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Via Electronic Submission

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
45 L Street, NE
Washington, DC 20554

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

Dear Ms. Dortch:

The U.S. Chamber of Commerce ("Chamber"), the Texas Association of Business, and the Longview Chamber of Commerce respectfully submit these comments to the above-titled proceeding to express concern regarding the Commission's implementation of Section 60506 of the Infrastructure Investment and Jobs Act ("IIJA").[1] These supplemental comments provide feedback on the public draft of the Order ("Draft") in this proceeding.[2] The Draft, if adopted, would reverse well settled communications policy that has provided benefits to consumers and the competitive position of the American economy.

Since the passage of the Telecommunications Act of 1996, Congress has mandated a communications policy based upon competition that uses subsidies, when appropriate, to ensure access for underserved populations and communities. Accordingly, neither Congress nor the Federal Communications Commission ("Commission" or "FCC") has ever compelled broadband deployment or regulated its prices. This policy has been wildly successful in providing Americans with affordable, high-speed Internet access. However, the Draft will reverse this long-standing policy with a command-and-control regulatory scheme featuring potential price controls and an unworkable disparate-impact standard. Accordingly, government mandates would replace reasonable business judgments with government-supervised buildout decisions and price controls determined through *ex post* enforcement

[1] Pub. L. No. 117-58, 135 Stat. 429, § 60506 (2021) (codified at 47 U.S.C. § 1754) (IIJA).

[2]. In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, Public Draft, Report and Order and Further Notice of Proposed Rulemaking, GN Docket No. 22-69 (rel. Oct. 25, 2023) ("Draft"), https://docs.fcc.gov/public/attachments/DOC-397997A1.pdf.

actions with little to no guidance on what conduct is prohibited. This overstep of the regulatory state would subject whole new sectors of the economy and virtually every term or condition of Internet service to the FCC's regulatory oversight.

These policies would render it impossible for businesses and the marketplace to make rational investment decisions. The scope of the services that the Draft covers is so broad that it does not provide meaningful guidance for how to comply.[3] And because the Draft fails to grant sufficient guidance, it does not give fair notice of how to avoid liability.[4] Consequently, investment in broadband innovation would disappear and consumers would have to pay higher costs for less efficient services. Furthermore, we believe that the draft is inconsistent with the IIJA and relevant case law raising questions of the FCC's authority to act.

The FCC should reverse course and limit its final rules to supporting "affirmative-based efforts," such as "funding the expansion of covered entities' broadband footprints" or "promoting digital skill building," rather than imposing new liability rules on covered entities, enforceable through civil penalties.[5] As explained below, the Draft also impermissibly imposes disparate-impact liability on covered entities without the effects-based language required by the Supreme Court, and adopts a test that imposes significantly more evidentiary burdens on companies defending against complaints than the Supreme Court has previously contemplated.

I. The FCC Has Been Highly Successful At Facilitating Widespread Broadband Deployment Through Tailored, Subsidies-Based Policies.

Congress amended the Communications Act in 1996 to "promote competition and reduce regulation in order to secure lower prices and higher quality services" and "encourage the rapid deployment of new telecommunications technologies."[6] Congress declared it "the policy of the United States" "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[7]

These choices were consistent with a broader, ongoing shift in communications policy that took place at the same time. While the goal of providing universal service previously relied on network "cross-subsidization," that regime made little sense following "the divestiture of AT&T in 1982."[8] With the "unusually important legislative enactment" of the 1996 Act, Congress "rejected the historic paradigm of telecommunications services provided by

[3] *See* Draft¶¶ 97-106.

[4] *See Christopher v. SmithKline Beecham Corp*., 567 U.S. 142, 156 (2012).

[5] *See* Draft ¶ 83 & nn.250–52 (citing prior Chamber comments).

[6] Pub. L. No. 104-104, 110 Stat. 56 (1996) (preamble).

[7] *Id.* § 509 (codified at 47 U.S.C. § 230(b)(2)).

