Reply Comments in the Matter of Implementing the Infrastructure, Investment, and Jobs Act: Prevention and Elimination of Digital Discrimination

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I. Introduction

On behalf of the International Center for Law & Economics (ICLE), we thank the Federal Communications Commission (FCC or the Commission) for the opportunity to comment on this Notice of Proposed Rulemaking in the *Matter of Implementing the Infrastructure, Investment, and Jobs Act: Prevention and Elimination of Digital Discrimination* (NPRM).[1]

The Commission is contemplating creating a definition of "digital discrimination of access" under Section 60506 as "(1) policies or practices, not justified by genuine issues of technical or economic feasibility, that differentially impact consumers' access to broadband internet access service based on their income level, race, ethnicity, color, religion, or national origin" and/or (2) "policies or practices, not justified by genuine issues of technical or economic feasibility, that are intended to differentially impact consumers' access to broadband internet access service based on their income level, race, ethnicity, color, religion, or national origin."[2]

Finding ways to increase deployment to those Americans who have been persistently difficult to connect is a laudable goal, but there are better and worse ways to proceed. Section 60506 is about making sure that broadband is deployed fairly, given existing technological and economic constraints. It is not a radical prescription from Congress, but a request that the FCC ensure that impermissible discrimination doesn't affect broadband deployment.

This requires accounting for the current state of deployment, the economic realities that constrain deployment decisions, and the existing legal framework that constrains the manner in which the Commission can interpret Section 60506.

A. The State of Deployment

As a baseline, it's important to recognize that broadband providers have, by and large, done an excellent job of deploying to most households, while the data the FCC is currently gathering to assemble new broadband maps will enhance our ability to identify those problem areas that remain. Some of the comments in the record illustrate this baseline well. For example, NCTA observes in its comments that more than 98% of homes across income levels have access to fiber connections with speeds of at least one gigabit per second,[3] and that more than "97% of all homes and businesses in cable provider service areas have gigabit access regardless of race."[4] As the FCC interprets Section 60506, the goal should be to work *with* this track record of success and not erect roadblocks that could prevent building on this base.

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[1] *Notice of Proposed Rulemaking, Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN DOCKET NO. 22-69 (Dec. 22, 2022) [hereinafter "NPRM"].

[2] *Id.* at ¶ 12.

[3] *Comments of NCTA*, GN DOCKET NO. 22-69 (Feb. 21, 2023), at 4 [hereinafter "NCTA"].

[4] *Id.* at 6.

Moreover, broadband providers have been actively courting low-income consumers, particularly since Congress enacted successful programs such as the $14.2 billion Affordable Connectivity Program (ACP). By actively participating in these programs and offering tailored low-cost options, broadband providers are working to bridge the digital divide and reach unserved consumers. For example, Comcast's "Internet Essentials" and "Internet Essentials Plus" programs offer affordable high-speed Internet service to eligible low-income households,[5] while AT&T's "Access" program provides low-cost broadband plans to qualifying families.[6] Additionally, providers such as Charter Communications, through their "Spectrum Internet Assist" initiative, extend discounted Internet services to qualifying individuals and families.[7]

B. The Economic Constraints of Section 60506 and Deployment

Section 60506 directs the FCC to prevent discrimination in broadband access based on income level. It also instructs the Commission to consider issues of technical and economic feasibility. A fundamental challenge presented by the intersection of these two directives is that a prospective broadband territory's income level is related, albeit indirectly, to the economic feasibility of deployment projects to serve that territory. Economic feasibility is driven largely by population density and anticipated broadband adoption and retention. Broadband adoption and retention are, in turn, driven by income, willingness-to-pay, and many other factors. This present an "income conundrum," in that it is nearly impossible to completely disentangle a given customer base's anticipated rates of broadband adoption and retention from their income level.

It is well known and widely accepted that income is correlated with many factors that are not identified in Section 60506, including population density, age, educational attainment, home-ownership status, home-computer ownership and usage, and rates of broadband adoption and un-adoption. Because each of these additional factors is correlated with income level, many effects-based statistical tests of broadband adoption are likely to produce false positives, concluding the presence of digital discrimination even where explicit efforts are made to avoid such discrimination.

This problem is exacerbated if providers are not allowed to point to the *relative* profitability of prospective deployment investments. Like all firms, broadband providers have limited resources to invest. While profitability is a necessary precondition for investment, not all profitable investments can be undertaken. At any given time, firms must choose from numerous potentially profitable projects, some more apparently profitable than others. Firms must be allowed to choose the mix of

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[5] *Apply for Internet Essentials or Internet Essentials Plus From Comcast*, COMCAST, https://www.xfinity.com/support/articles/comcast-broadband-opportunity-program (last visited Apr. 19, 2023).

[6] *Affordable Connectivity Program*, AT&T, https://www.att.com/help/affordable-connectivity-program (last visited Apr. 19, 2023).

[7] *Spectrum Internet for Low Income Households*, SPECTRUM, https://www.spectrum.com/internet/spectrum-internet-assist (last visited Apr. 19, 2023).

profitable investments that they believe will best advance long-term deployment without fear of having to defend claims of income discrimination.

While the NPRM[8] and several commenters[9] suggest the statute can be read to give the FCC broad authority to redress the disparate impact of deployment decisions based on income and race (among other impermissible deployment factors), principles of statutory interpretation preclude that reading. Supreme Court precedent on antidiscrimination statutes makes clear how Congress can write disparate-impact law.[10] It also makes clear that many provisions of antidiscrimination statutes apply only to intentional discrimination.[11] The difference turns on the language of the operative text and the statutory purpose, as illustrated by things like the overall structure of the legislation and the stated policy objective (including legislative intent, if it can be known).[12] Applying this rubric to Section 60506, we find that it lacks requisite "results-oriented language" that would make it into an effects-oriented statute. Thus, the prohibition against digital discrimination "based on income level, race, ethnicity, color, religion, or national origin" would apply only in cases of *intentional* discrimination in deployment decisions. Mere statistical correlation between deployment and protected characteristics is insufficient to support a finding of discrimination.

As to the overall structure of the Act, while the Infrastructure, Investment, and Jobs Act (IIJA) incorporates some of its provisions into the Communications Act, Section 60506 is not among them. The IIJA is concerned chiefly with promoting broadband buildout through the use of subsidies. As to the policy objective, the scant congressional record on Section 60506 fails to illuminate the text, leaving us to consider the plain meaning of the statute. The "statement of policy" in subsection (a) holds that subscribers "should" benefit from equal access to broadband and that the Commission "should" take steps to ensure such equal access.[13] This "precatory"[14] section tells

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[8] NPRM, *supra* note 1 at ¶ 12

[9] *See, e.g.*, *Comments of Public Knowledge, Benton Institute for Broadband and Society, and Electronic Privacy Information Center*, GN DOCKET NO. 22-69 (Feb. 21, 2023), at 52 ("Congress has again centered the focus of the Commission's actions on getting all people access, regardless of any discriminatory treatment or intent of the provider.") [hereinafter "Public Knowledge"]; *Letter from David Brody, Lawyers' Committee for Civil Rights Under Law, to Marlene H. Dortch, Implementing the Infrastructure and Jobs Act: Prevention and Elimination of Digital Discrimination*, WC DOCKET NO. 22-69 (Dec. 12, 2022) [hereinafter "Brody"].

