No. 24-1179 (and consolidated cases)

IN THE

United States Court of Appeals for the Eighth Circuit

MINNESOTA TELECOM ALLIANCE, *et al.*,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

On Petition for Review from the Federal Communications Commission
(No. 22-69, FCC 23-100)

BRIEF FOR *AMICI CURIAE* PUBLIC KNOWLEDGE AND ELECTRONIC PRIVACY INFORMATION CENTER IN SUPPORT OF RESPONDENTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, *amici curiae* Public Knowledge and Electronic Privacy Information Center state that they have no parent corporation, and that no publicly held corporation holds 10% or more of their stock.

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INTEREST OF AMICI CURIAE*

Amici Curiae Public Knowledge and Electronic Privacy Information Center have been long standing participants in the Federal Communications Commission's efforts to close the digital divide as it relates to broadband access, affordability, and adoption. Because broadband is an essential tool that provides consumers opportunities to access jobs, healthcare, education, and civic life, it is critical to eliminate discriminatory practices.

* No party's counsel authored any part of this brief. No one, apart from amici and their counsel, contributed money intended to fund the brief's preparation or submission. All parties have consented to the submission of this brief.

SUMMARY OF ARGUMENT

Congress spoke definitively and clearly in Section 1754 when it ordered the Federal Communications Commission to create rules to "prevent" and "eliminate" digital discrimination on the basis of "income level, race, ethnicity, color, religion, or national origin."[1] This brief argues that the principles of non-discrimination and universal service are rooted in the Communications Act. It traces Congress' specific intent as part of the Telecommunications Act of 1996 that the Commission prevent discrimination against low-income communities, communities of color, and other protected classes in the deployment of the new communications technologies Congress expected the 1996 Act would foster. Unfortunately, as demonstrated by the widespread disparity in access, the Commission's "light touch" approach focused primarily on Universal Service Reform allowed the inequities Congress ordered the Commission to prevent to occur. The COVID-19 public health crisis surfaced the barriers historically marginalized communities experience when attempting to access, afford, and adopt

[1] Infrastructure Investment and Jobs Act, Pub. L. No. 117-58 § 60506(b), codified at 47 U.S.C. § 1754(b).

broadband and made it clear that our country is vulnerable economically, politically, and socially when communities are unable to enjoy the benefits of high-speed internet, whether this is done intentionally, or unintentionally through policies and practices that have discriminatory results. Putting Section 1754 in this broader legal and policy context directly rebuts two of the industry petitioners' main arguments. First, it underscores the Commission's authority to promulgate rules implementing Congress's directive to eliminate digital discrimination. Second, it shows that, far from being "the exception, not the rule," Pet. Br. 24, "disparate impact" policies that serve to ensure universal and nondiscriminatory access, regardless of the intent or motivation of providers, are the norm for universal service policies.

Furthermore, a requirement to show specific discriminatory intent could undermine multiple other statutes and Commission rules designed to prevent "cherry picking" by providers, who might otherwise choose to provide service only to more densely-populated areas, or otherwise adopt policies that disadvantage rural Americans. For example, the Commission has found that refusal by a provider to complete calls to rural areas violates the anti-discrimination provision

of Section 202(a). It did not need to find a specific animus against rural Americans.[2] The Commission has used its general authority over wireless to compel mobile providers to serve less profitable rural areas,[3] and its Section 214 authority to compel service and preserve service in less profitable rural areas, without needing to show specific intent by providers to discriminate against rural Americans. The Commission takes such actions precisely ***because*** a rational actor maximizing profit would otherwise not serve such communities.[4]

In short, Section 1754 is simply the latest in a long line of statutes whereby Congress authorizes (indeed, requires) the FCC to ensure that a new communications technology is made available to all Americans.

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[2] Rural Call Completion, *Report and Order and Further Notice of Proposed Rulemaking*, 28 FCC Rcd 16154, ¶ 7 (2013).

[3] *See WTB Announces for Relicensing 700 MHz Spectrum in Unserved Areas,* 34 FCC Rcd 350 (WTB 2019) ("[C]onstruction obligations promote the Commission's goal of making spectrum available, so far as possible, to all the people of the United States regardless of where they live.")

[4] Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996; Petition for Forbearance of the Independent Telephone & Telecommunications Alliance, *Report & Order*, 14 FCC Rcd 11364, 11381 (1999) (declining to forbear from exit notification requirements and requiring notification of state PUCs because of "concern that, as local exchange markets become increasingly competitive, many currently dominant LECs may find themselves under increasing pressure to reduce or eliminate service in unprofitable areas.")

