

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

**COMMENTS OF
THE MULTICULTURAL MEDIA, TELECOM AND INTERNET COUNCIL**

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The Multicultural Media, Telecom and Internet Council (“MMTC”) respectfully submits these comments in response to the Notice of Inquiry (“NOI”) published by the Commission in the above-referenced proceeding.¹ The NOI invites public comment on how best to interpret the terms and concepts included in Section 60506 of the Infrastructure Investment and Jobs Act of 2021² (the “Infrastructure Act”) in the context of ensuring equal access to broadband, preventing digital discrimination, and identifying steps the Commission should take to eliminate digital discrimination.

I. INTRODUCTION AND SUMMARY

MMTC is the technology, media, and telecommunications industries’ leading non-partisan, national nonprofit diversity organization. Since its inception in 1986, MMTC has worked tirelessly to promote and preserve equal opportunity, civil rights, and social justice in the mass media, telecommunications, and broadband industries, and to close the digital divide on behalf of its members and constituents, including owners of radio and television broadcast

¹ *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, Notice of Inquiry, GN Docket No. 22-69 (rel. Mar. 17, 2022) (“NOI”).

² Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021) (“Infrastructure Act”).

stations, programmers, prospective station owners, and others involved in the technology, media, and telecommunications industries. One of MMTC's "core issue areas" focuses on infrastructure, connectivity, and digital inclusion.³ Increasing broadband access for unserved and underserved communities, therefore, is central to MMTC's mission.

At bottom, the provisions in Section 60506 of the Infrastructure Act should be viewed from the perspective of subscribers. In this way, the Commission should focus on issues related to broadband adoption, not just broadband availability. Furthermore, "equal access," as defined in subsection 60506(a), should be construed broadly to include non-technical quality-of-service attributes, such as equal opportunity in procurement, transactions, and advertising, in addition to the core technical criteria of speed, capacity, and latency. In addressing digital discrimination, the Commission should embrace an analytical framework that is anchored to a theory of disparate impact, rather than one that is tied to evidence of disparate treatment. It is also important that data collected by the Commission be disaggregated so that the nuances in discriminatory experiences can be captured, and that individuals have an effective mechanism by which to seek redress.

Any rules adopted by the Commission in connection with this proceeding should be severable in order to ensure that the totality of the Commission's rulemaking efforts to address digital discrimination are not placed in jeopardy.

Finally, given the seriousness and urgency of the issues at hand, the Commission should act quickly to prevent disadvantaged communities from being further left behind in this digital age.

³ See *MMTC's Focus Issues*, MMTC, <https://www.mmtconline.org/mmtc-online> (last visited Apr. 29, 2022).

II. “EQUAL ACCESS” MUST BE UNDERSTOOD FROM THE PERSPECTIVE OF THE SUBSCRIBER AND ADDRESS BARRIERS TO BROADBAND ADOPTION, NOT JUST BARRIERS TO BROADBAND AVAILABILITY

Through subsection 60506(a) of the Infrastructure Act, Congress declared that it is the policy of the United States that “subscribers should benefit from equal access to broadband internet access service.”⁴ It further defined equal access to mean the “equal opportunity to subscribe.”⁵ In interpreting this language, the Commission should look beyond simply whether comparable services at comparable terms and conditions are available to subscribers. Instead, the Commission should interpret the language in subsection 60506(a) from the perspective of subscribers (which should be understood broadly to include consumers, content creators, and entities participating in the internet service and infrastructure ecosystem), and it should identify the barriers that prevent subscribers from accessing broadband services beyond mere lack of availability.

Indeed, making broadband internet service more available will not alone suffice to ensure that non-subscribers will actually *adopt* such service. Despite having ready access to broadband services, millions of Americans have still not subscribed.⁶ The cost of broadband service is a significant factor contributing to non-adoption.⁷ Thus, while broadband internet may technically be available in a low-wealth or racial minority neighborhood, the high costs of obtaining and

⁴ Infrastructure Act § 60506(a)(1), 135 Stat. at 1245-46.

⁵ *Id.* § 60506(a)(2), 135 Stat. at 1245.

⁶ See Andrew Perrin & Sara Atske, *7% of Americans Don’t Use the Internet. Who Are They?*, Pew Research Ctr. (Apr. 2, 2021), <https://www.pewresearch.org/fact-tank/2021/04/02/7-of-americans-dont-use-the-internet-who-are-they>.

⁷ Emily A. Vogels, *Digital Divide Persists Even as Americans with Lower Incomes Make Gains in Tech Adoption*, Pew Research 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>.

maintaining service can prove to be an impediment for members of the community who are without the requisite means to pay for such service.⁸

In addition to the cost of broadband internet service, there are many other reasons why certain people have not signed up for such service despite it being available in their area. Lack of device readiness is one major contributing factor. Of Americans with household incomes less than \$30,000 per year, 24% do not have a smartphone and 41% lack a desktop or laptop computer.⁹ And, the divide in device ownership does not fall evenly, with Hispanic and Black adults less likely to own a laptop or desktop computer than White adults.¹⁰ A full quarter of Hispanic adults report they only access the internet through a smartphone.¹¹ Lack of digital readiness and awareness of government programs are other contributing factors. For instance, 80% of families that qualified for the Emergency Broadband Benefit, which launched in the spring of 2021, had not yet applied for it as of September 2021.¹² And as recently as 2016, 52%

