the *equal opportunity* to subscribe to an offered service that provides comparable speeds, capacities, latency, and other quality of service metrics in given areas, for comparable terms and conditions."[37] By choosing to focus on opportunity, Congress directed this Commission to focus on intent to discriminate, rather than equality of outcome. Because of Congress's directive to focus on intent, the text of the statute does not permit the Commission to adopt any anti-discrimination standard other than a disparate treatment test.

Both the disparate impact and disparate treatment standards started in the context of employment. Concerned with employment practices that discriminated against minorities, Congress passed Title VII as part of the Civil Rights Act of 1964,[38] which made it unlawful for an employer to

> fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin; or to limit, segregate, or classify his employees… in any way which would deprive … any

[36] Digital Discrimination NPRM at ¶¶ 14-24.
[37] IIJA at § 60506(a)(2) (emphasis added).
[38] Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241, 253–266 (codified as amended at 42 U.S.C. §§ 2000e, *et seq*.).

> individual of employment opportunities or adversely affect his status because of such individual's race, color, religion, sex, or national origin.[39]

The Supreme Court, interpreting Title VII and deferring to the Equal Employment Opportunity Commission's interpretation, approved of the disparate impact test.[40]

The Commission should adopt a disparate treatment test as its standard, since the test bans intentional discrimination based on prohibited factors. Such a test is consistent with the law's text, since Congress identified disparate treatment as preventing "the most easily understood type of discrimination."[41] Importantly, efforts to eliminate disparate treatment seek to punish intentional discrimination, which the Supreme Court has defined as treating someone "less favorably than others because of a protected trait."[42] Indeed, the Court noted that intentional discrimination is the "only one prohibited by the Constitution itself."[43]

Applied to the current proceeding, the disparate treatment test would ask carriers if a "decision not to deploy to a certain area has plausible business reasons independent of any discriminatory intent." Only if a carrier's answer is "no" may the Commission proceed to the counterfactual, which is an analysis of whether "the decision would have been any different if the affected group was rich, a different race, or so on."[44]

Disparate impact, on the other hand, has a dubious track record with textual interpretation and stands upon legally questionable grounds.[45] It often forces an institution not to examine its motives for a practice, but ask if a business practice may adversely affect a protected group

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[39] Ibid., at § 703(a).
[40] *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).
[41] *Teamsters v. United States*, 431 U.S. 324, 335, n.15 (1977).
[42] *Ricci v. DeStafano*, 557 U.S. 557, 577 (2009).
[43] *Arlington Heights v. Metropolitan Housing Corporation*, 429 U.S. 255, 264–265 (1977).
[44] Katie Eyer, "The But-For Theory of Anti-Discrimination Law," 107 *Va. L. Rev.* 1621, 1624 (2021). https://www.virginialawreview.org/articles/the-but-for-theory-of-anti-discrimination-law/.
[45] *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 551-553 (2015) (Thomas, J., dissenting).

regardless of intent. It presumes that a company's practice violates the law, rather than requiring a plaintiff or the government to bear the burden of proof.[46]

Within seven years of the Civil Rights Act's passage in 1964, the EEOC managed to implement the disparate impact test.[47] The disparate impact test, though, has harmed employees. Statistical discrimination—disparate impact by another name—does not eliminate discrimination. In fact, as one author has pointed out, the "EEOC's attempt to prevent 'disparate impact effect' creates an incentive for a 'real discrimination effect.'"[48] In seeking to prevent discrimination, then, the disparate impact test has a tendency to focus employers' race and other prohibited factors rather than minimizing them.

Disparate impact has gained very little traction outside of two or three applications.[49] In addition to affecting employment decisions, the Supreme Court expanded the test to age-discrimination in employment[50] and housing.[51] For a brief period, disproportionate impact also seemed to play a role in vote dilution cases, but the Supreme Court recently rejected the test as applied to this category of cases.[52]

The Commission would likely run into a very skeptical Supreme Court with any effort to expand the disparate impact test to private entities outside of employment and housing discrimination. Outside of employment cases, most claims of disparate impact in courts seek to prevent discrimination by governmental entities. Specifically, in vote dilution cases, the

