United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Stephanie N. O'Banion
Acting Clerk of Court

VOICE (314) 244-2400
FAX (314) 244-2780
www.ca8.uscourts.gov

May 03, 2024

Jennifer Erickson Baak
HILGERS & GRABEN
Suite 2800
600 17th Street
Denver, CO 80202

RE: 24-1179 Minnesota Telecom Alliance v. FCC, et al
24-1183 MCTA v. FCC, et al
24-1301 Ohio Telecom Association v. FCC, et al
24-1304 Ohio Cable Telecommunications Assoc. v. FCC, et al
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24-1411 Wireless Infrastructure Assoc., et al v. FCC, et al
24-1444 WISPA v. FCC, et al
24-1509 Nat'l Multifamily Housing Council v. FCC, et al

Dear Counsel:

The amicus curiae brief of the Information Technology & Innovation Foundation and International Center for Law & Economics has been filed. If you have not already done so, please complete and file an Appearance form. You can access the Appearance Form at www.ca8.uscourts.gov/all-forms.

Please note that Federal Rule of Appellate Procedure 29(g) provides that an amicus may only present oral argument by leave of court. If you wish to present oral argument, you need to submit a motion. Please note that if permission to present oral argument is granted, the court's usual practice is that the time granted to the amicus will be deducted from the time allotted to the party the amicus supports. You may wish to discuss this with the other attorneys before you submit your motion.

Stephanie N. O'Banion
Acting Clerk of Court

CRJ

Enclosure(s)

cc: Alizeh Ahmad
Cory L. Andrews
Ellie Jean Bailey
Corbin Barthold
Rosa L. Baum
Joseph A. Bingham
Matthew A. Brill
Jeremy Joseph Broggi
Edward G. Caspar
Sarah Citrin
Stephen E. Coran
Paul Richard Draper
James E. Dunstan
Jonathan Yates Ellis
P. Michele Ellison
John P. Elwood
Claire Fahlman
Merrick B. Garland
Boyd Garriott
Zoe A. Jacoby
Thomas M. Johnson Jr.
Jeffrey Alan Lamken
Jacob Matthew Lewis
Roman Martinez
David B. Meschke
Dan Morenoff
Robert Nicholson
Michael H. Pryor
Morgan L. Ratner
William Scher
Andrew Jay Schwartzman
Michael J. Showalter
Grace Greene Simmons
Gerard Sinzdak
Adam Sorensen
Blake E. Stafford
Berin Szoka
Thomas Scott Thompson
William Turner
Jeffrey B. Wall
Connie Lu Wang
Robert J. Wiggers
Erin Elizabeth Wilcox

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No. 24-1179 (and consolidated cases)

In the United States Court of Appeals for the Eighth Circuit

MINNESOTA TELECOM ALLIANCE, ET AL.,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION; UNITED STATES OF AMERICA,
Respondents.

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

BRIEF OF THE INTERNATIONAL CENTER FOR LAW & ECONOMICS AND THE INFORMATION TECHNOLOGY & INNOVATION FOUNDATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS AND SETTING ASIDE THE COMMISSION'S ORDER

BEN SPERRY
KRISTIAN STOUT
INTERNATIONAL CENTER FOR LAW & ECONOMICS
1104 NW 15TH AVE., STE. 300
PORTLAND, OR 97207
609.807.8688

JOE KANE
INFORMATION TECHNOLOGY & INNOVATION FOUNDATION
700 K ST. NW, STE. 600
WASHINGTON, D.C. 2001
(202) 449-1351

JENNIFER M. ERICKSON BAAK
HILGERS GRABEN, PLLC
600 17th Street
Denver, CO 80202
(773) 407-5502
jericksonbaak@hilgersgraben.com

Counsel for Amici Curiae

FEDERAL RULE OF APPELLATE PROCEDURE 29(A)(4)(A) &(E)
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Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(A), the International Center for Law & Economics ("ICLE") hereby states that ICLE is registered as a 501(c)(3) nonprofit in the United States of America. ICLE does not have a parent corporation and no entity or individuals own any stock in ICLE.

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FEDERAL RULE OF APPELLATE PROCEDURE 29(A)(4)(A) &(E)
STATEMENTS OF THE
INFORMATION TECHNOLOGY & INNOVATION FOUNDATION

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STATEMENTS OF INTEREST

The International Center for Law & Economics ("ICLE") is a nonprofit, non-partisan global research and policy center that builds intellectual foundations for sensible, economically grounded policy. ICLE promotes the use of law and economics methodologies and economic learning to inform policy debates and has longstanding expertise evaluating law and policy.