As is typical of such statutes, Congress steps in when market forces have reached their limit and directs the Commission to compel providers to serve communities Congress identifies as inadequately served. Because this is not only typical of the fact-finding power delegated to the FCC, but the very purpose for which the FCC was created, the Major Question Doctrine is inapplicable (as argued by petitioners), and Loper Bright does not change this analysis.[5] Because Congress has never required a showing of specific animus but has instead delegated to the Commission the power to remedy discriminatory impact, it did not make such a specific instruction here. By contrast, finding that such a specific instruction is required would reverse ninety years of consistent practice and undermine the ability of Congress and the Commission to ensure "to all Americans" access to essential communications technologies.

I. THE BROAD MEANING OF THE COMMUNICATIONS ACT AND THE CONCEPT OF UNIVERSAL SERVICE.

As a first step, it is important to differentiate between the concept of the "Communications Act," meaning all statutes administered by the

[5] *Loper Bright Enterprises v. Raimondo*, 603 U. S. ____ (2024) (slip op.).

FCC as part of the general purpose for which Congress created it, and the specific statutes covered by the grant of regulatory power under Section 201(b) when Congress refers to "this Chapter." Just as the term "universal service" can refer to the broad concept of ensuring that everyone has access to essential communications services or to the specific statute 47 U.S.C. § 254, one can speak of the Communications Act broadly as the statutes administered by the FCC, or the specific statues found at 47 U.S.C. §§ 151-624. It is highly relevant that those statutes that make Congressional findings with regard to the value of universal access to broadband are found both inside and outside "this Chapter," and are part of the broader body of law administered by the FCC under the general rubric of the "Communications Act."

The legislative history of Section 706 of the Communications Act effectively illustrates this point. As discussed below, Congress clearly intended Section 706 to act as a "safety valve" to ensure universal access to broadband by all Americans. It was initially codified as a note to 47 U.S.C. § 157, unambiguously within the scope of "this Chapter"

even by Petitioners' definition.[6] When Congress expanded this statute with additional provisions with the Broadband Data Improvement Act of 2008 ("BDIA"),[7] the section was moved from 47 U.S.C. § 157 nt. to 47 U.S.C. § 1302. Nothing in the BDIA or its legislative history indicated any intent by Congress to alter the former Section 157 nt. or shift its purpose from ensuring universal access to broadband by all Americans. To the contrary, the BDIA added new provisions further emphasizing the Commission's role in providing communications service to all Americans.

Accordingly, unless otherwise noted, reference in this brief to the "Communications Act" refers to the broad body of law administered by the FCC to achieve the purpose for which it was created—to provide all Americans access to communications service "with adequate facilities at reasonable rates." 47 U.S.C. § 151. Similarly, unless otherwise specified, "universal service" refers to the broad concept of

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[6] *See* GPO, 107th Congress 1st Session, Committee Print 107-1, Compilation of Selected Acts Within the Jurisdiction of the Committee on Energy and Commerce, Communications Law (2001) 428.
[7] Broadband Data Improvement Act, Title I, §§ 101-106, Pub. L. No. 110-385 (codified at 47 U.S.C. §§ 1301-1304).

communications service for all rather than to the specific statutory program in 47 U.S.C. § 254.

II. THE COMMUNICATIONS ACT HAS REQUIRED UNIVERSAL SERVICE FOR 90 YEARS, PROHIBITING UNJUST AND UNREASONABLE DISCRIMINATION IN DEPLOYMENT, WITHOUT A FINDING OF SPECIFIC INTENT.

Petitioners argue that disparate impact analysis is "rare," and that the prohibition on discrimination based on income is unheard of in the realm of civil rights law; however, these concepts are at the core of communications law. In fact, ninety years ago, in the very first words of the Communications Act, Congress charged the FCC "to make available, so far as possible, to all the people of the United States," access to a world-wide communications network at just and reasonable rates.[8] Conjointly with this positive agenda, Congress also made any "unjust and unreasonable" discrimination by carriers illegal.[9] Congress vested the Commission with "broad authority" to achieve these parallel

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[8] Communications Act of 1934, Pub. L. No. 73-416, 48 Stat. 1064 (1934). ("Communications Act of 1934"). As discussed below, Congress made explicit in the Telecommunications Act of 1996 that "all" means "without discrimination on the basis of race, color, religion, national origin, or sex."