[8] *Rep. on the Future of the Universal Serv. Fund*, Report WC Docket No. No. 22-67, ¶¶ 2–3 (rel. Aug. 15, 2022) ("*Report on The Universal Service Fund*"); *see also* Comments of USTelecom – The Broadband Association at 16–18, GN Docket No. 22-69 (filed Feb. 21, 2023) ("USTelecom Comments"), https://www.fcc.gov/ecfs/document/10221138523959/1

government-sanctioned monopolies in favor of a new paradigm that encourages the entry of efficient competing service providers."[9] It is no coincidence that the massive investment that led to the explosion of technologies and digital products used by consumers occurred after the 1996 Act.

The Commission has long adhered to Congress's choices, recognizing that "a minimal regulatory environment" is key to facilitating the "substantial investment . . . required to build out the networks that will support future broadband capabilities and applications."[10] As the FCC explained as far back as its National Broadband Plan during the Obama Administration, broadband access is "[f]ueled primarily by private sector investment and innovation," and thus "the role of government is and should remain limited."[11]

This approach has been incredibly successful. The private sector has invested *$2 trillion* into providing broadband service over the past 25 years.[12] It has laid down "over 400,000 route miles" of "high-speed fiber" in "2022 alone" and, in the last six years, has increased by four-fold from the number of "outdoor small cell nodes."[13] The results of this investment have paid dividends for the public. More than 90% of U.S. households have access to 100/10 Mbps broadband service.[14] And according to the Bureau of Labor Statistics, broadband prices have trended well below overall inflation.[15]

The Commission has also taken steps to facilitate service in high-cost and low-income areas by using explicit subsidies to incentivize buildout and subscribership. For example, approximately 7.4 million Americans benefit from the Commission's Lifeline Program, which is part of the Commission's broader, subsidies-based Universal Service Fund ("USF").[16] Congress passed the IIJA to build upon these subsidies. That statute allocates $42.5 billion to the

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[9] *PUC of Texas*, 13 FCC Rcd. 3460, ¶ 1 (1997) (quotations omitted).

[10] *Appropriate Framework for Broadband Access to Internet over Wireline Facilities*, 17 FCC Rcd. 3019, 3022 (2002).

[11] FCC, Connecting America: The National Broadband Plan at XI, 5 (2010), https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf.

[12] *See, e.g.*, Comments of AT&T at 9, GN Docket No. 22-69 (filed Feb. 21, 2023), https://www.fcc.gov/ecfs/document/10221638803518/1; USTelecom Comments at 37.

[13] *See Safeguarding and Securing the Open Internet*, Notice of Proposed Rulemaking, WC Docket No. 23-320 (rel. Oct. 20, 2023) (Statement of Commissioner Brendan Carr) ("*Open Internet NPRM*"); *see also Wireless Infrastructure By The Numbers 2022 Key Industry Statistics*, Wireless Infrastructure Association at 6 (Mar. 15, 2023), https://8967849.fs1.hubspotusercontent-na1.net/hubfs/8967849/WIA/Whitepapers%20+%20Reports/Wireless%20Infrastructure%20By%20The%20Numbers%202022/WIA_WP_MobileConnectivity23.pdf, ("In 2022, 452,200 outdoor small cell nodes had been deployed.").

[14] *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in A Reasonable & Timely Fashion*, 36 FCC Rcd. 836, ¶ 38 & Fig. 4 (2021).

[15] *See, e.g.*, Ex Parte Comments of ACA Connects, et al. at 2 & n.6, GN Docket No. 22-69 (filed Oct. 18, 2023) (collecting record evidence) ("ACA Ex Parte"), https://www.fcc.gov/ecfs/document/1018885719542/1; *see also* Broadband Prices Mostly Stable Last Year, Technology Policy Institute (Jan. 2023), https://techpolicyinstitute.org/publications/broadband/broadband-prices-mostly-stable-last-year/.

[16] Congressional Research Service, The Future of Universal Service Fund and Related Broadband Programs at 5 (July 11, 2023), https://www.fcc.gov/general/universal-service.