[10] *See, e.g.*, *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project Inc.*, 576 U.S. 519 (2015) [hereinafter "Inclusive Communities"].

[11] *See, e.g.*, *Alexander v. Sandoval*, 532 U. S. 275, 280 (2001) ("[I]t is… beyond dispute—and no party disagrees—that § 601 prohibits only intentional discrimination.").

[12] *See, e.g.*, Inclusive Communities, *supra* note 10 at 533- 34 ("[A]ntidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose."); *Board of Ed. of City School Dist. of New York v. Harris*, 444 U. S. 130 –141 (1979) (considering the context of a statute's text, history, purpose, and structure in determining whether a statute encompasses disparate impact analysis).

[13] *See* Section 60506(a)(1), (a)(3).

[14] *See, Emergency Coal. to Def. Educ. Travel v. U.S. Dep't of Treasury*, 498 F. Supp. 2d 150, 165 (D.D.C. 2007) ("Courts have repeatedly held that such 'sense of Congress' language is merely precatory and non-binding."), *aff'd*, 545 F.3d 4 (D.C. Cir. 2008).

us the goal of the operative text: to make sure *the Commission* takes steps to promote broadband buildout. The mandate to create rules that facilitate equal access to broadband service—including by "preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin"—grants the Commission authority to set up a regulatory structure that would prevent *intentional* discrimination in deployment decisions, using language akin to those antidiscrimination provisions that speak only to intent.[15] This limited authority doesn't allow for disparate-impact analysis, nor does it create a private right of action to enforce against any broadband provider. Instead, it empowers the Commission (and the Office of the Attorney General) to ensure federal policies promote equal access by prohibiting such deployment discrimination.[16]

Broadband buildout is big business, in the sense that a lot of money is invested by providers and governments (in the form of subsidies) alike. How these providers are regulated is a "major question" of "vast economic [and] political significance."[17] To allow the Commission to exercise broad authority to ameliorate disparate impact, as suggested by some commenters, would be to find the proverbial "elephants in mouseholes"[18] in this statute, which the U.S. Supreme Court has not permitted.

In Part II, we review specific questions in the NPRM, the economics underlying deployment decisions, and how these relate to potential digital discrimination.

In Part III, we review some of the legal implications of attempting to regulate "digital discrimination" under both an intent-based and effects-based approach.

In Part IV, we consider the need for safe harbors and other procedural protections.

In Part V, we conclude and offer some thoughts on how to give best effect to Section 60506.

II. Using Income as a Measure of Digital Discrimination

Section 60506 directs the FCC to prevent discrimination in broadband access based on income level, race, ethnicity, color, religion, or national origin, while also directing the Commission to consider issues of technical and economic feasibility.

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[15] *Compare* 42 U.S. Code § 2000d ("No person in the United States shall, *on the ground of* race, color, or national origin, be excluded from participation in, be denied the benefits of, or be *subjected to discrimination* under any program or activity receiving Federal financial assistance.") with Section 60506(b)(1) (empowering the Commission to create rules taking into account "*preventing digital discrimination* of access *based on* income level, race, ethnicity, color, religion, or national origin") (emphasis added).

[16] *See* Section 60506(c) ("The Commission and the Attorney General shall ensure that Federal policies promote equal access to robust broadband internet access service by prohibiting deployment discrimination…").

[17] *West Virginia v. EPA*, 142 S. Ct. 2587, 2607–2608 (2022); Util. Air Regul. Grp. (UARG) v. EPA, 573 U.S. 302, 324 (2014).

[18] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

We assert that the FCC should adopt an intent-based *discriminatory-treatment* standard, rather than one that opens the doors to *disparate-impact* claims. The high risk of false positives under a disparate-impact standard would stifle broadband deployment through additional costs, delays, and risk of litigation. Similarly, FCC rules should articulate a presumption of nondiscrimination in which allegations of digital discrimination must be demonstrated, rather than a presumption of discrimination that must be rebutted for each deployment decision.

It is clear that population density and anticipated broadband *adoption* are the key factors affecting the economic feasibility of broadband-deployment investments. Affordability and willingness to pay are the primary drivers of broadband adoption where it is available. Indeed, Congress has recognized this reality in its recent legislation. The IIJA's Broadband Equity and Access program provides more than $42 billion in grants to state programs to help them support providers and give assistance directly to users.[19] The Affordable Connectivity Program provided another $14 billion in funding to help users pay for devices and broadband connections.[20]

If the Commission has good evidence of intentional discrimination in the deployment of broadband, it has a role to play in preventing it. But attempts to use the regulatory process to root out digital discrimination will do little to shrink the digital divide without substantial resources to increase adoption and retention of broadband services.

A. The Indirect Relationship Between Income and Economic Feasibility

The NPRM asks "how does a consumer's income level, or the average income level of a geographical area, relate to economic feasibility in the deployment and provision of broadband internet access services?"[21]

The short answer is that income level is only indirectly related to economic feasibility. When evaluating the economic feasibility of a potential investment, broadband providers consider that territory's anticipated adoption rate.[22] There is evidence that income, willingness to pay, and many other factors affect consumers' adoption and retention decisions. Thus, it can be said that income level is related to deployment decisions only through a daisy chain linking anticipated adoption and retention rates to consumers' willingness to pay, with willingness to pay loosely correlated with income level.

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[19] *Broadband Equity, Access, and Deployment Program*, BROADBANDUSA, https://broadbandusa.ntia.doc.gov/resources/grant-programs/broadband-equity-access-and-deployment-bead-program (last visited Oct. 23, 2022).

[20] *Affordable Connectivity Program*, FEDERAL COMMUNICATIONS COMMISSION, https://www.fcc.gov/acp (last visited Oct. 23, 2022).

[21] NPRM, *supra* note 1 at ¶24.

[22] *NOI Reply Comments of AT&T*, GN DOCKET NO. 22-69 (Jun. 30, 2022), ("In particular, like all companies operating in a competitive marketplace, broadband providers must and do take expected demand into account, and the 'economic feasibility' qualifier protects their right to do so.")