⁸ The Infrastructure Act sought to address broadband affordability by, among other things, establishing the Affordable Connectivity Program (“ACP”), which offers low-income households subsidies of up to \$30 per month to purchase internet service. The Biden Administration recently furthered the impact of this program by securing a commitment from 20 leading internet service providers to charge ACP-eligible households no more than \$30 per month for high-speed, high-quality internet plans, effectively making those plans free for such households. Press Release, FACT SHEET: President Biden and Vice President Harris Reduce High-Speed Internet Costs for Millions of Americans (May 9, 2022), <https://www.whitehouse.gov/briefing-room/statements-releases/2022/05/09/fact-sheet-president-biden-and-vice-president-harris-reduce-high-speed-internet-costs-for-millions-of-americans>.

⁹ Kim Keenan, *Slow Broadband Adoption Needs a Real-Time Solution*, The Hill (July 22, 2021, 3:30 PM), <https://thehill.com/opinion/technology/564367-slow-broadband-adoption-needs-a-real-time-solution>.

¹⁰ Sara Atske & Andrew Perrin, *Home Broadband Adoption, Computer Ownership Vary by Race, Ethnicity in the U.S.*, Pew Research 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>.

¹¹ *Id.*

¹² Jamey Tucker, *Most Families Who Qualify for Help Paying Internet Bills through the Emergency Broadband Benefits Haven’t Applied*, WPSD (Sept. 27, 2021), <https://www.wpsd.com/story/news/politics/2021/09/27/emergency-broadband-benefits-haven-t-applied/7511140002>.

of Americans reported being hesitant to adopt new technology despite its importance in today's world.¹³ These “tech hesitant” Americans are prevented from adopting information technologies because they either lack the knowledge to set up or use such technology or lack awareness of technology concepts, which are constantly evolving.¹⁴

It is also worth recognizing that internet service providers (“ISPs”) are not the only entities that may create obstacles to broadband access. While ISPs could engage in discriminatory conduct that generates significant barriers to achieving equal access, other actors, such as state and local governments, can also perpetuate digital inequities through their practices and policy choices. For instance, public institutions have increasingly used digital tools in their operations.¹⁵ Before the pandemic, students without access to the internet could not complete homework that required such access.¹⁶ Although the shift to remote learning during the pandemic impacted all students' well-being, the effects were particularly profound for students from socioeconomically disadvantaged backgrounds and those who speak English as a second language, who experienced more learning loss than other groups.¹⁷ By the end of 2020, Hispanic children were already up to five months behind in math, as 40% of Hispanic homes lacked

wpsdlocal6.com/news/most-families-who-qualify-for-help-paying-internet-bills-through-the-emergency-broadband-benefits-havent/article_708fb4c4-200a-11ec-aebc-1bcb535461c9.html.

¹³ John B. Horrigan, Pew Research Ctr., *Digital Readiness Gaps*, at 3 (Sept. 20, 2016), https://www.pewresearch.org/internet/wp-content/uploads/sites/9/2016/09/PI_2016.09.20_Digital-Readiness-Gaps_FINAL.pdf.

¹⁴ *Id.*

¹⁵ Sean McDonald, *Designing Digital Services for Equitable Access*, Brookings (July 1, 2021) <https://www.brookings.edu/techstream/designing-digital-services-for-equitable-access>.

¹⁶ *Id.*

¹⁷ *Id.*; Libby Pier et al., *COVID-19 and the Educational Equity Crisis*, Pace (Jan. 25, 2021), <https://edpolicyinca.org/newsroom/covid-19-and-educational-equity-crisis>.

computer or broadband access and Latino school districts hit disproportionately hard by the pandemic remained closed.¹⁸

Moreover, public institutions have a history of not providing equal access to basic rights “based on income level, race, ethnicity, color, religion, [and] national origin.”¹⁹ The problem is particularly profound in Southern states where public institutions have often failed to prioritize the needs of their low-income and Black and Brown populations. For example, Southern states have a record of limiting the administration of basic public necessities, placing an undue burden on low-income populations that are often disproportionately Black. Most of the states that have not expanded Medicaid under the Affordable Care Act are in the South.²⁰ The population relying on Medicaid in these states contains a greater proportion of Black residents than in most other states.²¹ In one recent, well-documented example, the county and state government for Lowndes County, Alabama, refused for two decades to provide adequate sewage disposal, leaving low-

¹⁸ Marina E. Franco, *Digital Gap Leaves Latino Students Behind*, Axios (May 20, 2021), <https://www.axios.com/2021/05/20/digital-gap-latino-students-pandemic>; see also Beth Duff-Brown, *In California, the Pandemic Hits Latinos Hard*, Stan. Med. (May 13, 2021), [https://med.stanford.edu/news/all-news/2021/05/in-california-the-pandemic-hits-latinos-hard.html#:~:text=The%20Latino%20population%20had%20strikingly,\(38.3%20per%20100%2C000%20people\)](https://med.stanford.edu/news/all-news/2021/05/in-california-the-pandemic-hits-latinos-hard.html#:~:text=The%20Latino%20population%20had%20strikingly,(38.3%20per%20100%2C000%20people)) (explaining that the Hispanic population in California has contracted and died from COVID-19 at higher rates than the non-Hispanic White population).