ICLE scholars have written extensively in the areas of telecommunications and broadband policy. This includes white papers, law journal articles, and amicus briefs touching on issues related to the provision and regulation of broadband Internet service.

The FCC's final rule by Report and Order adopted on January 22, 2024 concerning "digital discrimination" (the Order) constitutes a significant change to an economic policy. Broadband alone is a $112 billion industry with over 125 million customers. If permitted to stand, the FCC's broad Order will be harmful to the dynamic marketplace for broadband that presently exists in the United States.

The Information Technology and Innovation Foundation ("ITIF") is an independent non-profit, non-partisan think tank. ITIF's mission is to formulate, evaluate, and promote policy solutions that accelerate innovation and boost productivity to spur growth, opportunity, and progress. To that end, ITIF strives to provide policymakers around the world with high-quality information, analysis, and recommendations they can trust. ITIF adheres to the highest standards of research

integrity, guided by an internal code of ethics grounded in analytical rigor, policy pragmatism, and independence from external direction or bias.

ITIF's mission is to advance public policies that accelerate the progress of technological innovation. ITIF believes that innovation can almost always be a force for good. It is the major driver of human advancement and the essential means for improving societal welfare. A robust rate of innovation makes it possible to achieve many other goals—including increases in median per-capita income, improved health, transportation mobility, and a cleaner environment. ITIF engages in policy and legal debates, both directly and indirectly, by presenting policymakers, courts, and other policy influencers with compelling data, analysis, arguments, and proposals to advance effective innovation policies and oppose counterproductive ones.

The FCC's Order will have a significant impact on the speed and adoption of technological innovation in the United States. The Order not only raises the cost of deployment investments, but it also increases the risk of liability for discrimination, thereby increasing the uncertainty of the investments' returns. As a result, the Order will not only stifle new deployment to unserved areas, but also will delay network upgrades and maintenance out of fear of alleged disparate effects.

Pursuant to Federal Rule of Appellate Procedure 29(a)(2), ICLE and ITIF have obtained consent of the parties to file the instant Brief of the International Center for Law & Economics and the Information Technology and Innovation Foundation as Amici Curiae In Support of Petitioners.

INTRODUCTION AND SUMMARY OF ARGUMENT

The present marketplace for broadband in the United States is dynamic and generally serves consumers well. *See* Geoffrey A. Manne, Kristian Stout, & Ben Sperry, *A Dynamic Analysis of Broadband Competition: What Concentration Numbers Fail to Capture* (ICLE White Paper, Jun. 2021), https://laweconcenter.org/wp-content/uploads/2021/06/A-Dynamic-Analysis-of-Broadband-Competition.pdf. Broadband providers acting in the marketplace have invested $2.1 trillion in building, maintaining, and improving their networks since 1996, including $102.4 billion in 2022 alone. *See* USTelecom, *2022 Broadband Capex Report* (Sept. 8, 2023), https://www.ustelecom.org/research/2022-broadband-capex/. The FCC's own data suggests that 91% of Americans have access to high-speed broadband under its new and faster definition. *See* 2024 706 Report, FCC 24-27, GN Docket No. 22-270, at paras. 20, 22 (Mar. 18, 2024).

Despite this, there are areas in the country, primarily due to low population density, where serving consumers is prohibitively expensive. Moreover, affordability remains a concern for some lower-income groups. To address these concerns, Congress passed the Infrastructure Investment and Jobs Act (IIJA), Pub. L. No. 117-58, 135 Stat. 429, which invested $42.5 billion in building out broadband to rural areas through the Broadband Equity, Access, and Deployment (BEAD) Program, and billions more in the Affordable Connectivity Program (ACP), which provided low-income individuals a

$30 per month voucher. Congress's passage of the IIJA was consistent with sustaining the free and dynamic market for broadband.

In addition, to address concerns that broadband providers could engage in discriminatory behavior in deployment decisions, Section 60506(b) of IIJA requires that "[n]ot later than 2 years after November 15, 2021, the Commission shall adopt final rules to facilitate equal access to broadband internet access services, taking into account the issues of technical and economic feasibility presented by that objective, including… preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin." Pub. L. No. 117-58, § 60506(b)(1), 135 Stat. 429, 1246.

The FCC adopted the final rule by Report and Order in the Federal Register on January 22, 2024. *See* 89 Fed. Reg. 4128 (Jan. 22, 2024) [hereinafter "Order"] attached as the Addendum to Petitioners' Brief ("Pet. Add."). But the digital discrimination rule issued in this Order is inconsistent with the IIJA, so expansive as to claim regulatory authority over major political and economic questions, and is arbitrary and capricious. As a result, this Court must vacate it.