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[46] Ibid., at 553–554.
[47] Gail L. Heriot, "Title VII Disparate Impact Liability Makes Almost Everything Presumptively Illegal," 14 *N.Y. Univ. J. L. & Liberty* 1 (2020), https://ssrn.com/abstract=3482015.
[48] Ibid., at 123.
[49] This is not to say that the courts or Congress have limited anti-discrimination laws to two or three applications, but that the disparate impact has not gained significant usage outside of preventing discrimination in certain scenarios. For a much more thorough analysis of anti-discrimination law see TechFreedom's Comments in *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69, available at https://techfreedom.org/wp-content/uploads/2022/05/TechFreedom-Digital-Discrimination-NOI-Comments.pdf.
[50] *Smith v. City of Jackson*, 544 U.S. 228 (2005).
[51] *Arlington Heights*, 429 U.S. at 266.
[52] *Brnovich v. Democratic National Committee*, 594 U.S. ___, 141 S.Ct. 2321, 2340-2341 (2021).

defendant was always a governmental entity—state or local—and a number of disparate impact housing cases challenge local zoning laws or other ordinances. The distinction between private and public entities and the impact of each on discrimination has not been lost on the Supreme Court.[53]

Deciding which test to apply when "facilitat[ing] equal access to broadband internet access service,"[54] the Commission would do well to consider the major questions doctrine, as discussed above. If the Commission chooses to adopt a disparate impact test, the test would cause unnecessary confusion and contradict Congress's intent, in other provisions of the Infrastructure Act, to prioritize deployment based on closing the digital divide. The Commission must be careful not to ascribe to one word or phrase a meaning inconsistent with the rest of the statute, and thereby give "unintended breadth to the Acts of Congress."[55]

The Commission should also be aware that the disparate impact test is unlikely to survive judicial review. Putting aside the fact that the test simply has not been employed outside of a few, limited circumstances, at least five members of the current court have either expressed reservations about *Griggs* (or its progeny) or joined decisions strictly interpreting statutory text, often declining to apply the disparate impact test.[56]

Preventing discriminatory practices is a proper, and noble, goal. Congress provided the Commission the responsibility to "adopt final rules to facilitate equal access to broadband

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[53] *Department of Homeland Security v. Regents of the University of California*, 591 U.S. ___, 140 S.Ct. 1891, 1915 (2020) (Criticizing government discrimination).
[54] IIJA at 60506(b).
[55] *Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995).
[56] *Texas Department of Housing*, 576 U.S. 519 (Thomas, Alito, and Roberts; Alito and Roberts joined the same dissent while Thomas wrote a separate dissent), *Greater New Orleans Fair Housing Action Center v. HUD*, 639 F.3d 1078 (D.C. Cir. 2011) (Kavanaugh), *Kleber v. CareFusion Corporation*, 914 F.3d 480 (7th Cir. 2019, *en banc*) (Barrett).

internet access service."[57] The Commission best fulfills that charge by adopting a disparate treatment standard.

C. There is no statutory basis for the Commission to review deployment decisions as part of its digital discrimination rules.

The statute defines equal access to mean only "equal opportunity to subscribe to an offered service . . . in a given area." It is hard to interpret § 60506 as giving the FCC authority to review the deployment decisions of BIAS providers. Once again, the statute uses carefully crafted phrases to explain its intent. The quoted text above makes clear that the digital discrimination it intends the FCC to monitor is for already-deployed services, rather than have the Commission either directly or indirectly use this statute to orient private-carriers' future deployment strategies.

The FCC's determination that a carrier's particular deployment decision is a violation of its rules would have the practical effect of asking that company to spend millions of dollars to rectify the perceived violation. Such a result would occur because the carrier would either have to divest the money it already spent toward that plan or dedicate new funds to satisfy the FCC. Undoubtedly, this places such a measure squarely into a major questions category because most carriers base their decisions on providing coverage across the country. Any change in that strategy could halt deployments in areas for multiple years, with drastic implications to local, state, and national economies. Hence, the Commission would need to rely on more than the vagueness of the phrase "in a given area" to make its case. Moreover, such a result almost categorically ignores the statute's expressed limit in subsection (b) asking it to take into account the economic reality of its decisions in this proceeding. Either way, there is no statutory justification for the FCC to engage in such reviews.

[57] IIJA § 60506(b).