¹⁹ Infrastructure Act § 60506(b)(1), 135 Stat. at 1246.

²⁰ See *Status of State Medicaid Expansion Decisions: Interactive Maps*, Kaiser Fam. Found. (Apr. 26, 2022), <https://www.kff.org/medicaid/issue-brief/status-of-state-medicaid-expansion-decisions-interactive-map> (showing that Alabama, Florida, Georgia, Kansas, Mississippi, North Carolina, South Carolina, Tennessee, and Texas are among the states that have not expanded Medicaid)

²¹ See *Distribution of the Nonelderly with Medicaid by Race/Ethnicity*, Kaiser Fam. Found., <https://www.kff.org/medicaid/state-indicator/medicaid-distribution-nonelderly-by-raceethnicity/?activeTab=map¤tTimeframe=0&selectedDistributions=black&sortModel=%7B%22colId%22:%22Location%22,%22sort%22:%22asc%22%7D> (last visited May 11, 2022) (showing that the population of non-elderly Black Medicaid recipients for Alabama, Florida, Georgia, Mississippi, North Carolina, South Carolina, Tennessee, and Texas range from 16.5% to 59%).

income, Black residents living in raw sewage.²² The biases underlying these policies threaten to entrench the digital divide, as they operate to exclude Black residents without internet access, especially those in the rural South, from the funding for broadband expansion in the Infrastructure Act.²³

Given that there are multiple barriers from multiple actors preventing Americans from actually accessing the internet, the Commission must be careful to not conflate broadband *availability* with broadband *access*. Rather, the Commission should take a holistic approach when assessing “equal access” and consider the variety of factors leading to low subscription rates even where broadband may be available.

III. THE PHRASE “OTHER QUALITY OF SERVICE METRICS” MUST INCLUDE NON-TECHNICAL METRICS SUCH AS A PROVIDER’S PROCUREMENT, TRANSACTIONAL, AND ADVERTISING POLICIES

Subsection 60506(a) states that subscribers must have equal access to services provided at “comparable speeds, capacities, latency, and other quality of service metrics in a given area, for comparable terms and conditions.”²⁴ In interpreting the definition of “other quality of service metrics,” the Commission must continue to prioritize the subscribers’ perspectives and consider non-technical factors that impact how subscribers experience and interact with service providers.

²² Bill Whitaker, *60 Minutes Investigates: Americans Fighting for Access to Sewage Disposal*, CBS News (Dec. 19, 2021, 6:55 PM), <https://www.cbsnews.com/amp/news/alabama-sewage-disposal-60-minutes-2021-12-19/#app>.

²³ See Avi Asher-Schapiro & David Sherfinski, *‘Digital Divide’ Hits Rural Black Americans Hardest*, Thomson Reuters Found. News (Oct. 6, 2021, 1:55 PM), <https://news.trust.org/item/20211006135421-xv0sj>.

²⁴ Infrastructure Act § 60506(a)(2), 135 Stat. at 1245.

A. The Text of the Statute and Existing Rules Support Including Non-Technical Elements Within the Definition of “Equal Access”

The bare text of the statute requires the Commission to interpret the phrase “other quality of service metrics” to include non-technical element of carriers’ service. Statutes are construed so that each word has meaning; none are superfluous.²⁵ The terms “comparable speeds, capacities, [and] latency” reflect all three of the core technical criteria by which an ISP will be judged. By including the word “other,” however, Congress necessarily intended to include additional quality-of-service metrics that are non-technical in nature. Put another way, if Congress had instead intended to limit quality-of-service metrics to technical attributes, it would not have introduced the term “other.”²⁶

Equal procurement, transactional, and advertising requirements should be among the non-technical criteria included in the definition of “equal access.” The Commission has existing rules that can serve as models for such requirements. For example, in 1992, Congress passed the Cable Television Consumer Protection and Competition Act and included within it provisions encouraging cable operators to increase participation by minorities and women in their organizations.²⁷ As a result, the Commission adopted the Cable Procurement Rule, which requires cable operators to “[e]ncourage minority and female entrepreneurs to conduct business with all parts of [their] operation.”²⁸ It provides that this requirement may be met by “[r]ecruiting as wide as possible a pool of qualified entrepreneurs from sources . . . likely to be

²⁵ Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 174 (2012).

²⁶ *Cf., e.g., Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Cmty. Project*, 576 U.S. 519, 533 (2015).

²⁷ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

²⁸ 47 C.F.R. § 76.75(e).

representative of minority and female interests.”²⁹ It also sets out requirements to continuously analyze company recruitment, hiring, promotion, and service usage policies to ensure they are not discriminatory.³⁰ This rule has been a successful tool for ensuring that women- and minority-owned businesses have a fair chance at winning major contracts. By so doing, it has also helped to diversify the pool of suppliers for key products and services. Incorporating a similar rule into the “other quality of service metrics” will ensure that the internet service market is not only robust but also serves all communities.

