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COMMENTS OF ITIF

Before the

Federal Communications Commission

Washington, D.C.

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

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INTRODUCTION AND SUMMARY

The Infrastructure Investment and Jobs Act ("IIJA") provides the federal government with the resources necessary to close the digital divide based on lack of service in certain geographic areas and make broadband available to all Americans.[1] ITIF appreciates this opportunity to comment on how the Federal Communications Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking ("NPRM" or "Notice") should implement the provisions of the IIJA related to purported "digital discrimination."[2] The Commission's primary goal in this rulemaking should be adherence to the text of the statute and to close the digital divide. For these reasons, the Commission should pay close attention to the structure of the statute and the impact its policies would have on the statute's goals.

[1] Infrastructure Investment and Jobs Act, § 60102 (47 U.S.C. § 1702).

[2] Infrastructure Investment and Jobs Act, § 60506 (47 U.S.C. § 1754); Founded in 2006, ITIF is an independent 501(c)(3) nonprofit, nonpartisan research and educational institute—a think tank. Its mission is to formulate, evaluate, and promote policy solutions that accelerate innovation and boost productivity to spur growth, opportunity, and progress. ITIF's goal is to provide policymakers around the world with high-quality information, analysis, and recommendations they can trust. To that end, ITIF adheres to a high standard of research integrity with an internal code of ethics grounded in analytical rigor, policy pragmatism, and independence from external direction or bias. See About ITIF: A Champion for Innovation, https://itif.org/about.

THE STATUTE AUTHORIZES ONLY RULES THAT PREVENT DISPARATE TREATMENT, NOT DISPARATE IMPACT

A primary question for the Commission in this rulemaking is the meaning of "digital discrimination" under Section 60506 of the IIJA.[3] The term is nowhere defined, and the statute itself bears little resemblance to other anti-discrimination statutes.[4] Therefore, a careful reading of is necessary to determine the extent of the Commission's authority under this section.

The plain text of the statute entails a "disparate treatment" definition

The operative use of the term "digital discrimination" is in Section 60506(b)(1). Subsection (b) describes the rules it authorizes, explicitly in terms of an "objective" to "facilitate equal access to broadband internet access service…" It then proceeds to a non-exhaustive list of ways the rules could "facilitate" that "objective." Paragraph (1) states one such way: "preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin…"

The natural reading of this portion of the text is that discrimination requires disparate treatment. The Supreme Court has held that disparate treatment is the natural reading of the term "discrimination," so proponents of an alternative meaning bearing the burden of showing the statute entails another definition.[5]

The plain-meaning reading of 60506 (b)(1) is further strengthened by the inclusion of the requirement that conduct must be "based on" protected characteristics to constitute discrimination. "Based on" implies a party making some characteristic the *basis* of its decision, not an abstract state of the world for a party can be held responsible without causing. Indeed, the NPRM itself exemplifies this linguistic fact: it asks "whether to adopt the definition of digital discrimination *based on* disparate impact (i.e., discriminatory effect), disparate treatment (i.e., discriminatory intent), or both."[6] The decision that the question contemplates will be an intentional act of determining upon what to base its definition, not some unintentional act. The Commission should read the statute the same way: Discrimination "based on" protected characteristics entails intentional acts of discriminating just as the definitions "based on" legal concepts entail intentional acts of defining.

The Supreme Court has countenanced disparate-impact liability under discrimination statutes 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."[7] In practice, the Court has found this condition satisfied when specific language in a legislative prohibition of discrimination broadens its scope. For example, in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* ("*Inclusive Communities*"), the Fair Housing Act ("FHA") prohibited several ways for a defendant to engage in housing discrimination, and then

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[3] Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69, Notice of Proposed Rulemaking, (Dec. 21, 2022), para. 14. https://www.fcc.gov/document/fcc-takes-next-steps-combat-digital-discrimination-0 (Hereinafter "NPRM" or "Notice").

[4] Comments of TechFreedom, Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69, Notice of Inquiry (May 16, 2022) pp. 8-10.

