Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

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I. INTRODUCTION AND SUMMARY

The Infrastructure Investment and Jobs Act ("Infrastructure Act" or "Act")[1] reflects Congress's continued commitment to closing America's digital divide. To that end, Congress appropriated record sums — more than $65 billion — towards broadband deployment and affordability, as well as improving digital literacy. Verizon[2] likewise has invested billions of dollars over many years in its wireless and wireline broadband networks, and in initiatives to promote digital education and inclusion.[3] Congress also included a provision — Section 60506 — focused on the impact that "digital discrimination of access" and "deployment discrimination" could play in the existing digital divide and preventing its closure in the future.[4] This provision directs the Commission to adopt rules "to facilitate equal access to broadband internet access service," while "taking into account the issues of technical and economic feasibility" that objective presents.[5]

Verizon embraces the Act's goals of ensuring all people have equal access to broadband and preventing digital discrimination. To meet those goals, the Commission must, in adopting these rules, remain mindful of the role that Section 60506 plays within the Infrastructure Act — as part of the overall measures Congress adopted to close the digital divide. To that end, the Commission should interpret and implement Section 60506 to complement Congress's resource-

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[1] Pub. L. No. 117-58, 135 Stat. 429 (2021).

[2] The Verizon companies participating in this filing are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

[3] *See* Verizon, *Citizen Verizon*, https://www.verizon.com/about/responsibility.

[4] Infrastructure Act § 60506(b)-(c), codified at 47 U.S.C. § 1754.

[5] *Id.* § 60506(b).

based efforts and should take care not to undercut their effectiveness. In doing so, the Commission should bear in mind several objectives as it carries out Congress's direction:

First, the Commission should interpret the phrase "digital discrimination of access" to mean intentionally denying consumers "in a given area" the "opportunity to subscribe to an offered [broadband] service" based on any of the six characteristics listed in the statute.[6] This interpretation follows directly from the language of Section 60506 and best serves the Infrastructure Act's overall approach to closing the digital divide. If the Commission were to adopt a disparate-impact standard for identifying prohibited discrimination — which, for reasons discussed below, it should not — it should implement well-established requirements associated with such a standard, including a burden-shifting framework that incorporates the following safeguards: a requirement to identify a specific pattern or practice that leads to the alleged harm as well as the appropriate area for comparison for evaluating the discrimination claim, a causality requirement, and a business-justification defense.

Second, the Commission's rules should reflect the language in Section 60506 that the definition of "equal access" covers a limited set of service-related characteristics and that Section 60506 is not an invitation to second-guess standard business decision-making and to prescribe rates of return, and does not authorize retroactive rules. The Commission should reject arguments asking it to assert authority beyond what Congress delegated.

Third, the Commission should adopt rules that leave flexibility for service-provider decision-making based on technical or economic infeasibility. To that end, the Commission should give those concepts the flexible interpretations it has assigned to them in the past and

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[6] *Id*. § 60506(a)(2), (b)(1). The enumerated characteristics are "income level, race, ethnicity, color, religion, or national origin." *Id.* § 60506(b)(1).

reject novel interpretations that would unduly cabin service providers' abilities to engage in sustainable broadband investment.

Fourth, the Commission should adopt a complaint system that is efficient and furthers the ultimate goal of achieving equal access for all. Specifically, the Commission should modify its existing informal consumer complaint process to preserve the ease-of-use of the current informal complaint system while allowing the Commission to gain a detailed understanding of experiences consumers consider to be potential digital discrimination of access.

II. VERIZON HAS BEEN A LONGSTANDING SUPPORTER OF THE SHARED GOAL OF CLOSING THE DIGITAL DIVIDE

For decades, Verizon has invested significant resources to widely deploy state-of-the-art broadband networks to American consumers. For example, Verizon has been one of the largest builders of fiber broadband networks.[7] Indeed, Verizon was the first major U.S. provider to offer fiber — and the high internet speeds that it enables — to residential customers, investing billions of dollars in wide-scale, all-fiber deployment to bring new broadband competition.[8] Rolled out in 2005 as Verizon Fios, Verizon continues to deploy this technology to expand its wired broadband footprint, with Fios expected to be available to 18 million homes by the end of 2025.[9] Verizon's Fios network is deployed throughout communities and across demographic lines. For example, Fios is deployed throughout Washington, D.C., and deployment in

[7] Press Release, Fiber Broadband Association, *Fiber Broadband Enters Largest Investment Cycle Eve*r (Jan. 5, 2022), https://www.fiberbroadband.org/blog/fiber-broadband-enters-largest-investment-cycle-ever.

[8] *See* Verizon, *Fiber Optic Network*, https://www.verizon.com/about/our-company/high-speed-broadband.

[9] *See Verizon Investor Day 2022 Presentation* (Mar. 3, 2022), https://www.verizon.com/about/sites/default/files/2022-05/Investor-Day-2022-Presentation_rv1.pdf ("*Verizon Investor Day 2022 Presentation*").

Washington not only includes, but began with, the historically lower-income, more diverse communities east of the Anacostia river. Similarly, Verizon's Fios deployment in Boston includes the historically lower-income, diverse communities in Roxbury and Dorchester. And, these areas had Fios available to them long before it was available to Boston's Beacon Hill neighborhood.

Verizon continually works to invest in and build out its networks, as demonstrated by its $23.1 billion in capital expenditures in 2022.[10] Verizon participated in the Commission's 2018 Connect America Fund ("CAF") auction and won CAF support to build gigabit-speed fiber broadband in underserved areas of seven states.[11] Relatedly, Verizon recently completed its partnership with New York State to deliver broadband fiber service to over 48,000 residents in rural locations in New York.[12] Verizon is also quickly expanding its deployment of broadband using fixed wireless technology and expects to cover 50 million homes with its wireless broadband services by the end of 2025.[13]

Additionally, Verizon recognizes that broadband access is not the only barrier to closing the digital divide; affordability and adoption are also key issues.[14] To this end, Verizon fully

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[10] *See* Verizon, *Fourth Quarter & Full Year Financial & Operating Results* (Jan. 24, 2023), https://www.verizon.com/about/sites/default/files/2023-02/2022Q4-VZ-FormalRemarks-012423cl.pdf.

[11] *See*, *e.g.*, *Connect America Fund Auction To Expand Broadband to Over 700,000 Rural Homes and Businesses; Auction Allocates $1.488 Billion To Close the Digital Divide*, FCC News Release, DOC-353840 (Aug. 28, 2018).

[12] *Verizon to deploy high-speed broadband to rural households in Central New York*, Verizon News Center (Nov. 15, 2022), https://www.verizon.com/about/news/verizon-high-speed-broadband-central-new-york.

[13] *See Verizon Investor Day 2022 Presentation*.

[14] *See* Notice of Inquiry, *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, FCC 22-21, GN Docket No. 22-69, (Mar. 17, 2022) ("*NOI*"); Comments of Verizon, GN Docket No. 22-69, at 4-7 (May 16, 2022) ("Verizon *NOI* Comments") (describing Verizon's participation in the Commission's Broadband

supports and participates in the Commission's Affordable Connectivity Program ("ACP"). Through this program, Verizon makes symmetrical 300 Mbps broadband service, including a router, available to qualifying consumers effectively for free, with the ACP subsidy, in areas where Fios is available.[15]

III. CONGRESS HAS APPROPRIATED BILLIONS OF DOLLARS TO BRIDGE THE DIGITAL DIVIDE

In the Infrastructure Act and in other recent legislation, Congress has appropriated unprecedented amounts of money — tens of billions of dollars — to fund broadband deployment where, to date, deployment has been cost-prohibitive, often due to challenging geography, low population density, or both.[16] In the Infrastructure Act alone, Congress appropriated more than $47 billion to fund broadband deployment programs.[17] The Infrastructure Act's broadband-deployment-related appropriations do not stand alone: Congress also appropriated billions of dollars towards broadband deployment in the American Rescue Plan Act of 2021,[18] and recent

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Lifeline program and in the Infrastructure Act's Affordable Connectivity Programs and its efforts to foster digital literacy and inclusion, to provide digital skills training).

[15] *See id.*

[16] The Commission's longstanding High Cost Program, known as the CAF, stands as recognition of the cost-prohibitive nature of deployment in many areas. CAF "distributes funding to telecom carriers to deliver service in rural areas where the market alone cannot support the substantial cost of deploying network infrastructure and providing connectivity." Universal Serv. Admin. Co., *Program Overview*, https://www.usac.org/high-cost/program-overview/.