In addition to the Cable Procurement Rule, the Commission has existing rules that serve as models for addressing discrimination in transactions and advertising. Broadcasters cannot discriminate “on the basis of race, color, religion, national origin or sex in the sale of commercially operated AM, FM, TV, Class A TV or international broadcast stations.”³¹ The Commission further requires broadcasters to certify in their Forms 303-S for license renewals that their “advertising agreements do not discriminate on the basis of race or gender and that all such agreements . . . contain nondiscrimination clauses.” The Commission can use these rules as models to prevent and prohibit discrimination in the provision of internet service. This will, in turn, ensure that all subscribers are receiving comparable quality of service, as providers must engage with all communities on a nondiscriminatory basis.

B. Failing to Recognize Non-Technical Elements of Service Defeats the Ultimate Purposes of the Infrastructure Act’s Broadband Provisions

The importance of including non-technical elements within the definition of “equal access” metrics cannot be understated, as failing to prevent discrimination in these contexts

²⁹ *Id.* § 76.75(e)(1).

³⁰ *Id.* § 76.75(f), (g).

³¹ *Id.* § 73.2090.

threatens digital adoption. Broadband providers that discriminate in procurement, transactions, or advertising contexts will lose subscribers who are disinclined from purchasing their services. This exacerbates the challenges of deploying and adopting broadband, the primary purpose of the Infrastructure Act’s broadband provisions.

Historically, movements such as the “Don’t Buy Where You Can’t Work” movement, which originated as a protest to Black unemployment rates during the Great Depression, have provided a strong basis for — and a succinct description of — direct action movements.³² For instance, in 1938, Reverend (and later Congressman) Adam Clayton Powell, Jr. wrote each firm in Harlem that did not have Black employees, threatening to picket and prompting the Uptown Chamber of Commerce to negotiate with the Greater New York Coordinating Committee for Employment, which led the movement.³³ Within two months of the parties’ agreement, 300 Black New Yorkers had white-collar jobs in Harlem.³⁴ And, today, more consumers are becoming mindful of where they spend their money and are forcing corporations to address discrimination or risk losing customers and goodwill.³⁵ Reverend Jesse Jackson highlighted the pressure that is being applied to internet and technology companies when he visited Silicon

³² Cheryl Lynn Greenberg, *“Or Does It Explode?”: Black Harlem in the Great Depression* 115-139 (1991).

³³ *Id.* at 135.

³⁴ *Id.* at 136.

³⁵ E.g., Tiffany Hsu, *Corporate Voices Get Behind ‘Black Lives Matter’ Cause*, N.Y. Times (June 10, 2020), <https://www.nytimes.com/2020/05/31/business/media/companies-marketing-black-lives-matter-george-floyd.html>; see also McKinsey & Co., *Perspectives on Retail and Consumer Goods* 10 (Aug. 2020), https://www.mckinsey.com/~media/mckinsey/industries/retail/our%20insights/perspectives%20on%20retail%20and%20consumer%20goods%20number%208/perspectives-on-retail-and-consumer-goods_issue-8.pdf (reporting that 40% of Americans have said that they are becoming more mindful of where they spend money and that 21% of Americans research brand and product choices before buying).

Valley in 2014.³⁶ Reverend Jackson secured data on diversity efforts and commitments to improve workforce diversity from companies such as Google in an effort built on his early work organizing boycotts to pressure White-owned businesses to hire more Black workers and purchase from more Black contractors.³⁷

In addition, given the broad reach of the internet, addressing discrimination within the industry will reverberate throughout society. When the Commission first exercised its authority to prevent discrimination in broadcast employment practices in 1968, the Department of Justice published a letter supporting the Commission's actions, highlighting broadcast radio and television's influence on the world as a major reason why "the employment practices of the broadcasting industry have an importance greater than that suggested by the number of its employees."³⁸ In the modern era, the internet is just as influential as broadcast was in 1968, if not more so. Therefore, promoting nondiscrimination in how the industry interacts with the public and other businesses will create a ripple effect throughout society, reducing the marginalization minorities and women experience more generally.

IV. TO BE MEANINGFUL, ANY INTERPRETATION OF "DIGITAL DISCRIMINATION" MUST BE INFORMED BY AN ANALYSIS OF DISPARATE IMPACTS

Subsection 60506(b) of the Infrastructure Act directs the Commission to adopt rules that "facilitate equal access," including by "preventing digital discrimination."³⁹ In order to properly

³⁶ Josh Harkinson, *Jesse Jackson Is Taking on Silicon Valley's Epic Diversity Problem*, Mother Jones (June 30, 2015), <https://www.motherjones.com/politics/2015/06/tech-industry-diversity-jesse-jackson>.

³⁷ *Id.*

³⁸ *Petition for Rulemaking to Require Broadcast Licensees to Show Nondiscrimination in their Employment Practices*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 F.C.C. 2d 766, 777 App. A (1968) (quoting Stephen J. Pollak, Assistant Attorney General, Civil Rights Division, Department of Justice, in support of new EEO rules, famously known as the "Pollak Letter").

