

**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
AND THE U.S. BLACK CHAMBERS**

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February 21, 2023

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I. INTRODUCTION AND SUMMARY

The Multicultural Media, Telecom and Internet Council (“MMTC”) and the U.S. Black Chambers (collectively, the “National Multicultural Organizations”)¹ respectfully submit these comments in response to the Notice of Proposed Rulemaking (“NPRM”) published by the Federal Communications Commission (“Commission” or “FCC”) in the above-referenced proceeding.² The NPRM invites public comment on potential rules to address digital discrimination of access to broadband internet access service. The National Multicultural Organizations seek to address four topics that have been raised by the NPRM. First, the Commission should adopt a definition of “digital discrimination of access” in Section 60506 of the Infrastructure Investment and Jobs Act (“Infrastructure Act”) that assesses discrimination on the basis of both disparate impact *and* disparate treatment. Second, the rules should address

¹ For information on the National Multicultural Organizations, see Appendix A.

² *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, Notice of Proposed Rulemaking, GN Docket No. 22-69 (rel. Dec. 22, 2022) (“NPRM”).

issues surrounding broadband adoption and quality, not just broadband availability. Third, the Commission should establish a formal process for resolving discrimination complaints that is built upon the model embraced by the Equal Employment Opportunity Commission (“EEOC”) with respect to complaints under Title VII of the Civil Rights Act. Finally, the National Multicultural Organizations support the Commission’s proposal to make digital discrimination data available to the public, but the Commission should (i) ensure that such data is sufficiently disaggregated and (ii) conduct digital access and inclusion surveys to capture relevant information.

II. THE DEFINITION OF “DIGITAL DISCRIMINATION OF ACCESS” SHOULD BE INFORMED BY A DISPARATE IMPACT ANALYSIS

To best achieve the goal established by Congress in Section 60506 of the Infrastructure Act to “facilitate equal access,” the Commission’s definition of “digital discrimination of access” should incorporate both a disparate impact standard *and* a disparate treatment standard.³ Solely incorporating a disparate treatment approach would fail to address the fundamental problems underlying digital discrimination that the Commission, through this rulemaking, seeks to remedy. Contrary to the arguments of some commenters,⁴ adopting a disparate impact approach is not likely to chill broadband investment or deployment because the potential liability of providers can be appropriately limited so as not to undermine or substantially affect related incentives.⁵ Nor is such an approach likely to present substantial practical challenges for entities subject to the Commission’s rules, victims of discrimination, or the Commission’s ability to administer the approach, since the Commission would only need to assess the effects of a particular policy or

³ See *id.* ¶¶ 14, 16.

⁴ See *id.* ¶ 23; *infra* Section II.A.

⁵ See NPRM ¶¶ 16, 21; *infra* Section II.B.

practice rather than discern a provider’s intent (among other reasons discussed below).⁶ Finally, both the statutory text of Subsection 60506(b) of the Infrastructure Act and U.S. Supreme Court precedent support a definition of “digital discrimination of access” that is based on disparate impact.⁷

A. The Commission’s Efforts To “Facilitate Equal Access” Will Fall Short if it Does Not Address Disparate Impact

Digital discrimination is a problem that can have widespread impacts, and the Commission’s efforts to “facilitate equal access” will fall short if the Commission were to solely incorporate a disparate treatment standard into the definition of “digital discrimination of access.”⁸ Discrimination can take place on four different levels: the individual, the interpersonal, the institutional, and the structural.⁹ Although there are certainly instances of intentional discrimination that can arise between and among people on an individual-to-individual basis, in practice, digital discrimination often occurs unintentionally at the institutional and structural levels through the perpetuation of pre-existing discrimination and biases that are built into the way organizations and governments operate. This phenomenon is evidenced clearly, for example, by the continuing harmful effects of urban redlining on communities of color,¹⁰ long

⁶ See NPRM ¶¶ 16, 21; *infra* Sections II.C-II.D.

⁷ See NPRM ¶¶ 17-20; *infra* Section II.E.

⁸ See NPRM ¶ 16.

⁹ Comments of the Multicultural Media, Telecom and Internet Council, GN Docket No. 22-69, at 14-15 (filed May 16, 2022) (“MMTC Comments”).