[17] *See* Infrastructure Act, div. J, tit. I-II ($42.45 billion for the Broadband Equity, Access, and Deployment Program, $2 billion for the Tribal Broadband Connectivity Program, $1.926 billion for the ReConnect Loan and Grant Program, $74 million for the Rural Broadband Loan and Loan Guarantee Program); *see also id.* § 60401(c), (h) ($1 billion for a grant program "for the construction, improvement, or acquisition of middle mile infrastructure").

[18] Pub. L. No. 117-2, § 604(a), 135 Stat. 4, 233 (2021) ($10 billion for the Coronavirus Capital Projects Fund).

appropriations laws.[19] In total, Congress has invested well in excess of $55 billion in broadband deployment in the last 26 months.

On top of those historic investments for broadband deployment — equivalent to at least 15 years of support from the CAF — Congress has appropriated billions of additional dollars in recent years to address broadband affordability, including over $14 billion in the Infrastructure Act alone.[20] Over the past 26 months, Congress's total investment in broadband affordability reaches well over $24 billion.[21]

Additionally, Congress has appropriated billions of dollars towards programs for digital equity and inclusion.[22]

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[19] *See* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. A, tit. III, __ Stat. __ (2022) ($348 million for the Reconnect Loan and Grant Program); Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. A, tit. III, 136 Stat. 49 (2022) ($400 million for the Reconnect Loan and Grant Program); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 905(b), (c), 134 Stat. 1182, 2138 (2021) ($1 billion for the Tribal Broadband Connectivity Program, $300 million for the Broadband Infrastructure Program). Amounts exclude congressionally directed spending.

[20] Infrastructure Act, div. J, tit. IV ($14.2 billion for the ACP. The ACP replaced the $3.2 billion Emergency Broadband Benefit ("EBB") Program. FCC, *Emergency Broadband Benefit* (updated May 9, 2022), https://www.fcc.gov/broadbandbenefit.

[21] *See* American Rescue Plan Act of 2021, Pub. L. No. 117-2, § 7402(c)(2)(A), 135 Stat. 4, 109 ($7.17 billion for the Emergency Connectivity Fund); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, § 904(i)(2), 134 Stat. 1182, 2135 ($3.2 billion for the EBB Program); *see also* Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, div. A, tit. III ($60 million for the Distance Learning and Telemedicine Grant Program; excludes any portions specified for "Community Project Funding/Congressionally Directed Spending"); Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, div. A, tit. III, 136 Stat. 49, 75 (same); Consolidated Appropriations Act, 2021, Pub. L. No. 116-260, div. A, tit. III, 134 Stat. 1182, 1208 (same).

[22] As part of the Infrastructure Act, Congress passed the Digital Equity Act of 2021, which appropriated $2.75 billion to establish three grant programs that support the development and implementation of digital literacy plans and projects by states and territories. Infrastructure Act, div. J, tit. II; *see id.* §§ 60304(k)(1)-(2), 60305(*l*)(1); *see also* Nat'l Telecomms. & Info. Admin., U.S. Dep't of Commerce, *Digital Equity Programs*, https://broadbandusa.ntia.doc.gov/resources/grant-programs/digital-equity-programs.

IV. SECTION 60506 IS A TARGETED COMPONENT OF CONGRESS'S PLAN FOR CLOSING THE DIGITAL DIVIDE

Direct appropriation to fund new broadband deployment and to subsidize consumer broadband subscriptions are the Infrastructure Act's primary means of addressing the digital divide. Critically, that financial support underscores Congress's understanding that the primary reason for a lack of broadband deployment is the challenging economics of deploying to high-cost areas. To ensure that this historic investment in broadband deployment meets the Infrastructure Act's ultimate goal of "equal access," Section 60506 directs the Commission to adopt rules (i) to prevent intentional discrimination "of access" based on characteristics such as race,[23] and (ii) to "ensure that Federal policies promote equal access" by prohibiting intentional "deployment discrimination" based on certain characteristics of an area.[24] Verizon applauds Congress for enacting Section 60506 and agrees that the Commission should adopt rules to prohibit intentional digital discrimination.

Ultimately, however, Section 60506 plays an important, but very targeted, role that must be read in context next to Congress's resource-based efforts to bridge gaps in broadband coverage and accessibility — and the Commission should interpret that section consistently with its place in that broader congressional scheme.[25] In particular, the Commission should be mindful not to construe Section 60506 in ways that would undermine the efficacy of the billions of dollars Congress appropriated to facilitate broadband deployment and rationale for Congress's

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[23] Infrastructure Act § 60506(b)(1).

[24] *Id.* § 60506(c).

[25] *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("It is a fundamental canon of statutory construction that the words of a statute must be read . . . with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an [sic] harmonious whole." (internal citations and quotation marks omitted)).

sizable investment in broadband-related efforts. It also cannot be read to undermine the longstanding federal policies encouraging facilities-based competition and robust private investment in broadband. For example, any interpretation that would require broadband service providers to immediately invest in deployment wherever they have not currently done so — on threat of charges of unlawful discrimination — would conflict with the reality that many areas are uneconomic to serve, which is why Congress has appropriated significant amounts of broadband-targeted funding.

V. CONGRESS RECOGNIZED THAT ISSUES OF TECHNICAL AND ECONOMIC FEASIBILITY AFFECT BROADBAND DEPLOYMENT

Congress recognizes the important role that technical and economic feasibility plays in broadband deployment decisions and this recognition is reflected in technical and economic feasibility considerations being included in both the "Statement of Policy" and "Adoption of Rules" subparts of Section 60506.[26] It is well documented that actions outside Verizon's control can impede broadband deployment. In response to the Commission's *NOI*, Verizon described technical and economic challenges associated with its Fios network deployment.[27] Factors such as gaining access to rights-of-way, negotiating access to multiple tenant environments, navigating challenging permitting processes, and franchise considerations are all non-discriminatory reasons why there are areas where Verizon has not yet deployed fiber broadband services. In fact, factors such as these prevent Verizon from serving particular addresses even

[26] Infrastructure Act § 60506(a)(1), (b).

[27] *See* Verizon *NOI* Comments at 1, 3-8, 15-18. Other commenters likewise discussed the many deployment-related challenges faced by broadband service providers. *See*, *e.g.*, Comments of AT&T, GN Docket No. 22-69, at 2-4 (May 16, 2022) ("AT&T *NOI* Comments"); Comments of CTIA, GN Docket No. 22-69, at 1-9 (May 16, 2022); Comments of NCTA, GN Docket No. 22-69, at 3-5, 11-12 (May 16, 2022); Comments of T-Mobile, GN Docket No. 22-69, at 2-8 (May 16, 2022); Comments of USTelecom, GN Docket No. 22-69, at 5-7 (May 16, 2022).

within an area where Verizon has heavily invested in deploying Fios. For example, even when Verizon has built out its broadband network in an area, landlords can still deny service providers access to connect networks to multiple tenant environments.[28] These types of challenges, rather than discrimination, account for areas within Verizon's wireline footprint where the Fios network is not deployed.[29]

In addition, although Verizon is reaching more households through fixed wireless services such as 5G Home Internet, Verizon faces similar technical, economic, and regulatory challenges to wireless broadband deployment. Verizon has navigated these challenges in deploying successive generations of wireless technology while providing its customers with the fastest and most reliable wireless services possible. Overall, Verizon has invested more than $176 billion in its networks since 2000.[30]

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[28] This explains why buildings in the same neighborhood may have access to one service provider but not another. The Commission has actively been working on this issue and adopted a final rule in an attempt to promote access in certain multiple tenant environments. *See* Report and Order and Declaratory Ruling, *Improving Competitive Broadband Access to Multiple Tenant Environments*, FCC 22-12, GN Docket No. 17-142, ¶¶ 16-32 (Feb. 15, 2022).

[29] A study co-published by the Associated Press and The Markup purports to show otherwise but is fundamentally flawed. Verizon has explained in detail why this study is not credible, including that it excludes most of Verizon's biggest markets and the authors cherry-picked a small, unrepresentative sample of less than 0.2% of the 17 million locations in Verizon's Fios network; it excludes other available broadband technologies such as cable, satellite, and fixed wireless; and it makes an apples-to-oranges comparison of pricing that cannot withstand scrutiny. *See The facts on Verizon's broadband deployment*, Verizon News Center (Jan. 20, 2023), https://www.verizon.com/about/news/facts-verizons-broadband-deployment (attached as Appendix A).

[30] *See Verizon Fact Sheet* (Jan. 24, 2023), https://www.verizon.com/about/our-company/verizon-fact-sheet.

