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

In the Matter of	
Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination	GN Docket No. 22-69
	February 21, 2023

Lawyers' Committee for Civil Rights Under Law
Comments in Response to the Notice of Proposed Rulemaking

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I. Summary

The Lawyers' Committee for Civil Rights Under Law submits these comments in response to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking, *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination* ("NPRM").[1] Through the Infrastructure Investment and Jobs Act ("Infrastructure Act"), Congress instructed the Commission in section 60506, codified at 47 U.S.C. § 1754 ("section 60506"), "to ensure that all people of the United States benefit from equal access to broadband internet access service"[2] by enacting rules to "preven[t]" and "eliminate" digital discrimination relating to broadband.[3]

The Lawyers' Committee uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have the voice, opportunity, and power to make the promises of our democracy real. The organization's Digital Justice Initiative works at the intersection of racial justice, technology, and privacy to address predatory commercial data practices, discriminatory algorithms, invasions of privacy, disinformation, and other online harms that disproportionately affect Black people and other people of color. Everyone is entitled to the equal enjoyment of the internet's goods and services without discrimination.

Congress has ordered the Commission, as its primary mission, "to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges[.]"[4] In the digital discrimination statute, Congress again commanded the Commission to remediate discrimination. Prohibiting discrimination in the deployment, availability, terms, and enjoyment of broadband internet is essential to the Commission's primary mission and falls squarely within its core competencies. This new statute gives the Commission new tools to do better what it has endeavored to do before: establish, promote, and protect universal service. Universal means everyone; preventing and eliminating discrimination in broadband is necessary to achieve the Commission's primary mission. Today's digital divide has its roots in historic redlining and decades of systematic disenfranchisement of communities of color that led to disparities in wealth, infrastructure, and opportunity. This rulemaking plays an important role in helping to remedy past discrimination so that segregated and underserved communities can equally enjoy the benefits of the internet.

We urge the Commission to (1) recognize that because this is an anti-discrimination and universal service statute, it should be generously construed to effectuate its remedial purpose; (2)

[1] 88 Fed. Reg. 3681 (proposed Jan. 20, 2023) (hereinafter *NPRM*).
[2] 47 U.S.C. § 1754(a)(3).
[3] *Id.*§ 1754(b)(1)-(2).
[4] *Id.* § 151.

interpret section 60506 to apply to both discrimination occurring through disparate impact and discrimination occurring through disparate treatment; (3) carefully define and interpret statutory terms to maximally achieve the anti-discrimination and universal service mandate from Congress, including narrowly tailoring any exceptions related to technical and economic feasibility; (4) recognize that the statutory command to "preven[t]" and "eliminate" discrimination requires affirmative efforts to remediate historic inequities; (5) harmonize common carrier anti-discrimination requirements under section 202(a) of Title II; and (6) create an Office of Civil Rights.

II. Section 60506 advances the core mission of the Commission—eliminating discrimination in telecommunications and promoting universal service—and provides broad authority that must be generously construed to fulfill the statute's remedial purpose.

In ¶ 91, the Commission seeks comment on the scope of its authority to adopt rules under section 60506 of the Infrastructure Act. In ¶¶ 59-60, the Commission seeks comment on whether it should issue rules prohibiting digital discrimination versus other regulatory approaches.

Section 60506 is an anti-discrimination statute. The plain text of the statute requires the Commission to issue rules, requires those rules to prevent digital discrimination, requires the Commission to identify further necessary steps to eliminate digital discrimination, and requires the Commission to prohibit deployment discrimination, among other mandates. Anything less would not be consistent with the statutory text.

This statute fits neatly within the panoply of authorities given to the Commission through the Communications Act, augments the Commission's existing powers, and furthers the Commission's central purpose of providing universal telecommunications service to everyone in the United States without discrimination.[5] Section 60506 is an amendment to the Communications Act and a command to the Commission to issue regulations to promote equitable broadband internet access.

This digital anti-discrimination statute is a civil rights law intended to prevent and remediate inequity. It is axiomatic that civil rights laws shall be interpreted generously to effectuate their broad remedial purposes and that any exemptions shall be narrowly construed.[6]

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[5] *See id.*

[6] *See, e.g.*, *Monell v. Dep't of Soc. Servs. of City of New York*, 436 U.S. 658, 684 (1978) (quoting legislative history of Section 1 of the Civil Rights Act of 1871); *Daniel v. Paul*, 395 U.S. 298, 307-08 (1969) (Title II of the Civil Rights Act of 1964); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (Fair Labor Standards Act); *Lenzi v. Systemax, Inc.*, 944 F.3d 97, 110 (2d Cir. 2019) (Title VII of the Civil Rights Act of 1964); *Ga. State Conf. of the NAACP v. City of LaGrange*, 940 F.3d 627, 631-32 (11th Cir. 2019) (Fair Housing Act); *Herbst v. Ryan*, 90 F.3d 1300, 1304 (7th Cir. 1996) (Section 1988); *Foster v. Armontrout*, 729 F.2d 583, 585 (8th Cir.

As the Commission weighs the meaning of section 60506, it should keep in mind the section's remedial purpose and accordingly give it a generous construction.

The language of the statute confers authority and a directive to the Commission, stating the Commission *shall* "adopt final rules to facilitate equal access to broadband internet access service," "including-- preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin."[7] This authority is expanded upon in the next subsection which addresses the scope of the Commission's authority by explicitly directing the Commission to "identif[y] necessary steps for the Commissions to take to eliminate discrimination."[8]

The anti-discrimination purpose of this statute aligns with the Commission's longstanding mission, expertise, and authority to eliminate discrimination in telecommunications for the purpose of furthering universal service. Congress instructed that the Commission is "to make available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex, a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges[.]"[9] The Communications Act empowers the Commission to ensure that telecommunications services, which are common carriers, serve everyone who seeks service and provide such service with charges and practices that are "just and reasonable."[10] Pursuant to section 202, the Commission has authority—and has developed expertise through decades of regulation and enforcement—to prohibit "any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device" as well as prohibiting "any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage."[11] Courts have held that section 202 prohibits

1984) (Section 1983); *White v. Square, Inc.*, 446 P.3d 276, 279 (Cal. 2019) (California Unruh Act); *Victor v. State*, 203 N.J. 383, 412 (N.J. 2010) (New Jersey Law Against Discrimination); *Frat. Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Frat. Order of Eagles*, 59 P.3d 655, 661-62 (Wash. 2002) (en banc) (Washington Law Against Discrimination); *Vortex Fishing Sys., Inc. v. Foss*, 308 Mont. 8, 16 (Mont. 2001) (Montana Human Rights Act); *Wallace v. Skadden, Arps, Slate, Meagher & Flom*, 715 A.2d 873, 889 (D.C. 1998) (D.C. Human Rights Act).

[7] 47 U.S.C. §1754(b).

[8] *Id.*

[9] *Id.* § 151.

[10] *Id.* § 201(a)-(b).

[11] *Id.* § 202(a).

discrimination on the basis of protected characteristics such as race or income,[12] and the Commission has also applied it to national origin.[13]

Section 202 is notable in this context because it demonstrates that a core purpose of the Commission is, and always has been, the prevention and elimination of discrimination. The language of section 202 has a storied history at the heart of the Civil Rights Movement's fight to eliminate Jim Crow segregation.

Section 202(a) was adapted, partially verbatim, from Section 3 of the Interstate Commerce Act ("ICA").[14] The Supreme Court has observed that the ICA "served as [the Communications Act's] model."[15] In particular, "the almost identical non-discrimination provisions of the Interstate Commerce Act" were the basis for "the non-discrimination provisions of the Communications Act."[16]

The ICA governed the authorities of the Interstate Commerce Commission ("ICC"), a sister agency to the FCC. Section 3 was pivotal in the fight for racial integration in the 20th century, specifically the desegregation of interstate transportation (an avenue of interstate commerce highly similar to broadband internet service—both move high volumes of traffic nationally and locally, by common carriers, for commercial, cultural, educational, and other purposes). Section 3 was known as the "unjust discrimination" provision of the ICA[17] and, like section 202, was often used in cases regarding discrimination between businesses.[18] But even as far back as 1914, the Supreme Court observed that "[t]his language is certainly sweeping enough

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[12] *See Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003) (Common carriers "cannot decline 'to serve any particular demographic group (*e.g.*, customers who are of a certain race or income bracket).'") (quoting 17 F.C.C. Rcd. 8987, 8997 (2002)); *Barnes v. 3 Rivers Tele. Coop., Inc.*, 2022 WL 3212100 at *4 (D. Mont. Aug. 9, 2022) (Section 202(a) prohibits race discrimination).
[13] *See, e.g.*, *Nina Shahin v. Verizon Delaware LLC*, 29 F.C.C. Rcd. 4200 (2014) (adjudicating claim of national origin discrimination).
[14] *Compare* Pub. L. No. 49-104, 24 Stat. 379, 49th Cong. § 3 (1887) ("[I]t shall be unlawful for any common carrier subject to the provisions of this act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."), *with* 47 U.S.C. § 202(a) ("It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.").
[15] *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218, 229-30 (1994).
[16] *MCI Telecomm. Corp. v. FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990).
[17] *Louisville & N. R. Co. v. United States*, 282 U.S. 740, 748 (1931).
[18] *See, e.g.*, *Houston, E. & W. Tex. Ry. Co. v. United States*, 234 U.S. 342 (1914) ("*The Shreveport Case*").

to embrace all the discriminations of the sort described which it was within the power of Congress to condemn."[19] In 1941, the Supreme Court held that this language prohibited racial segregation in railroad cars.[20] Importantly for the interpretation of section 60506, the Court held that differential demand for a service cannot justify discrimination. "[T]he comparative volume of traffic cannot justify the denial of a fundamental right of equality of treatment[.]"[21] The Supreme Court reinforced this holding in another Section 3 railroad segregation case in 1950, holding that "limited demand" cannot justify discrimination because "it is no answer to the particular passenger who is denied service . . . that, on the average, persons like him are served."[22] In 1955, the ICC held that Section 3 prohibited segregation on interstate buses after Sarah Keys, a Black private in the Women's Army Corps, refused to give up her seat at the front of the bus to a white Marine.[23] Then, in 1960, the Supreme Court again employed this statutory language to compel desegregation of bus terminals in the landmark case *Boynton v. Virginia*.[24] "The Interstate Commerce Act, as we have said, uses language of the broadest type to bar discriminations of all kinds."[25] Civil rights activists tested the *Boynton* decision in the 1961 Freedom Rides by riding integrated buses through the South. The resulting violence against the Freedom Riders appalled the nation and contributed to the enactment of the Civil Rights Act of 1964, which prohibited segregation of places of public accommodation.

While the ICC may no longer exist, Congress gave near identical authority to its sister agency the Federal Communications Commission as it gave to the ICC.[26] It is the duty of the Commission to prevent discrimination and segregation in telecommunications, including broadband internet service, to ensure that 21st century interstate commerce is not tainted by the inequities of prior generations.

The Commission also has experience with anti-discrimination enforcement through the Cable Act of 1984. Under 47 U.S.C. § 541(a)(3), the Commission prohibits cable providers from discriminating on the basis of income. 47 U.S.C. § 554 addresses equal employment opportunity provisions that prohibit discrimination by cable providers in a manner similar to Title VII of the Civil Rights Act of 1964.[27] The requirements of the Cable Act are extensive, such as requiring

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[19] *Id.* at 356.
[20] *Mitchell v. United States*, 313 U.S. 80 (1941).
[21] *Id.* at 97.
[22] *Henderson v. United States*, 339 U.S. 816, 825 (1950).
[23] *Keys v. Carolina Coach Co.*, 64 M.C.C. 769 (1955); *see also* T. Anthony Bell, *The Quietly Defiant, Unlikely Fighter: Pfc. Sarah Keys and the Fight for Justice and Humanity*, U.S. Army (Feb. 25, 2014), https://www.army.mil/article/120456/The_quietly_defiant_unlikely_fighter_Pfc_Sarah_Keys_and_the_fight_for_justice_and_humanity/.
[24] 364 U.S. 454 (1960).
[25] *Id.* at 457.
[26] *See MCI Telecomm.*, 917 F.2d at 38.
[27] *See* 47 U.S.C. § 554(b).

providers to maintain equal opportunity programs,[28] and instructing the Commission to establish detailed rules to promote equal opportunity and transparency about equal opportunity programs.[29] The Commission has denied license renewal based on race discrimination by a cable provider.[30]

III. Section 60506 encompasses disparate impact as well as disparate treatment.

In ¶¶ 14-23, the Commission seeks comment on whether and how the statute covers disparate impact versus disparate treatment. Specifically, in ¶ 18, the Commission asks how it should interpret Section 60506 in light of the Supreme Court's decision in *Inclusive Communities*, concluding "that antidiscrimination laws should be interpreted to encompass disparate impact claims when (1) the statutory text refers 'to the consequences of actions and not just the mindset of actors,' and (2) 'that interpretation is consistent with statutory purpose.'" In ¶¶ 44-51, the Commission seeks comment on when and how to determine if a differential impact occurred. In ¶ 60, the Commission asks whether disparate impact inherently includes disparate treatment. In ¶¶ 62-65, the Commission seeks comment on how it should structure its rules and procedures to implement prohibition of digital discrimination based on disparate impact and disparate treatment. And in ¶ 62, the Commission specifically asks whether it should defer to the typical three-part test used by courts to determine whether a facially neutral policy or practice discriminates against members of protected groups under other civil rights statutes.