¹⁰ See Julia Perrino, “Redlining” and Health Indicators: Decisions Made 80 Years Ago Have Health Consequences Today, Nat’l Cmty. Reinvestment Coal. (July 2, 2020), <https://ncrc.org/redlining-and-health-indicators-decisions-made-80-years-ago-have-health-consequences-today>; Julian Agyeman, *How Urban Planning and Housing Policy Helped Create “Food Apartheid” in US Cities*, The Conversation (Mar. 9, 2021, 8:36 AM), <https://theconversation.com/how-urban-planning-and-housing-policy-helped-create-food-apartheid-in-us-cities-154433>.

after such practices were outlawed. Similar system-level impacts have resulted in the effective redlining of communities of color in the digital context as well.¹¹

A standard that only considers disparate treatment cannot adequately address how providers perpetuate the access gap, which largely stems from the drastically unequal opportunities and outcomes present within American society, not from overt discriminatory intent. The divergence in comments in response to the Notice of Inquiry in this proceeding demonstrates this point. Some providers argued that there is no ongoing digital discrimination, citing a lack of discriminatory animus and a lack of awareness of instances of discrimination.¹² Yet there was widespread agreement among commenters of various stripes — including advocacy organizations, businesses, and governments — that digital discrimination is a critical ongoing issue affecting American society.¹³ Thus, while it may be true that providers generally

¹¹ See Reply Comments of the Multicultural Media, Telecom and Internet Council, GN Docket No. 22-69, at 6 (filed June 30, 2022) (“MMTC Reply Comments”); *see also* Comments of Communications Workers of America, GN Docket No. 22-69, at 3-6 (filed May 16, 2022) (“CWA Comments”) (referencing Commission data that documents the systemic nature of digital discrimination and citing several other studies in support); Comments of Electronic Frontier Foundation et al., GN Docket No. 22-69, at 4-23 (filed May 16, 2022) (“EFF et al. Comments”) (citing several studies demonstrating broad systemic discrimination against low-income consumers).

¹² See Comments of USTelecom—The Broadband Association, GN Docket No. 22-69, at 13-17 (filed May 16, 2022) (arguing that unequal access reflects difficulties in broadband deployment, not discriminatory animus, and stating that providers look at factors including geography, demand, competition, and the cost to build to inform deployment decisions); Comments of AT&T, GN Docket No. 22-69, at 5 (filed May 16, 2022) (“AT&T Comments”) (asserting that AT&T is not aware of any credible instances in which providers have engaged in discrimination based on racial composition of neighborhoods or other unlawful criteria).

¹³ See, e.g., Comments of the Lawyers’ Committee for Civil Rights Under Law, GN Docket No. 22-69, at 5-13 (filed May 16, 2022) (“Lawyers’ Committee Comments”); Comments of Asian Americans Advancing Justice, GN Docket No. 22-69, at 2-7 (filed May 16, 2022); Comments of the Black Women’s Roundtable, GN Docket No. 22-69, at 2, 4 (filed May 16, 2022); Comments of the League of United Latin American Citizens, GN Docket No. 22-69, at 1 (filed May 16, 2022) (“LULAC Comments”); Comments of the National Digital Inclusion Alliance, GN Docket

do not act with discriminatory intent when it comes to their broadband deployment decisions, these decisions tend to adversely affect communities in ways that can only be captured by disparate impact analysis. For example, when some providers deployed fiber in Oakland and Los Angeles, low-income neighborhoods were left out despite the fact that these neighborhoods are densely populated, which is a factor that typically provides a strong economic and network rationale for fiber deployment.¹⁴ Similarly, a recent study by the nonprofit news organization, The Markup, analyzed more than 800,000 internet service offers from four large providers across 38 U.S. cities and found that all four providers offered base speeds at or above 200 Mbps in wealthier and predominantly White neighborhoods for the same price as connections below 25

No. 22-69, at 2, 9-11 (filed May 16, 2022) (“NDIA Comments”); Comments of Microsoft Corporation, GN Docket No. 22-69, at 1-3 (filed May 16, 2022); Comments of the National Urban League, GN Docket No. 22-69, at 1 (filed May 16, 2022); Comments of Public Knowledge, GN Docket No. 22-69, at 5 (filed May 16, 2022) (“Public Knowledge Comments”); Comments of the American Foundation for the Blind, GN Docket No. 22-69, at 2 (filed May 16, 2022); Comments of the City and County of San Francisco, GN Docket No. 22-69, at 1-2 (filed May 16, 2022); Comments of the National Association of Telecommunications Officers and Advisors, GN Docket No. 22-69, at 1-2 (filed May 16, 2022); Comments of Next Century Cities, GN Docket No. 22-69, at 3-5, 10-12 (filed May 16, 2022); CWA Comments at 3-7; EFF et al. Comments at 5-17. The National Multicultural Organizations commend the Commission’s recently announced plans to conduct regional listening sessions to gather input from various stakeholders about their experiences with digital discrimination, which will likely provide additional valuable revelations about the breadth and incidence of the problem. *See* Public Notice, FCC Task Force To Prevent Digital Discrimination Launches Regional Listening Sessions in Los Angeles, California (Feb. 15, 2023), <https://docs.fcc.gov/public/attachments/DA-23-131A1.pdf>.