VI. THE COMMISSION SHOULD ADOPT A STANDARD ROOTED IN THE TEXT OF THE ACT AND WELL-ESTABLISHED LAW

In the *NPRM*,[31] the Commission poses crucial questions that it must address to implement Section 60506, including questions that have been addressed in other contexts in a well-developed body of case law that sets out the proverbial "rules of the road" for agency interpretations of laws addressing discriminatory conduct.

A. Congress's Definition of "Equal Access" Controls the Scope of Permissible Efforts to Prevent "Digital Discrimination of Access"

The Commission seeks comment on the "significance" of the phrase "of access," as used in Section 60506(b)(1).[32] The word "access" appears twice in Section 60506(b). That section directs the Commission to "adopt final rules to facilitate equal *access* to broadband internet access service."[33] And it explains that the "objective" of equal access "includ[es] . . . preventing digital discrimination of *access* based on income level, race, ethnicity, color, religion, or national origin."[34] Because "preventing digital discrimination of access" is included within the broader objective of "facilitat[ing] equal access," "of access" in the phrase "digital discrimination of access" is no broader than the "equal access" that Congress directed the Commission to "facilitate." As a result, the meaning of "equal access" controls the scope of "digital discrimination of access."[35]

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[31] Notice of Proposed Rulemaking, *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN Docket No. 22-69, FCC 22-98 (Dec. 22, 2022) ("*NPRM*").

[32] *See id.* ¶ 13.

[33] Infrastructure Act § 60506(a)(2) (emphasis added).

[34] *Id.* § 60506(b)(1) (emphasis added).

[35] More generally, where Congress uses the same word ("access") multiple times "in different parts of the same statute" — and especially here, where Congress did so in the same provision of the same statute — Congress is presumed to have intended the word to "have the same meaning." *Law v. Siegel*, 571 U.S. 415, 422 (2014); *see also*, *e.g.*, *Kirtsaeng v. John Wiley*

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 a given area, for comparable terms and conditions."[36] Thus, "preventing digital discrimination of access" is best understood as referring to preventing intentional discrimination in the "opportunity to subscribe" to a "comparable" broadband service offered in a consumer's "given area," based on one of the protected characteristics enumerated in Section 60506(b)(1).

Two aspects of the meaning of "access" warrant emphasizing. *First*, because "access" is defined in the statute as a consumer's "opportunity to subscribe to an offered [broadband] service" in their "given area," intentional discriminatory deployment choices by a broadband service provider based on a protected characteristic that result in infrastructure being deployed, and thereby offered, to one portion of a given area rather than another could be deemed "digital discrimination of access." Additionally, conduct by a broadband service provider after the point at which a consumer has subscribed to an offered service, such as wait times for technical support when problems arise after commencement of the subscription, does not implicate the "opportunity to subscribe" and therefore falls outside the scope of "digital discrimination of access."[37]

& Sons, Inc., 568 U.S. 519, 536 (2013) (noting the "presum[ption]" that words "carry the same meaning when they appear in different but related sections"); *Dep't of Revenue of Or. v. ACF Indus., Inc.*, 510 U.S. 332, 342 (1994) (applying "the normal rule of statutory construction that identical words used in different parts of the same act are intended to have the same meaning" (internal quotation marks omitted)).

[36] Infrastructure Act § 60506(a)(2).

[37] *See NPRM* ¶ 13 & n.43; *see also* Electronic Frontier Foundation ("EFF") *NOI* Comments, GN Docket No. 22-69, at 2, 4 (May 16, 2022) (EFF and others aligned with it agree that "digital discrimination of access" does not encompass conduct after the point of sale). While Verizon does not agree with all aspects of EFF's position that fiber is the only type of broadband service that can meet the needs of today's consumers, Verizon does agree that post-sale conduct lies beyond the statute's reach.

Second, Section 60506 is technology-neutral: a broadband service provider may utilize multiple technological solutions in a particular area to provide an "opportunity to subscribe" to the provider's broadband service. The definition of "access" does not turn on the underlying technology a provider uses; rather, providers may use multiple technological solutions in a given area to provide consumers the "opportunity to subscribe" to a comparable broadband service. Thus, if a provider were to use a mix of technologies in a given area to provide the "opportunity to subscribe" — for example, fixed wireless access and fiber-to-the-home solutions — and if those technologies "provide[d] comparable speeds, capacities, latency, and other quality of service metrics" to each other, and were made available "for comparable terms and conditions," the consumers in that area all would have "access."[38]

B. In Section 60506, Congress Directs the Commission to Adopt Rules to Prohibit Intentional Discrimination

i. Congress Authorized Rules to Prohibit Disparate Treatment, Not Disparate Impact

Congress enacted Section 60506(b) in 2021, against the backdrop of 50 years of legal precedent explaining the statutory language that authorizes disparate-impact liability.[39] The

[38] The Commission asks whether "the availability of one service utilizing a different technology, such as 5G wireless service versus traditional wireline service, impact[s] the ['equal access'] analysis where the other is otherwise incomparable or unavailable[.]" *NPRM* ¶ 45. From the perspective of Section 60506, the services are comparable: both provide a high-speed, always-on broadband connection with sufficient bandwidth to support multiple peoples' simultaneous abilities to work, learn, shop, consume entertainment or medical services, or take advantage of many of the myriad opportunities facilitated by broadband service.

[39] *See Ryan v. Gonzales*, 568 U.S. 57, 66 (2013) ("We normally assume that, when Congress enacts statutes, it is aware of relevant judicial precedent." (internal quotation marks omitted)).

language Congress uses in Section 60506(b) indicates that the Commission should adopt rules that address disparate-treatment, not disparate impact.[40]

Two aspects of Section 60506(b)(1) demonstrate that disparate treatment is required by the plain language of the statute. First, the "normal definition" of "discrimination" is "differential treatment,"[41] meaning "intentional discrimination."[42] Second, "the phrase 'based on' indicates a but-for causal relationship."[43] Therefore, Congress has directed the Commission to adopt rules preventing the use of certain characteristics (*e.g.*, race, ethnicity) as but-for causes of differential treatment in digital "access," meaning the opportunity to subscribe to an offered broadband service in a given area.[44]

Commenters suggest that the phrase "based on" authorizes the Commission to adopt rules that aim to remedy disparate impacts as well as disparate treatment.[45] But none of the cases cited — *Griggs v. Duke Power Co.*,[46] *Smith v. City of Jackson*,[47] and *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*[48] — pointed to the words "based on"

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[40] *See*, *e.g.*, *City of Anaheim v. FERC*, 558 F.3d 521, 525 (D.C. Cir. 2009) (Kavanaugh, J.) ("In the end, as in the beginning, the plain language of [a statutory provision] controls.").

[41] *Babb v. Wilkie*, – U.S. –, 140 S. Ct. 1168, 1173 (2020) (cleaned up).

[42] *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) (referring to "differential treatment" as "disparate treatment").

[43] *Babb*, 140 S. Ct. at 1173.

[44] Similarly, Congress has directed the Commission to "ensure that Federal policies" prohibit the use of certain characteristics (*e.g.*, "the predominant race or ethnicity composition of an area") as but-for causes of differential treatment in deployment. *See* Infrastructure Act § 60506(c).

[45] *See* Lawyers' Committee for Civil Rights Under Law *NOI* Comments, GN Docket No. 22-69, at 25-26 (May 16, 2022).

[46] 401 U.S. 424 (1971).

[47] 544 U.S. 228 (2005).

[48] 576 U.S. 519 (2015).

as a reason for interpreting an anti-discrimination provision to encompass disparate-impact liability. In fact, the statutory language at issue in those cases did not even include that phrase.[49] In contrast, when courts have addressed statutes that use the words "based on," they have interpreted "the plain meaning of 'based on' [as] synonymous with 'arising from' and as ordinarily referring to a 'starting point' or a 'foundation.'"[50] Thus, "based on" in Section 60506(b) refers to the "starting point" or "foundation" of a broadband service provider's actions — in other words, the provider's intent — underscoring that *intentional* discrimination is Congress's target.

Importantly, Section 60506(b) contains none of the telltale statutory language that the Supreme Court has held Congress uses when it authorizes disparate-impact liability.[51] In *Inclusive Communities*, the Supreme Court identified several textual through-lines in the Fair Housing Act ("FHA"), Title VII, and the Age Discrimination in Employment Act ("ADEA") that supported reading the FHA to encompass disparate-impact liability:

- Congress's use of the phrases "otherwise adversely affect" or "otherwise make unavailable," which "refer[ ] to the consequences of an action rather than the actor's intent";[52]

- Congress's placement of those "catchall phrases looking to consequences, not intent," "at the end of lengthy sentences that begin with prohibitions on disparate treatment";[53] and

[49] The statutes did include the analogous phrase "because of," *see* 29 U.S.C. § 623(a), 42 U.S.C. § 2000e-2(a), 42 U.S.C. §§ 3604(a)-3605(a), yet the Supreme Court never relied on those words as a reason for green-lighting disparate-impact liability. *See Inclusive Communities*, 576 U.S at 530-46 (summarizing and applying *Griggs* and *Smith*).