This section of the comment will first discuss disparate impact legal precedent to explain how and when an agency can address disparate impact versus disparate treatment. It will then discuss how the Commission should interpret the plain meaning and Congressional intent of section 60506, which show that the statute covers both disparate impact and disparate treatment. We will conclude the section with how the Commission should apply the tests for assessing whether a disparate impact or disparate treatment is actionable or justifiable.

a. Disparate impact legal precedent

There are two circumstances in which the Commission should apply section 60506 to disparate impact, either of which is sufficient justification on its own, and both are present here. First, if the statutory text is aimed at achieving an outcome—like equal access to broadband internet access service for everyone—then this effects-based structure *requires* the Commission to address disparate impacts as well as disparate treatment. In such circumstance the agency lacks *Chevron* deference *not* to apply the statute to disparate impact.[31] Second, if the statutory text is silent or ambiguous as to whether discriminatory intent is required and it gives an agency authority to craft appropriate regulations to achieve an anti-discrimination goal, then it is a

[28] *Id.* § 554(c).
[29] *Id.* § 554(d).
[30] *See, e.g.*, *In re Application of Catoctin Broad. Corp. of New York*, 4 F.C.C. Rcd. 2553 (1989).
[31] *Chevron U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837 (1984).

reasonable exercise of the agency's discretion to promulgate disparate impact regulations. The Commission can only be blocked from enacting regulations covering disparate impact if the statutory text plainly and unambiguously forecloses the agency from doing so.

Decades of Supreme Court precedent establish that anti-discrimination statutes apply to disparate impact, not just disparate treatment, when the statutory language is aimed at outcomes and effects on the affected population, not the manner or intent of the perpetrator. The Department of Justice states, "As the Supreme Court has explained, even benignly-motivated policies that appear neutral on their face may be traceable to the nation's long history of invidious race discrimination in employment, education, housing, and many other areas."[32]

In *Griggs v. Duke Power*, a landmark case that expounded the meaning of disparate impact liability, the Supreme Court explained that Title VII of the Civil Rights Act of 1964 encompasses disparate impact claims because "Congress directed the thrust of the Act to the consequences of employment practices, not simply the motivation."[33] The Court also considered the legislative history of Title VII and found it reinforced this conclusion.[34] In *Smith v. City of Jackson*, a plurality of the Court concluded that the Age Discrimination in Employment Act authorizes disparate impact claims because its text does not simply prohibit specific conduct by an employer, but rather any action that deprives an employee of opportunity.[35]

In *Texas Department of Housing & Community Affairs v. Inclusive Communities Project*, the Supreme Court relied on *Griggs* and *Smith* to hold that the Fair Housing Act ("FHA") permits disparate impact claims because the statute's "results-oriented language" turns on the availability of housing, not the actor's intent.[36] In doing so, the Court articulated a general rule that anti-discrimination statutes should be interpreted to cover 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."[37] The Court held that the FHA's "results-oriented language counsels in favor of recognizing disparate-impact liability," particularly because "the phrase 'otherwise make unavailable" refers to the consequences of an action rather than the actor's intent."[38] The Court noted that "catchall phrases looking to consequences, not intent" are relevant to the determination.[39] The Court further observed that it is immaterial "that Congress did not reiterate Title VII's exact language in the FHA . . . because to do so would have

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[32] U.S. Dep't of Just., *Title VI Legal Manual* § VII.A (Apr. 22, 2021), https://www.justice.gov/crt/fcs/T6Manual7.
[33] *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).
[34] *Id.* at 433-35.
[35] *Smith v. City of Jackson*, 544 U.S. 228, 236 (2005).
[36] *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 533-35 (2015).
[37] *Id.* at 533.
[38] *Id.* at 534.
[39] *Id.* at 535.

made the relevant sentence awkward and unclear."[40] It is sufficient that Congress "chose words that serve the same purpose and bear the same basic meaning but are consistent with the structure and objectives of the FHA."[41] The Court held that the FHA "was enacted to eradicate discriminatory practices within a sector of our Nation's economy,"[42] and that recognition of disparate impact claims was therefore "consistent with the FHA's central purpose."[43] Importantly, the Court also noted that disparate impact coverage eases enforcement in situations where disparate treatment is likely but hard to prove. "Recognition of disparate-impact liability under the FHA also plays a role in uncovering discriminatory intent: It permits plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment."[44] The Equal Credit Opportunity Act ("ECOA") also applies to disparate impact.[45]

Furthermore, even if section 60506 does not *require* coverage of disparate impact (which we think it does), the Commission retains discretion to enact regulations to address disparate impact if it concludes such regulations are appropriate to achieve the goal of the statute.

Agencies can apply statutory anti-discrimination authorities to address disparate impacts when those authorities are not explicitly cabined to disparate treatment and the regulations are appropriate methods of achieving the statutory objective. For example, regulations promulgated under Title VI of the Civil Rights Act of 1964, which prohibits race and national origin discrimination in federally funded programs, can apply to both disparate treatment and disparate

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[40] *Id.*
[41] *Id.*
[42] *Id.* at 539.
[43] *Id.*
[44] *Id.* at 540.
[45] *See, e.g.*, *United States v. Union Auto Sales, Inc.*, 490 F. App'x 847 (9th Cir. 2012); *Haynes v. Bank of Wedowee*, 634 F.2d 266 (5th Cir. 1981); *Mian v. LoanCare Servicing Co.*, 2022 WL 1289662 (D. Md. Apr. 29, 2022); *Eustice v. JPMorgan Chase & Co.*, 2020 WL 5541084 (S.D. Tex. Aug. 10, 2020); *Smith v. CarMax*, 2020 WL 13133209 (N.D. Ga. July 16, 2020); *Duarte v. Quality Loan Serv. Corp.*, 2018 WL 2121800 (C.D. Cal. May 8, 2018); *NAACP v. Ameriquest Mortg. Co.*, 635 F. Supp. 2d 1096 (C.D. Cal. 2009); *Ramirez v. GreenPoint Mortg. Funding, Inc.*, 633 F. Supp. 2d 922 (N.D. Cal. 2008); *Taylor v. Accredited Home Lenders, Inc.*, 580 F. Supp. 2d 1062 (S. D. Cal. 2008); *Powell v. Am. Gen. Fin., Inc.*, 310 F. Supp. 2d 481 (N.D.N.Y. 2004); *Coleman v. Gen. Motors Acceptance Corp.*, 196 F.R.D. 315 (M.D. Tenn. 2000), *modified on other grounds*, 296 F.3d 443 (6th Cir. 2002). Notably, the primary prohibition on discrimination in ECOA, 15 U.S.C. § 1691(a), does *not* have a catchall provision such as the FHA's "otherwise makes unavailable" or Title VII's "otherwise adversely affect." Yet, it is well understood that Congress intended ECOA to have anti-discrimination coverage similar to these sister statutes and courts have afforded it. *See* S. Rep. No. 94-589, 1976 U.S.C.CA.N. 403, 406 (instructing that "judicial constructions of anti-discrimination legislation in the employment field," such as in cases where the Supreme Court has sustained disparate impact claims, should serve as guidelines in ECOA cases).

impact, according to the Supreme Court's decision in *Alexander v. Sandoval* and the Department of Justice's *Title VI Legal Manual*, the authoritative text on the statute—even though individuals can bring lawsuits only for disparate treatment.[46] According to the Department, twenty-six federal agencies have Title VI regulations that address disparate impact.[47]

In conclusion, there are two circumstances in which an agency should enact disparate impact regulations. First, obviously, when the statutory text commands it. But second, when Congress commands an agency to remediate discrimination, and gives it the authority to promulgate appropriate regulations to achieve that goal, it is a reasonable exercise of the agency's discretion to extend such regulations to cover disparate impacts.

b. Section 60506 encompasses disparate impact and disparate treatment.

Section 60506 is entirely results-oriented. Its purpose is to promote universal broadband internet access service through the prevention and elimination of discrimination. Every aspect of the statute is focused on achieving this goal and is silent as to the intent of providers. Reading the statute to only cover intentional discrimination would produce absurd results, would render some language superfluous, and therefore would be an arbitrary and capricious interpretation. Moreover, even if the statute did not affirmatively require disparate impact coverage, there is nothing in the statutory text that would bar the Commission from enacting disparate impact regulations that are consistent with and appropriate for achieving the purpose of the statute.

i. Disparate impact coverage is necessary to fulfill the statute's purpose and Congressional intent.

Congress clearly stated that "[i]t is the policy of the United States that, insofar as technically and economically feasible . . . subscribers should benefit from equal access to broadband internet access."[48] The language of subsection 60506(a) evinces Congress's intent to create a world where all people can "benefit from equal access to broadband internet access service" and tasks the Commission with executing this mission.[49] This is outcome-oriented language; the use of the words "benefit," "equal access," "equal opportunity to subscribe," and "comparable" all indicate that the statutory objective is to establish universal service and improve the welfare of the public.[50]

The legislative history of section 60506 supports this interpretation. During a House of Representatives debate on the Infrastructure Investment and Jobs Act, House Majority Whip James E. Clyburn lamented the current digital divide where "millions of Americans are not connected to the internet," and pointed out the need for "comprehensive legislation to make high

[46] *Alexander v. Sandoval*, 532 U.S. 275, 281-82 (2001); U.S. Dep't of Just., *supra* note 32.
[47] U.S. Dep't of Just., *supra* note 32, § VII.A, n.3 (collecting federal regulations by agency).
[48] 47 U.S.C. § 1754(a)(1).
[49] *Id.* § 1754(a)(3).
[50] *Id.* § 1754(a)(1)-(2).

speed broadband accessible and affordable for all."[51] Similarly, House Majority Leader Steny H. Hoyer underscored the necessity of "making sure that all of us can make it in America because we have access to the Internet."[52] Congress manifested a clear intent to achieve universal equal access to broadband and was not focused just on holding bad actors accountable for animus.

Congress no doubt recognized that a discriminatory intent standard would render its objective virtually impossible. Proving discriminatory intent is a high bar. Absent an explicitly stated purpose involving discrimination, it demands "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available."[53] "Sometimes a clear pattern, unexplainable on grounds other than [a protected characteristic], emerges from the effect of the [action]" even when a policy "appears neutral on its face."[54] "The evidentiary inquiry is then relatively easy. But such cases are rare."[55] Because contemporary digital discrimination is largely structural in nature, and because corporations would be careful not to document intent to disenfranchise a protected class, it would be near-impossible to enforce the statute under this prohibitively onerous standard. Reading section 60506 to encompass only discriminatory intent claims would drastically curtail the effectiveness of the statute vis-à-vis guaranteeing equal access to broadband and, thus, would conflict with the statutory purpose.

ii. The plain meaning of subsections (b) and (c) encompasses disparate impact.

Critically, nowhere in the statute is there any mention of intent. The focus of the statute is instructing the Commission to achieve an outcome. Subsection (b)(1) calls for the Commission to establish rules "preventing digital discrimination of access"—it is instructing the Commission to obtain a result.[56] Subsection (b)(2) directs the Commission to "identif[y] necessary steps" to "eliminate discrimination."[57] This also is a command to the Commission to obtain a result. Subsection (c) instructs the Commission and the Attorney General to "ensure that Federal policies promote equal access."[58] Subsection 60506(c)(3), in allowing the Commission to prohibit deployment discrimination based on "other factors [it] determined to be relevant" includes a broad residual clause that contains the kind of consequence-oriented catchall that the Supreme Court found instructive in *Inclusive Communities* in determining the appropriateness of

[51] Transcribed from *House Debate on Infrastructure Bill*, C-SPAN (Sept. 28, 2021), https://www.c-span.org/video/?514958-3/house-debate-infrastructure-bill.
[52] *Id.*
[53] *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).
[54] *Id.* (citations omitted).
[55] *Id.* (citations omitted).
[56] 47 U.S.C. § 1754(b)(1).
[57] *Id.* § 1754(b)(2).
[58] *Id.* § 1754(c).

a disparate impact approach.[59] Critically, subsections (b) and (c) do not mention providers at all, much less specify whether a provider's intent is a relevant consideration.