Population density is widely acknowledged to be the most important factor driving broadband-deployment decisions. For example, the U.S. Government Accountability Office (GAO) reports that population density is the "most frequently cited cost factor" and "a critical determinant of companies' deployment decisions."[23] Academic research supports the GAO's conclusions. Brian Whitacre & Roberto Gallardo describe population density as one of "the main determinants of Internet availability."[24] Similarly, Tonny Oyana, citing earlier research, concluded that "[l]imited broadband access is common in rural communities because of geographic remoteness and low population density."[25]

Several other factors also affect the profitability of broadband-deployment investments, including:

- *Terrain:* The GAO notes that "it is more costly to serve areas with low population density and rugged terrain with terrestrial facilities than it is to serve areas that are densely populated and have flat terrain."[26]

- *Backhaul*: That is, the cost of routing Internet traffic from rural areas to larger cities in order to connect to a major Internet-backbone provider. The GAO also reports that the cost of backhaul can affect broadband deployment to rural areas.[27]

- *State-level broadband-funding programs*: Whitacre & Gallardo find such programs are associated with a modest increase (1.2–2.0 percentage points) in broadband availability.[28]

Juan Schneir & Yupeng Xiong note that firms are more likely to deploy broadband in urban and suburban areas, rather than rural areas, due to both cost and demand factors. They conclude this is "because of the high density of users willing to pay for high-speed broadband services and the relatively low network rollout costs in urban and suburban areas."[29] Consistent with Schneir & Xiong's conclusion, the GAO also finds that population density is an important factor on the demand side of deployment decisions. In particular, the GAO concludes that it is more difficult to "aggregate sufficient demand" to pay for broadband service in low-density rural areas.[30]

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[23] *Telecommunications: Broadband Deployment Is Extensive Throughout the United States, but It Is Difficult to Assess the Extent of Deployment Gaps in Rural Areas*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-06-426 (May 2006), https://www.gao.gov/assets/gao-06-426.pdf. [hereinafter "GAO-06-426"].

[24] Brian Whitacre & Roberto Gallardo, *State Broadband Policy: Impacts on Availability*, 44 TELECOMM. POL'Y. 102025 (2020).

[25] Tonny J. Oyana, *Exploring Geographic Disparities in Broadband Access and Use in Rural Southern Illinois: Who's Being Left Behind?*, 28 GOV'T. INFO. Q. 252 (2011).

[26] GAO-06-426, *supra* note 23.

[27] *Id.*

[28] Whitacre & Gallardo, *supra* note 24.

[29] Juan Rendon Schneir & Yupeng Xiong, *A Cost Study of Fixed Broadband Access Networks for Rural Areas*, 40 TELECOMM. POL'Y. 755 (2016).

[30] GAO-06-426, *supra* note 23.

But broadband *access* alone also may not be sufficient to drive greater rates of broadband *adoption*. For example, Brian Whitacre and his co-authors found that while the reduced levels of broadband access in rural areas explained 38% of the rural-urban broadband-adoption gap in 2011, differences in other general characteristics—such as income and education—explain "roughly half of the gap."[31] Another GAO report concluded that "even where broadband service is available … an adoption gap may persist due to the affordability of broadband and lack of digital skills."[32] The report further notes that nearly one-third of those with access to broadband do not subscribe to it and that "lower-income households have lower rates of home broadband subscriptions."[33]

The price of broadband services is another significant factor that affects adoption. A National Telecommunications and Information Administration (NTIA) survey of Internet use identified "affordability as a driving factor around why some households continue to remain offline, confirming that cost of service is an essential part of increasing Internet adoption."[34] The survey reported that the average price that offline households wanted to pay for Internet access was approximately $10 per month, and about 75% of households gave $0 or "none" as their answer. Kenneth Flamm & Anindya Chaudhuri's empirical research finds that broadband price is a "statistically significant driver" of broadband demand.[35] They conclude that broadband-price declines in the early 2000s explain "some portion" of increased broadband adoption.[36] Victor Glass & Stela Stefanova's empirical study found that higher prices "depress" demand for broadband.[37]

Price sensitivity is linked to income. Christopher Reddick and his co-authors concluded that "[i]ncome is a major factor that is likely to influence broadband adoption especially where technology is available."[38] Glass & Stefanova find broadband service to be a normal good, which means that increased incomes are associated with increased broadband adoption—a finding consistent with

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[31] Brian Whitacre, Sharon Strover, & Roberto Gallardo, *How Much Does Broadband Infrastructure Matter? Decomposing the Metro–Non-Metro Adoption Gap with the Help of the National Broadband Map*, 32 GOV'T INFO. Q. 261 (2015).

[32] *Broadband: National Strategy Needed to Guide Federal Efforts to Reduce Digital Divide*, U.S. GOV'T ACCOUNTABILITY OFF., GAO-22-104611 (May 31, 2022) [hereinafter "GAO-22-104611"].

[33] *Id. See also*, *How Do Speed, Infrastructure, Access, and Adoption Inform Broadband Policy?*, PEW RESEARCH CENTER (Jul. 7, 2022), https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2022/07/how-do-speed-infrastructure-access-and-adoption-inform-broadband-policy ("nearly 1 in 4 Americans do not subscribe to a home broadband connection, even where one is available").

[34] Michelle Cao & Rafi Goldberg, *New Analysis Shows Offline Households Are Willing to Pay $10-a-Month on Average for Home Internet Service, Though Three in Four Say Any Cost is Too Much*, NATIONAL TELECOMMUNICATIONS AND INFORMATION ADMINISTRATION (Oct. 6, 2022), https://www.ntia.doc.gov/blog/2022/new-analysis-shows-offline-households-are-willing-pay-10-month-average-home-internet.

[35] Kenneth Flamm & Anindya Chaudhuri, *An Analysis of the Determinants of Broadband Access*, 31 TELECOMM. POL'Y. 312 (2007).

[36] *Id.*

[37] Victor Glass & Stela K. Stefanova, *An Empirical Study of Broadband Diffusion in Rural America*, 38 J. REG. ECON. 70 (Jun. 2010).

[38] Christopher G. Reddick, Roger Enriquez, Richard J. Harris, & Bonita Sharma, *Determinants of Broadband Access and Affordability: An Analysis of a Community Survey on the Digital Divide*, 106 CITIES 102904 (2020).

previous research.[39] Similarly, the GAO reports: "A recent nationally representative survey by Consumer Reports reported that nearly a third of respondents who lack a broadband subscription said it was because it costs too much, while about a quarter of respondents who do have broadband said they find it difficult to afford."[40] Alison Powell and her co-authors report that a significant number of low-income Americans engage in a cycle of broadband adoption and "un-adoption," in which they adopt broadband and then drop it for financial or other reasons, and then re-adopt when circumstances improve for them.[41]

In addition to price and income guiding a household's broadband-adoption decisions, other factors are also relevant. Oyana's empirical research concludes that income, the share of a population who are senior citizens, and the share with some college education are the "three most important demand-side factors" affecting both access and adoption.[42] On the demand side, the GAO reports that "demand will be greater in areas where potential customers are familiar with computers and broadband."[43] The GAO reports that "[o]ther barriers include lack of digital skills," citing a 2016 Pew Research Center report finding that "about half of American adults were hesitant when it comes to new technologies and building their digital skills."[44]

It can be argued that the gap between rates of broadband access and broadband adoption may present the real digital divide. That is, large numbers of American who have access to broadband do not adopt it, and some who do may "un-adopt" it. While income is a key factor in a household's adoption choice, it is only one of several important factors, which also include age, educational attainment, and home-computer ownership and usage—each of which is, in turn, also correlated with income.