Broadband Equity, Access, and Deployment ("BEAD") program to "fund infrastructure buildouts needed to connect every American to reliable, high-speed, affordable internet."[17] It also provides $14.2 billion to the Affordable Connectivity Program ("ACP")[18], benefiting more than 20 million households, and $2.75 billion in Digital Equity Act funding to help increase broadband affordability and adoption.[19]

At a broader level, this approach—using express subsidies in place of heavy-handed regulatory tools—was employed throughout communications policy following the adoption of the 1996 Act. The 1996 Act, and the Commission's orders implementing it, recognized that these implicit subsidy mechanisms are inconsistent with the development of a robust, competitive marketplace, because a provider cannot rely on profits in one area to subsidize service in another without inviting the entry of competitors to undercut its prices in the higher margin region. In sum, Congress and the Commission have for many years—and with great success—facilitated broadband buildout and adoption with subsidies for high-cost and low-income areas and without heavy-handed regulatory tools.

II. The FCC's Draft Would Fundamentally Change This Longstanding Approach To Communications Policy.

The Draft rejects this longstanding approach to broadband regulation. It would subject a vast array of business practices that the FCC has never previously regulated to intrusive government oversight. It would scrutinize broadband prices and promotional discounts to ensure that rates were comparable across regions and neighborhoods with vastly different characteristics and deployment challenges. It would employ a novel disparate-impact standard that would penalize providers that failed to build out networks to areas even where there were legitimate business reasons not to do so—subjecting every infrastructure investment decision to second-guessing by the FCC's Enforcement Bureau. And the FCC would extend liability, including civil penalties (which Congress never authorized), to entire sectors of the economy that it previously has not regulated. The Draft's approach is not based upon Congressional authority, and we strongly urge the FCC should not adopt it.

[17] *See* Oversight of the National Telecommunications and Information Administration, Written Statement Before the Senate Committee on Commerce, Science, & Transportation Subcommittee on Communications, Media, and Broadband, 117th Cong. (June 9, 2022) (written statement of Alan Davidson, Assistant Secretary for Communications and Information, NTIA), https://www.commerce.senate.gov/services/files/C8F00F9B-69AC-4752-ACC4-FC9CDB2E0063.

[18] *See* FCC, Affordable Connectivity Program Fact Sheet, https://www.fcc.gov/sites/default/files/acp_fact_sheet_3_final_0.pdf.

[19] *See* NTIA, Digital Equity Act Programs Overview (May 2022), https://www.internetforall.gov/sites/default/files/2022-05/digital-equity-act-info-sheet.pdf.

a. Broadband Price Controls Exceed The FCC's Statutory Authority And Are Misguided.

Additionally, despite claims to the contrary,[20] the Commission lacks authority to regulate broadband pricing.

Section 60506 makes no mention of "price" or "rates."[21] And of course, when it comes to statutory construction, "a matter not covered is to be treated as not covered—a principle so obvious that it seems absurd to recite it."[22] While the FCC claims authority from the statute's reference to "terms and conditions,"[23] that phrase is commonly understood to be distinct from prices.[24] In fact, its use in this context confirms the exclusion of price regulation—because elsewhere in both the IIJA and the Communications Act, Congress expressly uses the phrases "*rates*, terms, and conditions" and "*prices*, terms, and conditions."[25] Courts generally "presume differences in language like this convey differences in meaning,"[26] particularly where the difference appears in two sections "of the same Act."[27] Thus, Congress's omission of price in Section 60506 was intentional and should be treated as such.

The legislative background and context confirm that Congress did not intend to impose broadband price controls. As detailed above, Congress and the Commission have for decades pursued a tailored broadband policy, and an overall communications policy focused on replacing opaque implicit subsidies with pro-competitive, transparent, explicit subsidy mechanisms. Command-and-control price regulation would be a radical departure from that policy. Indeed, just last month, in its proposal to reclassify broadband as a Title II service, the Commission proposed that "rate regulation is unnecessary" in the face of robust "broadband

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[20] Draft ¶ 102; *see also id.* ¶¶ 104–05.

[21] *See generally* 47 U.S.C. § 1754.

[22] *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645 (2020) (quotations omitted).

[23] Draft ¶ 105.

[24] *See, e.g.*, *Deere & Co. v. Ohio Gear*, 462 F.3d 701, 703 (7th Cir. 2006) (referring to "quotation containing [company's] pricing and standard terms and conditions"); *C-O-Two Fire Equip. Co. v. United States*, 197 F.2d 489, 490 (9th Cir. 1952) (referring separately to "prices and terms and conditions of sale").