³⁹ Infrastructure Act § 60506(b), 135 Stat. at 1246.

address discrimination in the context of broadband access, the Commission must also interpret this subsection from the subscriber’s perspective. That is, if the Commission were to adopt rules that only looked to the intent of the actor and their disparate treatment of subscribers, the Commission would capture a very small subset of the discrimination that subscribers often face. Instead, any rules adopted by the Commission in this proceeding should be grounded in a framework that is informed by disparate impact analysis.

A. Excluding Disparate Impact Analysis from the Commission’s Interpretive Lens Would Fail to Redress Significant Instances of Digital Discrimination

Rules that only assess individual or enterprise intent would be insufficient to “facilitate equal access” because they would inherently fail to capture most of the discrimination that occurs in the modern age. According to the National Equity Project’s “Lens of Systemic Oppression” framework, discrimination can arise at four distinct levels: (1) the individual, (2) the interpersonal, (3) the institutional, and (4) the structural.⁴⁰ Individual discrimination occurs when a person’s belief and actions serve to perpetuate oppression.⁴¹ This can be conscious or unconscious and can be externalized or internalized.⁴² When one person treats another person as inferior due to such a belief, the discrimination becomes interpersonal.⁴³ These beliefs can then be perpetuated at an institutional level through an organization’s policies and practices.⁴⁴ When

⁴⁰ *The Lens of Systemic Oppression*, National Equity Project, https://www.nationalequityproject.org/frameworks/lens-of-systemic-oppression?gclid=Cj0KCQjwyMiTBhDKARIsAAJ-9Vs6MNoFE0j_zKSuUrfbpcXbNJHoftZz0hf4vwhQi5p4G_ZKxmRQ85oaAvbOEALw_wcB (last visited May 4, 2022).

⁴¹ *Id.*

⁴² *Id.*

⁴³ *See id.*

⁴⁴ *Id.*

such institutional discrimination is repeated across different types of institutions and across time, the discrimination becomes structural.⁴⁵

At best, employing a disparate treatment standard captures some instances of individual and interpersonal discrimination — instances that are likely to meet a certain evidentiary threshold keyed to the express words and actions of individuals. A disparate treatment analysis will not, however, be able to adequately account for discrimination that occurs at the institutional or structural levels. Discrimination at those levels often functions without a particular actor demonstrating or documenting an intent to discriminate. For instance, because ISPs are driven in large part by inherent revenue-generation incentives, they are likely to “invest in upgrading networks or providing vital network maintenance in wealthier areas instead of extending basic infrastructure or similar service to low-income areas.”⁴⁶ This leaves lower income communities, which are disproportionately communities of color, with slower broadband speeds and less affordable internet.⁴⁷ However, ISP investment decisions are unlikely to be traceable to an individual actor or set of actors whose express intent is to discriminate against consumers on the basis of income. Nevertheless, the impacts of digital redlining can be felt across communities and across time.

Rules that adopt a disparate treatment lens, therefore, fail to identify significant harms and deter government interventions that are often necessary to ensure equity. However, a disparate impact lens takes appropriate account of practices that have a “disproportionately

⁴⁵ *Id.*

⁴⁶ Zack Quaintance, *What Is Digital Redlining? Experts Explain the Nuances*, Gov’t Tech. (Mar. 28, 2022), <https://www.govtech.com/network/what-is-digital-redlining-experts-explain-the-nuances>.

⁴⁷ *Id.*

adverse effect on minorities and are otherwise unjustified by a legitimate rationale.”⁴⁸ This means that the Commission could look at the discriminatory impact of a policy or action to examine disparities at the institutional and structural level which, in turn, would allow the Commission to infer discriminatory intent and identify where discrimination is occurring.

Finally, with a disparate impact lens, liability can still be appropriately limited so that the regulated actors retain the discretion necessary to make requisite decisions. For instance, it is not sufficient for litigants alleging disparate impact to merely show that a statistical disparity exists.⁴⁹ The disparity must be traceable to the actor’s policy or actions.⁵⁰ And the actor must have the opportunity to show that the challenged policy or action furthers a valid interest.⁵¹ That is, a business necessity can justify a practice that otherwise causes a disparate impact.⁵² As a result, and as the Supreme Court has noted, thinking about discrimination from a disparate impact perspective “has not given rise to . . . dire consequences.”⁵³ Adopting a disparate impact lens, instead, will ensure that the Commission can protect subscribers against covert and illicit stereotyping or unconscious prejudice that would otherwise leave millions of Americans without equal access to a vital resource.

⁴⁸ *Tex. Dep’t of Hous. & Cmty. Affs.*, 576 U.S. at 524 (quoting *Ricci v. DeStefano*, 577 U.S. 557, 577 (2009)).

⁴⁹ *Id.* at 542.

⁵⁰ *Id.*

⁵¹ See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971).

⁵² See *id.* (explaining that an employment practice that has a disparate impact, such as the general intelligence test at issue, would not be prohibited if the employer can show the practice is related to job performance).

⁵³ *Tex. Dep’t of Hous. & Cmty. Affairs*, 576 U.S. at 542 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012)).