If firms do not expect sufficient levels of adoption, then deployment may be unprofitable. It would be a mistake to infer that income discrimination in deployment causes low rates of broadband adoption in low-income communities when low income itself—and other factors correlated with income—may be a primary cause of low rates of broadband adoption, even where broadband access is available.

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[39] Glass & Stefanova, *supra* note 37 at 70.

[40] GAO-22-104611, *supra* note 32.

[41] Alison Powell, Amelia Bryne, & Dharma Dailey, *The Essential Internet: Digital Exclusion in Low-Income American Communities*, 2 POL'Y & INTERNET 161 (2010).

[42] Oyana, *supra* note 25.

[43] GAO-06-426, *supra* note 23.

[44] GAO-22-104611, *supra* note 32.

B. Profitability, Return on Investment, and Economic Feasibility

The NPRM asks, "should a provider be permitted to defend a claim of income-based intentional discrimination by offering projections showing that deploying to a particular community would likely produce a lower-than-normal rate of return on investment?"[45]

Section 60506 requires the Commission to take account of "issues of technical and economic feasibility." There is broad understanding that "economic feasibility" here refers to profitability.[46] More precisely, a project is economically feasible if it provides an adequate return on investment (ROI). Like all firms, broadband providers have limited resources with which to make their investments. While profitability is a necessary precondition for investment, not all profitable investments can be undertaken. Among the universe of potentially profitable projects, firms are likely to give priority to those that promise greater returns on investment relative to those with lower ROI.[47] Thus, any evaluation of potential digital discrimination must examine not only whether a given deployment is likely to be profitable, but also how its expected returns compare to other investment opportunities.

This concept—opportunity cost—is fundamental not just to economics, but to our daily lives. Indeed, we all live in a world of endless wants, but only limited resources (*e.g.*, money, time, natural resources) to satisfy them. As a result, we must make choices about how best to use those resources to satisfy our wants. By choosing to pursue one activity, we must forgo another. The value of what we have foregone is our opportunity cost.[48] A worker contemplating quitting their job to start a business is certain to consider the income they would be giving up as an opportunity cost of entrepreneurship.

Similarly, a broadband provider who invests in region A recognizes that it is giving up the opportunity to invest in region B. But the provider faces another factor the would-be entrepreneur does not. If the provider regularly chooses low-ROI investments over higher ROI investments, then its shareholders may choose to replace management with a team that can provide better returns. The opportunity-cost calculus is unavoidable.

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[45] NPRM, *supra* note 1 at ¶ 66.

[46] *See, e.g., Notice of Inquiry, Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, GN DOCKET NO. 22-69 (2022) ("If underlying cost or geographic hurdles exist in conjunction with demand in an area that makes it unprofitable, how should the Commission address such a situation?").

[47] Public Knowledge, *supra* note 9 at 45 ("In many cases, a provider has the choice to build out and provide service in one area, or another. It will likely choose to build out in the more profitable area, even if it could break even or turn a profit serving the other, as well.")

[48] *See*, *e.g.*, N. GREGORY MANKIW, PRINCIPLES OF MICROECONOMICS, 9th ed. (2021) ("The **opportunity cost** of an item is what you give up to get that item. When making any decision, decision makers should take into account the opportunity costs of each possible action.").

Thus, it is surprising to see comments to this proceeding that suggest the FCC should ignore opportunity cost in evaluating economic feasibility.[49] Section 60506 specifically calls on the FCC to consider *economic* feasibility—not financial feasibility or accounting feasibility. There is no evidence that this was an accident or mistake. Because opportunity cost is a cornerstone of economic analysis, it would be reasonable to conclude that the law's mandate to consider economic feasibility was meant to rely on economic analysis and, in turn, to consider the opportunity costs of foregone deployment investments. We strongly encourage the Commission to include opportunity costs that providers face whenever it evaluates alleged digital discrimination in deployment.

C. Demonstrating Discrimination: The Income Conundrum

The NPRM asks, "[S]hould a provider be permitted to defend a claim of income-based intentional discrimination by offering projections showing that deploying to a particular community would likely produce a lower-than-normal rate of return on investment? How are we to determine whether a proffered economic justification, such as rate of return, is a pretext for income-based discrimination?"[50] The NPRM reports that some have argued a sub-normal profit margin should not be considered sufficient reason to claim economic infeasibility and that the Commission should rarely excuse discrimination on such grounds.[51]

A provider should be permitted to defend a claim of income-based intentional discrimination by demonstrating that deploying to a particular community would likely produce a lower return on investment *relative to other likely alternatives investments*. Thus, a provider should be able to defend a claim of income-based intentional discrimination even if deploying to a particular community would likely produce a *higher* than "normal" ROI—so long as other deployment alternatives produce anticipated ROIs that are greater still. As noted above, a positive ROI is a necessary precondition for investment, but not all profitable investments can be undertaken. Evaluations of potential digital discrimination must examine not only whether a given deployment is likely to be profitable, but also how its expected returns compare to other investment opportunities.

It would be near-impossible to evaluate demographic, economic, and financial data to determine whether profitability, ROI, or other economic reasons constitute a pretext for a pattern of so-called income-based discrimination. Our research indicates that such an approach would likely lead to a huge number of "false positives"—finding discrimination where no discrimination is intended or, indeed, where it was explicitly avoided. This presents what we call the "income conundrum," because it is virtually impossible to disentangle the factors affecting economic feasibility from factors

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[49] Public Knowledge, *supra* note 9 at 45 ("determinations of economic feasibility also cannot take into account opportunity costs").

[50] NPRM, *supra* note 1 at ¶ 66.

[51] *Id.*

correlated with membership in certain income and other protected classes.[52]As such, alleged patterns of income-based discrimination provide very little (if any) information, and certainly not enough information to sufficiently prove a violation of Section 60506.

Former FCC Chief Economist Glenn Woroch combined recent census-block-level wireline-broadband deployment data from the Commission's Form 477 reports with demographic and income data published by the U.S. Census Bureau to evaluate broadband availability rates for wireline 100/20 Mbps service (1) between census-based "white" and "non-white" households and (2) between households above and below the Federal Poverty Guidelines.[53] His statistical analysis indicates broadband availability rates are about 5 percentage points higher for non-white households than for white households, and that broadband availability rates are nearly identical for households above and below the Federal Poverty Guidelines.