[25] IIJA §§ 40304(a) (codified at 42 U.S.C. § 16371(2)) ("The term 'common carrier' means a transportation infrastructure operator or owner that publishes a publicly available tariff containing the just and reasonable rates, terms, and conditions of nondiscriminatory service."), 11523 (codified at 23 U.S.C. § 129(a)(9)) ("Not later than 90 days after the date of enactment of this subparagraph, a public authority that operates a toll facility shall report to the Secretary any rates, terms, or conditions for access to the toll facility by public transportation vehicles that differ from the rates, terms, or conditions applicable to over-the-road buses."); *see* 47 U.S.C. §§ 222(e) (requiring that subscriber list information be provided "under nondiscriminatory and reasonable rates, terms, and conditions"), 224, 226(h)(1)(A), 228(c)(8)(A)(i) (distinguishing "material terms and conditions under which the information is offered" from "the rate at which charges are assessed for the information"), 251, 259(b)(7), 272(e)(4), 327, 335(b)(3) ("prices, terms, and conditions"), 532, 541(d)(1), 548, 572(d)(2), 573(b)(1)(A), 615a-1(b).

[26] *Henson v. Santander Consumer USA Inc.*, 582 U.S. 79, 86 (2017).

[27] *Russello v. United States*, 464 U.S. 16, 23 (1983).

deployment and competition."[28] It thus disclaimed even in the Title II context, that it would engage in "*ex post* rate regulation"—the exact policy the FCC is now contemplating.[29] If Congress wanted to upset this longstanding and carefully-drawn regulatory scheme, one would have expected it to say something about it—or, at the very least, use the word "price" or "rate."[30]

But rather than offering a clear statement reversing this decades-long status quo, the IIJA does the opposite. Recognizing the need for new deployments, Congress in the IIJA appropriated, among other things, over *$42 billion* in grants to "bridge the digital divide" through the BEAD program[31] and over *$14 billion* to provide subsidies to low-income Americans through the ACP.[32] In other words, it established explicit subsidy mechanisms to help with the provision of service. And while BEAD recipients must offer at least one "low-cost broadband service option for eligible subscribers,"[33] Congress was clear that the federal government could *not* "regulate the rates charged for broadband service."[34] Given the adoption of a comprehensive and well-funded solution to accelerate broadband deployment *without* rate regulation—consistent with the Commission's longstanding explicit subsidies-based approach to universal service—it would strain credulity to suggest that Congress adopted *sub silentio* a novel rate regulation scheme in a complementary nondiscrimination provision.

The Commission claims in the Draft that it is not "attempt[ing] to institute rate regulation" but merely ensuring that prices are "comparable" and not "discriminatory."[35] But that is simply rate regulation by another name. In the Communications Act, common carriers may not engage in "unjust or unreasonable discrimination" in pricing.[36] Under this framework, if a plaintiff can show that two common carrier services are alike and are being offered under different terms and conditions, the burden shifts to the provider to show that the difference is reasonable.[37] The Draft would subject broadband providers' prices for the first time to the same utility-style framework.

Apart from the law, Congress's choice to continue eschewing command-and-control price regulation makes good policy sense. Its longstanding policy of market-based broadband deployment and subsidization has worked well. By contrast, decades of research has shown

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[28] *Open Internet NPRM* ¶ 105.

[29] *Ibid.*

[30] *See Whitman v. Am. Trucking Associations*, 531 U.S. 457, 468 (2001) (explaining that Congress does not "hide elephants in mouseholes").

[31] 47 U.S.C. § 1702(b)(1), (2).

[32] *See supra* n.16.

[33] 47 U.S.C. § 1702(h)(4)(B).

[34] *Id.* § 1702(h)(5)(D).

[35] Draft ¶ 105.

[36] 47 U.S.C. § 202(a).