The FCC could have issued a final rule consistent with the statute and the dynamic broadband marketplace. Such a rule would have recognized the limited purpose of the statute was to outlaw intentional discrimination by broadband providers in deployment decisions, in a way that would treat a person or group of persons less favorably than others because of a listed protected trait. This rule would be workable,

leaving the FCC to focus its attention on cases where broadband providers fail to invest in deploying networks due to animus against those groups.

Instead, the FCC chose to create an expansive regulatory scheme that gives it essentially unlimited discretion over anything that would affect the adoption of broadband. It did this by adopting a differential impact standard that applies not only to broadband providers, but to anyone that could "otherwise affect consumer access to broadband internet access service," *see* 47 CFR §16.2 (definition of "Covered entity"), which includes considerations of price among the "comparable terms and conditions." *See* Pet. Add. 59, Order at para. 111 ("Indeed, pricing is often the most important term that consumers consider when purchasing goods and services… this is no less true with respect to broadband internet access services."). Taken together, these departures from the text of Section 60506 would give the FCC nearly unlimited authority over broadband providers, and even a great deal of authority over other entities that can affect broadband access.

To interpret Section 60506 to encompass a "differential impact" standard, as the agency has done here, leads to a situation in which covered entities that have no intent to discriminate or even take active measures to help protected classes could still be found in violation of the rules. This standard opens nearly everything to FCC review because of the correlation of profit-maximizing motivations not covered by the statute with things that are covered by the statute.

Income level, race, ethnicity, color, religion, and national origin are often incidentally associated with some other non-protected factor important for investment decisions. Specifically, population density is widely recognized as one of the determinants of expected profitability for broadband deployment. *See* Eric Fruits & Kristian Stout, *The Income Conundrum: Intent and Effects Analysis of Digital Discrimination* (ICLE Issue Brief 2022-11-14) *available at* https://laweconcenter.org/wp-content/uploads/2022/11/The-Income-Conundrum-Intent-and-Effects-Analysis-of-Digital-Discrimination.pdf *citing* U.S. Gov't Accountability Office, GAO-06-426, Telecommunications Broadband Deployment Is Extensive Throughout the United States, but It Is Difficult to Assess the Extent of Deployment Gaps in Rural Areas 19 (2006) (population density is the "most frequently cited cost factor affecting broadband deployment" and "a critical determinant of companies' deployment decisions"). But population density is also correlated with income level, with higher density associated with higher incomes. *See* Daniel Hummel, *The Effects of Population and Housing Density in Urban Areas on Income in the United States*, 35 LOC. ECON. 27, Feb. 7, 2020, (showing statistically significant positive relationship between income and both population and housing density). Higher population density is also correlated with greater racial, ethnic, religious, and national origin diversity. *See, e.g.,* Barrett A. Lee & Gregory Sharp, *Diversity Across the Rural-Urban Continuum*, 672 Annals Am. Acad. Pol. & Soc. Sci. 26 (2017).

Consider a hypothetical provider who eschews discrimination against any of the protected traits in its deployment practices by prioritizing its investments *solely* on

population density, deploying to high-density areas first then lower-density areas later. If higher-density areas are also areas with higher incomes, then it would be relatively easy to produce a statistical analysis showing that lower-income areas are associated with lower rates of deployment. Similarly, because of the relationships between population density and race, ethnicity, color, religion, and national origin, it would be relatively easy to produce a statistical analysis showing disparate impacts across these protected traits.

With so many possible spurious correlations, it is almost impossible for any covered entity to know with any certainty whether its policies or practices could be actionable for differential impacts. Nobel laureate, Ronald Coase, is reported to have said, "If you torture the data long enough, it will confess." 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. The FCC's Order amounts to an open invitation to torture the data.

While it is possible that the FCC could determine that the costs of deployment due to population density or another profit-relevant reason go to "technical or economic feasibility," the burden to prove infeasibility are on the covered entity by a preponderance of the evidence standard. *See* 47 CFR §16.5(c)-(d). This may include "proof that available, less discriminatory alternatives were not reasonably achievable." *See* 47 CFR §16.5(c). In its case-by-case review process, there is no guarantee that the Commission will agree that "technical or economic feasibility" warrants an exception

in any given dispute. *See* 47 CFR §16.5(e). This rule will put a great deal of pressure on covered entities to avoid possible litigation by getting all plans pre-approved by the FCC through its advisory opinion authority. *See* 47 CFR §16.7. This sets up the FCC to be a central planner for nearly everything related to broadband, from deployment to policies and practices that affect even adoption itself, including price of the service. This is inconsistent with preserving the ability of businesses to make "practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system." *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 533 (2015). The Order will thus dampen investment incentives because "the specter of disparate-impact litigation" will cause private broadband providers to "no longer construct or renovate" their networks, leading to a situation where the FCC's rule "undermines its own purpose" under the IIJA "as well as the free market system." *Id.* at 544.