The interplay between subsections (b)(1) and (b)(2) evidences the coverage of disparate impact. Pursuant to subsection (b)(1), the Commission must adopt rules that prevent digital discrimination. Then, in subsection (b)(2), the Commission must go further and identify "necessary steps" to eliminate discrimination—which means that merely preventing discrimination under (b)(1) is insufficient to achieve the statutory goal. These "necessary steps" must include disparate impact coverage. If something is "necessary" then it is something the Commission *must* do; a necessary task is "required," "inescapable," and "compulsory."[60] If disparate impact coverage is "necessary" to "eliminate discrimination"—and the deep factual record in the NPRM and from many commenters at the Notice of Inquiry stage shows that it is[61]—then the statute *requires* the Commission to promulgate regulations covering disparate impact. If the Commission did not promulgate disparate impact regulations, it would be failing its statutory duty to "identify[]" and "take" necessary steps to eliminate discrimination.[62]

Subsection (c) likewise supports disparate impact coverage. Subsection (c) instructs the Commission and Attorney General to establish policies prohibiting deployment discrimination.[63] This provision is aimed primarily (although not exclusively) at societal-level harms—such as the exclusion of entire neighborhoods or regions from new infrastructure investment. This is evident from subsection (c)'s focus on broadband deployment and use of the phrase "of an area" in (c)(1) and (c)(2).[64] And the "other factors" catchall in (c)(3) further implicates effects and outcomes, similar to the "otherwise" clauses in the FHA and Title VII.[65] This subsection is trying to ameliorate the effects of historic redlining where entire areas (predominantly poor and Black neighborhoods) were impoverished and passed over for investment for generations.[66] In this way, the statute is highly similar to the FHA and the ECOA, which have similar anti-redlining and integration goals. The Supreme Court recognized in *Inclusive Communities* that institutionalized inequity, such as through infrastructure deployment, is exactly where disparate impact liability is meant to attach. "These unlawful practices include zoning laws and other housing restrictions that function unfairly to exclude minorities from certain neighborhoods without any sufficient justification. Suits targeting such practices reside at the heartland of disparate-impact liability."[67]

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[59] *Id.* § 1754(c)(3); *see Inclusive Communities*, 576 U.S. at 534-35.
[60] *Necessary*, Merriam-Webster (Feb. 8, 2023), https://www.merriam-webster.com/dictionary/necessary.
[61] *See also infra* Section V.
[62] 47 U.S.C. § 1754(b)(2).
[63] *Id.* § 1754(c).
[64] *Id.* § 1754(c)(1)-(2).
[65] *Compare id.* § 1754(c)(1)-(2), *with* 42 U.S.C. § 3604(a), *and* 42 U.S.C. § 2000e-2(a)(2).
[66] *See infra* Section V.a.
[67] *Inclusive Communities*, 576 U.S. at 539.

In ¶ 20, the Commission seeks comment on arguments by telecommunications companies that the terms "based on" in subsection (b)(1) cabin the language to intentional discrimination. This is incorrect. This type of phrasing has been used in all kinds of civil rights statutes, including some that cover disparate impact. Consequently, it is not dispositive. Title VII and the FHA say "because of," which is functionally identical to "based on."[68] In fact, in *Inclusive Communities*, Texas argued that the phrase "because of" encompassed only intentional discrimination, and the Supreme Court explicitly rejected that argument.[69] The companies' argument here is indistinguishable. The ECOA says "on the basis of" which is also functionally identical.[70] Meanwhile, provisions of Title II and Title VI of the Civil Rights Act of 1964 that do not apply to disparate impact say "on the ground of."[71] Sections 1981 and 1982, which are components of the Civil Rights Act of 1866 addressing intentional discrimination in commerce and property, use a completely different phrasing: "the same right . . . as is enjoyed by white citizens."[72] All of these phrasings are functionally equivalent—they serve merely to identify which characteristics are protected, not the scope of protection.

iii. The "technical and economic feasibility" clauses would be superfluous or absurd if the statute did not cover disparate impact.

The use of the "technical and economic feasibility" terms in section 60506 is strong evidence for disparate impact coverage. If the statute only covered intentional discrimination, the inclusion of these two factors in subsections (a) and (b) would either produce absurd results or be superfluous.

In disparate impact statutes, as interpreted and applied by the courts, there is typically a "business necessity" defense.[73] In this statute, Congress provided parameters for the business necessity standard both in the policy and rulemaking subsections: "It is the policy of the United States that, insofar as technically and economically feasible,"[74] and "the Commission shall adopt final rules to facilitate equal access to broadband internet access service, taking into account the issues of technical and economic feasibility presented by that objective."[75] These considerations make sense *only* if Congress intended the statute to cover disparate impact. There is no valid "technical" reason why the race of a subscriber should affect the metrics of their service. There is no valid "economic" reason why people of one religion should have to pay more than people of

[68] *See* 42 U.S.C. §§ 2000e-1(a)(1) to (2), 3604.
[69] *See Inclusive Communities*, 576 U.S. at 535.
[70] *See* 15 U.S.C. § 1691(a).
[71] 42 U.S.C. §§ 2000a(a), 2000d.
[72] *Id.* §§ 1981-1982.
[73] *See Inclusive Communities*, 576 U.S. at 531. *See also infra* Section III.c (*McDonnell Douglass test*).
[74] 47 U.S.C. § 1754(a).
[75] 47 U.S.C. § 1754(b).

another religion.[76] Allowing these justifications for intentional discrimination would produce absurd results contrary to practically every other civil rights statute.[77] The Lawyers' Committee is not aware of *any* anti-discrimination law where a business could excuse purposeful racial animus on economic grounds. One of the primary purposes of decades of civil rights laws seeking to end segregation and redlining was to eliminate such discrimination in everyday commerce.

Moreover, even if one could theoretically find some scenario in which economic feasibility could be justifiably interrelated with income level intentional discrimination,[78] there is still no scenario in which intentional discrimination on the basis of income level—or any other protected characteristic—could ever be justified by technical feasibility. Every technical feasibility scenario will be either a disparate impact matter or an insubstantial pretext for other motives. Consequently, if the statute did not cover disparate impact, then the technical feasibility clauses become superfluous. Such an interpretation would be arbitrary and capricious as the Commission must give effect to every term in the statute.[79]

These technical and economic considerations are not safe harbors for intentional discrimination; they are the parameters of the business necessity defense to a disparate impact allegation.

iv. The Commission has discretion to enact regulations that cover disparate impact.

Finally, and in the alternative, even if section 60506 did not require the Commission to promulgate rules covering disparate impact, it also does not foreclose the Commission from doing so. Once again, there is no language in the statute focused on the intent of the provider. Nor is there a provision that restricts the Commission's ability to address disparate impacts. Every subsection instructs the Commission to act while giving the Commission some discretion as to how it should act. Eliminating harmful disparate impacts is consistent with the purpose of the statute and the mission of the Commission. It would be a reasonable and appropriate execution of the Commission's discretion to promulgate regulations that apply to disparate impact if the statute was determined to be silent or ambiguous on this matter.

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[76] *See NPRM* ¶ 66 (seeking comment on whether technical and economic feasibility should excuse intentional discrimination).

[77] *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("It is true that interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

[78] However, as discussed below, simply obtaining lower revenues would not justify discrimination based on income level. Congress included income level as a protected characteristic precisely because providers often underserve low-income areas because they may be less profitable. *See infra* Section IV.d.

[79] *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute[.]") (cleaned up).

c. Applying the disparate impact and disparate treatment tests

In ¶¶ 62-63, the Commission asks about how to apply a disparate impact framework. In ¶¶ 64-67, it seeks comment on a disparate treatment framework.

It is important to recognize that just because a statute prohibits disparate impact does not mean that any disparate impact is automatically unlawful. Sometimes there can be a legitimate justification for a disparate impact. We recommend the Commission adopt the disparate impact test as articulated by the Second Circuit in *Mhany Mgmt., Inc. v. County of Nassau*[80] because it is consistent with *Inclusive Communities* as well as FHA regulations promulgated by the Department of Housing and Urban Development. First, the plaintiff has the burden to establish a prima facie case by showing "(1) the occurrence of certain outwardly neutral practices, and (2) a significantly adverse or disproportionate impact on persons of a particular type produced by the defendant's facially neutral acts or practices."[81] Next, the burden shifts to the respondent or defendant to "rebut the prima facie case by proving that the challenged practice is necessary to achieve one or more substantial, legitimate, nondiscriminatory interests of the respondent or defendant."[82] If the defendant satisfies that burden, then "the burden of proof shifts back to the plaintiff to show that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect."[83] For the second step of the analysis—identifying substantial, legitimate, nondiscriminatory interests—Congress has provided the Commission with guidance on what factors to consider. The statute instructs the Commission to "tak[e] into account the issues of technical and economic feasibility."[84] When the Commission weighs the third step, regarding less discriminatory alternatives, it should clearly recognize that a less discriminatory alternative need not be equally cost effective to be valid. The purpose of this statute, like many other universal service provisions in the Communications Act and other civil rights laws, is to require providers to serve everyone even when it is not profit-maximizing for them to do so. Congress has made the determination that the benefit to the public welfare of universal service outweighs the parochial economic interests of individual providers.

For analyzing claims in disparate treatment cases, the Commission asks whether it should use one of the standards laid out in *McDonnell Douglas*,[85] *Arlington Heights*,[86] or another

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[80] 819 F.3d 581 (2d Cir. 2016). *See also, e.g.*, *S.W. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist.*, 17 F.4th 950 (9th Cir. 2021); *Schaw v. Habitat for Human. of Citrus Cty., Inc.*, 938 F.3d 1259 (11th Cir. 2019); *Reyes v. Waples Mobile Home Park Ltd. Pship*, 903 F.3d 415 (4th Cir. 2018); *Ellis v. City of Minneapolis*, 860 F.3d 1106 (8th Cir. 2017); *City of Joliet v. New West, L.P.*, 825 F.3d 827 (7th Cir. 2016).
[81] *Mhany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 617 (2d Cir. 2016) (cleaned up).
[82] *Id.* (cleaned up).
[83] *Id.* (cleaned up).
[84] 47 U.S.C. § 1754(b).
[85] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
[86] *Arlington Heights*, 429 U.S. at 266-68.

framework, or whether it should just enumerate specific prohibited practices. First, the Commission should not merely enumerate prohibited practices. While it is a good idea to identify prohibited practices as a starting point, it is not sufficient. Such an approach would fail to be comprehensive and cover all the different mechanisms of discrimination; it would invite gamesmanship and circumvention of the rules. Moreover, it likely would not be future-proof and adaptable to changing circumstances.

Second, the Commission should recognize that there are *multiple* avenues to showing intentional discrimination and that one specific test for intentional discrimination is inadequate. We recommend that the Commission look to the Department of Justice's *Title VI Legal Manual* for guidance,[87] but ultimately disparate treatment requires a case-by-case adjudication. Facts may vary greatly; there is no one-size-fits-all mechanism for discrimination. The Department of Justice manual discusses how intentional discrimination can be shown through direct evidence like express classifications or the comments or conduct of decision-makers, or through circumstantial evidence.[88] If one has direct evidence, one does not need to employ a burden-shifting test or other standard. Both *Arlington Heights* and *McDonnell Douglas* provide useful and complementary frameworks for assessing circumstantial evidence in different types of factual scenarios. *Arlington Heights* is appropriate when assessing disparate treatment directed at a group or class. "Agencies can use this method for many different types of cases, but will find it particularly useful where the complaint is about the treatment of a group, not individuals, and the investigation reveals many different kinds of evidence. Agencies should be sure to consider this method where a complaint challenges an expressly neutral practice that has an effect on a larger class[.]"[89] *McDonnell Douglas* is appropriate when assessing disparate treatment of individuals by comparing them to other similarly situated individuals. "Agencies should consider using this method for investigations involving the selection of individuals, such as for program participation, benefits, or services, particularly where the [defendant] provides a nondiscriminatory explanation for its decision. This method is most likely to be helpful where the complaint is about one or a few individuals, and involves easily identifiable similarly situated individuals not in the protected class."[90] Satisfying either test should be sufficient to establish

[87] U.S. Dep't of Just., *supra* note 32, § VI.
[88] *Id.* In the context of disparate treatment under Title VI, the Department of Justice writes, "More than one type of analysis may apply to facts disclosed in an investigation or trial to determine race-based intent. Agencies and plaintiffs can use them individually or together and may combine both direct and circumstantial evidence. Ultimately, the 'totality of the relevant facts' will determine whether the recipient has engaged in intentional discrimination in violation of Title VI." *Id.* § VI.B. The Manual also notes, "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." *Id.*
[89] *Id.*
[90] *Id.*

disparate treatment.[91] We recommend the Commission adopt a holistic approach to intentional discrimination similar to the Department of Justice.