¹⁴ *See* 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>; Vinhcent Le & Gissela Moya, *On the Wrong Side of the Digital Divide, Life without Internet Access, and Why We Must Fix It in the Age of Covid-19*, Greenlining (June 2, 2020), <https://greenlining.org/publications/on-the-wrong-side-of-the-digital-divide/>; Hernan Galperin et al., Univ. of S. Cal., *Who Gets Access to Fast Broadband? Evidence from Los Angeles County 2014-17* (Sept. 2019), <https://arnicusc.org/wp-content/uploads/2019/10/Policy-Brief-4-final.pdf>.

Mbps in poorer and predominantly non-White neighborhoods.¹⁵ Whatever the rationale, a provider's disregard for the societal conditions in which these deployment decisions are made may ultimately serve to perpetuate digital discrimination. The National Multicultural Organizations acknowledge, however, that not all deployments have followed this pattern and commend the efforts of providers that have specifically targeted deployments to low-income, diverse communities.

In short, if the Commission adopts a definition of “digital discrimination of access” that incorporates only disparate treatment, common and deeply harmful forms of discrimination will not be addressed, and the Commission's efforts to facilitate equal access will falter.¹⁶ To avoid this result, the Commission should also adopt an approach that looks to the discriminatory impact of a provider's policies or practices and considers whether disparities exist at institutional or structural levels within the context of broadband internet access service. In doing so, the

¹⁵ See Leon Yin & Aaron Sankin, *Poor, Less White US Neighborhoods Get Worse Internet Deals*, Associated Press (Oct. 19, 2022), <https://apnews.com/article/broadband-internet-speed-inequality-01a99247a08b355e89cc54595aecda>. It is worth noting, however, that certain providers have taken issue with The Markup's reporting. See, e.g., Rich Young, *The Facts on Verizon's Broadband Deployment*, Verizon, <https://www.verizon.com/about/news/facts-verizons-broadband-deployment> (Jan. 20, 2023) (describing Verizon's efforts to deploy its Fios fiber service to historically low-income, diverse communities in New York, Washington D.C., and Boston).

¹⁶ See MMTC Reply Comments at 9. Because individuals can unconsciously discriminate based on implicit biases, as documented by social science research, see, e.g., Brief of Sociologists et al. as Amici Curiae Supporting Respondent, *Tex. Dep't of Hous. and Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015) (No. 13-1371), 2014 WL 7405800, at *31-32 (discussing implicit bias in the context of housing discrimination), a disparate treatment approach — which focuses solely on intent — would fail to address unconscious discrimination, and accordingly, would not adequately address digital discrimination of access.

Commission can better account for unintentional forms of digital discrimination, which is often how digital discrimination manifests in practice.¹⁷

For clarity, the National Multicultural Organizations urge the Commission to incorporate both disparate impact and disparate treatment standards into its definition for “digital discrimination of access.” Overt acts of discrimination should be strictly prohibited, even, as suggested in the NPRM, in circumstances in which an intentionally discriminatory policy or practice may not produce observably discriminatory effects.¹⁸ The Commission’s definition should include a disparate treatment standard so that the Commission is able to respond to acts of intentional discrimination before they grow and cause broader disparate impacts. The Commission should be careful, however, that its definition of “digital discrimination of access” is not so broad that it prevents providers from instituting affirmative action policies that are directed towards correcting past harms experienced by marginalized communities.

Nevertheless, to the extent the Commission decides to incorporate only disparate treatment into its definition of “digital discrimination of access,” the Commission should at least adopt a broad understanding of what constitutes intent and permit intent to be inferred from the circumstances. Providers are no doubt well aware of existing and historical disparities in broadband access, yet many have not addressed such disparities.¹⁹ As a result, the Commission should be able to infer intent from providers’ affirmative decisions to not address the disparate

¹⁷ See Sara Atske & Andrew Perrin, *Home Broadband Adoption, Computer Ownership Vary by Race, Ethnicity in the U.S.*, Pew Research Ctr. (Jul. 16, 2021), <https://www.pewresearch.org/fact-tank/2021/07/16/home-broadband-adoption-computer-ownership-vary-by-race-ethnicity-in-the-u-s>; Shara Tibken, *The Broadband Gap’s Dirty Secret: Redlining Still Exists in Digital Form*, CNET (June 28, 2021, 5:00 AM), <https://www.cnet.com/home/internet/features/the-broadband-gaps-dirty-secret-redlining-still-exists-in-digital-form>.

¹⁸ See NPRM ¶ 16.

¹⁹ MMTC Reply Comments at 9.

impacts of their actions. For example, if a provider continually or systematically excludes low-income neighborhoods from its fiber deployments without any justification of technical or economic feasibility, the Commission should be able to infer that the provider intentionally intended to discriminate against low-income individuals in its deployment decisions. By adopting this approach, the Commission would better achieve the ends sought by Section 60506.