[50] *McDaniel v. Chevron Corp.*, 203 F.3d 1099, 1111 (9th Cir. 2000).

[51] Neither does Section 60506(c).

[52] *Inclusive Communities*, 576 U.S at 534.

[53] *Id.* at 534-35.

- Congress's uses of the "catchall phrases" in the "operative text" of the statute.[54]

None of these textual through-lines appear in Section 60506(b), or anywhere else in Section 60506 — there are no "catchall phrases looking to consequences, not intent," such as "otherwise adversely affect" or "otherwise make unavailable," let alone any of the other textual cues that the Supreme Court has identified as signaling congressional approval of disparate-impact liability. And in other statutes where the Supreme Court has found authorization for disparate-impact liability, the Court has underscored that the statutes "use the word 'otherwise' to introduce the results-oriented phrase."[55] That word "otherwise" does not appear in Section 60506.

At the *NOI* phase, some commenters identified language they contend authorizes disparate-impact liability.[56] But the language they identified simply explains the congressional "policy" motivating Section 60506;[57] instructs the Commission to "identify[] necessary steps" to "eliminate" "digital discrimination of access";[58] or invites the Commission to identify "factors" other than those expressly enumerated that are "relevant" to "Federal policies . . . prohibiting

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[54] *Id.* at 534. The Commission seeks comment on whether these textual through-lines are "a part of, or . . . supersede, the two-pronged test" the Commission identifies in *Inclusive Communities*. *NPRM* ¶ 18. The Court in *Inclusive Communities* ultimately considered four factors as relevant to its holding: the FHA's "its results-oriented language, the Court's interpretation of similar language in Title VII and the ADEA, Congress' ratification of disparate-impact claims in 1988 against the backdrop of the unanimous view of nine Courts of Appeals, and the statutory purpose." *Inclusive Communities*, 576 U.S. at 545-46. The textual through-lines summarize the "results-oriented language" that the Court identified in the FHA, Title VII and the ADEA, and so are an indispensable part of the Court's analysis.

[55] *Inclusive Communities*, 576 U.S at 535.

[56] *See NPRM* ¶ 19.

[57] *See* Infrastructure Act § 60506(a). That policy declaration, which uses the term "should," *see id.* § 60506(a)(1), is "merely precatory and non-binding," *Emergency Coal. To Defend Educ. Travel v. U.S. Dep't of Treasury*, 498 F. Supp. 2d 150, 165 (D.D.C. 2007) (discussing "sense of Congress" provisions), *aff'd*, 545 F.3d 4 (D.C. Cir. 2008).

[58] Infrastructure Act § 60506(b)(2).

deployment discrimination."[59] None of that language focuses on the "consequences" of any discriminatory "action."[60] Congress's recognition that all people "benefit from equal access to broadband" is consistent with congressional intent to prohibit intentional discrimination that interferes with such access. The same is true of the directive to "eliminate" such discrimination and to identify other "relevant" factors. A statute enacted after *Inclusive Communities* must contain clearer language than this to provide the necessary congressional intent to reach beyond intentional discrimination and encompass actions that have a discriminatory impact.

Moreover, the Commission should not read Section 60506 in a vacuum; rather, it should take into account the sweeping actions that Congress took through the Infrastructure Act to address the digital divide, including the historic decision to appropriate tens of billions of dollars to fund new deployment of broadband infrastructure, as well as affordability and digital literacy efforts.[61] Thus, an intent-based standard not only is consistent with the plain language of Section 60506(b), but also — when Section 60506 is read alongside other components of the Infrastructure Act — best fits with the overall congressional scheme of the Infrastructure Act.[62]

ii. If the Commission Adopts a Disparate-Impact Standard or Hybrid Approach, It Also Must Adopt Longstanding Safeguards Associated With Such a Standard

If the Commission nonetheless adopts rules that also prohibit disparate-impact discrimination (which, as discussed above, it should not), it should incorporate well-established

[59] *Id.* § 60506(c)(3).

[60] *Inclusive Communities*, 576 U.S at 534.

[61] *See* Part III, *supra*.

[62] And even if a disparate-impact standard were consistent with the Infrastructure Act's purpose, that alone could not override the statute's plain text. "Legislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known pursues its stated purpose at all costs." *Henson v. Santander Consumer USA Inc.*, – U.S. –, 137 S. Ct. 1718, 1725 (2017) (cleaned up).

and widely accepted guardrails to ensure that such liability does not unduly burden the Commission, does not interfere with legitimate business and investment decisions, and does not interfere with efforts to close the digital divide.[63] To that end, a three-part burden-shifting framework similar to that referenced in the *NPRM* has been an effective mechanism for courts and federal agencies in enforcing discrimination laws in contexts permitting disparate-impact claims, and there is a wealth of prior case law to guide adjudication of those claims.[64]

Any disparate-impact framework should incorporate longstanding safeguards recognized by the Supreme Court as essential components of such a standard. Those safeguards will ensure that claims that do not contain a required component do not consume the Commission's time and resources, and will protect businesses from being improperly held liable.

First, a complainant must demonstrate that a "specific" policy or practice is "allegedly responsible for any observed statistical disparities" in a properly identified given area in order to make out a prima facie case.[65] This requirement is necessary, because the "failure to identify the specific practice being challenged is the sort of omission that could result in [regulated institutions] being potentially liable for the myriad of innocent causes that may lead to statistical imbalances."[66] Observed disparities must be "significant in both statistical and practical terms."[67]

[63] *See Inclusive Communities*, 576 U.S. at 533 (noting that "disparate-impact liability must be limited so employers and other regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system").

[64] *See NPRM* ¶ 62 (describing a framework).

[65] *Smith*, 544 U.S. at 241 (emphasis omitted).

[66] *Id.*

[67] 29 C.F.R. § 1607.4(D).

Second, a "robust causality requirement" also is an essential part of a prima facie case of disparate impact.[68] A plaintiff must allege (and eventually prove) that the specific policy or practice actually caused the observed statistical disparity.[69] In addition, "private policies are not contrary to the disparate-impact requirement unless they are artificial, arbitrary, and unnecessary barriers."[70]

Third, if a complainant makes out a prima facie case of disparate impact with respect to a specific policy or practice of a broadband service provider, business justifications that a provider "offer[s] for their use of these practices" must be considered.[71] *Fourth*, after the provider offers those business justifications, a complainant must come forward with an alternative practice that is "equally effective as" the challenged practice in achieving a provider's "legitimate . . . goals," and must show that the alternative practice would "reduce" the impact of the challenged practice and that the provider refuses to adopt the alternative practice.[72] *Fifth*, the "burden of persuasion" remains at all times "with the disparate-impact plaintiff."[73]

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[68] *Inclusive Communities*, 576 U.S. at 542.

[69] *Id.* ("[A] disparate-impact claim that relies on a statistical disparity must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity.").

[70] *Id.* at 543.

[71] *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 658 (1989). Considering such reasons at step two is an essential means to ensure defendants have "leeway to state and explain the valid interests served by their policies." *Inclusive Communities*, 576 U.S. at 541. The Commission should reject the recommendation that the burden of production and proof be placed onto broadband service providers to show that it is technically and economically infeasible to service an area. *See NPRM* ¶ 63 n.257. Congress directed the Commission to enact rules taking technical and economic feasibility into account, and placing the burden onto service providers would ignore this directive.

[72] *Wards Cove*, 490 U.S. at 660-61.

[73] *Id.* at 659.

C. Regardless of the Liability Standard Adopted, the Commission Must Choose Appropriate "Areas" for Comparison

The Commission should refrain from adopting a blanket definition of a "given area," such as one based on a defined geography, outside of the context of a specific complaint. Instead, and as part of their initial burden to make a prima facie showing by adequately pleading (and ultimately proving) that the specific policy or practice actually caused an observed statistical disparity, the Commission should require complainants to identify, for its consideration, the "given area" in which impact related to their specific claim of discrimination occurs. Conduct outside the properly defined "given area" is not relevant to evaluating that claim.