IV. The Commission should interpret the statutory terms generously to fulfill the Act's remedial purpose of preventing and eliminating digital discrimination.

In this section, we will discuss definitions of terms and related statutory interpretation on which the Commission seeks comment including digital discrimination, equal access, income level, geographic area, income level, technical and economic feasibility, deployment discrimination, covered entities, and the Commission's enforcement tools.

a. How to define "digital discrimination"

In ¶¶ 12-13, the Commission seeks comment on its proposed definition of "digital discrimination of access," including "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 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.'"[92]

As a threshold matter, the Commission asks in ¶ 13 whether it should define "digital discrimination" or "digital discrimination of access." The Commission should define the term "digital discrimination," because that term is used in three places in the statute,[93] and it would be confusing if "digital discrimination" and "digital discrimination of access" meant two different things. The Commission should read subsection (b)(1) to incorporate the defined term "equal access" when it says "digital discrimination of access" such that (b)(1) applies to discrimination impairing "equal access" to broadband. The definition of "equal access" will be discussed in the next section.

The Commission's current proposed definition of "digital discrimination" is a good start, with a few caveats. Because the statute encompasses disparate impact, as we discussed in Section III, we would recommend **the definition of "digital discrimination" should be: "policies or practices that differentially impact, or are intended to differentially impact, an individual or class of individuals' equal access to broadband internet access service based on their actual or perceived income level, race, ethnicity, color, religion, or national origin, or**

[91] *See id*. *See also Arlington Heights*, 429 U.S.at 266-68; *McDonnell Douglas Corp.*, 411 U.S. at 792.
[92] *NPRM* ¶ 12.
[93] *See* 47 U.S.C. § 1754(b)(1), (d), (e).

proxies thereof." We believe this definition fits the statutory text and congressional intent better than the proposed definition in the NPRM.

First, the definition should not include the phrase "not justified by genuine issues of technical or economic feasibility." Subsection (b) instructs the Commission to "tak[e] into account the issues of technical and economic feasibility" when crafting rules "to facilitate equal access to broadband internet access service,"[94] but the statute does not include these terms in the anti-discrimination clause in (b)(1) nor does it say that those issues are an excuse, justification, or other form of safe harbor for discrimination. Whether or not someone is discriminated against—definitionally—does not turn on whether the provider has some valid reason for discriminating. Rather, these factors may come into the process later when determining whether a specific instance of discrimination is lawful. As discussed above, technical and economic feasibility should be considerations in step two of a disparate impact analysis, where one assesses whether a provider has a legitimate business necessity for its action.[95]

While it might seem like a trivial distinction to put the technical and economic feasibility considerations in one part of the process versus another, it matters a *great* deal. As discussed above,[96] technical or economic feasibility should never be a justification for intentional discrimination. For example, it would be absurd if a provider could avoid liability by stating, "We could only afford to deploy to one of two neighborhoods, so we picked this neighborhood because it is predominantly white." If technical and economic feasibility considerations are part of the *definition* of discrimination, then they will excuse both intentional discrimination and disparate impact in all cases. In general, they should only be valid considerations in cases of disparate impact.[97]

Moreover, the technical and economic feasibility provisions are not present in subsections (d) and (e), which also use the term "digital discrimination." If the definition of "digital discrimination" includes technical and economic feasibility, then the "taking into account" clause in subsection (b) would be superfluous.

Second, it is typical in anti-discrimination contexts for a definition to encompass discrimination based on an "actual or perceived" protected characteristic. This is because intentional discrimination sometimes occurs due to misperceptions by the perpetrator and discrimination in such instances should not fall out of the scope of the statute. For example, a

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[94] *Id.* § 1754(b).
[95] *See supra* Section III.c.
[96] *See supra* Section III.
[97] The one exception where these factors could be considered in a disparate treatment analysis, as discussed above in Section III.c, is when there is no direct evidence of intentional discrimination and the *McDonnell Douglas* standard is a better fit for evaluating the specific circumstantial evidence of a particular case than the *Arlington Heights* standard. But this will not be relevant in many cases, requires a case-by-case analysis, and is not suitable for inclusion in a definitional term that will have downstream effects on the entire rule.

person who is Islamophobic may harass a person who is a Sikh that they mistake for being Muslim. Or someone of one nationality may be targeted for discrimination because of the misperception that they are of a different nationality, such as if someone lumped together people from different Latin American or African countries.

Third, the definition should recognize that discrimination can occur at either an individual level (e.g., denying a specific person service) or at a class level (e.g., denying an entire neighborhood service).

Fourth, the Commission should make clear that proxies for protected characteristics cannot be used to circumvent the prohibition against discrimination.

Fifth, the definition of "digital discrimination," as discussed above, is contingent on the definition of "equal access." Incorporating "equal access" into the definition and giving that term a proper scope as dictated by the statute will remove ambiguity about the application of subsection (b) and is consistent with the congressional intent stated in subsection (a).

Finally, the Commission should recognize that "digital discrimination" in subsection (b) is different and broader than "deployment discrimination" in subsection (c).[98] A statute should be construed to give effect to all its provisions, so that no part will be superfluous. "Nothing here indicates that Congress, when it provided these two terms, intended that they be understood to be redundant. We assume that Congress used two terms because it intended each term to have a particular, nonsuperfluous meaning."[99] There is no indication that the distinction Congress made between deployment and digital discrimination is a scrivener's error.[100]

The Commission should therefore read deployment discrimination as a subset of digital discrimination. There are many ways in which digital discrimination can manifest, and discrimination in deployment of infrastructure is just one of them. That Congress specifically identified deployment discrimination in subsection (c) demonstrates special concern for this aspect of digital discrimination and the role for the Attorney General. Notably, the "other factors" in (c)(3) are not defined by reference to the enumerated factors in (b)(1), but as any relevant factors that the Commission identifies during rulemaking. Thus, while the regulation of digital discrimination in subsection (b) is restricted to considerations of income level, race, ethnicity, color, religion, and national origin,[101] the Commission may consider "other factors" when addressing deployment discrimination.[102] This directive demonstrates Congress's intent for the Commission to have great flexibility in mitigating deployment discrimination.

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[98] *Compare* 47 U.S.C. § 1754(b), *with id.* § 1754(c).
[99] *Bailey v. United States*, 516 U.S. 137, 146 (1995).
[100] *See Niz-Chavez v. Garland*, 141 S. Ct. 1474, 1480 n.1 (2021) (scrivener's error doctrine "applies only in exceptional circumstances to obvious technical drafting errors.").
[101] 47 U.S.C. § 1754 (b)(1).
[102] *Id.* § 1754 (c)(3).

b. How to interpret "equal access"

In ¶ 13, the Commission seeks comment on how to use the statutorily-defined term "equal access" and in ¶¶ 31-33 it seeks comment on some components of its definition and how to apply them. We believe understanding the scope of "equal access" is essential to defining "digital discrimination" and to giving the statute as a whole its proper implementation, as it is used in key places in the text.[103]

The statute defines "equal access" to mean "the equal opportunity to subscribe to an offered service that provides comparable speeds, capacities, latency, and other quality of service metrics in a given area, for comparable terms and conditions."[104] By assessing the components of this term, the Commission should recognize that "equal access" does not mean just the ability to subscribe to a service, but the ability to get equal treatment while subscribed to that service.

First, the Commission should look to civil rights precedents to understand what "equal opportunity" means in the definition of equal access, because it is pivotal to the entire statute. Equal opportunity exists when the ability to obtain and enjoy the same good or service on the same terms does not depend on factors that are directly or indirectly correlated with protected characteristics. Under the terms of section 60506, equal access would thus mean that an individual's income level, race, ethnicity, color, religion, or national origin shall not affect that individual's ability to obtain or enjoy broadband internet access service. Decades of civil rights case law have illustrated what it means for opportunities to be equal.

At its most basic level, equal opportunity prohibits denial of service on the basis of a protected characteristic. And case law holds that equal opportunity goes beyond outright refusal to serve a given customer—providing service of differing quality also constitutes a denial of equal opportunity. In *Newman v. Piggie Park Enterprises*—a landmark case and one of the first decisions to interpret the Civil Rights Act of 1964—the court found that a restaurant "denied full and equal service" to its Black customers both when it refused them service and when it required Black patrons to pick up from the kitchen window instead of being waited upon like white customers.[105] The Supreme Court has held it unlawful to treat classes differently even if they can access the same facilities and even if there is no visible indication of "any disadvantage."[106] Moreover, denial of equal opportunity to access a service cannot be excused by showing that an equivalent service is available from another vendor.[107]

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[103] *See id.* § 1754(a)(1), (a)(3), (b), (c).
[104] *Id.* § 1754(a)(2).
[105] *Newman v. Piggie Park Enter., Inc.*, 377 F.2d 433, 434 & n.3 (4th Cir. 1967), *aff'd*, 390 U.S. 400 (1968).
[106] *McLaurin v. Oklahoma State Regents for Higher Ed.*, 339 U.S. 637, 640-42 (1950) (holding segregation unlawful even when segregated student used "the same classroom, library, and cafeteria as students of other races" without indication of "any disadvantage").
[107] *See Missouri ex rel. Gaines v. Canada*, 305 U.S. 337, 349 (1938) (finding unlawful discrimination where "[t]he white resident is afforded legal education within the State; the negro

Nor is it acceptable to provide disparate service based on differences in anticipated demand if such disparate service turns on a protected characteristic. Courts have rejected anticipated demand as a justification for unequal treatment or denying access to services.[108] Cases concerning railroad segregation are illustrative, given the many parallels between railroads and internet service, from infrastructure considerations and service tiers to impact on interstate commerce and regulation by federal commissions. In *Mitchell v. United States*, the Interstate Commerce Commission excused a lack of equal service for Black patrons because they had "comparatively little" traffic and "no indication that there was likely to be such demand[.]"[109] The Supreme Court rejected this excuse, holding that "the comparative volume of traffic cannot justify the denial of a fundamental right of equality of treatment[.]"[110] Similarly, in *Henderson v. United States*, the Supreme Court held that dining car segregation was unlawful even when a railway offered alternative and equivalent dinner service to an excluded Black patron for no extra charge.[111] The Court rejected the argument that "limited demand" for dining facilities by Black passengers justified the discrimination, explaining that "it is no answer to the particular passenger who is denied service at an unoccupied place in the dining car that, on the average, persons like him are served."[112]

Second, the Commission should give broad scope to the component terms of "equal access." Taken together, between "comparable . . . other quality of service metrics" and "comparable terms and conditions,"[113] the Commission should understand "equal access" to involve any element of broadband internet access service that would be material to a consumer.

In addition to the technical metrics enumerated in the statute, the Commission should consider qualitative aspects of service that can impact a subscriber's broadband usage—what one might call "bureaucratic friction." These metrics include the caliber of customer service, which can be measured by the number of support channels, support wait times and call durations, available languages, and representative expertise. The Commission should also consider the ease of scheduling repairs and timeliness of resolving outages, which can have a strong impact on broadband adoption, use, and access to services by subscribers. If subscribers in one neighborhood have to wait substantially longer for customer service, repairs, or upgrades than subscribers in another neighborhood, and the demographics of the neighborhoods differ based on a protected characteristic, the Commission should view such a disparity as prima facie evidence

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resident having the same qualifications is refused it there and must go outside the State to obtain it" despite such education nonetheless being available out of state).

[108] *See Henderson v. United States*, 339 U.S. 816, 825 (1950); *Mitchell v. United States*, 313 U.S. 80, 97 (1941).

[109] *Mitchell*, 313 U.S. at 92.

[110] *Id.* at 97.

[111] *Henderson*, 339 U.S. at 818.

[112] *Id.* at 825.

[113] 47 U.S.C. § 1754(a)(2).

of digital discrimination.[114] The Commission should also consider socio-economic factors in its evaluation—consumers struggling to afford a broadband subscription may also lack the time or resources to effectively navigate bureaucratic chains of customer support. The Commission should thus prohibit disparate impact in quality-of-service metrics, including potential firm practices that allocate better customer service and internet service to areas with higher median incomes, for example.