B. A Definition of “Digital Discrimination of Access” that Incorporates Disparate Impact Would Not Chill Broadband Investment or Deployment

Liability can be appropriately limited under a disparate impact theory so as not to chill investment or deployment of broadband service by providers.²⁰ When a complainant makes a disparate impact claim, it is not sufficient to merely show that a statistical disparity exists; rather, the complainant should be able to trace the disparity to a provider’s policies or practices.²¹ A provider also should have the opportunity to demonstrate that any challenged policy or practice is “justified by genuine issues of technical or economic feasibility.”²² Notably, this justification parallels aspects of burden-shifting frameworks currently used to determine whether a facially neutral policy or practice discriminates against members of a protected class.²³ As we discuss in more detail in Section II.E below, Congress’s inclusion of a similar concept in Section 60506

²⁰ See NPRM ¶ 16.

²¹ See *Tex. Dep’t of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 542 (2015).

²² NPRM ¶ 34; *cf. Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971) (holding that neither a high school completion requirement nor a general intelligence test was shown to bear a demonstrable relationship to successful performance of the jobs for which such criteria was used).

²³ See, e.g., U.S. Dep’t of Justice, *Title VI Legal Manual, Section VII: Proving Discrimination – Disparate Impact*, <https://www.justice.gov/crt/fcs/T6Manual7> (last updated Feb. 3, 2021) (“DOJ Title VI Guidance”) (employing a burden-shifting framework in the context of Title VI claims).

illustrates an intent to encompass claims of digital discrimination based on disparate impact here as well.²⁴

A requirement for complainants to establish a nexus between alleged disparity and a provider's policies or practices, coupled with an opportunity for providers to defend their actions on grounds of technical or economic feasibility, would reasonably cabin a disparate impact approach and do so in a manner that would afford sufficient regulatory clarity to providers. A definition centered on disparate impact would thus present little risk of becoming unduly burdensome or exposing providers to unwarranted liability. Without such risk, broadband deployment incentives for providers likely would not be undermined or substantially affected, and accordingly, their investments would not be chilled.²⁵ As the Supreme Court has observed, considering discrimination from a disparate impact perspective "has not given rise to . . . dire consequences."²⁶ There is no reason to believe that adopting such an approach in the context of broadband internet access service will lead to a different result.

C. A Disparate Impact Standard Would Not Pose Meaningful Practical Challenges for Entities Subject to the Commission's Rules or for Victims of Digital Discrimination

The inclusion of disparate impact analysis in the definition of "digital discrimination of access" is not likely to impose significant burdens on broadband providers or potential complainants of discrimination.²⁷ The history and use of disparate impact analysis in other

²⁴ See *infra* Section II.E.

²⁵ See EFF et al. Comments at 15-17 (noting that many low-income areas are profitable to serve in the long term); Public Knowledge Comments at 34 (noting that "[the Affordable Connectivity Program] and other subsidies make it economically feasible to offer comparable high speed access in low-income communities").

²⁶ *Inclusive Communities*, 576 U.S. at 546 (quoting *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 196 (2012)).

²⁷ See NPRM ¶ 16.

contexts — including employment,²⁸ housing,²⁹ and consumer lending³⁰ — could inform both providers and complainants. For instance, the previous experiences that litigants and courts have with proving discriminatory effects in these other contexts could offer complainants and providers with investigatory guidance and well-reasoned legal theories reflecting agency consensus, all of which would be helpful for establishing or rebutting the existence of digital discrimination of access.

Further, a disparate impact analysis lends itself to statistical and data analysis, which would provide valuable insights into the potential discriminatory effects of certain policies or practices followed by broadband providers. These insights would be mutually beneficial: they could help complainants identify discriminatory impacts caused by a provider’s policies or practices and could assist providers in showing that a challenged policy or practice is justified on grounds of technical or economic infeasibility. Simply taking a data-driven approach to broadband equity is not sufficient, however. The Commission should take steps to improve the

²⁸ See generally DOJ Title VI Guidance (providing guidance to investigatory agencies regarding how to establish the existence of a disparate impact under Title VI of the Civil Rights Act and determine the cause of such impact from a facially neutral practice or policy).

²⁹ See generally Reinstatement of HUD’s Discriminatory Effects Standard, 86 Fed. Reg. 33590, 33591-92 (June 25, 2021) (noting that the proposed adoption of a three-part burden shifting framework in the housing discrimination context would largely codify “longstanding judicial and agency consensus regarding discriminatory effects law” and is consistent with frameworks on which “courts had long relied,” *id.* at 33591); see also Press Release, U.S. Dep’t of Hous. & Urban Dev., HUD Proposes Restoring Discriminatory Effects Rule (June 25, 2021), https://www.hud.gov/press/press_releases_media_advisories/hud_no_21_107 (same).