ARGUMENT

The FCC's Order is unlawful. First, the Order's interpretation of Section 60506 is inconsistent with the structure of the IIJA. Second, the Order is inconsistent with the clear meaning of Section 60506. Third, the Order raises major questions of political and economic significance by giving the FCC nearly unlimited authority over broadband deployment decisions, including price. Fourth, the Order is arbitrary and capricious because it fails to adopt a rule that is reasonable insofar as it will end up reducing investment incentives of broadband providers to deploy and improve broadband

service, which is inconsistent with the purpose of the IIJA. Finally, the Order's vagueness leaves a person of ordinary intelligence no ability to know whether they are subject to the law and thus gives the FCC the ability to engage in arbitrary and discriminatory enforcement.

I. The Order's Interpretation of Section 60506 is Inconsistent with the Structure of the IIJA

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). The structure of the IIJA as a whole, as well as the fact that Section 60506, in particular, was not placed within the larger Communications Act (47 U.S.C. §150 et seq.) that gives the FCC authority, suggests that the Order claims authority far beyond what Congress has granted the FCC.

The IIJA divided broadband policy priorities between different agencies and circumscribes the scope of each program or rulemaking it delegates to agencies. Section 60102 addressed the issue of universal broadband deployment by creating the Broadband Equity, Access, and Deployment (BEAD) Program. *See* IIJA §60102. The statute designated the National Telecommunication and Information Administration (NTIA) to administer this $42.45 billion program with funds to be first allocated to deploy broadband service to all areas that currently lack access to high-speed broadband Internet. *See* IIJA §60102(b), (h). BEAD is, therefore, Congress's chosen method to

remedy disparities in broadband deployment due to cost-based barriers like low population density. Section 60502 then created the Affordable Connectivity Program (ACP), which provided low-income individuals a $30 per month voucher, and delegated its administration to the FCC. *See* IIJA §60502. ACP is, therefore, Congress's chosen method to remedy broadband affordability for households whose low income is a barrier to broadband adoption. Title V of Division F of the IIJA goes on to create several more broadband programs, each with a specific and limited scope. *See* IIJA § 60101 et seq.

In short, Congress was intentional about circumscribing the different problems with broadband deployment and access, as well as the scope of the programs it designed to fix them. Section 60506's authorization for the FCC to prevent "digital discrimination" fits neatly into this statutory scheme if it targets disparate treatment in deployment decisions based upon protected status—i.e., intentional harmful actions that are distinct from deployment decisions based on costs of deployment or projected demand for broadband service. But the FCC's Order vastly exceeds this statutory scope and claims authority over virtually every aspect of the broadband marketplace, including infrastructure deployment decisions due to cost generally and the potential market for the networks once deployed. Indeed, the FCC envisions scenarios in which its rules conflict with other federal funding programs but nevertheless says that compliance with them is no safe harbor from liability for disparate impacts that compliance creates. *See* Pet. Add. 69-70, Order at para. 142. The Order thus dramatically exceeds the

boundaries Congress set in Section 60506. Congress cannot have meant for section 60506 to remedy all deployment disparities or all issues of affordability because it created BEAD and ACP for those purposes.

Moreover, 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 IIJA was not meant to give the FCC vast authority over broadband deployment and adoption by implication. The FCC must rely on Section 60506 alone for any authority it was given to combat digital discrimination.

II. The Order is Inconsistent with the Clear Meaning of the Text of Section 60506

The text of Section 60506 plainly shows that the intention of Congress to combat digital discrimination was through the use of circumscribed rules aimed at preventing intentional discrimination in deployment decisions by broadband providers. The statute starts with a statement of policy in part (a) and then gives the Commission direction to fulfill that purpose in parts (b) and (c).

The statement of policy in Section 60506(a) is exactly that: a statement of policy. Courts have long held that statutory sections like Section 60506(a)(1) and (a)(3) using words like "should" are "precatory." *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). While the statement of policy helps illuminate the goal of the provision at issue, it does not actually give the FCC authority. The goal of the statute is clear: to make sure the Commission prevents intentional discrimination in deployment decisions. For instance, Section 60506(c) empowers the Commission (and the Attorney General) to ensure federal policies promote equal access by prohibiting intentional deployment discrimination. *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…"). Moreover, the definition of equal access as "equal opportunity to subscribe," *see* 47 U.S.C. §1754(a)(2), does not imply a disparate impact analysis. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2339 (2021) ("[T]he mere fact there is some disparity in impact does not necessarily mean… that it does not give everyone an equal opportunity.")