[5] Jackson v. Birmingham Bd. of Ed., 544 U.S. 167, 174 (2005).

[6] NPRM Para. 14 (emphasis added).

[7] Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519, 533 (2015).

added, in that same provision, "otherwise make unavailable" housing. That catchall language in addition to a baseline prohibition was the basis of the Supreme Court's permitting disparate impact liability under the FHA. There is no such language in the IIJA.

Commenters who seek to inject a disparate impact standard where Congress declined to do so cobble together a new standard from other provisions in the statute. The Lawyers' Committee for Civil Rights Under Law, for example, argues for an "expansive reading of the term 'digital discrimination'" based on the policy statements in subsection (a). But this gesture to language in other parts of the statute, including a non-substantive policy statement, is the opposite of what the court required to allow disparate impact claims in other contexts. Likewise, subsection (b)(1)(2)'s language use of "eliminate discrimination" does not fit the result-oriented language requirement. That provision is a mandate on the Commission to identify steps to eliminate (the intentional act of) discrimination, not a prohibition of any kind on private actors, much less a broad prohibition of disparate impacts. Finally, subsection (c)(3) allows the Commission and the Attorney General to address "deployment discrimination" that is "based on…other factors" not listed in earlier paragraphs. This provision is unhelpful to how the Commission should define digital discrimination. First, it applies to a different statutory term, not digital discrimination. Second, identifying more groups that are protected from discrimination is irrelevant to what conduct constitutes discrimination in the first place.

The attempt to conjure up a disparate impact standard from the penumbras of Section 60506 only highlights its absence from the text. Congress was well aware of the language necessary to create disparate impact liability under an antidiscrimination statute; it chose not to use it in Section 60506, and the Commission should not rewrite the statute.

The "technical and economic feasibility" provision does not entail a "disparate impact" definition.

The Notice asks commenters advocating a disparate treatment definition if the Commission should "understand Congress to have intended to allow providers to justify intentional discrimination on the basis of technical and economic feasibility?"[8] The answer is no. The statute requires the Commission to take into account "the issue of technical and economic feasibility presented by [the] objective" of facilitating equal access.[9] This is a requirement on the Commission's analysis in creating rules, not a mandate that the FCC create a business necessity defense to intentional discrimination. The Commission correctly notes that business necessity defense would accompany a disparate impact definition of discrimination, but that defense arises from the nature of discrimination law, not from any language in Section 60506. Congress did not even use the term "business necessity" in the statute, and it strains credulity that it meant for a different phrase to import the entirety of disparate impact law.

Under a disparate treatment standard, the necessity for the Commission to consider economic and technical feasibility is not mere surplusage, however. The Commission should seek to maximize the effectiveness of its rules against intentional discrimination—however unlikely that is to be given the desire for all Internet Service Providers (ISPs) to expand their customer base—and the ferreting out of where and whether such

[8] NPRM, Para. 21.

[9] Section 60506(b).

discrimination exists will be aided by a full understanding of the technical and economic factors that influence broadband deployment decisions. For example, a decisions not to build a network to a sparsely populated area at a cost that far exceeds any expected benefit does not implicate discrimination any more than any company's decision not to sell products at a loss would.

A "disparate treatment" definition is an effective, workable standard to prevent digital discrimination.

A disparate treatment standard applies in many areas of anti-discrimination law and has proven able to identify and remedy various types of discriminatory practices. The Commission should draw analogies from those existing frameworks here.

Broadband deployment inherently takes place in a geographic region and over time. In analogizing to other areas of discrimination law, therefore, digital discrimination would be more like a pattern or practice than an individual act. Thus, the Commission should analyze digital discrimination claims under a framework like that in *International Brotherhood of Teamsters v. United States*, rather than the *McDonnell Douglas* framework.[10]

Under a *Teamsters*-like method, the Commission should first require the party claiming discriminatory conduct to establish a prima facie case of a pattern or practice of unlawful discrimination (i.e. a party choosing not to serve people based on their membership in a class protected under Section 60506). This may be shown with statistical evidence.