[37] *See, e.g.*, *Union Tel. Co. v. Qwest Corp.*, 495 F.3d 1187, 1195 (10th Cir. 2007) (collecting authorities).

that price controls are "costly and of limited effectiveness" because "they produce costly shortages and gluts."[38] As Justice Breyer explained over forty years ago, "[g]iven the inability of regulation to reproduce the competitive market's price signals, only severe market failure would make the regulatory game worth the candle."[39] Recognizing the inefficiencies inherent in price controls, federal agencies have in recent decades abandoned the approach in economic sectors ranging from securities to energy production to communications.[40]

Thus, consistent with the IIJA and sound policy, the Commission should continue its decades-long policy of not regulating broadband prices.

b. The Draft's Disparate-Impact Approach Would Undermine Broadband Deployment And Run Afoul Of Section 60506.

The Draft proposes an unparalleled disparate-impact standard that would prohibit virtually anything that "differentially impact[s] consumers' access to broadband internet access service" unless "justified by genuine issues of technical or economic feasibility."[41] Covered activities would include both "actions and omissions" relating to "deployment, . . . speeds, capacities, latency, data caps, . . . network reliability, network upgrades, network maintenance, . . . pricing, deposits, discounts, customer service, . . . marketing or advertising," among many others.[42] The Draft would place the burden on private parties to show that any given practice with a differential impact "is justified on genuine technical or economic grounds," which the draft describes as "whether there were reasonably available and achievable alternatives . . . that would have been less discriminatory."[43] This standard is unlawful.

To begin, monitoring deployments using a disparate-impact standard is contrary to the statute.[44] Section 60506 makes no mention of "disparate impact" or other effects-based

[38] *See, e.g.*, Christopher J. Neely, *Why Price Controls Should Stay in the History Books*, Federal Reserve Bank of St. Louis (Mar. 24, 2022) ("Price controls have had a very long but not very successful history."), https://www.stlouisfed.org/publications/regional-economist/2022/mar/why-price-controls-should-stay-history-books; *see also* Securities and Exchange Commission, *Report of the Advisory Committee on Market Information: A Blueprint for Responsible Change*, at § VI1D.3 (SEC Sept. 14, 2001) (""[T]he 'public utility' cost-based ratemaking approach is resource-intensive, involves arbitrary judgments on appropriate costs, and creates distortive economic incentives.").

[39] Stephen G. Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reforms*, 92 Harv. L. Rev. 547, 565 (1979).

[40] *See, e.g.*, *NetCoalition v. SEC*, 615 F.3d 525, 535 (D.C. Cir. 2010); *Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993); Jonathan E. Nuechterlein and Howard Shelanski, *Building on What Works: An Analysis of U.S. Broadband Policy*, 73 Fed. Comm. L. J. 219, 239-40 (2020).

[41] Draft ¶ 33 & Appendix A (47 C.F.R. § 16.2(g)).

[42] *Id.* ¶ 102.

[43] *Id.* ¶ 52 & Appendix A (47 C.F.R. § 16.5(c), (d)); *see also id.* ¶ 120.

[44] Ex Parte Comments of NTIA at 4–7, GN Docket No. 22-69 (filed Oct. 6, 2023) ("NTIA Ex Parte"), https://www.fcc.gov/ecfs/document/100674533858/1.

language, despite Congress expressly doing so in other statutes.[45] That omission is dispositive notwithstanding the Commission's attempt to import purportedly effects-based language from neighboring provisions that appear nowhere in the antidiscrimination provision.[46] Thus, as the Chamber had previously explained, Section 60506 does not authorize a disparate-impact standard.[47]

The Draft's contemplated civil penalties or other remedies for providers' buildout decisions reinforce this conclusion. The Commission's disparate impact standard would prohibit "network infrastructure deployment" that "differently impact[s]" broadband access.[48] The Commission should disclaim such a policy, which would effectuate a return to the monopoly-era network "cross-subsidization" that Congress deliberately abandoned in 1996[49]—effectively wiping out 30 years of highly successful competition policy without so much as an acknowledgment. Indeed, as far back as 1997 the Commission itself recognized the pernicious effect of build-out requirements at the state level, finding that they "impose a financial burden that has the effect of prohibiting certain entities from providing telecommunications services."[50] What is true of state mandated build-out requirements is no less true of federally imposed build-out obligations—they will have the effect of prohibiting entry by new competitors, stifling both innovations and competition.