³⁰ See generally Consumer Fin. Prot. Bureau, *Supervision and Examination Manual* (Jan. 2023), https://files.consumerfinance.gov/f/documents/cfpb_supervision-and-examination-manual_2023-01.pdf (including, in its chapters on Mortgage Servicing and the Equal Credit Opportunity Act, procedures designed to identify evidence of disparate impact); see also Off. of the Comptroller of the Currency, *Fair Lending*, <https://www.occ.treas.gov/topics/consumers-and-communities/consumer-protection/fair-lending/index-fair-lending.html> (last visited Feb. 5, 2023) (providing consumer resources regarding how to address the potential disparate impact of a lender’s policies).

reliability of data when assessing digital discrimination and disparities, such as by relying on disaggregated data (as discussed in more detail in Section V below).³¹

D. A Disparate Impact Standard Would Not Be Overly Burdensome for the Commission to Administer

A disparate impact approach would not present significant administrative challenges for the Commission either.³² Under a disparate impact approach, the Commission would only need to analyze the effect of a particular policy or practice, as well as the business justification offered by a provider. By contrast, if the Commission solely adopted a disparate treatment approach, it would need to discern a provider's intent behind particular service or deployment decisions, a nebulous determination that is comparably more difficult to make.

The Commission's efforts to better understand the digital divide, including through data collection (particularly disaggregated data collection), also could help it administer a disparate impact standard by providing important context. Current data collection efforts, such as those related to creating more precise broadband maps,³³ could help the Commission determine where disparities exist and what may have caused them. At the same time, however, the Commission should undertake additional data collections efforts (such as digital access and inclusion surveys modeled on those conducted by local municipalities),³⁴ as these could similarly help the Commission ascertain the location and origins of disparities in broadband access.

³¹ See *infra* Section V.

³² NPRM ¶ 16.

³³ Fed. Comm'n's Comm'n, *National Broadband Map*, <https://broadbandmap.fcc.gov/home> (last visited Feb 6, 2023).

³⁴ See *Austin Digital Assessment*, AustinTexas.gov, <https://www.austintexas.gov/department/austin-digital-assessment> (last visited Feb. 2, 2023); “*State of Broadband Equity in Boston*” *Report Commissioned*, City of Bos., <https://www.boston.gov/news/state-broadband-equity-boston-report-commissioned> (last updated Sept. 15, 2021).

E. The Text of Subsection 60506(b) and U.S. Supreme Court Precedents Support Interpreting the Statutory Language to Include Disparate Impact Claims

Despite some commenters' assertions,³⁵ both Subsection 60506(b) of the Infrastructure Act and the Supreme Court's reasoning in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project*³⁶ support a consideration of disparate impacts when interpreting "digital discrimination of access." In *Inclusive Communities*, the Supreme Court observed that disparate impact claims are permissible under antidiscrimination laws where such claims look to "the consequences of actions not just to the mindset of actors" and where such claims are consistent with the statute's purpose.³⁷ The Court found that 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.³⁸

The Infrastructure Act contemplates the consequences of actions through Subsection 60506(b)'s use of the phrase "equal access," which the Commission should interpret similarly to the Supreme Court's interpretation of the Fair Housing Act's "otherwise make unavailable" phrase in *Inclusive Communities*.³⁹ Notably, unlike the Court in *Inclusive Communities*, the Commission does not need to conduct a deep analysis to determine what exactly Congress meant when it wrote "equal access" into the statute — Congress explicitly defined the term just above in Subsection 60506(a)(2):

³⁵ See NPRM ¶ 20.

³⁶ 576 U.S. 519 (2015).

³⁷ *Id.* at 520.

³⁸ *Id.* at 533 (emphasis added) (quoting 42 U.S.C. § 3604(a)).

³⁹ MMTC Comments at 17-19; *see also* Lawyers' Committee Comments at 26-27.

[T]he term “equal access”, for purposes of this section, means 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.⁴⁰

This definition, with its focus on an “equal opportunity to subscribe,” frames “equal access” from the subscriber’s perspective. Thus, Subsection 60506(b)’s use of the term is directed towards the consequences that service-related actions and policies have on the subscriber’s opportunity to obtain broadband service, not the intent of service providers. In fact, Subsection 60506(b) is not about providers or providers’ intents at all. Rather, it is a directive to the Commission to adopt rules to “facilitate equal access” and “prevent[] digital discrimination,”⁴¹ which is part of Congress’s overarching policy set forth in Subsection 60506(a)(3) that the Commission “take steps to ensure that all people of the United States benefit from equal access to broadband internet access service.”⁴² Just as with “equal access,” these are all effects-based phrases that are directed towards consequences, not mindsets.