This framework thus absolves complainants of the need to prove an exact mental state of an ISP with regard to any individual and, instead, allows discrimination to be found based on unlawful conduct that amounts to an ISP's practice more generally. It also forces the accused discriminator to meet the prima facie case once it is established, rather than merely produce a fig-leaf reason for the conduct as could occur under *McDonell Douglas*. At the same time, it demands robust standards for the establishment of the prima facie case, especially with statistical methodologies and the conclusions they permit. For example, the Commission should be careful not to confuse statistical metrics for deployment, something over which ISPs have a degree of control, with measures of adoption, in which individuals lack a broadband connection for reasons outside the ISP's control. Furthermore, in evaluating statistical evidence, the Commission should note that correlations within datasets do not automatically permit causal inferences absent concrete evidence or econometric methods that would isolate the allegedly discriminatory conduct.

Following such a framework would give effect to the statutory mandates on the Commission, vindicating any victims of bona fide discrimination without countenancing costly proceedings against meritless claims.

[10] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 360 (1977).

IF THE COMMISSION ADOPTS A DISPARATE-IMPACT DEFINITION, IT MUST CREATE GUARDRAILS TO PERMIT ONLY MERITORIOUS CLAIMS

Though a disparate treatment definition would be the most consistent with the text of the IIJA and provide the right remedies to protected individuals, the following independent and alternative analysis should apply if the Commission nevertheless adopts a disparate impact definition.

Disparate impact complainants must show a particular policy causing the disparity

In *Inclusive Communities*, the Court held that disparate impact claims based on statistical disparities "must fail if the plaintiff cannot point to a defendant's policy or policies causing that disparity."[11] In that case, the challenged policy was the Texas Department of Housing's method of distributing tax credits which, in turn, caused disparate access to housing. Likewise, for digital discrimination, the Commission must require complainants to identify with particularity the policy of an alleged discriminator that produces a disparate impact. Importantly, this entails that the disparate impact cannot itself be the challenged policy, so a complaint that alleges only the existence of a disparate impact should be dismissed.

The Commission should establish safe harbors to prevent perverse incentives that harm consumers

A disparate-impact definition of digital discrimination would introduce significant perverse incentives that could reduce access to broadband for those who need it most. For example, an ISP may delay deploying or upgrading its service in some areas of a locality for fear that it will face liability for not serving every part of that locality all at once. Or a certain area may experience differential quality of coverage based on changes in topography or weather that are outside a broadband provider's control. Still more, broadband providers are subject to many state and local permitting processes that can often delay or hamstring deployment efforts in certain localities, even if the provider itself has taken care to serve all areas equally. Equipment and labor availability, along with natural maintenance cycles, may result in some areas getting upgrades or service before others. If such technical and economic facts become a source of liability for ISPs, it is most likely that all consumers will suffer lower quality of services and longer waits for new deployment. When the evidence credibly suggests these kinds of non-fault drivers of a disparate impact, the Commission should dismiss complaints and focus its resources on culpable conduct.

The Commission should create robust safe harbors to protect against these perverse outcomes. Among other appropriate harbors, the FCC should dismiss complaints when an ISP has served at least 90 percent of the locations in a service area, when the ISP is awaiting approval of a state or local permitting process necessary for deployment to proceed, or when serving a given area would cause the ISP to lose its investment. These and other safe harbors are a natural way for the Commission to fulfill its statutory obligation to account for technical and economic feasibility.[12]

[11] *Inclusive Communities* at 542.

[12] Section 60506(b).

THE COMMISSION SHOULD ENSURE ITS RULES ADDRESS THE REAL CAUSES OF THE REMAINING DIGITAL DIVIDE

As the Commission drafts its rules, it should keep its focus on closing the digital divide and not enact digital discrimination policies in a way that detracts from that goal. While historical inequities are reflected in the digital divide, it would be counterproductive for the FCC to divert time and resources into digital discrimination claims when more actionable policies to remedy digital inequities are within its power.