[9] *Id.* at § 202(a).

goals of facilitating access and prohibiting discrimination.[10] This authority include the power to issue regulations, to enforce those regulations and perform "any and all acts … not inconsistent with this chapter, as may be necessary in the execution of its function."[11] Congress further instructed that: "It shall be the duty of every person … to observe and comply with [the Commission's] orders so long as the same shall remain in effect."[12]

In short, there is nothing more fundamental to the structure of the Communications Act and the core duties of the Commission than ensuring all Americans have universal access to communications services without discrimination. While technologies and the identity of specific vulnerable populations may change over time, other concepts remain constant. Specifically, Congress made clear that it wants to eliminate and prevent discrimination in the access to communications

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[10] *See* United States v. Southwestern Cable Co., 392 U.S. 157, 168 (1968) ("The Commission was expected to serve as the 'single Government agency' with 'unified jurisdiction' and 'regulatory power over all forms of electrical communication, whether by telephone, telegraph, cable, or radio.' It was for this purpose given 'broad authority.'").

[11] Communications Act of 1934 § 4(i).

[12] *Id.* at. § 416(c).

services Whether the specific communities Congress identifies are people with disabilities,[13] rural communities,[14] low-income communities,[15] or people of color,[16] the responsibility of the FCC remains the same—eliminate the existing disparity and prevent it from recurring while affirmatively fostering inclusion and equal access.

Congress has made clear that the Commission is charged with ensuring it reaches the goal of universal service both for the benefits to the broader nation of a communications network that reaches all Americans and to ensure that all Americans as individuals receive these benefits.[17] For this reason, the Communications Act, and therefore the Commission, recognizes that discriminatory impacts in broadband deployment and availability are not solely the result of pernicious racial or socioeconomic discrimination or the perpetuation of past wrongs. To the contrary, the Communications Act generally, and Section 1754 specifically, recognizes that rational economic actors will

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[13] *See, e.g.,* Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. No. 111-260 (2010).
[14] *See, e.g.,* 47 U.S.C. § 254(b)(3).
[15] *Id.*
[16] 47 U.S.C. § 309(j)(4)(C).
[17] *See, e.g.,* 47 U.S.C. §§ 151, 254, 1301, 1701.

behave in ways that produce unjust and unreasonable discriminatory impacts where serving specific communities may not result in an exponential increase in profit for a company. It is for this reason that Section 1754 explicitly included "income" as a protected class, and replaced the standard civil rights defense of "substantial, legitimate non-discriminatory interest" with the "economic and technological feasibility" test found throughout the Communications Act.[18]

It is in this context that the Court must understand 47 U.S.C. § 1754. It is simply another "universal service" statute where Congress recognizes that the market without intervention could continue to fail to provide equal access (here, to broadband) to specific vulnerable and underserved populations. The Commission's use of disparate impact is an interpretation consistent with the lengthy history of the Communications Act, and is justified by an extensive factual record. To the contrary, interpreting Section 1754 as requiring specific intent

[18] The words are used singly or together in multiple provisions. *See, e.g.*, 47 U.S.C. §§ 223(c) ("technically feasible"); 228(c)(5)(A), (B) ("economically and technically feasible"); 251(b)(2) ("technically feasible"); 251(c)(2)(B) ("technically feasible"); 336(e)(2) ("technically feasible"); 544a (c)(2) ("technically and economically feasible"); 610(b)(2)(B)(iii) ("technically feasible").

would be a major break with the traditional statutes administered by the FCC.

III. THE TELECOMMUNICATIONS ACT OF 1996: THE ADOPTION OF A NONDISCRIMINATION PROVISION TO ACHIEVE UNIVERSAL ACCESS

With the Telecommunications Act of 1996, Congress undertook a major rewrite of the Communications Act as a result of dramatic sector-wide changes in technology.[19] Congress broadly intended "to promote competition and reduce regulation … and encourage the rapid deployment of new telecommunications technologies."[20] A critical goal of the Act was to ensure universal service of telecommunications to all Americans.[21] Congress was well aware, however, that deployment has often left historically marginalized communities behind. The drafters of the 1996 Act considered various provisions to address traditional discrimination based on income level, race, or other suspect

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[19] Telecommunications Competition and Deregulation Act of 1995, Report of the Committee on Commerce, Science, and Transportation on S. 652, S. Rpt. 104-23 (1995) ("1996 Senate Report") at 2-4.
[20] Telecommunications Act of 1996, Pub. L. 104-104 (title).
[21] 1996 Senate Report 1-2 (purpose of the bill "to accelerate rapidly private sector deployment of advanced telecommunications and information technologies to all Americans"); Senate Report at 4 ("[T]he need to protect and advance universal service is one of the fundamental concerns of the Committee").