In light of the foregoing, the Infrastructure Act’s broad language is more clearly about the consequence of actions — and thus more clearly supports a discriminatory impact standard — than even the language of the Fair Housing Act. Importantly, in *Inclusive Communities*, the Court never stated that any specific magic words (such as “otherwise”) are required to make a statute about the “consequences of actions.”⁴³ In fact, the Court’s discussion in *Inclusive Communities* largely revolved around the fact that Congress did not use the exact same language

⁴⁰ Infrastructure Act § 60506(a)(2), 135 Stat. 429, 1245 (2021).

⁴¹ *Id.* § 60506(b), (b)(1), 135 Stat. at 1246.

⁴² *Id.* § 60506(a)(3), 135 Stat. at 1246.

⁴³ *Cf.* NPRM ¶ 20 (relaying broadband providers’ arguments suggesting that the lack of certain language in Section 60506 evinces an intent by Congress to limit the definition of “digital discrimination of access” to include only intentionally discriminatory acts).

in Fair Housing Act as it did in Title VII of the Civil Rights Act and the Age Discrimination in Employment Act.⁴⁴ Thus, the fact that Congress may not have used certain key words in the Infrastructure Act should not dissuade the Commission from incorporating a disparate impact standard into its definition of “digital discrimination of access.” Rather, the Commission need only focus on whether the text refers to “consequences of actions” and whether a disparate impact interpretation “is consistent with statutory purpose.”⁴⁵ Further, the Commission should not let the use of the phrase “based on” in Subsection 60506(b)(1) deter it from embracing a disparate impact standard.⁴⁶ This phrase does not necessitate a “showing of purposeful discrimination.”⁴⁷ The Court rejected a nearly identical, if not stronger, argument in *Inclusive Communities*, finding that the “because of” language in the Fair Housing Act did not preclude disparate impact liability.⁴⁸ The use of “based on” should not preclude a disparate impact analysis here either, especially considering that “because of” is a more directly causal phrase than “based on” is.⁴⁹

⁴⁴ See *Inclusive Communities*, 576 U.S. at 520.

⁴⁵ *Id.*

⁴⁶ Cf. NPRM ¶ 20 (relaying certain providers’ arguments that “section 60506’s use of the phrase ‘based on’ when formulating the prohibition ‘requires a showing of purposeful discrimination rather than incidental effects’” (quoting AT&T Comments at 16)).

⁴⁷ *Id.*

⁴⁸ *Inclusive Communities*, 576 U.S. at 535.

⁴⁹ Compare *Inclusive Communities*, 576 U.S. at 561 (Alito, J., dissenting) (noting that “because of” ordinarily means “by reason of” or “on account of”), with “Base on,” Oxford Advanced American Dictionary, https://www.oxfordlearnersdictionaries.com/us/definition/american_english/base-on (last visited Feb. 7, 2023) (defining “base on” as “to use an idea, a fact, a situation, etc. as the point from which something can be developed”).

III. THE COMMISSION SHOULD ADDRESS ISSUES CONCERNING BROADBAND ADOPTION AND QUALITY, NOT JUST BROADBAND AVAILABILITY

In order to achieve the objectives set out in the Infrastructure Act, the Commission should adopt policies requiring equality in broadband adoption opportunities and broadband quality, not simply equality in the mere availability of broadband service.⁵⁰ As MMTC and other commenters have previously argued, the unaffordability of broadband service, lack of access to Wi-Fi-enabled devices, and deep deficiencies in digital literacy serve as key impediments to broadband adoption even in circumstances where broadband service is made broadly available to a community.⁵¹ These issues are particularly acute in low-income neighborhoods, which often have significant minority and immigrant populations.⁵² To help spur adoption, the Commission should participate in and encourage community-led initiatives

⁵⁰ See NPRM ¶ 45; see also Paul Garnett & Deborah Lathen, *A Handbook for the Effective Administration of State and Local Digital Equity Programs*, at 8-12 (Feb. 23), https://static1.squarespace.com/static/5f5282b71117310d16e654d3/t/63e3cea987a46c4117624f72/1675873966739/DigEquityHandbook_HighRes_SinglePg_2-8-23.pdf. We note, however, that broadband availability is still an issue that warrants the Commission's attention in this proceeding. See, e.g., EFF et al. Comments at 16 (highlighting the lack of broadband deployment in low-income areas even where there is sufficient density and demand for providers to generate profits in those areas without the assistance of government subsidies).

⁵¹ See, e.g., MMTC Comments at 5-7; Lawyers' Committee Comments at 20; NDIA Comments at 5; LULAC Comments at 4; Comments of National Broadband Mapping Coalition, GN Docket No. 22-69, at 3 (filed May 16, 2022); Comments of Starry, Inc., GN Docket No. 22-69, at 6 (filed May 16, 2022); Comments of Engine, GN Docket No. 22-69, at 3 (filed May 16, 2022); Comments of National Asian/Pacific Islander American Chamber of Commerce and Entrepreneurship et al., GN Docket No. 22-69, at 1 (filed May 13, 2022) ("National ACE et al. Comments").