Woroch's results are consistent with the statistical analysis published by Randolph Beard & George Ford.[54] Their data indicate that U.S. Census blocks with higher population densities are associated with a higher share of minority residents and lower average incomes. Beard & Ford also report that blocks with a higher share of minority residents have lower fixed-broadband adoption rates and a higher share of mobile-only broadband use. Their empirical model includes four demand factors for each Census block: fixed-broadband adoption rate, mobile-broadband adoption rate, the share of persons with a tertiary education, and the share of homes with a computer. The model also includes five cost factors: population density, the share of rural blocks within the Census-block group, and three cost categories from CostQuest. Using this information, they evaluate: (1) fiber deployment by race, (2) fiber deployment by income level, (3) download speeds by race, and (4) download speeds by income level. Beard & Ford conclude from their statistical analysis that there is "no meaningful evidence of digital discrimination in either race or income for fiber deployments or for download speeds."

It is well-known and widely accepted that income is correlated with many factors that are not identified in Section 60506, including population density, age, educational attainment, home-ownership status, home-computer ownership and usage, and broadband adoption and un-adoption. But because each of these other factors is, in turn, correlated with income level, applying an effects-based statistical analysis is likely to produce false positives that conclude the presence of digital discrimination, even if there was an explicit effort to avoid such discrimination. This is a version of

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[52] Eric Fruits & Kristian Stout, *The Income Conundrum: Intent and Effects Analysis of Digital Discrimination*, INT'L CTR. FOR L. & ECON. (Nov. 14, 2022), *available at* https://laweconcenter.org/wp-content/uploads/2022/11/The-Income-Conundrum-Intent-and-Effects-Analysis-of-Digital-Discrimination.pdf.

[53] *Declaration for Glenn Woroch*, NOI Reply Comments of AT&T, *supra* note 22.

[54] T. Randolph Beard & George S. Ford, *Digital Discrimination: Fiber Availability and Speeds, by Race and Income*, PHOENIX CTR. FOR ADVANCED LEGAL & ECON. POL'Y STUD., Phoenix Ctr. Pol'y Paper No. 58 (Sep. 2022), https://phoenix-center.org/pcpp/PCPP58Final.pdf.

Nobel laureate Ronald Coase's well-known quote: "If you torture the data long enough, it will confess."[55]

Indeed, as the Competitive Enterprise Institute (CEI) notes, even if the Commission were to adopt a disparate-impact standard (discussed *infra*), it would be exceedingly difficult, if not impossible, to prove income discrimination through a series of correlated proxies under existing Supreme Court precedent:

> Thus, as *Hazen* demonstrates that as long as the motivating factor for digital discrimination of access is analytically distinct from the protected characteristic (even if one is correlated with the other, like age when set against years of service), the person who is wholly motivated by other factors wouldn't be discriminating based on protected characteristics. [56]

Thus, even if correlational evidence is introduced, it will be of such little probative value as to contribute very little information to a proceeding. For example, even if statistical analysis indicated a relationship between income and some other non-protected characteristic (*e.g.*, education), under 1993's *Hazen Paper Co. v. Biggins* decision, that information could not be used to demonstrate income discrimination. The only way that a prohibition on income-based discrimination would make sense at all would be if Section 60506 were construed as prohibiting *intentional* discrimination. In this sense, claims would have to be brought on the basis that a provider intentionally discriminated against a low-income household, or against a territory for being low-income, with all else being equal. That is, if a particular opportunity would otherwise have been included in a provider's deployment plans, discrimination could be found if that provider refrained from deploying based on an intent not to serve low-income households in the area.

III. Section 60506 Empowers the Commission to Facilitate Equal Access to Broadband by Prohibiting Intentional Discrimination

Congress did not, with Section 60506, turn the FCC into a general-purpose civil-rights agency. It did, however, give the Commission a set of tools to identify and remedy particular acts of discrimination.

In the NPRM, the Commission proposes:

> to define "digital discrimination of access," for purposes of this proceeding, as one or a combination of the following: (1) "policies or practices, not justified by genuine issues of technical or economic feasibility, that differentially impact consumers' access to broadband internet access service based on their income level, race, ethnicity, color, religion, or national origin"; and/or (2) "policies or practices, not justified by genuine

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[55] Garson O'Toole, *If You Torture the Data Long Enough, It Will Confess*, QUOTE INVESTIGATOR (Jan. 18, 2021), https://quoteinvestigator.com/2021/01/18/confess.

[56] *Comments of CEI*, GN DOCKET NO. 22-69 (Feb. 21, 2023), at 8.

> issues of technical or economic feasibility, that are intended to differentially impact consumers' access to broadband internet access service based on their income level, race, ethnicity, color, religion, or national origin."[57]

Although some commenters have called for the FCC to employ an effects-based "disparate impact" analysis under Section 60506,[58] we continue to believe this would be a mistake under both the structure of Section 60506 and the Supreme Court's established jurisprudence on disparate-impact analysis. A more reasonable approach for the Commission would be to construe Section 60506 as directing an analysis of intentional discrimination in deployment.

Statutes that define impermissible discrimination, such as the Civil Rights Act of 1964, can be analyzed legally either as addressed toward explicit discriminatory intent, referred to as "discriminatory treatment," or toward behavior inferred from discriminatory effects, such as the "disparate impact" that the challenged behavior or policy has on a protected class.[59] A case involving discriminatory treatment is somewhat more straightforward,[60] insofar as it demands evidence demonstrating that decisions adversely affecting some protected class were made based on bias toward members of that class. In this context, where deployment decisions are made on the basis of discriminatory intent, the Commission is on much firmer legal ground to pursue them.

By contrast, were the Commission to adopt a "disparate impact" assessment as part of Section 60506, it would face a steep uphill legal climb. Among the primary justifications for disparate-impact analysis is to remedy those historical patterns of *de jure* segregation that left an indelible mark on minority communities.[61] While racial discrimination has not been purged from society, broadband only became prominent in the United States well after all forms of *de jure* segregation were made illegal, and after Congress and the courts had invested decades in rooting out impermissible *de facto* discrimination. Any policy intended to tackle disparate impact in broadband deployment needs to take this history into account.

Commenters like Public Knowledge point to Section 60506's stated policy objective to make the case that the statute encompasses disparate-impact analysis.[62] They also situate the IIJA as a part of the universal service regime of the Communications Act.[63] However, Section 60506 was *not* incorporated into the Communications Act, unlike other parts of the IIJA. In other words, the FCC's general enforcement authority doesn't apply to the regulatory scheme of Section 60506. The

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[57] NPRM, *supra* note 1 at ¶ 12.