Beyond customer support, the Commission should examine less obvious service components which can nonetheless curtail use by certain subscribers. For example, mobile data caps may have an outsized effect on smartphone dependent subscribers, which include 25% of Hispanic users, 17% of Black users, and 12% of white users.[115] With millions of Americans relying on smartphones as their primary source of high-speed internet at home,[116] limited availability of low-cost data plans or prohibitive fees for overages will create steep obstacles to access. Limitations on supported devices, plan choice in apartment buildings, and language options could all have a similarly outsized influence on those most likely to struggle with access. The Commission should also consider differentials in software or firmware updates, data security and privacy practices, and customer-premises equipment and other provided devices. While far from exhaustive, these parameters exemplify just some of the many factors impacting the actual experience of American consumers that existing reporting may not capture or consider.

The Commission should understand "other quality of service metrics" to be a flexible and non-exhaustive term. Congress wrote this catchall to capture the long tail of intangible variables that are difficult to list exhaustively and are subject to change. Because this is a remedial statute entitled to broad construction,[117] the term should be given generous scope. The nature of broadband technology is ever evolving, such that the criteria for evaluating service and the expectations with respect to "quality" will invariably change over time. Just as most of us today would no longer accept a dial-up connection—once the cutting-edge option for internet access—it would be short-sighted to set fixed benchmarks based on current technology. To limit evaluation to a set group of metrics with static targets would be to ignore the inherently dynamic nature of broadband service and the need to keep pace with subscribers' expectations and demands based on current technologies.

"Comparable terms and conditions" should be understood to refer to all contractual provisions between the provider and subscriber (the "terms"), as well as all policies and practices of the provider that affect the subscriber's service, regardless of whether they are made explicit in a contract (the "conditions"). "Terms" encompass the price, duration, and composition of

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[114] *See infra* Section V.b.
[115] Andrew Perrin, *Mobile Technology and Home Broadband 2021*, Pew Rsch. Ctr. (June 3, 2021), https://www.pewresearch.org/internet/2021/06/03/mobile-technology-and-home-broadband-2021/.
[116] *Id.*
[117] *See supra* note 6 and accompanying text.

available service contracts,[118] as well as additional contractual provisions, including—but not limited to—customer support options, data caps, promotional offerings, equipment availability and rental terms, deposits, type and number of devices allowed, forced arbitration clauses, and privacy policies.

The word "conditions" directs the Commission to consider measures beyond the standard contractual terms that can impact subscriber experience. Differences in corporate policy and procedure around credit checks, installation, contract renewal, upgrades, account termination, transfers to another service provider, service suspension, complaint procedures, and debt collection may meaningfully impact subscriber experience and consumer choice. If some subscribers receive ample notice regarding upcoming or past-due bills while others receive no such reminders, disparities in timeliness of payment are likely to result—as are consequences in the form of late fees, service shutoff, and credit reporting. Similarly, the Commission should look out for policies systematically excluding subscribers enrolled in lower-cost, legacy plans from government benefits or demanding upgrades to newer, premium plans to qualify for promotions.[119]

The Commission should consider in particular the cumulative effect on access that a series of terms and conditions may have even when each may be only slightly onerous on its own. Each policy, practice, or provision on its own may have a subtle whittling effect on the number of people able to obtain and maintain broadband access, especially lower-income consumers. But when compounded together they may result in broad denials of service, just as many small leaks in a garden hose can reduce the ultimate output to a trickle. The Commission must not allow providers to use such methods to winnow and gatekeep access to service that is ostensibly available.

The Commission should give special attention to terms and conditions that govern the use of subscriber data. By nature of their position in the telecommunications stack and the size of their user base—just six providers make up almost 99% of the market[120]—broadband providers

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[118] For example, whether broadband service is available as a standalone component as well as bundled with other components such as television or telephone service. *See* NTCA-The Rural Broad. Ass'n, *Broadband/Internet Availability Survey Report* (Dec. 2021), https://www.ntca.org/sites/default/files/documents/2021-12/2021-broadband-survey-report-final-12-15-21.pdf (noting that approximately 16% of rural providers do not offer standalone broadband access).

[119] Though providers pledged to honor the Emergency Broadband Benefit, intended to provide relief for qualifying consumers during the COVID crisis, several introduced additional criteria to accessing these benefits making them difficult to obtain or functionally meaningless. *See* Geoffrey Fowler, *The Government Has a Program to Cut Your Internet Bill. Verizon Was Using It to Force You Onto a New Data Plan*, Wash. Post (May 17, 2021), https://www.washingtonpost.com/technology/2021/05/17/verizon-emergency-broadbandbenefit/.

[120] FTC, *A Look at What ISPs Know About You: Examining the Privacy Practices of Six Major Internet Service Providers* 2-3 (Oct. 21, 2021),

have access to vast quantities of data about a large number of people. This data includes valuable and sensitive information about their subscribers' location, demographics, and internet usage.[121] Providers that bundle broadband with television, home security, or other services can track even more detailed information.[122] The manner in which a provider collects subscriber data is an important component of the terms of the service. The Commission should also consider how a given provider uses subscriber data, and the degree to which subscribers can adequately understand and control what happens to the data collected about them.[123] For example, the sale of subscriber data to debt collectors or its use in advertisement targeting presents serious risks of disparate impact on the basis of race or other protected characteristics.[124] Similarly, tracking the data usage habits of subscribers to throttle speeds and thereby incentivize upgrades to more expensive service plans may disproportionately harm lower-income consumers.[125] Such discrimination can deter the adoption of broadband and equal access.

Finally, the language of the statute not only permits, but rather requires, the Commission to consider the affordability of terms and conditions. Even with identical terms and conditions, comparability will be rendered merely illusory if rates are prohibitively expensive. If some individuals cannot afford the same terms of service as their neighbors, they may be effectively forced to accept contracts for lower tiers of service with less favorable, more restrictive, terms and conditions or forgo it entirely. As it is, 23% of Americans without broadband cite financial constraints as among the most important reasons for forgoing service.[126]

For the same reasons quality of service must be interpreted expansively to account for the many ways in which access can be rendered so inconvenient or unreliable that it is functionally nonexistent, the full range of terms and conditions governing subscribers must also be considered to account for their role in preventing equal access, whether by discouraging adoption, restricting service, or failing to address consumer concerns.

c. How to define and evaluate the relevant geographic area.

In ¶¶ 42-49, the Commission seeks comment on how to understand relevant geographic areas to which to apply its digital discrimination rules and how to compare geographic areas to measure discrimination.

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https://www.ftc.gov/system/files/documents/reports/look-what-isps-know-about-you-examining-privacy-practices-six-major-internet-service-providers/p195402_isp_6b_staff_report.pdf.

[121] *Id.* at 15-16, 18-19.

[122] *Id.* at 17.

[123] *See id.* at 26-32.

[124] *Id.* at 34.

[125] *Id.* at 7.

[126] Colleen McClain, *34% of Lower-Income Home Broadband Users Have Had Trouble Paying for Their Service Amid COVID-19*, Pew Rsch. Ctr. (June 3, 2021), https://www.pewresearch.org/fact-tank/2021/06/03/34-of-lower-income-home-broadband-users-have-had-trouble-paying-for-their-service-amid-covid-19/.

As a threshold matter, the Commission should recognize that there may not be a one-size-fits-all definition of geographic area that works for all types of digital discrimination. There are many different geographies in the United States and a legitimate distinction in one region may not be a legitimate distinction in another region. Moreover, there could be some forms of discrimination where it does not matter what the geographic area is. For example, there could be valid reasons to provide differential customer service response times in urban versus rural areas under some circumstances. But it would not be permissible to provide differential customer service because the rural area is predominantly white and the urban area is predominantly Black, or vice versa. Geographic area may be relevant for disparate impact analyses but will almost never be relevant in cases involving intentional discrimination—if there is intentionality to disadvantage a protected class, that decision is not turning on geographic differences.

Consequently, the Commission needs to consider the totality of the circumstances when determining the appropriate geographic area to prevent gamesmanship of the rules. In general, when defining the overall area within which a provider is prohibited from discriminating, the Commission should draw the area as large as is reasonable to avoid the telecommunications equivalent of gerrymandering.

In many cases of deployment discrimination, the area can be defined as the relevant metropolitan area, as defined by the Census Bureau.[127] This is a standardized metric that will facilitate apples-to-apples comparisons. Providers should not be allowed to discriminate in deployment within a metropolitan area. The Commission should not use a provider's service area as the defining factor because providers' service areas may already be drawn based on historical redlining or areas the provider does not want to serve, such as low-income neighborhoods. Or providers could draw and change their service areas prospectively to evade liability for discrimination. If a provider is providing service within a metropolitan area, it should not be allowed to discriminate in its deployment within that area either intentionally or by disparate impact. Notably, the disparate impact analysis will account for legitimate business necessities, including technical and economic feasibility. This means that providers will not automatically be required to deploy to an entire metropolitan area. It just means that within a metropolitan area, a provider must be able to justify its deployment based on legitimate business necessity and must, where appropriate, use less discriminatory alternatives to mitigate disparate impacts.

When measuring discrimination within a metropolitan area, the Commission should use Census tract data to compare locations because it is a standardized metric that is well understood, uniformly measured, used in many other areas of research, and is linkable to detailed demographic data about the inhabitants of such tract. For example, Census tract data is routinely used to measure discrimination under the Fair Housing Act, Voting Rights Act, Equal Credit Opportunity Act, and other anti-discrimination statutes. Using a larger or less defined geographic area could mask discriminatory effects, such as if adjacent wealthy and poor neighborhoods get lumped together. And going *too* precise could lose the forest for the trees—if the Commission looked at a single block it might find no discrimination because the entire neighborhood is being

[127] *See Metropolitan and Micropolitan*, U.S. Census Bureau (July 5, 2022), https://www.census.gov/programs-surveys/metro-micro.html.

redlined but each household is treated equally as their neighbors. Again, the Commission should adopt a rule of reason, rather than a bright line, to prevent circumvention and gamesmanship of the rules.

d. How to evaluate income level discrimination

In ¶ 24, the Commission seeks comment on whether the inclusion of income level as a listed characteristic should guide the Commission's understanding of whether the statute applies to claims of discrimination based on disparate impact or disparate treatment. In ¶ 66, the Commission seeks comment on how subsection (b)(1)'s inclusion of "income level" as a listed characteristic fits into this framework.

As a threshold matter, the Commission should recognize that section 60506 was enacted as part of the larger Infrastructure Investment and Jobs Act, which also contained many provisions aimed at expanding broadband access, funding broadband deployment, and subsidizing broadband subscriptions. Consequently, it would be contrary to the overall scope and purpose of the Act if prohibition of income level discrimination was unduly and narrowly cabined.

Consistent with our definition of "digital discrimination,"[128] the Commission should broadly understand "income level" to cover both income level itself as well as proxies for income level, such as credit scores, education, homeownership, source of income and participation in public assistance programs, and other common indicia of income levels. Credit scores, for example, are correlated with other characteristics listed in subsection (b)(1)—including race, ethnicity, and national origin—and have been historically used and are presently used to discriminate against large groups of people.[129] Source of income discrimination similarly perpetuates race-based discrimination, particularly in rental markets.[130] If the Commission were to exclude consideration of proxies for income level in preventing digital discrimination, the Commission would be hampered in its ability to execute Congress's mandate in subsection (b)(1).

Even approaches to advertising may provide cause for concern in this respect. For example, extending promotional rates to current customers while insinuating that their credit scores are tied to contract renewal may create undue pressure to resubscribe with the same

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[128] *See supra* Section IV.a.

[129] Aaron Klein & Lisa Servon, *To Reform the Credit Card Industry, Start with Credit Scores*, Brookings Inst. (May 20, 2019), https://www.brookings.edu/opinions/to-reform-the-credit-card-industry-start-with-credit-scores/ ("Credit remains a tool of discrimination that denies opportunity to broad groups of people in our society for unfair reasons.").

[130] Antonia K. Fasanelli & Philip Tegeler, *Your Money's No Good Here: Combatting Source of Income Discrimination in Housing*, A.B.A. Hum. Rts. Mag.Am. Bar. Ass'n (Nov. 30, 2019), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/economic-justice/your-money-s-no-good-here--combatting-source-of-income-discrimin/.

provider.[131] Not only are lower-income consumers likely to be more vulnerable to negative credit reports, but they may also lack the resources to investigate and dispute these claims. Some of these practices may be unofficial and discretionary, in which case the Commission may see fit to study their operation in practice or to require providers to systematize and share them for accountability purposes.