There is no evidence that IIJA's drafters intended the law to be read as broadly as the Commission has done in its rules. The legislative record on Section 60506 is exceedingly sparse, containing almost no discussion of the provision beyond assertions that "broadband ought to be available to all Americans," 167 Cong. Rec. 6046 (2021), and also that the IIJA was not to be used as a basis for the "regulation of internet rates."167 Cong. Rec. 6053 (2021). The FCC argues that since "there is little evidence in the legislative history… that impediments to broadband internet access service are the result of intentional discrimination," Congress must have desired a disparate impact standard. *See* Pet. Add. 25, Order at para. 47. But the limited nature of the problem

suggests a limited solution in the form of a framework aimed at preventing such discrimination. Given the sparse evidence on legislative intent, Section 60506 should be read as granting a limited authority to the Commission.

With Section 60506(b), Congress gave the Commission a set of tools to identify and remedy acts of intentional discrimination by broadband providers in deployment decisions. As we explain below, under both the text of Section 60506 and the Supreme Court's established jurisprudence, the Commission was not empowered to employ a disparate-impact (or "differential impact") analysis under its digital discrimination rules.

Among the primary justifications for disparate-impact analysis is to remedy historical patterns of *de jure* segregation that left an indelible mark on minority communities. *See Inclusive Communities*, 576 at 528-29. 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. In enacting its rules that give it presumptive authority over nearly all decisions related to broadband deployment and adoption, the FCC failed to adequately take this history into account.

Beyond the policy questions, however, Section 60506 cannot be reasonably construed as authorizing disparate-impact analysis. While the Supreme Court has allowed disparate-impact analysis in the context of civil-rights law, it has imposed some important limitations. To find disparate impact, the statute must be explicitly directed

"to the consequences of an action rather than the actor's intent." *Inclusive Communities.,* 576 U.S. at 534. There, the Fair Housing Act made it unlawful:

> 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.

42 U.S.C. §3604(a) (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. *Inclusive Communities.,* 576 U.S. at 534. Such phrases, the Court found, "refer[] to the consequences of an action rather than the actor's intent." *Id.* 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.

Id. at 534-35.

Previous Court opinions help parse the distinction between statutes limited to intentional discrimination claims and those that allow for disparate impact claims. Particularly relevant here, the Court looked at language from Section 601 of the Civil Rights Act stating that "[n]o 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," 42 U.S.C. §2000d (emphasis added), and found it "beyond dispute—and no party disagrees—that [it] prohibits only intentional discrimination." *Alexander v. Sandoval*, 532 U.S. 275, 280 (2001).

Here, the language of Section 60506" ("based on") mirrors the language of Section 601 of the Civil Rights Act ("on the ground of"). Moreover, it is consistent with the reasoning of *Inclusive Communities* that determines when a statute allows for disparate impact analysis. *Inclusive Communities* primarily based its opinion on the "otherwise make unavailable" language at issue, with a particular focus on "otherwise" creating a more open-ended inquiry. *See Inclusive Communities*, 576 U.S. at 534 ("Here, the phrase 'otherwise make unavailable' is of central importance to the analysis that follows"). Such language is absent in Section 60506. Moreover, the closest analogy for Section 60506's "based on" language is the "on the ground of" language of Title VI of the Civil Rights Act, which also does not include the "otherwise" language found to be so important in *Inclusive Communities*. *Compare* 42 U.S.C. §2000d *with Inclusive Communities*, 576 U.S. at 534-35 (focusing on how "otherwise" is a catch-all phrase looking to consequences instead of intent). 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.

Thus, since Section 60506 was drafted without "results-oriented language" and instead frames the prohibition against digital discrimination as "***based on*** income level, race, ethnicity, color, religion, or national origin," this would put the rule squarely within the realm of prohibitions on *intentional* discrimination. 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.

III. Congress Did Not Clearly Authorize the FCC to Decide a Major Question in this Order

To read Section 60506 of the IIJA as broadly as the FCC does in the Order invites a challenge under the major-questions doctrine. There are "extraordinary cases" where the "history and the breadth of the authority" that an agency asserts and the "economic and political significance" of that asserted authority provide "reason to hesitate before concluding that Congress" meant to confer such authority. *See West Virginia v. EPA*, 597 U.S. 697, 721 (2022) (*quoting FDA v. Brown & Williamson*, 529 U.S. 120, 159-60 (2000)). In such cases, "something more than a merely plausible textual basis for agency action is necessary. The agency instead must point to 'clear congressional authorization' for the power it claims." *Id.* at 723 (*quoting Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014).