Further still, this interpretation would give the Commission authority to fine providers and/or impose other undefined yet assertedly broad "remedial measures" *ex post* for buildout decisions—a policy completely unlike its existing *ex ante* buildout requirements for wireless licensees (who take any such conditions into account when deciding whether to bid at auction and accept the conditions). The Commission has traditionally established buildout requirements to manage scarce spectrum resources. There is no similar scarcity justification or justification based on provider choice for imposing a generally applicable buildout obligation on facilities-based broadband providers. "Given this history and the breadth of the authority" required to establish voluntarily-accepted wireless license buildout requirements, the Commission may not adopt this "expansive construction of the statute" and must instead hew to "Congress' consistent judgment" to the contrary.[51]

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[45] *See* 42 U.S. § 2000e-2(k)(1)(A) (setting conditions on establish "practice based on disparate impact"); *see also* Comments of T-Mobile at 16–18, GN Docket No. 22-69 (filed Feb.21, 2023) (collecting statutes including effects-based language), https://www.fcc.gov/ecfs/document/1022132797714/1.

[46] Draft ¶¶ 41–42.

[47] *See* Comments of the U.S. Chamber, GN Docket No. 22-69 (filed Feb. 21, 2023) ("Chamber Comments"), https://www.fcc.gov/ecfs/document/1022176172320/1; *see also* Reply Comments of the U.S. Chamber, GN Docket No. 22-69 (filed June 30, 2022), https://www.fcc.gov/ecfs/document/10630265882333/1.

[48] Draft ¶ 102 & Appendix A (47 C.F.R. § 16.2(g)).

[49] *Report on The Universal Service Fund*, ¶¶ 2–3.

[50] *Texas PUC,* 13 FCC Rcd at 3466, ¶ 13.

[51] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000).

c. The Draft's Disparate-Impact Approach Does Not Heed The Safeguards Established By The Supreme Court In *Inclusive Communities*.

The disparate impact regime proposed by the Commission here also fails to comport with the United States Supreme Court's decision in *Texas Department of Housing & Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015). The Court there explained that statutes imposing disparate-impact liability must hew to a "robust causality requirement" that ensures companies "are able to make the practical business choices and profit-related decisions that sustain a vibrant and dynamic free-enterprise system."[52] Thus, "private policies are not contrary to the disparate-impact requirement unless they are 'artificial, arbitrary, and unnecessary barriers.'"[53] While the Draft acknowledges the need for "robust causality" for a disparate-impact standard to be lawful,[54] its proposals fail to live up to that standard in at least three ways.

First, the Commission's standard is not limited to removing "artificial, arbitrary, and unnecessary barriers" to access.[55] That is, the Draft does not require a complainant or the FCC to "at the very least, point to an 'artificial, arbitrary, and unnecessary' policy causing the problematic disparity."[56] It instead provides that any "actions [or] omissions" with differential impact—even legitimate business decisions—may trigger liability.[57] Under the Draft, the only available defense against an allegation of differential impact is to invoke technical or economic infeasibility.[58] But the statutory feasibility standard must be in addition to—not in lieu of—the requirement to identify an artificial, arbitrary, and unnecessary practice. Indeed, the Supreme Court noted that absent the requirement to identify an arbitrary policy—as opposed to one that furthers legitimate business interests—a disparate-impact standard would raise "[d]ifficult questions" under the U.S. Constitution by "inject[ing] . . . considerations" of race or other protected status "into every [business] decision."[59]

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[52] *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.,* 576 U.S. 519, 542 (2015).

[53] *Id.* at 543 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

[54] Draft ¶ 149.

[55] *Ibid.*

[56] *Ellis v. City of Minneapolis*, 860 F.3d 1106, 1114 (8th Cir. 2017). Some courts address this requirement by "requir[ing] plaintiffs to plead facts demonstrating that the targeted policy is 'arbitrary, artificial, and unnecessary,'" *Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist.*, 17 F.4th 950, 962 n.9 (9th Cir. 2021), while others recognize this principle in the form of a "business necessity defense," *Inclusive Communities*, 576 U.S. at 531–32, 541. Regardless of posture, the Draft errs because it does not employ at any stage of its framework a guardrail to limit application of its disparate-impact standard to arbitrary, artificial, and unnecessary practices and exclude practices that serve a "valid interest." *Id.* at 541.