Such an approach would best account for the particular circumstances of a specific claim and avoid unreasonable comparisons (*e.g.*, comparing greenfield areas to areas with existing deployment). The area that will be appropriate for making comparisons among customers and conducting statistical analysis will vary based on the specific policy and practice that the complainant is challenging, as well as the area over which the provider applies that policy or practice.

VII. CONGRESS DIRECTLY SPOKE TO THE MEANING OF MANY OF THE TERMS IN SECTION 60506

A. The Definition of "Equal Access" Covers a Targeted Set of Service-Related Characteristics

The Commission requests comment on the meaning of the phrases "other quality of service metrics" and "terms and conditions" in Section 60506's definition of "equal access." Specifically, the NPRM asks (i) whether the phrase "other quality of service metrics" covers more than the technical aspects of services, and (ii) whether the phrase "terms and conditions"

includes pricing.[74] "[E]mploying traditional tools of statutory construction," it is clear that Congress intended the answer to both questions to be no.[75] "[T]hat intention is the law and must be given effect."[76] Worded differently, "[w]here, as here, the canons supply an answer," that answer controls.[77]

With respect to the phrase "other quality of service metrics," the "words immediately surrounding" the phrase "cabin [its] contextual meaning."[78] Here, the phrase "other quality of service metrics" appears last in a list that begins with the words "speeds, capacities, [and] latency."[79] Therefore, the "quality of service metrics" that can fall within the final phrase in the list must be metrics similar to "speeds, capacities, [and] latency," all of which are technical aspects of service.

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[74] *See NPRM* ¶ 33.

[75] *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984).

[76] *Id.*; *see also*, *e.g.*, *id.* (noting that courts "must reject administrative constructions which are contrary to clear congressional intent"); *Hylton v. U.S. Att'y Gen.*, 992 F.3d 1154, 1160 (11th Cir. 2021) (holding that "the canons [of construction] make the meaning of [8 U.S.C. §] 1227(a)(2)(A)(iii) unambiguous" and rejecting the contrary interpretation of the Board of Immigration Appeals); *Arangure v. Whitaker*, 911 F.3d 333, 336 (6th Cir. 2018) (rejecting an agency's interpretation of a statute where a canon of interpretation "makes the statute's meaning clear").

[77] *Epic Sys. Corp. v. Lewis*, – U.S. –, 138 S. Ct. 1612, 1630 (2018) (noting that "*Chevron* leaves the stage" where the canons of construction clarify the statutory meaning (internal quotation marks omitted)).

[78] *Yates v. United States*, 574 U.S. 528, 543 (2015). Specifically, courts "rely on the principle of *noscitur a sociis* — a word is known by the company it keeps — to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Id.*; *see also United States v. Williams*, 553 U.S. 285, 294 (2008) (observing that the "meanings [of words] are narrowed by the commonsense canon of *noscitur a sociis* — which counsels that a word is given more precise content by the neighboring words with which it is associated").

[79] *Cf. Yates*, 574 U.S. at 544 (noting that " '[t]angible object' is the last in a list of terms that begins 'any record [or] document' " (second alteration in original)).

The *ejusdem generis* canon — a related canon of statutory construction — similarly counsels that, "where general words follow specific words in a statutory enumeration, the general words are [usually] construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[80] Applying that canon here similarly requires interpreting the general phrase "other quality of service metrics" to encompass only metrics "similar in nature" to "speeds, capacities, [and] latency" — again, technical aspects of service. Indeed, had Congress intended a broader meaning, "it is hard to see why it would have needed to include the examples at all."[81] In short, it is clear that Congress intended the phrase "other quality of service metrics" to cover only technical aspects of service.

With respect to the phrase "terms and conditions," Congress's intent is just as clear: the phrase does not encompass pricing. That is because, when Congress uses that phrase in Title 47 of the U.S. Code, Congress does not mean for it to encompass pricing unless it clearly states that it does. Throughout Title 47, Congress repeatedly distinguishes between pricing (using the terms "pricing" or rates") on the one hand, and "terms and conditions" on the other, utilizing phrases such as "rates, terms, and conditions" or "price, terms, and conditions."[82] And where Congress

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[80] *Id.* at 545 (internal quotation marks and first alteration omitted); *see CSX Transp., Inc. v. Alabama Dep't of Revenue*, 562 U.S. 277, 295 (2011) ("We typically use *ejusdem generis* to ensure that a general word will not render specific words meaningless.").

[81] *Yates*, 574 U.S. at 545-46.

[82] *See* 47 U.S.C. §§ 222(e) ("under nondiscriminatory and reasonable rates, terms, and conditions"), 224 (repeatedly referring to "rates, terms, and conditions"), 226(h)(1)(A) ("Any changes in such rates, terms, or conditions"), 228(c)(8)(A)(i) (distinguishing "material terms and conditions under which the information is offered" from "the rate at which charges are assessed for the information"), 251 (repeatedly using the phrase "rates, terms, and conditions"), 259(b)(7) ("the rates, terms and conditions"), 272(e)(4) ("at the same rates and on the same terms and conditions"), 327 ("under the terms and conditions and at rates prescribed"), 335(b)(3) ("upon reasonable prices, terms, and conditions"), 532 (repeatedly referring to "rates, terms, and conditions" and "price, terms, and conditions"; distinguishing "the maximum reasonable rates that a cable operator may establish . . . for commercial use of designated channel capacity" from the "reasonable terms and conditions for such use"), 541(d)(1) ("the rates, terms, and

wants the phrase "terms and conditions" to include pricing, it has communicated that intent unambiguously by explicitly describing pricing or rates as among the "terms and conditions"—for example, by referring to "different terms and conditions, including price terms,"[83] or discussing "rates" and then referring to "other terms and conditions."[84] Section 60506(a)(2) includes no such unambiguous expression of intent. Therefore, Congress clearly intended the phrase "terms and conditions," as used in Section 60506(a)(2), not to include pricing.[85]

But even if there were ambiguity on that point, the Commission should not interpret the phrase "terms and conditions" to include pricing or rates. In its own regulations, the Commission itself distinguishes repeatedly between pricing and "terms and conditions."[86] And numerous Commission orders have distinguished them, too.[87] There is no reason for the

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conditions"), 548 (repeatedly referring to "prices, terms, and conditions"), 572(d)(2) ("the rates, terms, and conditions"), 573(b)(1)(A) ("the rates, terms, and conditions"), 615a-1(b) ("the same rates, terms, and conditions").

[83] *Id.* § 325(b)(3)(C)(ii)-(iii).

[84] *Id.* § 332(c)(3)(A).

[85] *See*, *e.g.*, *Azar v. Allina Health Servs.*, – U.S. –, 139 S. Ct. 1804, 1812 (2019) ("This Court does not lightly assume that Congress silently attaches different meanings to the same term in the same or related statutes."); *cf. In re Coffman*, 766 F.3d 1246, 1250 (11th Cir. 2014) (treating the meaning of a phrase in one section of Title 28 of the U.S. Code as "inform[ative]" of the meaning of the same phrase in a different section of Title 28).

[86] *See*, *e.g.*, 47 C.F.R. §§ 9.12(b) ("rates, terms, and conditions"), 42.10(a) ("rates, terms and conditions"), 51.503(a) ("rates, terms, and conditions"), 51.809(a) ("rates, terms, and conditions"), 63.14(c) ("rates, terms and conditions"), 64.2321 ("rates, terms, and conditions"), 76.1001(b)(1)(i) ("prices, terms, and conditions"), 76.1002 (repeatedly refers to "prices, terms and conditions").

[87] *See*, *e.g.*, Fourth Report and Order and Sixth Further Notice of Proposed Rulemaking, *Rates for Interstate Inmate Calling Servs.*, FCC 22-76, WC Docket No. 12-375, ¶¶ 114, 151, 156, 161 (Sept. 30, 2022) (referring to "rates, terms, and conditions"; "prices, fees, call metrics, and the terms and conditions"; and "at rates, and on terms and conditions"); Mem. Op. and Order, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Servs.*, 17 FCC Rcd 27000, ¶¶ 2, 7, 11, 13, 15, 18, 21-22, 24, 27-29 (2002) (repeatedly referring to "rates, terms, and conditions"); Second Report and Order, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd 20730, ¶¶ 10, 25-26, 37, 39, 45-47, 56-57,

Commission to depart from this long-standing approach. Additionally, doing so would be a major policy change at odds with the Commission's long-standing policy of "light-touch" regulation that has fostered hundreds of billions of dollars in private investment.