Here, the FCC has claimed dramatic new powers over the deployment of broadband Internet access, and it has exercised that alleged authority to create a process

for inquiry into generalized civil rights claims. Such a system is as unprecedented as it is important to the political and economic environment of the country. The FCC itself implicitly recognizes this fact when it emphasizes the critical importance of Internet access as necessary "to meet basic needs." Broadband alone is a $112 billion industry with over 125 million customers. *See The History of US Broadband*, S&P Global (last accessed May 11, 2023), https://www.spglobal.com/marketintelligence/en/news-insights/research/the-history-of-us-broadband. This doesn't even include all the entities covered by this Order, which also includes all those who could "otherwise affect consumer access to broadband internet access service." *See* 47 CFR §16.2. There is, therefore, no doubt that the Order is of great economic and political significance.

This would be fine if the statute clearly delegated such power to the FCC. But the only potential source of authority for the Order is Section 60506. Since the text of Section 60506 can be (and is better) read as *not* giving the FCC such authority, it simply *can't* be an unambiguous delegation of authority.

As argued above, Congress knows how to write a disparate-impact statute in light of Supreme Court jurisprudence. Put simply, Congress did not write a disparate-impact statute here because there is no catch-all language comparable to what the Supreme Court has pointed to in statutes like the FHA. *Cf. Inclusive* Communities, 576 U.S. at 533 (finding a statute includes disparate-impact liability when the "text refers to the consequences of actions and not just the mindset of actors"). At best, Section 60506 is

ambiguous in giving the authority to the FCC to use disparate impact analysis. That is simply not enough when regulating an area of great economic and political significance.

In addition to the major question of whether the FCC may enact its vast disparate impact apparatus, the FCC claims vast authority over the economically and politically significant arena of broadband rates despite no clear authorization to do so in Section 60506. In fact, in the legislative record, Congress explicitly wanted to avoid the possibility that the IIJA would be used as the basis for the "regulation of internet rates." 167 Cong. Rec. 6053 (2021). The FCC disclaims the authority to engage in rate regulation, but it does claim authority for "ensuring pricing consistency." *See* Pet. Add. 56-57, Order at para. 105. While the act of assessing the comparability of prices is not rate regulation in the sense that the Communications Act contemplates, a policy that holds entities liable for those disparities such that an ISP must adjust its prices until it matches an FCC definition of "comparable" is tantamount to setting that rate. *See* Eric Fruits & Geoffrey Manne, *Quack Attack: De Facto Rate Regulation in Telecommunications* (ICLE Issue Brief 2023-03-30), *available at* https://laweconcenter.org/wp-content/uploads/2023/03/De-Facto-Rate-Reg-Final-1.pdf (describing how the FCC often engages in rate regulation in practice even when it doesn't call it that).

Furthermore, the Order could also allow the FCC to use the rule to demand higher service quality under the "comparable terms and conditions" language, even if consumers may prefer lower speeds for less money. That increased quality comes at a cost that will necessarily increase the market price of broadband. In this way, the Order

would allow the FCC to set a price floor even if it never explicitly requires ISPs to submit their rates for approval.

The elephant of rate regulation is not hiding in the mousehole of Section 60506. *Cf. Whitman v. American Trucking Assns., Inc.,* 531 U.S. 457, 468 (2001). Indeed, the FCC itself forswears rate regulation in an ongoing proceeding in which the relevant statute would clearly authorize it. *See* Safeguarding and Securing the Open Internet, 88 Fed. Reg. 76048 (proposed Nov. 3, 2023) (to be codified at 47 CFR pts. 8, 20). Nevertheless, the FCC recognized that rate regulation is inappropriate for the broadband marketplace and has declined its application in that proceeding. Even here, the FCC has denied that including pricing within the scope of the rules is "an attempt to institute rate regulation." *See* Pet. Add. 59, Order at para. 111. But despite its denials, the FCC's claim of authority would allow it to regulate prices despite nothing in Section 60506 granting it authority to do so. The FCC should not be able to recognize a politically significant consensus against rate regulation one minute and then smuggle that disfavored policy in through a statute that never mentions it the next.

Finally, as noted above, since many of the protected characteristics, but especially income, can be correlated with many factors relevant to profitability, it would be no surprise that almost any policy or practice of a covered entity under the Order could be subject to FCC enforcement. And since there is no guarantee that the FCC would agree in a particular case that technical or economic feasibility justifies a particular policy or practice, nearly everything a broadband provider or other covered entities do would

likely need pre-approval under the FCC's advisory opinion process. This would essentially make the FCC a central planner of everything related to broadband. In other words, the FCC has clearly claimed authority far beyond what Congress could have imagined without any clear authorization to do so.