D. § 60506 does not give the FCC the authority to create a private right of action to enforce its rules.

The Commission seeks comment as to whether the statute allows it to create a private right of action for state and local enforcement agencies.[58] There is absolutely no justification in the text of the statute for taking this measure. It appears the FCC is relying on questionable interpretations from commenters in the previous round when asking this question.[59] One commenter makes an odd, inapposite analogy to the FCC's enforcement of the Telephone Consumer Protection Act ("TCPA"), which falls apart when considering two factors:[60]

- The TCPA explicitly includes a private right of action where § 60506 does not;[61] and
- Private rights of action provisions are extremely political in nature. For example, last term, Congress hotly debated every privacy and antitrust bill introduced containing such a provision. After all the debate, not a single privacy or antitrust bill with a private right of action passed. Consequently, it is very unlikely that Congress inserted language that would give the Commission the authority to create a private right of action.[62]

Worse for the Commission, § 60506 has no ill-defined term that would allow the Commission to include it as part of its rules. As a result, not only would such a rule fail under a major-questions analysis, neither would it pass muster under *Chevron* step one.

[58] Digital Discrimination NPRM at ¶ 76.
[59] Ibid., at n. 79.
[60] *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69, Comments of New York City's Office of Technology and Innovation Comments, at 1-2 (rec. May 16, 2022); The Utility Reform Network Comments, at 19 (rec. May 16, 2022); and Reply Comments of Chicago, et al., at 12 (rec. June 30, 2022) (representing Chicago, Illinois; Boston, Massachusetts; Howard County, Maryland; Montgomery County, Maryland; and the Texas Coalition of Cities for Utility Issues), at 11-13.
[61] 47 U.S.C. § 227(b)(3).
[62] Hence, any rule including a private right of action would certainly fall under a major-questions analysis.

III. The Commission Would Be Wise to Move Incrementally and Stay Within the Scope of Congress's Intent and the Text of the Statute

Given the conflicting studies regarding the existence or the cause of digital discrimination, the Commission should move incrementally. As some commenters suggested in the NOI, one option the Commision should consider, in line with Congress's call to action, is to start gathering actual complaints about potential digital discrimination.[63] Indeed, the FCC could amend its informal complaint rules to create a new category of complaints on "digital discrimination" that asks complainants to provide specific examples for the Commission to review. This would allow the FCC to better understand whether a consumer or small business is lacking the equal access required by Congress.

To ensure the quality of the complaint, the Commission should seek information from the complainants such as: 1) their address; 2) whether they believe they have been denied equal access on account of race, ethnicity, color, religion, national origin, sex, sexual orientation, or income level; 3) whether broadband Internet access is available to them at all; and 4) if so, under what terms and conditions.

The FCC seeks comment as to whether it should make the complaint data available.[64] Given the nature of such disclosures, the Commission should make clear that the disclosure of such information is strictly voluntary and apply the appropriate confidentiality safeguards to protect the privacy of any complainant. NDIA offers helpful commentary on how such a system could be established, urging the Commission to:

> (1) create a dedicated, user-friendly online pathway in the FCC's Consumer Complaint Center through which the public can submit complaints related to digital discrimination;

[63] Reply Comments of Digital Progress Institute, GN Docket 22-69 (2022).
[64] Digital Discrimination NPRM at ¶ 56.

(2) make available a phone option through which the public can lodge complaints related to digital discrimination; and
(3) include somewhere on the FCC website or Consumer Complaint Center a Frequently Asked Questions resource that answers common questions related to digital discrimination in understandable language.[65]

Just as in its informal complaint process in other matters, the Commission should give the complained-against party an opportunity to respond. The gathering of these complaints and the responses will help build a record on whether a more formal complaint process is warranted, as well as what rules the Commission should adopt regarding its charge to "facilitate equal access."

The Commission should recognize that its work in implementing this statute must be faithful to the IIJA. For instance, deployment discrimination is very different from what the statute considers "digital discrimination." The statute does allow for the Commission to start with a relatively narrow set of rules—for example, prohibiting discriminatory treatment of an individual, a household, or a small business based on their race, ethnicity, color, religion, national origin, sex, sexual orientation, or income level in the offering of BIAS already deployed to that location.

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[65] NDIA NOI Comment, GN Docket 22-69 at p. 20.

IV. Conclusion

Given the consequences this proceeding has for closing the digital divide, the impact it may have on local, state, and national economies, along with internet regulation more generally, I urge the Commission to consider these views when constructing and promulgating its rules.

Respectfully submitted,

/s/

Jonathon Hauenschild, J.D.
Policy Counsel
Lincoln Network
810 7th Street NE
Washington, D.C.
20002

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