B. Supreme Court Precedents Support Interpreting the Statutory Language to Include Disparate Impact Claims

Relevant Supreme Court precedent further supports the conclusion that the Commission can adopt such a lens in its approach to digital discrimination. In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*, the Supreme Court observed that disparate impact claims are permissible where such claims look to “the consequences of actions not just the mindset of actors” and claims are consistent with the statute’s purpose.⁵⁴ The Court found the text of the Fair Housing Act making it unlawful “[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable or deny[] a dwelling to any person because of [protected characteristics]*” demonstrated Congress’s intent to make disparate impact claims cognizable under the Act.⁵⁵ That is, the inclusion of an “otherwise” clause shifts the statute from looking at discriminatory intent only to a catchall that captures discrimination where such intent may not be evidenced but where “unconscious prejudices and disguised animus that escape easy classification” still operate.⁵⁶

Here, the Infrastructure Act contemplates the consequences of actions, not just the mindset of the actors. In subsection 60506(b), Congress directs the Commission to “adopt final rules that facilitate equal access to broadband internet access service,” including by “preventing digital discrimination” based on income level, race, ethnicity, color, religion, and national origin.⁵⁷ The definition of “equal access” from subsection 60506(a), in turn, should be interpreted the same way “otherwise” is in the Fair Housing Act and shift the statute to capture

⁵⁴ *Id.* at 533.

⁵⁵ *Id.* (emphasis added) (quoting 42 U.S.C. § 3604(a)).

⁵⁶ *Id.* at 535, 540.

⁵⁷ Infrastructure Act § 60506(b), 135 Stat. at 1246.

digital discrimination where intent may not be evidenced. That is, “equal access” is framed from the subscriber’s perspective as the “equal opportunity to subscribe.”⁵⁸ It is not about the intent of the provider in providing services, but the consequences the provider’s policies and actions have on the subscriber’s opportunity. Therefore, the statutory language plainly supports an understanding of digital discrimination using a disparate impact lens.

Moreover, an agency’s statutory interpretation is given substantial weight in determining whether a statute addresses discrimination arising from disparate impacts. In *Griggs v. Duke Power Co.*, the Supreme Court held, among other things, that a company’s general intelligence testing requirement as a condition of employment or to transfer jobs violated Title VII of the Civil Rights Act of 1964 where such requirement was not significantly related to successful job performance, Black applicants were disqualified at substantially higher rates than White applicants, and the jobs in questions had formerly been filled only by White employees as part of a longstanding practice of giving preference to Whites.⁵⁹ In so holding, the Court gave deference to the view of the Equal Employment Opportunity Commission (“EEOC”), which has the authority to enforce Title VII and which had issued guidelines interpreting Title VII as only permitting the use of job-related tests.⁶⁰

This principle of agency deference was underscored more than 30 years later in *Smith v. City of Jackson, Mississippi*.⁶¹ In that case, the plurality analyzed the text of the Age Discrimination Employment Act (“ADEA”) to find that the law allowed disparate impact claims⁶² and noted that the Department of Labor, which initially drafted the legislation, and the

⁵⁸ *Id.* § 60506(a)(2), 135 Stat. at 1245.

⁵⁹ 401 U.S. at 425-26, 433-37.

⁶⁰ *Id.* at 433-37.

⁶¹ 544 U.S. 228 (2005).

⁶² *Id.* at 233-240.

EEOC, which is charged with implementing the statute, had consistently interpreted the ADEA to authorize disparate impact liability.⁶³ In a concurrence, Justice Scalia went even further, finding “an absolutely classic case for deference to agency interpretation,” as the ADEA “confer[red] upon the EEOC authority to issue” rules and “the EEOC promulgated, after notice-and-comment rulemaking” a regulation that permitted disparate impact liability.⁶⁴ The Commission can similarly establish that digital discrimination be viewed through a disparate impact lens under Section 60506, as it was expressly given authority to promulgate rules under the Infrastructure Act and, as explained above, the statutory text is directed toward the consequences of actions, not the intent of individuals or entities.⁶⁵

V. THE COMMISSION MUST RELY ON DISAGGREGATED DATA WHEN ASSESSING DIGITAL DISCRIMINATION AND DISPARITIES.

To help identify where discrimination is occurring and where disparities exist, the Commission must ensure that any data it collects and relies on is sufficiently disaggregated to display the lived experiences of marginalized communities. In short, aggregate data masks inequities. For example, the demographic category of “Asian” used in the U.S. census aggregates many ethnicities that have ties to Asia, the largest continent on Earth.⁶⁶ Research shows that this aggregated category masks the vast disparities in income levels, employment, educational attainment, healthcare, and access to the internet present between the many communities falling under the “Asian” census category.⁶⁷ Using data sufficiently disaggregated

⁶³ *Id.* at 239.

⁶⁴ *Id.* at 243 (Scalia, J., concurring).

⁶⁵ See Infrastructure Act § 60506(b), 135 Stat. at 1246.

⁶⁶ See Eric Jensen et al. *Measuring Racial and Ethnic Diversity for the 2020 Census*, U.S. Census Bureau (Aug. 4, 2021), <https://www.census.gov/newsroom/blogs/random-samplings/2021/08/measuring-racial-ethnic-diversity-2020-census.html>.