IV. The Order is Arbitrary and Capricious Because it will Produce Results Inconsistent with the Purpose of the Statute

As noted above, the purposes of the broadband provisions of the IIJA are to encourage broadband deployment, enhance broadband affordability, and prevent discrimination in broadband access. Put simply, the purpose is to get more Americans to adopt more broadband, regardless of income level, race, ethnicity, color, religion, or national origin. The FCC's Order should curtail discrimination, but the aggressive and expansive police powers the agency grants itself will surely diminish investments in broadband deployment and efforts to encourage adoption. We urge the Court to vacate the Order and require the FCC to adopt rules limited to preventing *intentional* discrimination in *deployment* by broadband Internet access service *providers*. More narrowly tailored rules would satisfy Section 60506's mandates while preserving incentives to invest in deployment and encourage adoption. *Cf. Cin. Bell Tel. Co. v. FCC*, 69 F.3d 752, 761 (6th Cir. 1995) ("The FCC is required to give [a reasoned] explanation when it declines to adopt less restrictive measures in promulgating its rules."). But the current Order is arbitrary and capricious because the predictable results of the rules would be inconsistent with the purpose of the IIJA in promoting broadband

deployment. *See Motor Vehicle Mfrs. Ass'n v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) ("[A]n agency rule would be arbitrary and capricious if the agency has… offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view of the product of agency expertise").

The Order spans nearly every aspect of broadband deployment, including, but not limited to network infrastructure deployment, network reliability, network upgrades, and network maintenance. Pet. Add. 58, Order ¶ 108. In addition, the Order covers a wide range of policies and practices that while not directly related to deployment, affect the profitability of deployment investments, such as pricing, discounts, credit checks, marketing or advertising, service suspension, and account termination. Pet. Add. 58, Order ¶ 108.

Like all firms, broadband providers have limited resources with which to make their investments. While profitability (*i.e.*, economic feasibility) is a necessary precondition for investment, not all profitable investments can be undertaken. Among the universe of economically feasible projects, firms are likely to give priority to those that promise greater returns on investment relative to those with lower returns. Returns on investment in broadband depend on several factors. Population density, terrain, regulations, and taxes are all important cost factors, while a given consumer population's willingness to adopt and pay for broadband are key demand-related factors. Anything that raises the cost of expected cost deployment or reduces the

demand for service can turn a profitable investment into an unprofitable prospect or downgrade its priority relative to other investment opportunities.

The Order not only raises the cost of deployment investments, but it also increases the risk of liability for discrimination, thereby increasing the *uncertainty* of the investments' returns. Because of the well-known and widely accepted risk-return tradeoff, firms that face increased uncertainty in investment returns will demand higher expected returns from the investments they pursue. This demand for higher returns means that some projects that would have been pursued under more limited digital discrimination rules will not be pursued under the current Order.

The Order will not only stifle new deployment to unserved areas, but also will delay network upgrades and maintenance out of fear of alleged disparate effects. At the extreme, providers will be faced with the choice to upgrade everyone or upgrade no one. Because they cannot afford to upgrade everyone, then they will upgrade no one.

It might be argued that providers could avoid some of the *ex post* regulatory risk by *ex ante* seeking pre-approval under the FCC's advisory opinion process. Such processes are costly and are not certain to result in approval. Even if approved, the FCC reserves to right to rescind the pre-approval. *See* Pet. Add. 75, Order ¶ 156 ("[A]dvisory opinions will be issued without prejudice to the Enforcement Bureau's or the Commission's ability to reconsider the questions involved, and rescind the opinion. Because advisory opinions would be issued by the Enforcement Bureau, they would also be issued without prejudice to the Commission's right to later rescind or revoke

the findings."). Under the Order's informal complaint procedures, third parties can allege discriminatory effects associated with pre-approved policies and practices that could result in the recission of pre-approval. The result is an unambiguous increase in deployment and operating costs, even with pre-approval.

Moreover, by imposing liability for disparate impacts outside the control of covered broadband providers, the Order produces results inconsistent with the purpose of the IIJA because parties cannot conform their conduct to the rules. Among the 7% of households who do not use the internet at home, more than half of Current Population Survey (CPS) respondents indicated that they "don't need it or [are] not interested." George S. Ford, *Confusing Relevance and Price: Interpreting and Improving Surveys on Internet Non-adoption*, 45 TELECOMM. POL'Y, Mar. 2021. ISPs sell broadband service, but they cannot force uninterested people to buy their product.