B. Section 60506 Does Not Authorize the Commission to Prescribe Rates of Return or Otherwise Second-Guess Standard Business Decision-Making

As some commenters noted, neither Section 60506 nor any other provision of the Infrastructure Act authorizes the Commission to regulate the rates of return that broadband service providers receive or to second-guess providers' decisions as to how to optimize their capital investments.[88] Quite the opposite: Section 60506(b) provides that the Commission's "final rules to facilitate equal access to broadband internet access service" must "tak[e] into account the issues of technical and economic feasibility presented by that objective."[89] Congress's instruction to the Commission to "account" for "feasibility" constraints explicitly leaves room for broadband service providers' standard decision-making criteria, including the required return or the timelines for return necessary to justify, and attract funding for, an investment and the tradeoffs among different investment options.[90]

Additionally, sound policy would counsel against exercising control over providers' investment decision-making. Indeed, it is crucial for the development and maintenance of the

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61-62, 79, 84-85, 87, 122, 128, 131, 138, 150-151 (1996) (repeatedly referring to "rates, terms, and conditions" or "rates, terms, or conditions").

[88] *See* USTelecom *NOI* Reply Comments, GN Docket No. 33-69, at 23-27 (June 30, 2022); AT&T *NOI* Comments at 20-21.

[89] Congress also emphasized feasibility constraints when describing the "policy of the United States" with respect to broadband service access, adding the qualifier "insofar as technically and economically feasible." Infrastructure Act § 60506(a).

[90] Such a question carries great "economic and political significance" and so "more than a merely plausible textual basis . . . is necessary" for the Commission to claim that authority. *West Virginia v. EPA*, 142 S. Ct. 2587, 2608-09 (2022).

nation's broadband infrastructure, and the services supported by that infrastructure, that the Commission's final rules preserve broadband service providers' flexibility to optimize the allocation of their resources. A better approach would be — as Section 60506(b) directs — to prohibit consideration of "income level, race, ethnicity, color, religion, or national origin"[91] as a factor in a service provider's decision not to deploy broadband or provide broadband services in an area. This approach would achieve the statutory goals of prohibiting digital discrimination of access based on these enumerated factors without pervasive and intrusive regulation of service provider's standard business decisions.

C. Section 60506 Does Not Authorize Rules That Would Hold Providers Liable for Past Actions

As Verizon and other commenters previously explained, Section 60506 does not authorize the Commission to apply its final rules retroactively.[92] The Commission should reject some commenters' reliance on the term "eliminate" in Section 60506(b)(2) to argue otherwise.[93]

It is well settled that "[r]etroactivity is not favored in the law."[94] Thus, "a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms"[95] — for example, terms like "before, on, or after" that explicitly state that rules may (or

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[91] Infrastructure Act § 60506(b)(1).

[92] *See* Verizon *NOI* Reply Comments, GN Docket No. 22-69, at 13-16 (June 30, 2022); AT&T *NOI* Comments at 22-23; AT&T *NOI* Reply Comments, GN Docket No. 22-69, at 24-25 (June 30, 2022).

[93] *NPRM* ¶ 92.

[94] *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988).

[95] *Id.* at 472; *see Bergerco Canada, a Div. of Conagra, Ltd. v. U.S. Treasury Dep't, Off. of Foreign Assets Control*, 129 F.3d 189, 192 (D.C. Cir. 1997) (noting the Administrative Procedure Act's imposition of a "categorical limit" on agency rules that "alter[ ] the past legal

must) be applied to conduct occurring prior to the date of enactment of the statute.[96] Where, as here, such express terms are "absent," the statute "may not be interpreted to impair rights a party possessed when Congress acted."[97]

While Congress used the term "eliminate" in Section 60506(b)(2), that is not a similarly express authorization that allows for retroactive rulemaking. That subsection directs the Commission to adopt final rules that "identify[ ] necessary steps for the Commission[ ] to take to eliminate discrimination described in" Section 60506(b)(1), which is "digital discrimination of access" (*i.e.*, intentional discrimination in the "opportunity to subscribe to an offered service") based on certain enumerated characteristics. Pinpointing the steps needed to "eliminate" intentional discrimination in the "opportunity to subscribe to an offered service" is a *prospective* exercise — one designed to create new opportunities in the future. It does not provide the type of express authorization necessary to adopt rules that would also punish entities for behavior taken long before Congress enacted the Infrastructure Act and long before the Commission promulgated rules to implement Section 60506.[98] Thus, the term "eliminate" not only fails as a

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consequences of past actions," "requiring express congressional authority" (emphasis and internal quotation marks omitted)).

[96] *Cf. Al Bahlul v. United States*, 767 F.3d 1, 12 (D.C. Cir. 2014) ("The 2006 [Military Commissions Act] confers jurisdiction on military commissions to try 'any offense made punishable by this chapter or the law of war when committed by an alien unlawful enemy combatant before, on, or after September 11, 2001.' . . . There could hardly be a clearer statement of the Congress's intent to confer jurisdiction on military commissions to try the enumerated crimes regardless whether they occurred 'before, on, or after September 11, 2001.' " (emphases omitted)); *Angel-Ramos v. Reno*, 227 F.3d 942, 948 (7th Cir. 2000) (holding that two statutory provisions applying rules to events that occurred "before, on, or after the date of the enactment of the Act" "clearly show[ed] Congress' intent to apply the[ ] provisions retroactively").

[97] *QUALCOMM Inc. v. FCC*, 181 F.3d 1370, 1378 (D.C. Cir. 1999).

[98] This is consistent with the well-recognized distinction between primary and secondary retroactivity; that is, between a "rule that alters the *past* legal consequences of past actions" and

clear statement in favor of authority to act retroactively, but underscores the *absence* of such authority.[99]

VIII. TECHNICAL AND ECONOMIC FEASIBILITY PLAYS A CRITICAL ROLE IN SECTION 60506

Congress instructed that, when enacting rules "to facilitate equal access to broadband internet access service," the Commission must "tak[e] into account the issues of technical and economic feasibility presented by that objective."[100] This instruction echoes the congressional policy underlying Section 60506: that "insofar as technically and economically feasible[,] . . . subscribers should benefit from equal access to broadband internet access service within the service area of a provider of such service."[101] Therefore, any rules the Commission adopts under Section 60506 must leave room for service-provider decision-making based on technical or economic infeasibility.

"is retroactive," and "a rule that alters only the future effect of past actions," which "in contrast, is not." *Northeast Hosp. Corp. v. Sebelius*, 657 F.3d 1, 14 (D.C. Cir. 2011) (cleaned up).

[99] And even if the statutory language were arguably ambiguous, the Commission nonetheless could not lawfully interpret the language as authorizing retroactivity. "[A] statute that is ambiguous with respect to retroactive application is construed under [Supreme Court] precedent to be unambiguously prospective," and so "there is . . . no ambiguity in such a statute for an agency to resolve." *INS v. St. Cyr*, 533 U.S. 289, 320 n.45 (2001), *superseded by statute on other grounds by* REAL ID Act of 2005, 8 U.S.C. § 1252(a)(4)-(5) (2006); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244, 272 (1994) (noting that "prospectivity remains the appropriate default rule"); *St. Francis Hosp., Inc. v. Becerra*, 28 F.4th 119, 132 n.15 (10th Cir. 2022) ("We need not address the applicability of *Chevron* deference because any potential ambiguity is resolved through the presumption against retroactivity.").

[100] *See* Infrastructure Act § 60506(b).

[101] *Id.* § 60506(a)(1).

A. The Commission Should Draw on Its Prior Interpretations of the Concepts of Technical and Economic Feasibility

As the Commission recognizes,[102] Congress did not legislate on a blank slate in referencing "technical and economic feasibility" in Section 60506. Congress has built the concepts of technical and economic feasibility into other telecommunications-related legislation,[103] and the Commission has had to apply those concepts. That Commission precedent is directly relevant here — it demonstrates that the concepts of technical and economic feasibility encompass a variety of factors well beyond whether an action is possible or capable of being done. The Commission's order adopting rules to implement the Telephone Disclosure and Dispute Resolution Act of 1992, 15 U.S.C. § 5701 *et seq*., provides a good example.[104] That Act requires telephone companies to allow their subscribers the option to block access to area codes used by pay-per-call telephone services "where technically feasible," and also to offer customers the option of pre-subscribing to certain services while blocking others "where the Commission determines it is technically and economically feasible."[105] The Commission rejected a commenter's argument that simply being "capable of providing selective blocking" justified the "imposition of a broad blocking requirement."[106] The record demonstrated that extensive upgrades were "necessary" for companies "to accomplish a service-specific block," and the Commission saw "no justification for compelling" local exchange carriers "to accelerate their

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[102] *See NPRM* ¶ 36.