classification associated with traditional redlining or refusal to serve. The Senate version would have added a new Section 253A to the Communications Act prohibiting any telecommunications provider from "excluding from its services … any resident based on the person's income," and would have required public comment "on the adequacy of the carrier's proposed service area."[22] By contrast, the House version would have expressly forbidden common carriers offering video services "from excluding areas from its video platform services on the basis of the ethnicity, race, or income of the residents of that area" and also would have required public comment "on the adequacy of the proposed service area."[23] Additionally, both the House and Senate versions emphasized the importance of ensuring deployment of internet access and other new "advanced telecommunications services" and "information services" to all Americans—with special concern for availability to low-income communities, rural communities,

[22] Telecommunications Act of 1996, Conference Report, S. Report 104-230 at 143. ("1996 Conference Report")
[23] *Id.*

traditionally redlined communities, and individuals traditionally subject to discrimination on the basis of race, ethnicity or religion.[24]

Congress ultimately settled on a mixed approach of subsidy carrots and regulatory sticks. Rather than prohibit discrimination on a service by service basis, Congress adopted a broad "nondiscrimination provision" by amending Section 1 of the Act to expressly prohibit discrimination on the basis of "race, color, religion or national origin or sex." As the Conference Report explained: "This Amendment to Section 1 applies to ***all entities*** covered by the Communications Act."[25] Additionally, Congress created a new Section 254 expressly designated "Universal Service" and including principles stating clearly that all Americans "including ***low-income consumers*** and those in rural, insular and high cost areas, should have access to telecommunications and information services" of comparable qualities and at comparable rates as in urban areas.[26] To ensure carriers complied with the new nondiscrimination provision and the principle of universal service and

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[24] House of Representatives Report on Communications Act of 1995, H.R. 1555, H. Rep 104-204 at 102 ("1996 House Report"); 1996 Conference Report at 131, 143.
[25] 1996 Conference Report at 143 (emphasis added).
[26] 47 U.S.C. § 254(b)(3) (emphasis added).

provided equal and affordable access to low-income and "insular" (which includes isolated or distinct communities, including those in rural areas or on islands, distinct language communities and urban ethnic enclaves, as well as Native tribes and Pacific Islander) communities,[27] Congress created a new system of express subsidies.

Recognizing that both this combination of broad prohibition and subsidies would not achieve the goal of ensuring universal access, Congress also included a mandatory reporting requirement "to ensure that one of the primary objectives of the bill—to accelerate deployment of advanced telecommunications capacity—is carried out."[28] It required the Commission (and state regulators) not merely to "encourage" deployment of advanced telecommunications services to all Americans,[29] but to regularly "initiate a notice of inquiry concerning the availability of advanced telecommunications capabilities to ***all*** Americans," and to determine whether advanced telecommunications

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[27] *See* Leonard Baynes, *The Mercedes Divide? American Segregation Shapes the Color of Electronic Commerce*, 29 W. NE L. REV. 165, 169-70 (2006) (explaining how "extreme segregation" in certain urban areas isolates minority neighborhoods and allows perpetuation of digital redlining).

[28] 1996 Senate Report at 50.

[29] Telecommunications Act of 1996 § 706(a).

capability is "being ***deployed*** to ***all*** Americans in a reasonable and timely fashion."[30] In the event of a negative determination, Section 706 instructed the FCC to take immediate action to accelerate deployment.[31]

This was not intended to be simply a report with no associated and urgent action. As the Senate Report explained, this provision was intended to ***require*** the FCC to take "immediate action" if it found that some Americans lagged behind others in access to broadband.[32] It explicitly directed the FCC "to include an assessment … of the availability, at reasonable cost, of equipment needed to deliver advanced broadband capability" and expressly instructed the FCC to consider "price caps" as a mechanism for encouraging access to broadband for all Americans. Taking these two provisions together, it is clear that Congress was aware that Americans might face not only a failure of deployment based on traditional discriminatory criteria including race, but access discrimination based on low-income classification. The Senate Report concluded by noting: "The Committee

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[30] *Id.* § 706(b) (emphasis added).
[31] *Id.*
[32] 1996 Senate Report at 50.

believes that this provision is ***a necessary fail-safe*** to ensure that the bill achieves its intended infrastructure objective."[33]