⁶⁷ See, e.g., Kao Lee Yang, *Disaggregate Data on Asian Americans — For Science and Scientists*, *Nature* (Mar. 1, 2022), <https://www.nature.com/articles/d41586-022-00539-z>;

by race, ethnicity, gender identity, income, location, and age will make it much easier for the Commission to identify where digital disparities exist.⁶⁸

The Commission is already undertaking efforts to collect disaggregated location data through the creation of more precise broadband maps.⁶⁹ As the Commission is well aware, location data aggregated at the census block level hides disparities by overestimating the number of individuals who have access to broadband.⁷⁰ To avoid similar issues with demographic data, the Commission should employ the same careful consideration it is using to create the new broadband maps and also collect disaggregated demographic data. This information would allow the Commission to identify and develop policies tailored to the specific needs of intersectional communities that are being left behind.⁷¹

In addition to disaggregating data, the Commission should also carefully consider how it collects digital discrimination data. Municipalities such as Nashville, Austin, and Boston have

Christian Edlagan & Kavya Vaghul, *How Data Disaggregation Matters for Asian Americans and Pacific Islanders*, Wash. Ctr. for Equitable Growth (Dec. 14, 2016), <https://equitablegrowth.org/how-data-disaggregation-matters-for-asian-americans-and-pacific-islanders>; Emily Chi & Nicole Morgenstern, *Broadband: What Is the Digital Divide and What Does It Look Like?*, Advancing Justice – AJC (May 24, 2021), <https://medium.com/advancing-justice-aajc/broadband-what-is-the-digital-divide-and-what-does-it-look-like-6c414656361d>.

⁶⁸ Cf., e.g., Vogels, *supra* note 7; Emily A. Vogels, *Some Digital Divides Persist Between Rural, Urban and Suburban America*, Pew Research Ctr. (Aug. 19, 2021), <https://www.pewresearch.org/fact-tank/2021/08/19/some-digital-divides-persist-between-rural-urban-and-suburban-america>; Perrin & Atske, *supra* note 6.

⁶⁹ See Press Release, Fed. Comm’n, Acting Chairwoman Rosenworcel Establishes Broadband Data Task Force (Feb. 17, 2021), <https://docs.fcc.gov/public/attachments/DOC-370049A1.pdf>.

⁷⁰ See John Kahan, *It’s Time for a New Approach for Mapping Broadband Data to Better Serve Americans*, Microsoft (Apr. 8, 2019), <https://blogs.microsoft.com/on-the-issues/2019/04/08/its-time-for-a-new-approach-for-mapping-broadband-data-to-better-serve-americans>; see also *National Broadband Map*, BroadbandNow, <https://broadbandnow.com/national-broadband-map> (last visited May 5, 2022).

⁷¹ Cf. Rebecca Fogel, *The Digital Divide: Gender and Technology in an Unequal World*, Urban@UW (Nov. 6, 2020), <https://urban.uw.edu/news/the-digital-divide-gender-and-technology-in-an-unequal-world>.

recently conducted extensive digital access and inclusion surveys.⁷² The Commission should consult with the groups who conducted these surveys to help determine what information is needed to gauge broadband access, affordability, and adoption. This information will add necessary context to other data the Commission collects pertaining to the digital divide, including the more accurate broadband maps the Commission intends to release later this year. Using the models from these municipalities, in addition to collecting disaggregated data, would enable the Commission to better understand the digital divide and support effective policymaking to close it.

VI. THE COMMISSION SHOULD MODEL THE PROCESS FOR FILING DIGITAL DISCRIMINATION COMPLAINTS AFTER THE EEOC’S COMPLAINT REGIME

As the Commission acknowledges in the NOI, an effective complaint process is critical to addressing digital discrimination.⁷³ For the protections adopted in this proceeding to be meaningful, individuals and communities must have a means to vindicate their rights. In addition to providing such a mechanism for instances of discrimination, a robust complaint process will deter companies from engaging in discriminatory behavior. Further, data collected through a complaint process will help the Commission assess the effectiveness of its digital discrimination interventions.

⁷² See *Results Published for Nashville’s First Countywide Digital Inclusion Survey*, Nashville.gov (July 12, 2021), <https://www.nashville.gov/departments/information-technology-services/news/results-published-nashvilles-first-countywide>; *Austin Digital Assessment*, AustinTexas.gov, <https://www.austintexas.gov/department/austin-digital-assessment> (last visited May 5, 2022); “*State of Broadband Equity in Boston*” *Report Commissioned*, City of Bos. (Sept. 15, 2021), <https://www.boston.gov/news/state-broadband-equity-boston-report-commissioned>.

⁷³ See NOI ¶¶ 34-35.

To create an effective complaint system, the Commission should follow the EEOC model for employment discrimination complaints under Title VII.⁷⁴ Under this model, individuals who believe they have experienced employment discrimination may file a charge with the EEOC. The EEOC will then investigate the charge and take any necessary actions, including dismissing the charge, helping resolve the issue through an informal conciliation process, issuing Right-to-Sue letters, or having the EEOC itself file a lawsuit in federal court on behalf of the claimant. If the EEOC finds there is no discrimination at any point, claimants are still entitled to bring their claim to federal court. Data collected by the EEOC has shown this model to be both effective and efficient for resolving employment discrimination complaints.⁷⁵

Following this model, an expert within the Commission should be authorized to review and investigate digital discrimination complaints and have the discretion to either dismiss the complaint or issue a non-binding probable cause determination letter. Having an expert issue such non-binding determinations provides all the parties involved with a clear understanding of the facts and how the issue is likely to be resolved in court. This process encourages settlement and prevents complaints from overcrowding the Commission's docket. But it also ensures that potential litigants still have access to the courts and a full hearing if necessary. This model will also help the complaint system be meaningful and taken seriously by allowing the Commission the necessary discretion to handle the unique circumstances of each complaint.