The Commission should prohibit mandatory arbitration clauses for the discriminatory disparate impacts they have on lower-income consumers by denying them effective recourse when providers violate their rights. The Commission has previously observed that there are "serious concerns about the impact on consumers from the inclusion of mandatory arbitration requirements as a standard part of many contracts for communications services,"[132] that "mandatory arbitration, in particular, may more frequently benefit the party with more resources and more understanding of the dispute procedure, and therefore should not be adopted,"[133] and that arbitration procedures often impose high costs on consumers.[134] We agree with the Commission's prior statement that "customers should not be forced to agree to binding arbitration and surrender their right to their day in court in order to obtain broadband Internet access service."[135] In addition to prohibiting mandatory arbitration in broadband internet access, the Commission can also prohibit its use by common carriers as an unjust and unreasonable practice in violation of section 202(a).[136]

To be sure, the inclusion of "income level" as a protected characteristic in subsection (b)(1) is not novel and should not serve as the basis for understanding subsection (b)(1) as being limited to intentional discrimination. The Cable Act prohibits cable providers from discriminating on the basis of income.[137] The ECOA prohibits lenders from discriminating in "any aspect of a credit transaction . . . because all or part of the applicant's income derives from any public assistance program."[138] Statutes barring discrimination based on source of income—particularly income received from federal, state, and local public assistance programs—are

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[131] David Lazarus, *Column: Renew Your Service or We'll Trash Your Credit Score, Spectrum Tells Ex-Customer*, L.A. Times (Oct. 12, 2021), https://www.latimes.com/business/story/2021-10-12/column-spectrum-billing-threat.
[132] *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Report and Order, WC Docket No. 16-106, FCC 16-148, 31 F.C.C. Rcd. 13911, 14039 ¶ 305 (Nov. 2, 2016).
[133] *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, GN Docket No. 14-28, FCC 15-24, 30 F.C.C. Rcd. 5601, 5718 ¶ 267 (Mar. 12, 2015).
[134] *Id.* at 5718 ¶ 267 & n. 689.
[135] *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Notice of Proposed Rulemaking, WC Docket No. 16-106, FCC 16-39, 31 F.C.C. Rcd. 2500, 2587 ¶ 274, 2588 (Apr. 1, 2016).
[136] *See infra* Section VII.
[137] *See* 47 U.S.C. § 541(a)(3).
[138] 15 U.S.C. § 1691(a), (a)(2).

prevalent at the state level.[139] And at least eleven states, the District of Columbia, and several localities prohibit the use of credit reports in employment decisions.[140]

But even if income level were considered novel at the federal law, there is no legal basis for adopting an extratextual reading of subsection (b) based on this novelty. As laid out above, the plain meaning of subsection (b) encompasses disparate impact.[141] To treat income level differently would represent a departure from the plain text of the statute. Income level is listed with race, ethnicity, color, religion, and national origin in subsection (b), and the statute does not otherwise indicate that the Commission should provide special treatment to any of the listed characteristics—much less income level. Rather, Congress recognized in its policy statement that ***all*** people of the United States should benefit from equal access and accordingly enumerated specific characteristics that would achieve this policy objective.

When weighing income level protection versus economic feasibility, the Commission must remember that this statute is a civil rights statute to be generously construed to effectuate its remedial purpose and that the purpose of this statute is to provide universal service by ensuring everyone can achieve equal access.[142] That means sometimes providers may have to serve consumers that are not profitable or are not profit-maximizing, and they should be required to do so as long as it does not substantially imperil the fiscal health of the provider. When assessing whether a provider is reasonably denying service due to inability to pay, the Commission should look at the totality of the circumstances for both the consumer and the provider. Consumers' ability to pay must be balanced against the provider's ability to provide service with less profit, at cost, or even at a loss. For example, would the consumer be able to pay a lower rate? Would the provider's business be jeopardized by charging a lower rate to this class of consumers? The Commission should look at the size, revenues, expenditures, profits, and fiscal health of the provider as a whole, not merely at whether one transaction, deployment, service contract,

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[139] *See, e.g.*, Cal. Gov't Code § 12921(b) (West 2022) ("The opportunity to seek, obtain, and hold housing without discrimination because of . . . source of income . . . is hereby recognized as and declared to be a civil right."); Mass. Gen. Laws ch. 151B, § 4(10) (2022) ("For any person furnishing credit, services or rental accommodations to discriminate against any individual who is a recipient of federal, state, or local public assistance, including medical assistance, or who is a tenant receiving federal, state, or local housing subsidies, including rental assistance or rental supplements, because the individual is such a recipient, or because of any requirement of such public assistance, rental assistance, or housing subsidy program."); Minn. Stat. Ann. § 363A.08 (West 2023) (prohibiting employment discrimination because of "status with regard to public assistance").

[140] Nancy Gunzenhauser Popper & Amanda M. Gomez, *House Passes Bill Restricting Employer Credit Checks*, Nat'l L. Rev. (Feb. 15, 2020), https://www.natlawreview.com/article/house-passes-bill-restricting-employer-credit-checks (mentioning at least the states of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont and Washington and cities of Philadelphia, New York, and Chicago).

[141] *See supra* Section III.b.ii.

[142] *See supra* notes 5-6 and accompanying text.

offering, program, or service area is profitable. It should also consider whether the provider is or could be receiving grants to offset costs and whether the provider could help the subscriber obtain subsidies. If a provider can reasonably afford to serve a consumer or class of consumers at cost or below cost, it should have to do so.

e. How to interpret technical and economic feasibility

In ¶¶ 34-36, the Commission seeks comment on how to take into account issues related to technical and economic feasibility. Specifically, the Commission asks whether rules for preventing discrimination should give way to safe harbors based on technical and economic feasibility. They should not.

As a threshold matter, it is important to recognize what the statute does and does not do. The issues of technical and economic feasibility appear in only two places in section 60506: in the preamble of subsection (a) and in the preamble of subsection (b). In both instances, the totality of the text makes clear that the Commission should maximally pursue equal access and prevention of discrimination and that technical and economic feasibility are considerations ancillary to these policy objectives. Subsection (b) contains similarly absolute language—e.g., "preventing" and "eliminate"—that is oriented toward maximum possible compliance. Technical and economic feasibility are mere considerations for the Commission. Congress gave the Commission wide discretion as to *how* it would identify technical and economic feasibility issues, how those issues interact with ensuring equal access, and how to "tak[e] into account"[143] these issues. And while Congress offers a wide berth to the Commission in assessing technical and economic feasibility, Congress's instruction amounts to more than an instruction to merely conduct a cost-benefit analysis. Congress is explicit when it allows the Commission to conduct a cost-benefit analysis,[144] and with subsection (b), Congress did not do so. Nowhere in the statute is technical and economic feasibility considered or recommended to be a complete safe harbor, excuse, or justification for discrimination.

f. Deployment discrimination should encompass additional protected characteristics.

In ¶ 43, the Commission asks whether it can take action to address inequities faced by those with unlisted characteristics under a different provision of section 60506. Yes, it can, and it should.

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[143] 47 U.S.C. § 1754(b).

[144] *Id.* § 610(e) (requiring the Commission to "specifically consider the costs and benefits to all telephone users, including persons with and without hearing loss" in promulgating regulations for ensuring reasonable access to telephone service by persons with impaired hearing); *id.* § 544a(a)(1)(B) (requiring the Commission to consider "the costs and benefits to consumers of imposing compatibility requirements on cable operators and television manufacturers").

Subsection (c)(3) says that the Commission should prohibit deployment discrimination based on "other factors the Commission determines to be relevant."[145] This is a catchall that, consistent with the broad remedial purpose of the statute, should be generously construed. While subsection (b) has specific enumerated protected characteristics, this catchall is broader and more flexible. Consistent with the anti-discrimination protections often afforded by other civil rights laws, the Commission should additionally prohibit deployment discrimination based on sex, sexual orientation, gender identity or expression, age, disability, familial status, immigration status, domestic violence survivor status, and homelessness.[146]

g. How to define "covered entities"

In ¶¶ 29-30, the Commission seeks comment on what types of entities should be covered by its definition of digital discrimination of access.

Guaranteeing equal access to broadband for all individuals requires applying the statute to any entity that can affect the ability of an individual to access the service, not just those entities that provide connectivity. Limiting the statutory application to broadband providers would fall short of the statutory goal of "eliminating [digital] discrimination,"[147] because there exist numerous other entities that have the capacity to engage in such discrimination. For instance, a landlord could restrict broadband options within an apartment building even if multiple providers are available, delay service for building facilities, or discriminate against tenants in myriad other ways. A business providing Wi-Fi access could also discriminate based on protected characteristics. For example, if a cafe chain allowed students to freely access Wi-Fi in their stores in one neighborhood but not others, this may constitute digital discrimination. This is particularly salient given that students from lower-income households are more likely to rely on public Wi-Fi to finish their homework.[148]

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[145] 47 U.S.C. § 1754(c)(3).

[146] *See, e.g.*, 42 U.S.C. § 2000e-2 (race, color, religion, sex, national origin); *id.* § 3604 (race, color, religion, sex, familial status, national origin); *id.* § 2000a (race, color, religion, national origin); Exec. Order No. 12250 §1-201(d), 45 Fed. Reg. 72995, 72995 (1980) (race, color, national origin, "handicap," religion, sex), *reprinted in* 42 U.S.C. § 2000d-1; D.C. Code § 2-1402.31 (2023) (race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, gender identity or expression, familial status, family responsibilities, genetic information, disability, matriculation, political affiliation, source of income, place of residence or business, homeless status); Cal. Civ. Code § 51 (West 2022) (sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, sexual orientation, citizenship, primary language, immigration status).

[147] 47 U.S.C. § 1754(b)(2).

[148] *See* Colleen McClain et al., *The Internet and the Pandemic*, *2. Parents, Their Children, and School During the Pandemic*, Pew Rsch. Ctr. (Sept. 1, 2021), https://www.pewresearch.org/internet/2021/09/01/parents-their-children-and-school-during-the-pandemic/.

The text of the statute supports this interpretation. Subsections (b) and (c) focus on preventing and eliminating discrimination—they are oriented to the impacts on affected populations and do not identify specific covered entities.[149] Similarly, subsection (a)(2) defines "equal access" to mean "the equal opportunity to subscribe to an offered service"[150] not offering a service equally to potential subscribers. The latter is an act that only certain types of entities could do, whereas anyone could interfere with the former. Only subsection (d) specifies an actor, instructing the Commission to develop recommendations for states and localities "to ensure that *broadband internet access service providers* do not engage in digital discrimination."[151] Using this term in one subsection but not others demonstrates that Congress knows how to specify an entity if it wants to do so.[152]

Other civil rights laws are illustrative here. For example, the property rights section of the Civil Rights Act of 1866, known colloquially as Section 1982, similarly focuses on establishing equitable outcomes and does not enumerate specific covered actors when it states, "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property."[153] Section 1982 has been held not only to apply to parties to a property transaction (e.g., landlords, realtors, lenders, and sellers) but also to third parties that interfere with an individual's equal enjoyment of property.[154] Section 1981, a companion to section 1982 that protects equal rights to contract and engage in commerce, has a similar structure and similarly has been held to apply to third-party interference.[155]

The Commission should interpret section 60506 to prohibit interference with equal access to broadband by any type of entity. Anyone who engages in digital discrimination and impairs the ability of individuals to equally access broadband service undermines the goal of section 60506 and should thus fall under the scope of the regulation.

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[149] 47 U.S.C. § 1754(b)-(c).
[150] *Id.* § 1754(a)(2).
[151] *Id.* § 1754(d) (emphasis added).
[152] *See Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 341 (2005) (warning against reading requirement into statute "when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest").
[153] 42 U.S.C. § 1982.
[154] *See, e.g.*, *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987) (anti-Semitic vandalism of a synagogue); *Antonio v. Sec. Serv. of Am.*, *LLC*, 701 F. Supp. 2d 749 (D. Md. 2010) (arson targeting Black homeowners); *Johnson v. Smith*, 810 F. Supp. 235 (N.D. Ill. 1992) (cross-burning on homeowner's lawn).
[155] *See, e.g.*, *Vietnamese Fishermen's Ass'n v. Knights of the Ku Klux Klan*, 518 F. Supp. 993 (S.D. Tex. 1981) (racist assaults targeting fishermen and their ships).

h. Section 60506 is part of the Communications Act and the Commission can use the Act's enforcement provisions.

In ¶ 71, the Commission seeks comment on whether section 60506 is part of the Communications Act and whether the Commission can therefore use all of its various authorities to enforce it. Yes, and yes.