[57] Draft ¶ 102.

[58] Draft Appendix A (47 C.F.R. § 16.2(g), (h), (k)).

[59] *Inclusive Communities*, 576 U.S. at 543; *see also id.* at 544 ("Were standards for proceeding with disparate-impact suits not to incorporate at least the safeguards discussed here, then disparate-impact liability might displace valid governmental and private priorities, rather than solely removing artificial, arbitrary, and unnecessary barriers." (cleaned up)).

The caselaw applying *Inclusive Communities* confirms the importance of requiring challengers to identify an arbitrary policy—*i.e.*, one that does not further a business's "legitimate interests."[60] For example, in *Southwest Fair Housing Council, Inc. v. Maricopa Domestic Water Improvement District*, the Ninth Circuit found that a water utility did not run afoul of the FHA's disparate-impact standard when it required a higher security deposit for some households because the policy would "prevent losses produced by [customer] delinquencies," thereby furthering the company's "legitimate interest" in "fiscal solvency."[61] Likewise, in *Abril-Rivera v. Johnson*, the First Circuit held that an agency did not violate Title VII's disparate-impact standard when it implemented a "rotational staffing plan" because it furthered the agency's "legitimate needs of maintaining as many employees as possible to assist in the event of a disaster."[62] In these cases, the challenged policies may or may not have been justified by technical or economic feasibility, but—more fundamentally—they were non-arbitrary and thus permissible. The Draft errs by abandoning this guardrail.

Second, the Commission's standard inappropriately requires the accused to prove a negative. That is, the Commission requires a covered entity to prove that "less discriminatory alternatives were not reasonably achievable at the time the policy or practice was adopted, implemented, or utilized because of genuine technical or economic constraints."[63] But that is contrary to the Supreme Court's conception of disparate-impact liability. Under *Inclusive Communities*, the *challenger* was required to "prov[e] that the substantial, legitimate, nondiscriminatory interests supporting the challenged practice could be served by another practice that has a less discriminatory effect."[64] By shifting this burden to the defending party, the Commission has removed an important "safeguard[]," thereby raising "serious constitutional questions."[65] Indeed, if the covered entity must affirmatively disprove the availability of any alternative for each and every business decision, the Commission's framework will necessarily require the statute's protected attributes "to be used and considered in a pervasive way" when making those business decisions.[66]

Third, the Commission's proposed standard would inappropriately extend liability beyond corporate policies to one-time decisions. In *Inclusive Communities*, the Supreme Court explained that, under its "robust causality requirement," a challenger must identify "a policy causing a disparate impact," not merely a "one-time decision."[67] The Draft here does precisely

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[60] *Sw. Fair Hous. Council, Inc. v. Maricopa Domestic Water Improvement Dist.*, 17 F.4th 950, 967 (9th Cir. 2021) ("To require that a business or government show that a challenged policy is 'necessary' to its interests would be to render the defense a nullity.").

[61] 17 F.4th 950, 968 (9th Cir. 2021).

[62] 806 F.3d 599, 605 (1st Cir. 2015) (quotations omitted).

[63] Draft Appendix A (47 C.F.R. § 16.5(c), (d)).

[64] *Inclusive Communities*, 576 U.S. at 527 (quotations omitted).

[65] *Id.* at 542.

[66] *Ibid.* (quotations omitted).

[67] *Id.* at 542–43; *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 354–60 (2011) (holding that individual decisions are not "pattern or practice").

the opposite by providing that its disparate-impact standard covers "both actions and omissions, whether recurring *or a single instance*."[68] And that change carries significant consequences: providers will presumably have to consider any differential treatment from conducting maintenance on an individual node, renewing a single customer's contract, or deploying one piece of equipment. *Inclusive Communities* does not allow this level of federal micromanagement, which would inevitably infect every decision with pervasive consideration of race, ethnicity, income level, or other protected characteristics.