⁵² See, e.g., Atske & Perrin, *supra* note 17; Alexis Cherewka, *The Digital Divide Hits U.S. Immigrant Households Disproportionately During the COVID-19 Pandemic*, Migration Policy Inst. (Sept. 3, 2020), <https://www.migrationpolicy.org/article/digital-divide-hits-us-immigrant-households-during-covid-19>.

and public-private partnerships aimed at lowering the barriers to entry for broadband access.⁵³

In addition, the Commission should take other steps to address broadband affordability and digital literacy, such as by backing the establishment of “broadband ambassador” programs that can help consumers navigate broadband offerings and financial assistance programs,⁵⁴ requiring that broadband support services such as repairs and customer service be offered in a comparable manner to all subscribers regardless of income,⁵⁵ supporting the growth and continuation of the Affordable Connectivity Program (“ACP”),⁵⁶ and partnering with trusted community institutions (such as churches and schools) to increase broadband access.⁵⁷ Additional resourcing from the government would also go a long way toward closing the adoption gap.⁵⁸

⁵³ See Garnett & Lathen, *supra* note 50, at 24; Commc’n Equity & Diversity Council, Fed. Commc’n Comm’n, *Recommendations and Best Practices to Prevent Digital Discrimination and Promote Digital Equity*, at 41 (Nov. 7, 2022), <https://www.fcc.gov/sites/default/files/cedc-digital-discrimination-report-110722.pdf>; *Our Movement for Digital Equity*, Black Churches 4 Digital Equity, <https://www.blackchurches4digitalequity.com/about-us> (last visited Feb. 17, 2023) (describing the work that the MMTC-co-founded nonprofit Black Churches 4 Digital Equity does to organize and empower Black church leaders to advocate on issues related to digital equity).

⁵⁴ See LULAC Comments at 4.

⁵⁵ See Public Knowledge Comments at 10.

⁵⁶ See National ACE et al. Comments at 1.

⁵⁷ See, e.g., *Black Churches 4 Digital Equity Connects Communities to the Affordable Connectivity Program*, Benton Inst. for Broadband & Soc’y (Sept. 23, 2022), <https://www.benton.org/blog/black-churches-4-digital-equity-connects-communities-affordable-connectivity-program> (highlighting efforts by Black Churches 4 Digital Equity to mobilize sign-up drives nationwide to increase participation in the ACP); Rick Paulas, *Bringing Schools Into the 21st Century*, Pac. Standard (June 14, 2017), <https://psmag.com/education/bringing-schools-into-the-21st-century> (describing the work of the education nonprofit EducationSuperHighway to connect American public school classrooms to high-speed internet).

⁵⁸ Cf. Garnett & Lathen, *supra* note 50, at 3-6 (highlighting broadband grant programs administered under the Infrastructure Act among recent efforts to allocate government funding to address broadband equity).

The quality of broadband service is also critical to addressing the digital divide. Subsection 60506(a) states that subscribers should 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.”⁵⁹ By including the phrase “other quality of service metrics,” the Infrastructure Act expressly gives the Commission authority to consider how factors beyond broadband speed, capacity, and latency may impact the subscriber experience.⁶⁰ The Infrastructure Act does not limit these other factors to just the technical aspects of quality of service, so contrary to the views of certain commenters,⁶¹ the Commission has the power to — and should — consider non-technical factors (including equal procurement, transactional, and advertising imperatives) when assessing equal access.⁶² By addressing broadband adoption and quality, the Commission will help ensure that the goals underlying the Infrastructure Act’s antidiscrimination charge are actually met.

IV. THE COMMISSION SHOULD ESTABLISH A FORMAL PROCESS FOR RESOLVING DIGITAL DISCRIMINATION COMPLAINTS, USING THE EEOC’S ADJUDICATORY REGIME AS A MODEL

The National Multicultural Organizations endorse the proposal advanced in the NPRM to establish a structured process for adjudicating formal complaints alleging digital discrimination.⁶³ A dedicated complaint process could help individuals and communities impacted by digital discrimination by providing them with an avenue through which they could vindicate their rights. Such a process could also benefit those who are subject to the

⁵⁹ Infrastructure Act § 60506(a)(2), 135 Stat. at 1245 (emphasis added).

⁶⁰ See MMTC Comments at 9-10.

⁶¹ See NPRM ¶ 33.

⁶² MMTC Comments at 10-11.

⁶³ See NPRM ¶ 72.

Commission’s rules by offering them a forum and straightforward approach to addressing and resolving digital discrimination complaints.