By far, the largest reason the digital divide persists in the United States is a lack of adoption, not a lack of deployment, much less unequal deployment. FCC Form 477 data and the National Broadband Map's most recent iteration both show that serviceable broadband networks reach the vast majority of the country, and NTIA's Internet Use Survey reports that a very small proportion of non-adopters are so because of a lack of access—3.9 percent at last count in 2021.[13] Instead, NTIA finds the majority of nonadopters cite a lack of interest as the reason they are not online. Other reasons include the cost of a connection, lack of a computer, privacy or security concerns, and the ability to access the Internet elsewhere, in descending order.

This is not to say that demographic inequities exist within populations who disproportionately do not adopt broadband. On the contrary, unequal broadband usage is often downstream from larger societal inequalities. But this only highlights the fact that a mandate directed to individual ISPs addresses the problem at the wrong level. For example, low-income households are more likely to be price-sensitive, perhaps to the point of being unable to purchase broadband at all, and an area with multiple low-income households might show such low rates of demand that an ISP is discouraged from investing there because they would be selling broadband services at a loss, with other consumers making up the loss. Disadvantaged Americans a whole have lower digital literacy rates, which also plays into demand. All of these reasons can produce demographic data showing disparities in broadband access rates. But none of them would be fixed by onerous micromanagement of deployment decisions and still less by a punitive regime directed at those not engaged in discriminatory conduct. After all, it would be irrational for profit-seeking ISPs, to discriminate against potential customers.

Instead, the most intelligent combination of active efforts to close the divide—which means matching finite resources as closely as possible to the relative weights of ongoing causes of lack of access—will be necessary to make positive steps forward. For example, the Affordable Connectivity Program is a good solution to get these price-sensitive households online, since it is targeted directly to low-income consumers and can be put towards whatever purchase the household most needs assistance with. At the same time, most private ISPs also offer low or no-cost plans geared toward connecting low-income or disadvantaged households.

At the same time, many households aren't reacting to price but to another type of barrier—like low digital literacy. A growing body of effort is working to engage those consumers that reject even a no-cost plan, including investing in areas to connect outside of the home and advancing digital literacy. These existing

[13] "Digital Nation Data Explorer," National Telecommunications and Information Administration (Oct. 5, 2022) https://ntia.gov/other-publication/2022/digital-nation-data-explorer#sel=unavailableMainReason&demo=&pc=prop&disp=chart

efforts are all good candidates for more resources and attention, since they target actionable solutions to specific problem areas.

Widespread broadband availability is an important and unignorable part of that goal. The fact that there are legitimate reasons for unequitable distributions of resources does not mean the disadvantaged should be left behind, but it does mean that the Commission should use a surgical approach rather than impose a burdensome threat of litigation on all broadband deployment decisions. To that end, the Digital Equity and Inclusion Working Group's first recommendation is a good place to start: to "develop, implement, and make publicly available periodic broadband equity assessments in partnership with ISPs, the community, and other local stakeholders."[14] This is a broadly defined recommendation that can be tailored to fit the needs of the community, but it's core—that the relevant actors work together, rather than being rendered adversaries, is key to success.

CONCLUSION

The IIJA could be the biggest step toward closing the geographic digital divide ever. The Commission should keep its eye on that goal and not give in to calls to stray from the statutory text to claim sweeping new power over broadband deployment. Here, the statutory text unambiguously permits only a disparate-treatment definition of digital discrimination. Independently and in the alternative, the Commission must closely scrutinize claims based on disparate impact claims to ensure that the threat of litigation does not perversely delay and diminish efforts to connect all Americans.

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[14] "Recommendations and Best Practices to Prevent Digital Discrimination and Promote Digital Equity," Communications Equity and Diversity Council (Nov. 7, 2022), https://www.fcc.gov/sites/default/files/cedc-digital-discrimination-report-110722.pdf.