[103] *See*, *e.g.*, 47 U.S.C. §§ 228(c)(5)(B) ("technically and economically feasible") 338(*l*)(3)(A) (same), 544a(c)(2)(B)(ii) (same), 615c(c)(8) (same).

[104] Report and Order, *Policies and Rules Implementing the Telephone Disclosure and Dispute Resolution Act*, 8 FCC Rcd 6885 (1993) ("*Telephone Disclosure and Dispute Resolution Act Order*").

[105] 47 U.S.C. § 228(c)(5).

[106] *See Telephone Disclosure and Dispute Resolution Act Order* ¶ 63 n.110.

incorporation" of certain technologies to implement such blocking.[107] The Commission concluded that "it would be unrealistic and unwarranted to impose upon carriers an obligation to offer services which are dependent upon certain technical capabilities not yet fully available."[108] Thus, in finding technical and economic infeasibility, the Commission considered the scale of the work that would be necessary, the efficient deployment of resources, and the availability of the required technology.

The Commission identified similar impediments to technical and economic feasibility when implementing a provision from the Satellite Television Extension and Localism Act Reauthorization Act.[109] That Act directed the Commission to account for feasibility concerns, specifying that rules "shall not create additional carriage obligations for a satellite carrier if it is not technically and economically feasible for such carrier to accomplish such carriage."[110] In adopting a final rule, the Commission did not read "technically and economically feasible" to mean "possible." Instead, it gave substantial weight to the providers' arguments that even though providing new stations was technically possible, it would be an "inefficient use of resources" and bring with it a host of other technical challenges.[111] The Commission recognized that practical considerations and alternative uses for scarce resources would limit what is

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[107] *Id.* ¶ 63.

[108] *Id.*

[109] *See* Report and Order, *Amendment to the Commission's Rules Concerning Market Modification*, 30 FCC Rcd 10406, ¶ 1 (2015) (noting that "Congress recognized that satellite carriage of additional stations might be technically or economically infeasible in some circumstances") ("*Market Modification Rules Order*").

[110] 47 U.S.C. § 338(*l*)(3)(A).

[111] *Market Modification Rules Order* ¶ 32.

possible for a carrier to accomplish. The term "technically and economically feasible" encompasses these practical concerns.

The Commission should continue its practical and flexible approach to interpreting "feasibility," which will best continue to allow for private sector innovation and investment which has been a primary driver in closing America's digital divide.

B. The Commission Should Craft Rules Reflecting the Technical and Economic Challenges of Building and Operating Broadband Infrastructure

The Commission's rules should reflect the reality that building and operating broadband networks is technically and economically challenging. 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. Some technical feasibility factors also directly impact economic feasibility. For example, regional terrain and topography can make deployment to an area not only technically difficult, but also cost prohibitive. Regulatory and procedural hurdles, such as historical preservation reviews, environmental permitting, and compliance with local zoning and construction regulations also raise deployment costs or, in some cases, prevent deployment altogether. For these reasons, Congress's directive that the Commission "tak[e] into account the issues of technical and economic feasibility" requires that the Commission's rules leave broadband service providers the ability to consider these types of challenges in their deployment decisions.

In addition, the Commission should build issues of technical and economic feasibility into step one of any burden-shifting framework it adopts for evaluating complaints. For example, whenever lack of access to broadband falls outside of a provider's control, the

Commission should create a simple off-ramp to any further action against that provider, ensuring that factors beyond broadband providers' control are not improperly regarded as discriminatory.

Relatedly, the Commission should not require broadband service providers to justify every build decision through a complex waiver process, accounting for technical and economic feasibility.[112] Section 60506 does not grant the Commission authority to impose such a burdensome system. A waiver process would impermissibly transfer the duty to account for technical and economic feasibility from the Commission to broadband service providers. Consistent with Congress's instructions, the Commission should adopt rules that account for technical and economic feasibility issues that providers face in determining what constitutes digital discrimination of access.

IX. THE COMMISSION'S COMPLAINT PROCESS SHOULD MAXIMIZE EFFICIENCY AND RELY ON CURRENT DATA COLLECTIONS

A. The Commission Should Modify the Existing Informal Consumer Complaint Process to Improve Efficiency

As Verizon explained in its *NOI* comments, and as the Commission recognizes in the *NPRM*,[113] modifying the existing consumer complaint process to specifically allow for informal complaints related to digital discrimination is an effective way to comply with Section 60506(e), which directs the Commission to "revise its public complaint process to accept complaints from consumers or other members of the public that relate to digital discrimination." The Commission's existing informal complaint process works well for consumers and is easy to use. It can be mapped to a unique digital discrimination complaint portal, made accessible in other languages and by phone or mail, and can be modified as necessary to allow for complaints

[112] *See NPRM* ¶ 66.

[113] *See id.* ¶ 52.

regarding digital discrimination. In modifying the complaint process, however, the Commission should take care to preserve its best features: the ease of use by consumers, and, along with that ease of use, its utility to the Commission in identifying issues and trends that warrant closer investigation. The Commission should not lose these features by adding less flexible and importing more difficult-to-use elements of its formal complaint process. The Commission's formal complaint process would remain available for instances where use of it is appropriate.

The Commission also proposes to make anonymized complaint data available to the public through its Consumer Complaint Data Center to inform third-party analyses.[114] Service-provider names must also be anonymized if complaint data is publicized. If the Commission chooses to publicize service provider names in the complaint data — although Verizon would strongly oppose that decision — it must take further steps to "verify the existence of the complainant"[115] and substantively evaluate the complaint before publishing.

B. The Commission Already Collects Sufficient Data to Fulfill Its Statutory Obligations

The Commission requests comment on "[w]hat existing data sources could help [the Commission] to identify when consumers' access to broadband internet has been differentially impacted" and "whether [it] should undertake new data collection efforts."[116] Two existing sources of information — the Broadband Data Collection ("BDC") system and providers' broadband consumer labels — give the Commission all the data it needs to make any necessary comparisons for purposes of a discrimination analysis.

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[114] *See id.* ¶ 57.

[115] *See id.* ¶¶ 55, 57.

[116] *Id.* ¶ 51.

The Commission's BDC system "is used to collect broadband availability, subscription, and bulk crowdsourced/challenge data for use in the Comm[i]ssion's broadband mapping program."[117] As part of the BDC process, "internet service providers report where they make internet services available," as well as details about those services.[118] The Commission then "reviews the data" and "publishes it on the National Broadband Map,"[119] which can be used to find information about which providers offer service at specific addresses, including "the broadband technologies they offer, and the maximum download and upload speeds they advertise for each technology."[120] The Commission ensures the reliability of the data by permitting broadband service providers and other stakeholders to challenge inaccurate information displayed on the National Broadband Map.[121] In short, the Commission already collects a wealth of vetted data via the BDC process, and the Commission can — and should — leverage that information for purposes of fulfilling its mandate under Section 60506.

The Commission also should leverage the broadband service providers' broadband consumer labels. The Infrastructure Act directed the Commission to promulgate rules "to require the display of broadband consumer labels . . . to disclose to consumers information regarding broadband internet access service plans."[122] Fulfilling that directive, the Commission recently adopted rules requiring the broadband service providers "to display, at the point of sale, labels

[117] FCC, *Broadband Data Collection System*, https://bdc.fcc.gov/.

[118] FCC, *Broadband Data Collection Consumer Information*, https://www.fcc.gov/BroadbandData/consumers.

[119] *Id.*; *see* FCC, *National Broadband Map*, https://broadbandmap.fcc.gov/home.

[120] Jessica Rosenworcel, Chairwoman, FCC, *The New Broadband Maps Are Finally Here* (Nov. 18, 2022), https://www.fcc.gov/news-events/notes/2022/11/18/new-broadband-maps-are-finally-here.

[121] *See id.*

[122] Infrastructure Act § 60504(a).

that disclose certain information about broadband prices, introductory rates, data allowances, and broadband speeds" and latency, and that "include links to information about their network management practices, privacy policies, and the Commission's [ACP]."[123]

Thus, before imposing additional burdens on itself or providers, the Commission should use the data collected through the BDC process and providers' broadband consumer labels — two easily and readily available sources of reliable and relevant data — to fulfill its obligations under Section 60506.

X. CONCLUSION

Verizon has long been committed to closing the digital divide, and stands ready and willing to work with Congress, the Commission, and other stakeholders to get that crucial job done. To that end, the Commission should implement Section 60506 in the manner discussed above, which is consistent with the statutory language and reads that section in light of the Infrastructure Act as a whole.