[58] Public Knowledge, *supra* note 9 at 52 ("Congress has again centered the focus of the Commission's actions on getting all people access, regardless of any discriminatory treatment or intent of the provider."); *see also*, Brody, *supra* note 9.

[59] *Ricci v. DeStefano*, 557 U.S. 557, 577 (2009) [hereinafter "Ricci"].

[60] *Id.* (Intentional discrimination cases "present the most easily understood type of discrimination…[that] occur[s] where [a party[has treated [a] particular person less favorably than others because of a protected trait.").

[61] Inclusive Communities, *supra* note 10 at 528–29.

[62] *See* Public Knowledge, *supra* note 9 at 50-53.

[63] *Id.* at 5-40.

FCC must rely on the statute alone for that authority. Moreover, the statement of policy in Section 60506(a) is exactly that: a statement of policy. Courts have long held that sections using words like "should"[64] are "precatory."[65] While this helps to illuminate the goal of the provision at issue, it does not actually expand the remit of FCC authority. The goal of the statute is clear: to make sure *the Commission* takes steps to promote broadband buildout. It empowers the Commission (and the Office of the U.S. Attorney General) to ensure that federal policies promote equal access by prohibiting such deployment discrimination.[66]

There is little evidence that IIJA's drafters intended the law to be read so broadly. The legislative record on Section 60506 is exceedingly sparse, containing almost no discussion of the provision beyond assurances that "broadband ought to be available to all Americans,"[67] and also that the provision was not to be used as a basis for the "regulation of internet rates."[68] Given that sparse textual basis, reading Section 60506 as granting the Commission expansive powers to serve as a broadband civil-rights czar could also run afoul of the "major questions" doctrine.[69] That doctrine requires Congress "to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'"[70] To allow the Commission to exercise the type of broad authority to ameliorate disparate impact, as suggested by some commenters, would be to find the proverbial "elephants in mouseholes"[71] in this statute that the Supreme Court has not allowed.

More specifically, it does not appear that Section 60506 can be reasonably construed as authorizing disparate-impact analysis. While the Supreme Court continues to uphold disparate-impact analysis in the context of civil-rights law, it has recently imposed some important limitations. For example, in *Texas Department of Housing & Community Affairs v. The Inclusive Communities Project Inc.*, the Court upheld the disparate-impact doctrine, but noted that disparate-impact claims arise under statutes explicitly directed "to the consequences of an action rather than the actor's intent."[72] For example, in the Fair Housing Act, Congress made it unlawful:

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[64] *See* Section 60506(a)(1), (a)(3).

[65] *See, Emergency Coal. to Def. Educ. Travel v. U.S. Dep't of Treasury*, 498 F. Supp. 2d 150, 165 (D.D.C. 2007) ("Courts have repeatedly held that such 'sense of Congress' language is merely precatory and non-binding."), *aff'd*, 545 F.3d 4 (D.C. Cir. 2008).

[66] *See* Section 60506(c) ("The Commission and the Attorney General shall ensure that Federal policies promote equal access to robust broadband internet access service by prohibiting deployment discrimination…").

[67] 167 Cong. Rec. 6046 (2021).

[68] 167 Cong. Rec. 6053 (2021).

[69] *See, e.g.*, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022); *Util. Air Regul. Grp. (UARG) v. EPA*, 573 U.S. 302 (2014).

[70] *West Virginia v. EPA*, 142 S. Ct. at 2607–2608; *UARG*, 573 U.S. at 324.

[71] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

[72] Inclusive Communities, *supra* note 10 at 534.

> To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, ***or otherwise make unavailable*** or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.[73] [*Emphasis added.*]

The Court noted that the presence of language like "otherwise make unavailable" is critical to construing a statute as demanding an effects-based analysis.[74] Such phrases, the Court found, "refer[] to the consequences of an action rather than the actor's intent."[75] Further, the structure of a statute's language matters:

> The relevant statutory phrases… play an identical role in the structure common to all three statutes: Located at the end of lengthy sentences that begin with prohibitions on disparate treatment, they serve as catchall phrases looking to consequences, not intent. And all [of these] statutes use the word "otherwise" to introduce the results-oriented phrase. "Otherwise" means "in a different way or manner," thus signaling a shift in emphasis from an actor's intent to the consequences of his actions.[76]

Previous Court opinions help to parse the distinction between statutes limited to intentional-discrimination claims and those that allow for disparate-impact claims. Particularly relevant here, in *Alexander v. Sandoval*, the Court emphasized that it was "beyond dispute—and no party disagrees—that § 601 prohibits only intentional discrimination."[77] The relevant statutory language stated that "No person in the United States shall, ***on the ground of*** race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."[78]

Thus, when Public Knowledge argues that "assertion that the phrase 'based on' limits the Commission to disparate intent is based on the dissent not the majority opinion of *Inclusive Communities*. The majority's opinion states the exact opposite… The phrase at issue in *Inclusive Communities* was 'because of,' which is equivalent to 'based on' contained in section 1754…"[79], it gets both *Inclusive Communities* and previous precedents wrong. First, *Inclusive Communities* primarily based its opinion on the "otherwise make unavailable" language and not on the "because of" language on its own. Second, the closest analogy for "based on" is the "grounded on" language of Title VI, which does not include the "otherwise" language found to be so important in *Inclusive Communities*. If the Court has found "grounded on" means only intentional discrimination, then it is hard to see how "based on" wouldn't lead to the same conclusion.

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[73] 42 U.S.C. § 3604(a) (emphasis added).

[74] Inclusive Communities, *supra* note 10 at 534.

[75] *Id.*

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

[77] *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

[78] 42 U.S.C. §2000d (emphasis added).

[79] Public Knowledge, *supra* note 9 at 54.

Further, even where disparate-impact analysis is appropriate, the Court held in *Inclusive Communities* that it is significantly constrained by the need to ensure that the free-enterprise system continues to function:

> ***[Supreme Court precedent] also teach[es] that disparate-impact liability must be limited so… regulated entities are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system.*** And before rejecting a business justification…a court must determine that a plaintiff has shown that there is "an available alternative … practice that has less disparate impact and serves the [entity's] legitimate needs."[80] [*Emphasis added.*]

In practice, this means that lower courts are free to probe a disparate-impact claim rigorously in order to avoid such claims becoming a club to wield against regulated entities.[81] It also suggests that, in a context such as Section 60506's proscriptions against digital discrimination, they may not be so broad as to render it impossible for broadband providers to make effective decisions about which deployment projects are economically feasible.

More to the point, as Section 60506 was drafted without "results-oriented language"[82] and instead frames the prohibition against digital discrimination as "***based on*** income level, race, ethnicity, color, religion, or national origin,"[83] this would put the rule squarely within the realm of prohibitions on *intentional* discrimination.[84] That is, to be discriminatory, the decision to deploy or not to deploy must have been intentionally made *based on* or *grounded on* the protected characteristic. Mere statistical correlation between deployment and protected characteristics is insufficient.