There are textual indicia that section 60506 is part of the Communications Act. *First*, it instructs the Commission to issue rules, establish policies, and pursue objectives without providing a detailed structure for the tools the Commission to use, which presumes that such matters are addressed in a related part of the statute it is amending. *Second*, subsection (e) specifically instructs the Commission to revise its public complaint process, which is housed in another part of the Communications Act, implying that this statute anticipates that the Commission's other complaint and enforcement provisions will apply to this section.[156]

Moreover, subsection (b)(2) and subsection (c) provide statutory support for using the Commission's authorities and enforcement powers under the Communications Act. Subsection (b)(2) says that the Commission should identify "necessary steps" it needs to take to eliminate discrimination—these can include using its enforcement powers under the Communications Act. Similarly, subsection (c) says the Commission "shall ensure that Federal policies . . . prohibi[t] deployment discrimination," and this too implies that the Commission can use its other policy tools.

Concluding that section 60506 was not part of the Communications Act would produce absurd results. Congress clearly intended the Commission to prevent and eliminate discrimination, but surely it did not also intend the Commission to have no enforcement power to execute this mandate and hold violators accountable.

V. Affirmatively addressing historic inequities is a "necessary step" for the Commission to take to "eliminate discrimination."

In ¶¶ 90 and 92, the Commission seeks comment on the authority offered by the terms "prevent" and "eliminate" under subsections (b)(1) and (b)(2) of section 60506.

Section 60506 instructs the Commission to write rules that both prevent and eliminate digital discrimination.[157] Prevention and elimination are two distinct concepts. Prevention in subsection (b)(1) is prospective and forward-looking, while elimination in subsection (b)(2) is retrospective. If the Commission's rules merely prohibit discriminatory actions, without more, the Commission would be ignoring its statutory obligation under subsection (b)(2).

Specifically, regarding elimination of discrimination, the statute says the Commission's rules should "identif[y] necessary steps for the Commission to take to eliminate discrimination

[156] 47 U.S.C. § 1754(e).
[157] *Id.* § 1754(b)(1)-(2).

described in paragraph (1)."[158] Subsection (b)(1) states that the Commission's rules should "preven[t] digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin."[159] The statute therefore instructs the Commission to identify *necessary* steps for elimination of discrimination. While the Commission is mandated to identify these steps, these are steps that the Commission *needs to take* to eliminate discrimination. Consequently, merely identifying the steps without taking further action would be inadequate, as the discrimination would persist. If the Commission does not take those steps to eliminate extant discrimination and the discrimination persists, then the Commission has failed to "prevent" the continuation of that discrimination, as required by subsection (b)(1). Elimination in subsection (b)(2) is retrospective and remedial, and it instructs the Commission not just to prohibit discriminatory actions going forward, but to eliminate unjust conditions that presently exist.

To rectify past harms, the Commission should require purposeful investment and policies designed to increase access and quality of service to historically discriminated-against communities. The Commission should require providers to prioritize deployment to communities that are underserved and to ensure that the services are accessible, affordable, and robust. For example, urban and rural areas with DSL or lesser service should be at the top of the list for infrastructure upgrades. The Commission could require providers seeking to expand or upgrade services in high-income and other well-served areas to demonstrate that they first make an equal or greater investment in underserved areas. This includes not just infrastructure upgrades, but investments in customer service, customer premises equipment, and other consumer devices.

In order to eliminate existing discrimination, it is important to recognize the history of systematic discrimination, segregation, and redlining that brought us to this point. In the subsections that follow, we will discuss how the history of redlining produced the current digital divide, and how that divide impairs people of color and low-income communities from realizing the full benefits of the internet.

a. Historic redlining led to digital redlining.

In ¶ 42, the Commission seeks comment on how to address areas that have experienced historic redlining. In ¶ 50, the Commission seeks comment on "the sources and effects of digital redlining."

There is a direct connection between historical redlining and digital discrimination. Digital redlining, as the new frontier of discrimination, is "the creation and maintenance of technology practices that further entrench discriminatory practices against already marginalized groups."[160] Digital redlining has deep roots in American history that begin with segregation and

[158] *Id.* § 1754(b)(2).
[159] *Id.* § 1754(b)(1).
[160] *Banking on Your Data: The Role of Big Data in Financial Services, Hearing Before Task Force on Fin. Tech. of the H. Comm. on Fin. Serv.*, 116th Cong. 9 (Nov. 21, 2019) (Statement of

actual redlining in the housing market. In 1934, the newly-established Federal Housing Administration furthered already prevalent segregation efforts by refusing to insure mortgages in and near Black neighborhoods while also subsidizing builders who were mass-producing entire subdivisions for white citizens.[161] Before World War II and continuing thereafter, government agencies including the Home Owners Loan Corporation, Fannie Mae, and the Federal Housing Administration continued to fuel the creation of suburban America through low-cost mortgage loans to developers and homebuyers in a manner that excluded people of color.[162] The segregation tactics and policies implemented by these agencies pushed many Black people to urban communities that were isolated and did not have the same access to resources.[163]

Prior to the passage of the Civil Rights Act of 1964, the Housing Act of 1954 "empowered local authorities to adopt [urban] renewal plans that guaranteed continued separate and unequal development.[164] The Home Owners' Loan Corporation specifically mapped out America's racial geography, drawing red lines around Black neighborhoods marking them as off limits for the government-insured mortgages.[165] Both the Federal Housing Administration and Fannie Mae refused to support the origination of mortgages to Black people or insure any project where developers had not taken adequate steps to ensure that no homes would be sold to Black buyers.[166] The current 60%income ratio between Black and white Americans' incomes and 5% wealth ratio can be attributed in part to discriminatory federal housing policies implemented in the 20th century.[167] Redlining isolated Black people in areas that would suffer lower levels of investment than their white counterparts—including investment in infrastructure.[168]

Dr. Christopher Gilliard), https://democrats-financialservices.house.gov/uploadedfiles/chrg-116hhrg42477.pdf.

[161] Terry Gross, *A 'Forgotten History' of How the U.S. Government Segregated America*, NPR (May 3, 2017), https://www.npr.org/2017/05/03/526655831/a-forgotten-history-of-how-the-u-sgovernment-segregated-america.

[162] *Id.*

[163] *Id.*

[164] Arnold R. Hirsch, *"The Last and Most Difficult Barrier": Segregation and Federal Housing Policy in The Eisenhower Administration, 1953-1960*, Poverty & Race Rsch. Action Counsel 2 (Mar. 2005), https://www.prrac.org/pdf/hirsch.pdf.

[165] *National Fair Housing Alliance Redlining Toolkit*, Nat'l Fair Housing All. §1 (History and Legal Framework) (Apr. 14, 2022), https://nationalfairhousing.org/wp-content/uploads/2022/03/Section1_Topic1_History_RedliningToolkit.pdf.

[166] Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* 18-24 (2017).

[167] Angela Hanks et al., *Systemic Inequality: How America's Structural Racism Helped Create the Black-White Wealth Gap*, Ctr. for Am. Progress (Feb. 21, 2018), https://www.americanprogress.org/article/systematic-inequality/.

[168] *See* Andre M. Perry & David Harshbarger, *America's Formerly Redlined Neighborhoods Have Changed, And So Must Solutions to Rectify Them*, Brookings Inst. (Oct. 14, 2019),

Today, the impacts of redlining persist and lead to many disparities. "Many measures of resource distribution and public well-being now track the same geographic pattern: investment in construction; urban blight; real estate sales; household loans; small business lending; public school quality; access to transportation; access to banking; access to fresh food; life expectancy; asthma rates; lead paint exposure rates; diabetes rates; heart disease rates; and the list goes on."[169] The digital divide defines the gap between those Americans who have access to telecommunications and information technologies and those who do not.[170] Rural communities do not have the same access to broadband services and are underserved in comparison to urban communities.[171] Lower income families are less likely to have access than higher income groups.[172] And people of color are less likely to have access than their white counterparts.[173] Racially restrictive covenants and redlining "form part of a long history of discrimination, which has contributed to the disparities in homeownership and wealth still observed between the Black and white populations of the country today."[174]

Underinvestment in infrastructure in Black communities during the Jim Crow era also included underinvestment in telecommunications infrastructure.[175] As a result, Black communities have always had less access, and less equal access, to telecommunications services, which includes access to the internet today. Lower income communities today and communities

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https://www.brookings.edu/research/americas-formerly-redlines-areas-changed-so-must-solutions/.

[169] *Leaders of a Beautiful Struggle v. Balt. Police Dep't*, 2 F.4th 330, 349 (4th Cir. 2021) (en banc) (Gregory, C.J., concurring) (collecting sources).

[170] Colby Leigh Rachfal, Cong. Rsch. Serv., R46613, *The Digital Divide: What Is It, Where Is It, and Federal Assistance Programs*, (Mar. 9, 2021), https://crsreports.congress.gov/product/pdf/R/R46613.

[171] CBS Mornings, *The Digital Divide Between Rural and Urban America's Access to Internet*, CBS News (Aug. 4, 2017), https://www.cbsnews.com/news/rural-areas-internet-access-dawsonville-georgia/?linkId=40576782.

[172] Allan Holmes et al., *Rich People Have Access to High-Speed Internet; Many Poor People Still Don't*, Ctr. for Pub. Integrity (May 12, 2016), https://publicintegrity.org/inequality-poverty-opportunity/rich-people-have-access-to-high-speed-internet-many-poor-people-still-dont/.

[173] Kaleigh Rogers, *Internet Service Providers Systemically Favor White Communities Over Communities of Color*, Vice: Motherboard (Feb. 23, 2018), https://www.vice.com/en/article/8xdd7b/internetservice-providers-systematically-favor-white-communities-over-communities-of-color.

[174] Perry & Harshbarger, *supra* note 168.

[175] Shelley Stewart III et al., McKinsey Inst. for Black Econ. Mobility, & McKinsey Glob. Inst., *The Economic State of Black America: What is and What Could Be*, McKinsey & Co. 1, 13 (June 2021), https://www.mckinsey.com/~/media/mckinsey/featured%20insights/diversity%20and%20inclusion/the%20economic%20state%20of%20black%20america%20what%20is%20and%20what%20could%20be/the-economic-state-of-black-america-what-is-and-what-could-be-f.pdf.

that were historically redlined based on race overwhelmingly overlap.[176] The results of redlining directly relate to the digital divide, creating circumstances "where wealthy broadband users are getting the benefits of cheaper and faster Internet access through fiber, and low-income broadband users are being left behind with more expensive slow access by that same carrier."[177] The United States has on average the most expensive and slowest internet among modern economies.[178] Having internet access that is expensive and also slower than the average broadband minimum speeds set by the Commission in 2015 is a recipe for unequal access.[179]

Thus, the history of discriminatory conduct in the housing industry has had a direct, downstream effect on discriminatory access of telecommunications services. Even without this direct relationship, a record of discrimination is not necessary for the Commission to adopt rules prohibiting digital discrimination practices given the direct authority it has received from Congress to address this issue.

b. People of color and low-income communities do not have equal access to broadband internet.

Broadband internet is not universally accessible. According to the Commission's *2019 Broadband Deployment Report*, 21.3 million Americans did not have access to broadband service as of 2018.[180] However, an independent 2021 study suggested that the actual number could be double that estimate.[181] That number increases to 157.3 million when including people who have theoretical access to broadband but are unable to utilize the internet at broadband speeds.[182]

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[176] Tracy Jan, *Redlining Was Banned 50 Years Ago. It's Still Hurting Minorities Today.*, Wash. Post (Mar. 28, 2018), https://www.washingtonpost.com/news/wonk/wp/2018/03/28/redlining-was-banned-50-years-ago-its-still-hurting-minorities-today/.
[177] Ernesto Falcon, *The FCC and States Must Ban Digital Redlining*, Elec. Frontier Found. (Jan. 11, 2021) https://www.eff.org/deeplinks/2021/01/fcc-and-states-must-ban-digital-redlining.
[178] Becky Chao et al., *The Cost of Connectivity 2020*, New Am.: Open Tech. Inst. (July 15, 2020), https://www.newamerica.org/oti/reports/cost-connectivity-2020/.
[179] Karissa Bell, *Senators Ask the FCC to Change the Definition of High-Speed Broadband*, Engadget (Mar. 4, 2021), https://www.engadget.com/senators-fcc-change-definition-high-speed-broadband-222150947.html.
[180] *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, *2019 Broadband Deployment Report*, GN Docket No. 18-238, FCC 19-44, 34 F.C.C. Rcd. 3857, 3858 ¶ 2 (May 29, 2019).
[181] John Busby et al., *BroadbandNow Estimates Availability for All 50 States; Confirms that More than 42 Million Americans Do Not Have Access to Broadband*, BroadbandNow (Oct. 21, 2021), https://broadbandnow.com/research/fcc-broadband-overreporting-by-state.
[182] Shelley McKinley, *Microsoft Airband: An Annual Update on Connecting Rural America*, Microsoft (Mar. 5, 2020), https://blogs.microsoft.com/on-the-issues/2020/03/05/update-connecting-rural-america/.