By stripping away the constitutional safeguards required by *Inclusive Communities*, the Draft would create an entirely unworkable standard that is flatly inconsistent with Supreme Court precedent. Worse, unlike other disparate-impact frameworks, this standard would be applied in the first instance by in-house agency adjudicators, rather than before a neutral Article III court. Absent a waiver, the Seventh Amendment and principles of due process do not permit a federal agency to pursue civil penalties against a suspected rules violator without the protections of a jury—as the Chamber recently argued in a case pending before the U.S. Supreme Court.[69]

As noted above, the FCC's assertion of authority comes amid a decades-long policy—repeatedly blessed by Congress and the Commission—of market-based regulation. By contrast, this regime "would create regulatory overhang on every deployment decision made by a provider, thereby stifling innovation and investment, and undermining the Commission's and Congress's goal of universal connectivity."[70] Rather than adopting a proposal that cannot survive judicial scrutiny, the Commission should revisit the conclusions in the Draft and adopt pro-competitive policies that advance the purpose of Section 60506 without imposing liability rules, thus staying within the bounds of its authority.

d. The Draft Would Subject Whole New Sectors Of The Economy To FCC Oversight.

Finally, the Draft would impermissibly seek to extend the FCC's authority to apply its newfound disparate-impact regime to a vast and undefined universe of businesses and contractors that reaches well beyond traditional communications service providers. Covered entities include not only broadband providers but all entities that "facilitate" or even "affect consumer access to broadband service."[71] These entities include "contractors retained by" broadband providers, "entities maintaining and upgrading network infrastructure," and "entities that otherwise affect consumer access" to broadband.[72] The Commission mentions,

[68] Draft ¶ 102 (emphasis added).

[69] *See, e.g.*, Brief of *Amici Curiae* The Chamber of Commerce of the United States, et al., at 6–22, SEC v. Jarkesey (No. 22-859) (filed Oct. 18, 2023), https://www.uschamber.com/assets/documents/U.S.-Chamber-Coalition-Amicus-Brief-SEC-v.-Jarkesy-U.S.-Supreme-Court.pdf.

[70] USTelecom Comments at 34.

[71] Draft ¶ 85 & Appendix A (47 C.F.R. § 16.2(d)).

[72] *Id.*

and declines to exempt from its rules, entities as diverse as landlords, infrastructure owners, and local governments.[73] Given the scope of business practices the FCC claims are covered by its new rules, the companies that might "affect consumer access" to broadband could include finance companies, collection agencies, billing and payment services, marketing and advertising companies, construction companies, and tower crews, to name only a few.

The Commission has historically been much more judicious in imposing regulations on entities other than service providers, recognizing for example that it has much more limited authority to regulate the activities of receiver equipment or property owners than it does companies that actually provide covered communications services.[74] Moreover, the FCC's formulation that its rules will apply to any entity that "affect[s] consumer access" is impermissibly vague, providing no guidance to sectors of the economy that typically are not regulated by the FCC as to whether their activities will or will not fall within these new prohibitions.[75]

The Draft's unreasonably lenient view of causality would not even satisfy a disparate-impact statute—let alone an *intent-based* statute like the IIJA that expressly requires the Commission to account for "technical and economic feasibility."

III. Conclusion

We thank the Commission for considering this supplemental comment. If you have any questions, please reach out to Matt Furlow, Policy Director, at mfurlow@uschamber.com.

[73] *Id.* ¶¶ 87-88.

[74] *See, e.g.*, *Expanding Flexible Use of the 3.7 to 4.2 GHz Band*, 35 FCC Rcd. 2343, ¶ 147 (2020) (explaining that "receive-only earth stations" fall outside the Commission's Title III authority over transmitters and are subject at most to Title I ancillary authority); *Improving Competitive Broadband Access to Multiple Tenant Env'ts*, 37 F.C.C. Rcd. 2448, ¶ 45 (2022) (justifying regulations affecting providers' contracts with owners of multiple tenant environments but declining to exercise authority over owners themselves). Indeed, Congress has specifically limited the ability of the Commission to impose penalties on entities that are not holders of or applicants for "a license, permit, certificate, or other authorization issued by the Commission;" 47 U.S.C. § 503(b)(5); these entities must first be issued a citation and continue to engage in the prohibited conduct *after* the citation has been issued.

[75] *See, e.g.*, *FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (explaining Fifth Amendment "requires the invalidation of laws that are impermissibly vague").

Sincerely,

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