In enacting the IIJA, Congress was undoubtedly aware of the Court's history with disparate-impact analysis. Had it chosen to do so, it could have made the requirements of Section 60506 align with the requirements of that precedent. But it chose not to do so, thereby reinforcing that it intended the FCC to have some discretion, but to err on the side of caution when declaring certain practices an impermissible form of discrimination.

This is not to say that Section 60506 has no effect. As mentioned above, it can be reasonably read to encompass intentional discrimination, given appropriate evidence. Further, the means available to the FCC to remedy undesirable patterns of deployment are manifold. The only options rendered off the table would be requirements that are technologically or economically infeasible, such as an unfunded mandate that providers deploy at maximum speeds to all households simultaneously.

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[80] Inclusive Communities, *supra* note 10 at 533 (emphasis added).

[81] *Id.* at 521–22 ("Courts should avoid interpreting disparate-impact liability to be so expansive as to inject racial considerations into every housing decision. These limitations are also necessary to protect defendants against abusive disparate-impact claims.").

[82] *Id.*

[83] Section 60506 (emphasis added).

[84] Ricci, *supra* note 59 at 557.

Moreover, as NCTA noted in its comments, the "intentional discrimination" standard provides ample room for the Commission to act upon instances of impermissible discrimination:

> [I]t is NCTA's position that discriminatory intent need not be proven with a "smoking gun," such as documentary evidence overtly acknowledging or demonstrating discrimination, but can instead be sufficiently pled and shown with evidence including a combination of impact elements and facts such as: statistics demonstrating a pattern of discriminatory intent, the sequence of events leading to the decision, departures from normal procedures, and a consistent pattern of actions imposing much greater harm on the protected class that is unexplainable on grounds other than discriminatory ones.[85]

Indeed, in *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*,[86] the Supreme Court established a legal test for determining intentional discrimination. The test requires a plaintiff to demonstrate that a discriminatory intent was a motivating factor behind the challenged action or decision.[87] To prove intentional discrimination, the Court identified several factors that can serve as evidence. Under this test, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[88] Such an analysis can include circumstantial evidence of:

- A history of discriminatory practices or a pattern of decisions that have consistently disadvantaged a protected class;[89]
- Significant departures from standard procedures, substantive norms, or established practices can indicate discriminatory intent, especially if they seem designed to disadvantage a specific group;[90]
- Statements or actions by decisionmakers during the decision-making process that reveal prejudice or bias against a protected group;[91]
- Evidence of differential treatment or disparate outcomes for similarly situated individuals from different protected groups; or[92]

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[85] NCTA, *supra* note 3 at 21.

[86] 429 U.S. 252, 266-67 (1977).

[87] *Id.* at 265 ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

[88] *Id.* at 266.

[89] *Id.* at 266-67.

[90] *Id.* at 267.

[91] *Id.* at 268.

[92] *See*, *Texas Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 258–59 (1981). Note that the last two factors listed in this and the subsequent footnote are part of the McDonnell Douglas framework, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798, 93 S. Ct. 1817, 1822, 36 L. Ed. 2d 668 (1973). Technically, the Arlington factors are generally used when analyzing *group* discrimination and the McDonnell Douglas factors are used when analyzing discrimination against individuals. Section 60506 might, however, be plausibly read as permitting either approach to intentional discrimination in deployment decisions.

- Unjustified or pretextual explanations that are implausible, inconsistent, or unsupported by facts.[93]

As the DOJ observes, while statistical evidence of patterns of discrimination cannot themselves be used as proof of discriminatory intent, they can be used as supporting evidence in such claims.[94] Critically, as noted in the section above, when dealing with claims of income-based discrimination, this means that challenges to deployment decisions must be made on the basis of bias regarding consumers at a particular *income* level, and cannot be divined through statistical inferences in the myriad factors that are merely correlated with income (such as education, computer ownership, adoption levels, and willingness to pay).

In sum, Section 60506 is an intentional-discrimination statute and the Commission's rules should reflect that fact. To create a disparate impact regime would be to invite a drawn-out legal battle that would likely result in the rules being struck down.

IV. The Commission Should Adopt Sufficient Procedural Protections

The Commission asks whether it should adopt safe harbors, rely on case-by-case inquiry into "technical or economic" feasibility issues, or both.[95] We believe that the FCC needs to establish clear and robust safe harbors and affirmative defenses to discrimination complaints. Without such safe harbors, the administration of Section 60506 would become unwieldy, as the Commission wades through what is likely to be many false positives. There are a few situations that provide *prima facie* evidence that a broadband provider is not impermissibly discriminating against low-income consumers, or consumers in an otherwise protected class.[96]

For instance, in areas where a provider deploys service that is adhering to obligations under federal or state subsidy programs, a provider is obviously trying to reach underserved communities. Any shortcomings in deployment in such an area are almost certainly going to be the result of technical or economic realities. Similarly, where a provider is constrained by federal or state laws regarding permitting or access to rights of way, it would be fruitless to investigate; only once a provider is actually able to deploy legally should it be subject to scrutiny under Section 60506.

Similarly, there are constrains implicit in particular technologies that would make it difficult to accurately assess discrimination in some cases.[97] For example, when examining deployment of

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[93] *See*, *Reeves v. Sanderson Plumbing Prod. Inc.*, 530 U.S. 133, 143–44 (2000).

[94] US DEP. OF JUSTICE, TITLE VI LEGAL MANUAL: PROVING DISCRIMINATION – INTENTIONAL DISCRIMINATION, https://www.justice.gov/crt/fcs/T6Manual6 ("While statistical evidence is not required to demonstrate intentional discrimination, plaintiffs often successfully use statistics to support, along with other types of evidence, a claim of intentional discrimination.").

[95] NPRM, *supra* note 1 at ¶ 35-36.

[96] Indeed, as NCTA notes in its comments, a safe harbor of this kind would give effect to Congress' requirement that the FCC acknowledge constraints on deployment relating to "technical or economic feasibility." NCTA, *supra* note 3 at 25-30.

[97] *See, e.g.*, *Comments of T-Mobile*, GN DOCKET NO. 22-69 (Feb. 21, 2023), at 30-31.

wireless providers, spectrum availability is a major issue that can constrain a provider's ability to deploy in certain areas. Relatedly, the nature of a particular geographic area may limit how signals propagate. Even if a wireless provider fully deploys in such areas, building density or, inversely, sparsely populated areas might appear to be underperforming. In such cases, the Commission should adopt a technological safe harbor that assumes best efforts in certain cases imply good-faith compliance with Section 60506.