Regardless of the approach that is ultimately taken with respect to the digital discrimination complaint process, the Commission should be careful to keep such process at least

⁷⁴ See *What You Can Expect After You File a Charge*, EEOC, <https://www.eeoc.gov/what-you-can-expect-after-you-file-charge> (last visited May 4, 2022).

⁷⁵ Press Release, EEOC, EEOC Releases Fiscal Year 2020 Enforcement and Litigation Data (Feb. 26, 2021), <https://www.eeoc.gov/newsroom/eeoc-releases-fiscal-year-2020-enforcement-and-litigation-data>.

as accessible and user-friendly as its current Consumer Complaint Center.⁷⁶ Among other things, the new complaint process for digital discrimination should not require individuals to seek help from a lawyer. Needing a lawyer to navigate the complaint system would preclude those most in need of protection from digital discrimination from taking advantage of the protections made available to them.

VII. ANY RULES ADOPTED BY THE COMMISSION IN THIS PROCEEDING SHOULD BE SEVERABLE

Given the clear congressional directive in Section 60506, the Commission has broad authority to adopt rules to prevent digital discrimination and ensure equal broadband access for all. Nevertheless, the Commission should make explicitly clear that any rules that it ultimately adopts in this proceeding will be severable in the event a court of appeals declares certain of the rules (or elements thereof) invalid or unenforceable.⁷⁷ At the very least, rules pertaining to the following subjects should be deemed severable:

- The listed characteristics protected under subsection 60506(b) — namely, income level, race, ethnicity, color, religion, and national origin;⁷⁸
- Attributes to determine “comparable speeds, capacities, latency, and other quality of service metrics,” as such terms are used in the definition of “equal access” under subsection 60506(a);⁷⁹
- Attributes to determine “comparable terms and conditions,” as such terms are used in the definition of “equal access” under subsection 60506(a);⁸⁰

⁷⁶ *Consumer Complaint Center*, Fed. Commc’ns Comm’n, <https://consumercomplaints.fcc.gov/hc/en-us> (last visited May 5, 2022).

⁷⁷ See NOI ¶ 31; see also *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311, 343-44 (¶¶ 574-576) (2018) (deeming the Commission’s open internet rules and rules governing mobile and fixed broadband service providers to be severable), *vacated in part on other grounds by Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2020).

⁷⁸ See NOI ¶¶ 4, 23.

⁷⁹ See *id.* ¶ 11.

⁸⁰ See *id.* ¶ 15.

- Attributes to determine when digital discrimination is “based on” one of the above-referenced listed characteristics, as such term is used in subsections 60506(b) and (c);⁸¹ and
- The entities to which any rules adopted in this proceeding apply.⁸²

Were any of the rules concerning these individual subjects be held invalid, the remaining rules would still be valuable tools for addressing digital discrimination.

VIII. THE COMMISSION MUST ACT WITH URGENCY IN THIS PROCEEDING

MMTC understands and appreciates that it will take time for rules addressing digital discrimination to come to fruition. The Commission must review the record in response to the NOI before determining whether to proceed to a Notice of Proposed Rulemaking,⁸³ which will likely generate a significant number of additional comments and may raise new avenues of inquiry. In addition, the Office of Management and Budget will need to approve any rules that impose information collection requirements,⁸⁴ which will further lengthen the timeline by which any such rules will actually take effect. All told, it may be several years before final rules in this proceeding become effective, unless the Commission acts expeditiously. It is important to complete this rulemaking with a sense of urgency, as it will create important protections for those who are being left behind as the world moves more and more online.

IX. CONCLUSION

Every person across our nation deserves — and must have — equal access to broadband internet in our increasingly digital world. Through its adoption of Section 60506 of the

⁸¹ See *id.* ¶ 22.

⁸² See *id.* ¶ 25.

⁸³ See *Rulemaking*, Fed. Commc’ns Comm’n, [https://www.fcc.gov/general/rulemaking#:~:text=A%20Notice%20of%20Inquiry%20\(NOI,seek%20comments%20on%20the%20proposals](https://www.fcc.gov/general/rulemaking#:~:text=A%20Notice%20of%20Inquiry%20(NOI,seek%20comments%20on%20the%20proposals) (last visited Apr. 29, 2022); see also 47 C.F.R. § 1.430 (explaining that notice-of-inquiry proceedings alone “do not result in the adoption of rules”).

⁸⁴ See Paperwork Reduction Act, 44 U.S.C. §§ 3501-3521.

Infrastructure Act, Congress gave the Commission a meaningful and once-in-a-lifetime opportunity to address discrimination head on by tamping down on the practices and policies that give rise to digital redlining. The Commission should take this opportunity to reflect on the needs of communities that are caught on the edges of the digital divide and craft rules tailored to address those particular needs.

Respectfully submitted,

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