These data show disparities along racial and socio-economic lines. According to a 2021 study, 71% of Black Americans and 65% of Hispanics have high-speed internet at home, compared to 80% of whites.[183] The same study showed that only 57% of households making less than $30,000 had home broadband, compared to 93% of households making $100,000 or more.[184] Among households that do have internet access, those in poorer areas have lower effective access speeds,[185] in part because lower income households are more likely to be limited to outdated technologies like DSL that overstate connection speeds.[186] Taken together, these figures suggest that the theoretical availability of broadband plans does not result in actual equity of broadband access. The data show that while broadband access is increasing over time, the digital divide persists.[187] A 2022 report from *The Markup* showed that lower income neighborhoods were being offered substantially lower quality internet service than other people living in the same city, for the same price.[188]

The digital divide affects students from kindergarten to college and beyond.[189] With greater reliance on internet access, racial and socio-economic gaps become even more stark. In a 2018 survey, 24% of teens whose annual family income was less than $30,000 said the lack of a dependable computer or internet access prohibited them from finishing their homework,

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[183] Sara Atske & Andrew Perrin, *Home Broadband Adoption, Computer Ownership Vary by Race, Ethnicity in the U.S.*, Pew Rsch. Ctr. (July 16, 2021), https://www.pewresearch.org/fact-tank/2021/07/16/home-broadband-adoption-computer-ownership-vary-by-race-ethnicity-in-the-u-s/.

[184] Emily Vogels, *Digital Divide Persists Even as Americans with Lower Incomes Make Gains in Tech Adoption*, Pew Rsch. Ctr. (June 22, 2021), https://www.pewresearch.org/fact-tank/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/.

[185] Roberto Gallardo & Brian Whitacre, *The Real Digital Divide? Advertised vs. Actual Internet Speeds*, Purdue Ctr. for Reg'l Dev. (Oct. 7, 2020), https://pcrd.purdue.edu/the-real-digital-divide-advertised-vs-actual-internet-speeds/.

[186] *See* Shara Tibken, *The Broadband Gap's Dirty Secret: Redlining Still Exists in Digital Form*, CNET (June 28, 2021), https://www.cnet.com/home/internet/features/the-broadband-gaps-dirty-secret-redlining-still-exists-in-digital-form/; Commc'ns Workers of Am. & Nat'l Digit. Inclusion All., *AT&T's Digital Redlining Leaving Communities Behind for Profit* (Oct. 2020), https://www.digitalinclusion.org/wp-content/uploads/dlm_uploads/2020/10/ATTs-Digital-Redlining-Leaving-Communities-Behind-for-Profit.pdf.

[187] *See Internet/Broadband Fact Sheet*, Pew Rsch. Ctr. (Apr. 7, 2021), https://www.pewresearch.org/internet/fact-sheet/internet-broadband/.

[188] *See* Leon Yin & Aaron Sankin, *How We Uncovered Disparities in Internet Deals*, Markup (Oct. 19, 2022), https://themarkup.org/show-your-work/2022/10/19/how-we-uncovered-disparities-in-internet-deals.

[189] Erin Richards et al., *A Year into The Pandemic, Thousands of Students Still Can't Get Reliable WiFi for School. The Digital Divide Remains Worse Than Ever.*, USA Today (Feb. 4, 2021), https://www.usatoday.com/story/news/education/2021/02/04/covid-online-school-broadband-internet-laptops/3930744001/.

compared to 9% of teens from households earning $75,000 or more.[190] Among the respondents, 13% of Black teens said they often could not finish homework due to lack of a computer or internet connection, compared to just 4% of white teens.[191] During the COVID pandemic, the vast majority of K-12 students received some degree of online instruction.[192] Among the parents of these children, 14% said their child had to resort to public Wi-Fi because there was no reliable connection at home—while this figure was 4% in high income households, it was 23% in lower income households.[193]

Adults need equitable internet access as well, for all kinds of daily necessities. Individuals who are seeking housing go online to find listings and apply for loans.[194] When looking for employment, a majority of Americans look for and apply to jobs online.[195] Lack of access to reliable telecommunication services can impede the ability for individuals in rural communities, especially rural Black households,[196] to get online and access telehealth resources, another necessity during the COVID-19 pandemic.[197]

As technology rapidly intertwines all aspects of our daily lives, being able to access and have reliable internet is a basic necessity and not a privilege. Based on the historical impacts of redlining, Black and Brown communities are impacted disproportionately by poor Internet connectivity, no Internet connectivity, and barriers to accessing fairly priced telecommunications.[198] Everyone in America should have equal opportunity to access high-speed

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[190] Monica Anderson & Andrew Perrin, *Nearly One-In-Five Teens Can't Always Finish Their Homework Because of the Digital Divide*, Pew Rsch. Ctr. (Oct. 26, 2018), https://www.pewresearch.org/fact-tank/2018/10/26/nearly-one-in-five-teens-cant-always-finish-their-homework-because-of-the-digital-divide/.

[191] *Id.*

[192] McClain et al., *supra* note 148.

[193] *Id.*

[194] *See* Nat'l Ass'n of Realtors, *2021 Home Buyers and Sellers Generational Trends Report* 50 (2021), https://www.nar.realtor/sites/default/files/documents/2021-home-buyers-and-sellers-generational-trends-03-16-2021.pdf; John B. Horrigan, *The Internet and Consumer Choice*, Pew Rsch. Ctr. (May 18, 2008), https://www.pewresearch.org/internet/2008/05/18/the-internet-and-consumer-choice/.

[195] Aaron Smith, *Searching for Work in the Digital Era*, *1. The Internet and Job Seeking*, Pew Rsch. Ctr. (Nov. 19, 2015), https://www.pewresearch.org/internet/2015/11/19/1-the-internet-and-job-seeking/.

[196] Avi Asher-Schapiro & David Sherfinski, *Digital Divide in the US: Nearly 40% of Rural Black Americans Have No Internet at Home*, Glob. Citizen (Oct. 7, 2021) https://www.globalcitizen.org/en/content/digital-divide-black-americans/.

[197] Krutika Amin et al., *How Might Internet Connectivity Affect Health Care Access?*, Peterson-KFF Health Sys. Tracker (Dec. 14, 2020), https://www.healthsystemtracker.org/chart-collection/how-might-internet-connectivity-affect-health-care-access/.

[198] Jabari Simama, *It's 2020. Why is the Digital Divide Still with Us?*, Governing (Feb. 28, 2020), https://www.governing.com/now/its-2020-why-is-the-digital-divide-still-with-us.html.

broadband and telecommunications services; it is a civil and human right in a world where our day-to-day interactions and much of our life takes place online.

VI. The Commission should create an Office of Civil Rights and implement the new executive order advancing racial equity.

In ¶ 89, the Commission seeks comment on any organizational changes it should make to the Commission to promote its efforts to address digital discrimination of access and assist in enforcement of any rules it adopts.

The Commission should create an Office of Civil Rights ("OCR"). As the Commission crafts rules to implement section 60506 and considers its other authorities, an OCR could help ensure that policies across the Commission are designed and executed holistically. There are more than 30 civil rights offices within federal agencies.[199] An OCR will create a focal point for Commission expertise and stakeholder engagement on digital discrimination and many other civil rights issues.[200] The OCR could advise on actions the Commission may take and coordinate with other agencies. The Commission can create an OCR at any time through its authority to manage the structure of the agency.

On February 16, President Biden issued a new executive order on "Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government."[201] Among other items, the executive order instructs federal agencies to establish Agency Equity Teams, create Equity Action Plans, and bolster their civil rights offices to "comprehensively use their respective civil rights authorities and offices to prevent and address discrimination and advance equity for all."[202] In particular, the executive order commands agencies to use their enforcement authorities to "prevent and remedy discrimination, including by protecting the public from algorithmic discrimination."[203] Independent agencies "are strongly encouraged to comply with the provisions of this order."[204] The Commission should adopt and implement this

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[199] *See Civil Rights Offices of Federal Agencies*, Dep't of Just., https://www.justice.gov/crt/fcs/Agency-OCR-Offices (last visited Feb. 17, 2023).
[200] *See* Letter from the Leadership Conf. on Civ. and Hum. Rts. to Leaders of the H. Comm. on Energy and Com., Civil Rights Priorities for Federal Communications Commission (Mar. 29, 2022), https://civilrights.org/resource/civil-rights-priorities-for-federal-communications-commission-fcc/.
[201] Exec. Order, *Further Advancing Racial Equity and Support for Underserved Communities Through the Federal Government*, White House (Feb. 16, 2023), https://www.whitehouse.gov/briefing-room/presidential-actions/2023/02/16/executive-order-on-further-advancing-racial-equity-and-support-for-underserved-communities-through-the-federal-government/ (not yet published in the *Federal Register*).
[202] *Id.*
[203] *Id.* § 8(f).
[204] *Id.* § 11(c).

executive order, including its definition of algorithmic discrimination, as if it was a covered agency.

VII. The Commission should require Title II common carriers to meet the same anti-discrimination requirements as broadband providers.

In ¶¶ 83-88, 90, and 96 the Commission asks what actions it should take in other policy areas to address discrimination. In ¶ 26, it seeks comment on the need to address discrimination by "other communications services."

In this rulemaking, the Commission should employ other provisions of the Communications Act to create a holistic regulatory regime to prevent and eliminate discrimination in other areas of the Commission's jurisdiction. Through sections 201 and 202 of the Communications Act, among other authorities, the Commission already possesses robust powers to address discrimination by common carriers.[205] As discussed above,[206] section 202(a) "uses language of the broadest type to bar discriminations of all kinds."[207] The Commission also has some anti-discrimination responsibilities through the Cable Act.[208]

The Commission should take this opportunity to use these existing authorities to harmonize anti-discrimination rules for Title II common carriers to ensure they are meeting the same standards for civil rights protection as broadband internet service providers. This means the Commission should issue regulations declaring that the types of discrimination prohibited by section 60506 also constitute an unjust or unreasonable practice under section 202(a) if similar acts are taken by a common carrier.

This means that if a common carrier, when providing a service covered by Title II, engages in "policies or practices that differentially impact, or are intended to differentially impact, an individual or class of individuals' equal access to telecommunications service based on their actual or perceived income level, race, ethnicity, color, religion, or national origin, or proxies thereof,"[209] including failing to provide "equal opportunity to subscribe to an offered service that provides comparable speeds, capacities, latency, and other quality of service metrics

[205] 47 U.S.C. §§ 201-202.
[206] *See supra* Section II.
[207] *Boynton v. Virginia*, 364 U.S. 454, 457 (1960).
[208] *See, e.g.*, 47 U.S.C. § 541(a)(3) (prohibiting income level discrimination by cable providers); *id.* § 554 (concerning equal employment opportunity programs by cable providers).
[209] *See supra* p. 18-19.

in a given area, for comparable terms and conditions,"[210] then that common carrier has engaged in unjust or unreasonable discrimination in violation of section 202(a).[211]

A Title II common carrier should be required to provide equal access to subscribe to their offered services, just like a broadband provider. For example, if a mobile wireless provider prioritizes cell tower deployment to high-income neighborhoods over low-income neighborhoods, or gives more promotional offers to white customers than Black customers, such practice would violate section 202(a). The Commission should make clear that section 202(a) prohibits both intentional discrimination and unjustified disparate impacts, as it is a results-oriented provision intended to promote universal service.

VIII. Conclusion

We appreciate the opportunity to comment on this Notice of Proposed Rulemaking regarding the implementation of section 60506. We encourage the Commission to use every tool in its toolkit to protect civil rights by preventing and eliminating discrimination in broadband internet access and telecommunications generally.

[210] 47 U.S.C. § 1754(a)(2).

[211] *See also Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003) (common carriers "cannot decline 'to serve any particular demographic group (*e.g.* customers who are of a certain race or income bracket).'") (quoting 17 F.C.C.R. 8987, 8997 (2002)); *Barnes v. 3 Rivers Tele. Coop., Inc.*, 2022 WL 3212100, *4 (D. Mont. Aug. 9, 2022) (Section 202(a) prohibits race discrimination).