Thus, not only do all providers need some form of safe harbor, given the limitations of technology, but the Commission should also employ tailored safe harbors that incorporate the unique features of both wireless and wired providers.

Moreover, safe harbors do more than merely safeguard against an unfair or inefficient process, but may become a virtual necessity if the Commission attempts to rely on a "disparate impact" standard. As USTelecom noted in its comments, related civil-rights laws invariably include safe harbors in the context of fact-dependent, complicated proceedings.[98] These well-established legal proceedings create a formal burden-shifting framework that attempts to capture the economic and business realities underlying challenged practices.[99]

The Commission has also asked whether it would be appropriate to rely on its informal consumer-complaint process as part of its enforcement of Section 60506.[100] An informal complaint process that invites input from individuals directly affected by deployment decisions can make sense in some cases, while in others, a more formal complaint process will be necessary. Even if the Commission can appropriately delineate these cases, certain procedural protections should be in place to ensure the process is not abused.

First, there should be some form of standing requirement, such that a complainant actually is in a position to obtain broadband service, but is unable to do so (or do so at "comparable speeds, capacities, latency, and other quality of service metrics in a given area, for comparable terms and conditions"[101]). Given how large the national deployment footprint is, without an injury-in-fact requirement, opening the process to third parties who lack direct interest would be unmanageable. It would burden both the Commission and providers, who we otherwise want to spend their scarce resources on further deployment. Moreover, private parties with adequate standing who believe they have valid complaints can file through an informal process that could theoretically be handled much more quickly and efficiently.

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[98] *Comments of USTelecom*, GN DOCKET NO. 22-69, (Feb. 21, 2023), at 33-34.

[99] *Id.*

[100] NPRM, *supra* note 1 at ¶ 52.

[101] Section 60506(a)(2).

The Commission also asks whether it should adopt a private right of action or permit state and local government enforcement against broadband providers.[102] Both options are likely to prove unworkable for a number of reasons. First, states and localities are often in a position of both granting access to necessary facilities as well as granting permission for providers to deploy. A right of action for states and localities—or even a process by which states and localities can source complaints in their jurisdiction and try those complaints—would create an imbalance in the bargaining process between providers and state authorities. Those authorities could use the complaint process as a leverage tool to extract inappropriate concessions from providers as they negotiate franchising agreements and other permissions necessary for deployment in particular jurisdictions.[103] Giving them a dual role in this respect—as both a complainant that can use legal process to intervene in providers' deployment decisions as well as a party seeking to conduct an arm's length negotiation with providers—threatens to seriously distort deployment incentives.

Moreover, providers are responsible for managing deployment decisions in a way that inherently crosses jurisdictional barriers, particularly for large providers that cross state lines. A given locality could be in a position to complain about a provider's deployment decision, even if that decision makes technical and economic sense across jurisdictional boundaries. A state or locality is not well-positioned to adjudicate this problem, while the FCC is extremely well-positioned to do so.

Ostensibly in the interests of completeness, the NPRM asks whether it has authority to retroactively pursue claims for digital discrimination.[104] We believe it should go without saying that this procedure should be forward looking. Nothing in Section 60506 suggests that Congress intended to give the FCC authority to pursue providers for previous deployment decisions.

V. Conclusion

It is evident that, while the Commission possesses considerable authority to remedy intentional discrimination under Section 60506, its discretion is not without boundaries. Moreover, it should create safeguards to ensure that the complaint process does not excessively burden Commission staff or erect administrative barriers to providers' efforts to deploy broadband.

Although "income level" is included as a protected category under Section 60506, income can be correlated with such a wide array of variables, which themselves better explain deployment and adoption, that the Commission needs to take care. Trying to construe discrimination on the basis

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[102] NPRM, *supra* note 1 at ¶ 76.

[103] These possibilities open the door for what public-choice economists call "rent extraction," whereby public officials use the ability to control entry into a market for their own benefit. *See* FRED MCCHESNEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION (1997). *See also, ICLE Ex Parte on Sec. 621*, MB DOCKET NO. 05-311 (Jul. 18, 2019), *available at* https://laweconcenter.org/wp-content/uploads/2019/07/ICLE-Comments-on-Implementation-of-Section-621a1-of-the-Cable-Communications-Policy-Act-of-1984.pdf (arguing that local and state franchising authorities often abuse their authority to get in-kind contributions from cable providers far beyond the 5% cost limit).

[104] NPRM, *supra* note 1 at ¶ 92.

of "income" too broadly will surely generate a large number of false positives, and will lead the Commission astray.

Moreover, Section 60506 employs language directly related to case law centered on "intentional discrimination" and further includes crucial provisions directing the Commission to consider technical and economic feasibility. This legislative framework exists against the backdrop of the Supreme Court's expanding "major questions" doctrine. With the law and the economics taken together, it is clear that the Commission should not adopt a "disparate impact" test under Section 60506. Moreover, it is crucial to remember that "income" remains a slippery metric to judge, and attempts to use correlational proxies in a discrimination analysis are fraught. As such, claims based on income discrimination should be rooted in bias regarding particular income levels, all else equal. It is critical that Section 60506 not be used as a cudgel against providers as they attempt to balance the opportunity costs of competing deployment opportunities.

The FCC rules should also articulate a presumption of nondiscrimination in which allegations of digital discrimination must be demonstrated, rather than a presumption of discrimination that must be rebutted for each deployment decision. This presumption should furthermore be coupled with adequate safe harbors that allow that Commission to consider defenses based on "technical and economic" feasibility in an expedited manner. Otherwise, given the economic realities discussed above, there is an unacceptably high chance that every one of a provider's decisions will be subject to challenge, wasting the resources of both the Commission and the providers.

The largest takeaway is that *adoption* matters quite a bit. Indeed, one of the biggest issues affecting economic feasibility is consumers' ability and willingness to pay. Moreover, Congress has recognized this reality in its recent legislation. The IIJA's Broadband Equity and Access program provides more than $42 billion in grants to state programs to help them support providers and give assistance directly to users.[105] The Affordable Connectivity Program provided another $14 billion in funding to help users pay for devices and broadband connections.[106] In our estimation, the Commission stands to do the most good by championing and shepherding programs like these.

If the Commission has good evidence of intentional discrimination in the deployment of broadband, it has a role to play in preventing it. But without strong, compelling evidence of intentional discrimination, the FCC will waste scarce resources chasing bogeymen.

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[105] *Broadband Equity, Access, and Deployment Program*, BROADBANDUSA, https://broadbandusa.ntia.doc.gov/resources/grant-programs/broadband-equity-access-and-deployment-bead-program (last visited Oct. 23, 2022).

[106] *Affordable Connectivity Program*, FEDERAL COMMUNICATIONS COMMISSION, https://www.fcc.gov/acp (last visited Oct. 23, 2022).