The EEOC’s procedures used to address employment discrimination complaints under Title VII of the Civil Rights Act provide a model of adjudication that, if utilized by the Commission, would facilitate the effective and efficient resolution of digital discrimination complaints under the Infrastructure Act.⁶⁴ Under this approach, people who have been aggrieved by discriminatory practices that prevent or impair broadband access could file a claim without the assistance of an attorney via the Commission’s Consumer Inquiries and Complaint Center. An expert within the Commission would have the power to review and investigate such claims and decide, based on the facts at hand, whether to dismiss the claim or issue a non-binding reasonable cause determination letter.⁶⁵ This sort of consumer-friendly and expert-driven process would likely facilitate settlement discussions without overtaxing the Commission’s limited administrative and financial resources.⁶⁶ Of course, the EEOC’s model is not perfect.⁶⁷ Thus, the Commission should establish a dispute resolution system that improves upon the processes established by the EEOC to ensure digital discrimination claims are addressed fairly and efficiently.

⁶⁴ See *id.* ¶ 74.

⁶⁵ See *What You Can Expect After a Charge Is Filed*, EEOC, <https://www.eeoc.gov/employers/what-you-can-expect-after-charge-filed#:~:text=If%20EEOC%20determines%20there%20is,through%20an%20informal%20process%20known> (last visited Feb. 13, 2023).

⁶⁶ See MMTC Comments at 21-23.

⁶⁷ See Patricia Barnes, *Is the EEOC Protecting Workers or Discriminatory Employers?*, Forbes (Sept. 4, 2019, 4:16 PM), <https://www.forbes.com/sites/patriciagbarnes/2019/09/04/is-the-eeoc-protecting-workers-or-discriminatory-employers/?sh=1c77acac5407> (reporting results from a study that found that “[t]he EEOC found reasonable cause for discrimination in only 4.6 percent of complaints” and that by the time the EEOC sends complainants a “right to sue” letter, “many workers are disillusioned by the EEOC’s dismissive handling of their complaint and considerable time has lapsed since the discriminatory event”).

V. THE COMMISSION SHOULD MAKE DIGITAL DISCRIMINATION DATA AVAILABLE TO THE PUBLIC IN DISAGGREGATED FORM AND SHOULD CONDUCT EXTENSIVE DIGITAL ACCESS AND INCLUSION SURVEYS

The National Multicultural Organizations strongly support the Commission's proposal to make digital discrimination complaint data available to the public through its Consumer Complaint Data Center.⁶⁸ Data transparency is crucial to ensuring that the general public is sufficiently apprised of the incidence of digital discrimination and of the Commission's progress in stemming it. Such data would also prove invaluable to advocacy, news, and social scientific organizations that rely on such data to perform critical research and reporting functions. In addition, the publication of digital discrimination complaint data will give aggrieved consumers additional leverage in the dispute resolution process described in Section IV above, which is likely to encourage settlement between such consumers and their providers.

We appreciate that releasing digital discrimination data publicly may present certain privacy concerns. As a result, the Commission should make sure that any information that could potentially identify specific individuals is aggregated or redacted as necessary to protect subscribers' privacy. Nevertheless, it is important that the data that the Commission collects and makes available to the public is sufficiently disaggregated to be of use to anti-digital discrimination efforts. Aggregated data can mask inequities by painting the experiences of distinct marginalized communities with a broad brush or by lacking information that is needed to properly ascertain where and when digital discrimination is happening.⁶⁹

⁶⁸ See NPRM ¶ 72.

⁶⁹ MMTC Comments at 19-20.

How the Commission goes about collecting data also matters. The Commission should confer with municipalities and groups that have conducted digital access and inclusion surveys to determine what information is needed to gauge and improve broadband access.⁷⁰

VI. CONCLUSION

Section 60506 gives the Commission broad authority to prevent and eliminate digital discrimination. The Commission should use this proceeding to take meaningful action to fulfill the mandate of the Infrastructure Act and ensure that no person — no matter who they are or where they come from — is left behind in our digital economy and world.

Respectfully submitted on behalf of the
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February 21, 2023

⁷⁰ *Id.* at 21.

APPENDIX A

About the National Multicultural Organizations

Multicultural Media, Telecom and Internet Council

The Multicultural Media, Telecom and Internet Council (MMTC) is a non-partisan, national nonprofit organization dedicated to promoting and preserving equal opportunity and civil rights in the mass media, telecom, and broadband industries, and closing the digital divide. MMTC is generally recognized as the nation's leading advocate for minority advancement in communications.

U.S. Black Chambers

Affectionately known as the "National Voice of Black Businesses," the U.S. Black Chambers (USBC) provides committed, visionary leadership, and advocacy in the realization of economic empowerment. Through the creation of resources and initiatives, USBC supports a network of African American Chambers of Commerce and business organizations in their work of developing and growing Black enterprises.