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[123] Report and Order and Further Notice of Proposed Rulemaking, *Empowering Broadband Consumers Through Transparency*, FCC 22-86, CG Docket No. 22-2, ¶¶ 3, 22-62 (Nov. 17, 2022). The Commission is currently seeking comment on whether to mandate inclusion of additional or more comprehensive information. *See id.* ¶¶ 4, 135-147.

Respectfully submitted,

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APPENDIX A

The facts on Verizon's broadband deployment,
Verizon News Center (Jan. 20, 2023)

https://www.verizon.com/about/news/facts-verizons-broadband-deployment

01/20/2023 | **Responsible Business** | **Public Policy**

The facts on Verizon's broadband deployment

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Verizon is committed to being an active partner in closing the digital divide. We build the networks that move the world forward, and we are committed to making the world a better place. That commitment is also reflected in how we deploy our technology and offer our services. Simply put, we don't discriminate in how we build our networks or how we set our prices.

A report published online last fall by The Markup asserts otherwise. The report alleges that Verizon and other ISPs are providing their "worst deals"—slower, more expensive service – in lower income, minority neighborhoods while providing faster service in nearby higher income, white neighborhoods. The report characterizes differences in services ISPs offer as discrimination that follows patterns of historical redlining in real estate lending.

The allegations The Markup report makes are serious, and we want to address them head on. Verizon doesn't discriminate, period. And a close look at the data relied on by The Markup confirms as much. As an initial matter, The Markup's approach was to seek out instances where less attractive services and prices are available in less-

affluent neighborhoods within a city. But at least for Verizon, the report excludes most of our biggest markets because the facts admittedly did not fit their narrative. For example, The Markup initially considered, but then excluded, Verizon addresses in New York City, Boston, and Philadelphia, among other cities, because it found that Verizon's service offers and pricing "do not contain enough variation to observe meaningful differences." That's the whole point. Where we obtained from local governments rights to build-out our Fios network, we did so throughout the entire area, and our pricing does not vary by location. As a result, The Markup report ignored our record in many of our largest markets and only considered a small, unrepresentative sample of about 33,000 Verizon addresses in its analysis—that's less than 0.2% of the 17 million locations passed by our Fios network. This undercuts the report's headline finding—that service offers vary by neighborhood or by demographic characteristics.

The lack of discrimination by Verizon in those markets where we offer Fios is no surprise. On pricing, aside from temporary promotional discounts, Verizon offers the same prices for our broadband services everywhere they are offered. Someone seeking Verizon's Fios fiber internet service anywhere will get the same speed and price offers if Fios is available to them. And they will get the same speed and price offers if our other internet services (e.g., DSL, fixed wireless access) are available to them. Our prices do not vary by region, let alone by neighborhood.

As for service availability, the way we approached our Fios network construction demonstrates our wide-scale deployment. For most of our Fios cities—including the ones mentioned in the study—we built a brand new fiber network on top of the legacy copper and largely tracked the copper network's boundaries. We worked closely with cities through this process, and we frequently made Fios available in historically lower-income, diverse communities like Anacostia in Washington, D.C. or Roxbury and Dorchester in Boston, before it was available in higher-income, less diverse communities like Georgetown in Washington, D.C. or Beacon Hill in Boston. Similarly, within New York City, we have made Fios available to all the NYC Housing Authority properties, thus making Fios available to some of the most economically vulnerable consumers in the City. The fact that Fios was deployed in this manner across virtually our entire Fios footprint dispels the idea that Fios was only built in higher-income neighborhoods.

So, what do The Markup's alleged differences in the 0.2 percent of our service locations show? They simply show that in some areas, fiber and DSL technologies coexist. The Markup report's findings really boil down to identifying this one distinction, with Fios service labeled as "Blazing," and locations where Fios is not offered, but where Verizon's DSL service remains available, labeled as "Slow." Why is DSL offered in Fios cities? Where Fios is available at a location, we no longer offer DSL as an option for new customers. So, when a customer can only get DSL in an area where Fios is generally available, the reason usually is that property owners have not allowed us to connect our Fios networks to their buildings (or to traverse their property to reach other buildings). This refusal by property owners significantly factors into availability of Fios service in apartment buildings, condominiums, and other places where multiple families live. In cities, building owner or manager refusals happen more often than we would like, and frequently enough that they create measurable numbers of addresses where Fios service is not available. Approximately three quarters of the Washington D.C. addresses that The Markup identified as "slow" are in these types of buildings and property owner refusal is likely the reason Fios is not available.

To further debunk the idea that Verizon's DSL offerings are clustered in certain demographic areas, we analyzed the demographic breakdown of the approximately 4,700 Washington D.C. addresses where Verizon provides DSL service to a subscriber. We found that these DSL addresses cut across demographics - they are in higher and lower income neighborhoods and are in areas with high and low percentages of non-white residents. Only a quarter of them are in lower or moderate income areas. In sum, they almost exactly match the overall demographics of the city.

The Markup also noted that the per-megabit pricing of Fios is significantly lower than for DSL. This is unsurprising as a matter of math and of physics–modern fiber-based networks are orders of magnitude faster than the slower, costlier legacy copper networks on which DSL relies. Given the dramatically different denominator, it is no surprise that the per-megabit price of fiber is significantly lower than for DSL. Moreover, the fact that fiber can be hundreds of times faster doesn't mean that DSL is hundreds of times less expensive to provide. The antiquated copper networks used to deliver DSL are frequently more expensive to maintain and operate than fiber networks, and those costs are spread over fewer and fewer customers. To illustrate this point, you can compare ticket costs, or overall speeds of travel by air and train. But it wouldn't make much sense to compare the price-per-mile of the two. And it would make even less sense to say that because planes travel faster, train fares should be less.

We'll note that while many homes that we couldn't reach with Fios may have access to older, slower DSL, Verizon is increasingly able to offer faster, cheaper broadband using fixed wireless technology – a service The Markup did not

consider but which is widely available and growing in popularity. Today's fixed wireless broadband services offer speeds that are much faster than DSL and qualifying customers can obtain the service at no cost through the FCC's Affordable Connectivity Program (ACP). And don't forget that in most cases, other broadband providers already serve these same buildings, as our Fios deployment brought new competition to cable in almost all cases.

One point on which we agree with The Markup is its demonstration that consumers will continue to benefit from better and more capable services as we all find ways to move from legacy networks to more modern fiber and wireless ones. Verizon has spent nearly two decades pursuing those efforts through its own investments—regularly one of the largest investors in our country's infrastructure. Over the years, Verizon has invested tens-of-billions of dollars in its networks. If The Markup were to check today, it would find that Verizon has quickly expanded its robust deployment of its next-generation fixed wireless broadband service in the cities it investigated and in others across the country.

Verizon is not alone in creating new options for consumers who remain either unserved or underserved by their available broadband networks. Federal and state policymakers are actively engaged in distributing tens-of-billions of dollars to bring modern broadband to those lacking it today. Verizon is excited about participating in the Infrastructure Act's programs to bring new high-speed broadband to areas that don't yet have it.

The new broadband-funding programs will complement work we have been doing for decades to provide broadband to as many people as possible and to close the digital divide. As part of our role as a provider of networks and broadband services, we have a long-standing commitment to help unlock the power of connectivity for those who need it the most. We have invested billions of dollars in these efforts which began long before the Covid-19 pandemic. For example, we are currently celebrating the 10-year anniversary of the Verizon Innovative Learning program, a transformative initiative that has brought connectivity, devices, and digital education to over 500 schools and 1.5 million low income students. We are also on target to provide digital skills training to 10 million youth by 2030 and are offering digital skills training to adults in rural communities. We expect to spend $3 billion between 2020-2025 to help close the digital divide. We are also big supporters of efforts to address broadband affordability, including through our active participation in the ACP. In fact, we introduced our Fios Forward program which offers a 300/300 Mbps service to eligible households for free, after they apply the ACP subsidy. And more recently have introduced free fixed wireless offerings for eligible households as well.

Verizon understands the urgency of the need to close the digital divide and solve the underlying reasons why some people are not connected. These reasons are addressable. We will continue to partner with the FCC as it develops rules this year to prevent digital discrimination, as Congress directed it to do. We also look forward to continuing to work with all stakeholders to succeed in efforts to close the digital divide. But the overly-narrow nature of The Markup's methodology and the resulting unfounded allegations in The Markup report that Verizon's pricing and offers for its broadband services differ by neighborhood or by demographics are not helpful to drive solutions. We will continue our efforts to ensure that internet service is available and affordable for everyone as we continue to innovate to bring customers the fast internet that they need and have come to depend on Verizon to deliver.