Only 2-3% of U.S. households that have not adopted at-home broadband indicate it is because of a lack of access. Eric Fruits & Geoffrey Manne, *Quack Attack: De Facto Rate Regulation in Telecommunications* (ICLE Issue Brief 2023-03-30) at Table 1, *available at* https://laweconcenter.org/wp-content/uploads/2023/03/De-Facto-Rate-Reg-Final-1.pdf. And even this tiny fraction is driven by factors such as topography, population density, and projected consumer demand. Differences in these factors will be linked to differences in broadband deployment, but there is little that an ISP can do to change them. If the FCC's command could make the mountainous regions into flat plains, it would have done so already. It is nonsensical to hold liable a company

attempting to overcome obstacles to deployment because they do not do so simultaneously everywhere. And it is not a rational course of action to address a digital divide by imposing liability on entities that cannot fix the underlying causes driving it.

Punishment exacted on an ISP will not produce the broadband access the statute envisions for all Americans. In fact, it will put that access further out of reach by incentivizing ISPs to reduce the speed of deployments and upgrades so that they do not produce inadvertent statistical disparities. Given the statute's objective of enhancing broadband access, the FCC's rulemaking must contain a process for achieving greater access. The Order does the opposite and, therefore, cannot be what Congress intended. *Cf. Inclusive Communities*, 576 U.S. at 544 ("If the specter of disparate-impact litigation causes private developers to no longer construct or renovate housing units for low-income individuals, then the FHA would have undermined its own purpose as well as the free-market system.").

The Order will result in less broadband investment by essentially making the FCC the central planner of all deployment and pricing decisions. This is inconsistent with the purpose of Section 60506, making the rule arbitrary and capricious.

V. The Order's Vagueness Gives the FCC Unbounded Power

The Order's digital discrimination rule is vague because it does not have "sufficient definiteness that ordinary people can understand what conduct is prohibited." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). As a result, the FCC has claimed unbounded power to engage in "arbitrary and discriminatory enforcement." *Id.*

As argued above, the disparate impact standard means that anything that is correlated with income, which includes many things that may be benignly relevant to deployment and pricing decisions, could give rise to a possible violation of the Order.

While a covered entity could argue that there are economic or technical feasibility reasons for a policy or practice, the case-by-case nature of enforcement outlined in the Order means that no one can be sure of whether they are on the right side of the law. *See* 47 CFR §16.5(e) ("The Commission will determine on a case-by-case basis whether genuine issues of technical or economic feasibility justified the adoption, implementation, or utilization of a [barred] policy or practice…").

This vagueness is not cured by the presence of the Order's advisory opinion process because the FCC retains the right to bring an enforcement action anyway after reconsidering, rescinding, or revoking it. *See* 47 CFR §16.5(e) ("An advisory opinion states only the enforcement intention of the Enforcement Bureau as of the date of the opinion, and it is not binding on any party. Advisory opinions will be issued without prejudice to the Enforcement Bureau or the Commission to reconsider the questions involved, or to rescind or revoke the opinion. Advisory opinions will not be subject to appeal or further review"). In other words, there is no basis for concluding a covered entity has "the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process." *Cf. Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). The FCC may engage in utterly arbitrary and discriminatory enforcement under the Order.

Moreover, the Order's expansive definition of covered entities to include any "entities that provide services that facilitate and affect consumer access to broadband internet access service," 47 CFR § 16.2 (definition of "Covered entity", which includes "Entities that otherwise affect consumer access to broadband internet access service"), also leads to vagueness as to *whom* the digital discrimination rules apply. This would arguably include state and local governments and nonprofits, as well as multi-family housing owners, many of whom may have no idea they are subject to the FCC's digital discrimination rules nor any idea of how to comply.

The Order is therefore void for vagueness because it does not allow a person of ordinary intelligence to know whether they are complying with the law and gives the FCC nearly unlimited enforcement authority.

CONCLUSION

For the foregoing reasons, ICLE and ITIF urge the Court to set aside the FCC's Order.

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Respectfully submitted,

s/ Jennifer M. Erickson Baak
Jennifer M. Erickson Baak
Hilgers Graben, PLLC
600 17th Street
Denver, CO 80202
(773) 407-5502
jericksonbaak@hilgersgraben.com

Attorney for Amici Curiae the International Center for Law & Economics and the Information Technology & Innovation Foundation

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Dated: May 3, 2024

/s/ Jennifer M. Erickson Baak
Jennifer M. Erickson Baak

CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I hereby certify that on May 3, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Jennifer M. Erickson Baak
Jennifer M. Erickson Baak