IV. THE COMMISSION RIGHTLY INTERPRETS SECTION 1754 TO ALIGN WITH "FAIL-SAFE" MANDATE OF SECTION 706

This history of the 1996 Act and its focus on deployment of "advanced telecommunications services" (subsequently identified by both the FCC and Congress as broadband) rebuts Petitioners' primary arguments. From the beginning of the broadband era, Congress displayed particular concern, based on its lengthy history regulating the Communications sector to promote universal service, that carriers would discriminate on the basis of income, race, color, ethnicity or sex. Second, Congress expressly ordered the FCC to ensure that traditionally excluded communities—low-income communities, communities of color, and rural communities—not be excluded going forward. Congress therefore adopted a broad nondiscrimination rule by modifying Section 1 of the Communications Act, created a new funding source for universal service, and coupled this funding with an express principle to ensure access by low-income Americans and "insular"

[33] *Id.* at 51 (emphasis added).

communities. In the event this proved insufficient to ensure universal service, Congress created the Section 706 "fail-safe" of mandatory Commission monitoring with an express command "requiring" action if the Commission found anyone falling behind.

The Commission's interpretation of Section 1754 therefore represents no sudden shift in Congressional policy or an assumption of authority Congress does not traditionally delegate to the FCC. To the contrary, as discussed below, Congress found it necessary to create Section 1754 because of the Commission's repeated failure to exercise its authority to effectuate Congress' intent. Far from a new interpretation that gives one pause, ensuring universal access and eliminating discrimination in deployment of broadband is precisely the kind of activity Congress delegates to the Commission generally. Indeed, it was explicitly delegated to the Commission as part of Congress' efforts to foster the development and deployment of advanced telecommunications capabilities such as broadband. Similarly, as demonstrated by the combination of steps taken by Congress in the 1996 Act, Congress fully intended the FCC to combine subsidies such as the newly created Universal Service Fund with regulatory action such

as price caps[34] to ensure universal deployment. There is therefore nothing unusual in Congress combining a historic influx of subsidy to the industry while simultaneously directing the FCC to prohibit discrimination in deployment.

V. DEPLOYMENT DISCRIMINATION AND THE FCC'S INABILITY TO REMEDY IT COMPEL CONGRESS TO MAKE ITS POLICY AND DELEGATION TO THE FCC MORE EXPLICIT.

Almost immediately following the 1996 Act, it became clear that traditional discrimination in access and deployment were reasserting themselves. The National Telecommunications Information Administration (NTIA) 1998 Report "Falling Through the Net II" warned that while overall access to the Internet was increasing, a persistent and growing "digital divide" was emerging. This Report states, "There is a widening gap, for example, between those at upper and lower income levels. Additionally, even though all racial groups now own more computers than they did in 1994, Blacks and Hispanics now lag even further behind Whites in their levels of PC-ownership and

[34] *See* Section 706(a).

on-line access."[35] The Report additionally urged policymakers "to focus on connecting these populations so that they too can communicate by telephone or computer."[36] Academic scholarship continued to confirm throughout the early 00s that, despite the clear intent of the 1996 to prevent discrimination and ensure deployment of broadband on a timely basis to all Americans, carriers were not motivated to deploy or serve low-income Americans and communities of color.[37] Again, motive did not matter. The natural function of the marketplace frustrated Congress' express goal of ensuring equal access to broadband.

Twelve years after the 1996 Act, in response to the growing digital divide and the communities that remained on the wrong side of this divide, Congress acted to require the FCC to elevate the importance and prominence of the Section 706 "fail-safe."[38] The 2008 Broadband Data

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[35] NTIA, FALLING THROUGH THE NET II: NEW DATA ON THE DIGITAL DIVIDE 3 (1998).
[36] *Id.*
[37] *See* Leonard Baynes, *The Mercedes Divide? American Segregation Shapes the Color of Electronic Commerce*, 29 W. NE L. REV. 165, 168-70 (2006).
[38] Broadband Data Improvement Act, Report of the Senate Committee on Commerce, Science, and Transportation on S. 1492, S. Rep. 110-204 ("BDIA Senate Report") at 3-4.

Improvement Act[39] proceeded on the assumption that with better data, increased involvement from other federal agencies and state partners—and with a firm nudge in the right direction—Congress could still rely primarily on market mechanisms coupled with subsidies and public/private partnerships.[40]

A year later as part of the American Reinvestment and Recovery Act,[41] Congress sought to achieve further clarity while also providing more money to address the issue of deployment and equal access. Under the Broadband Technology Opportunity Program (BTOP) administered by the NTIA, Congress allocated approximately $4.5 Billion for various grant purposes. The permissible purposes of BTOP included grants to "facilitate access to broadband service ***by low-income***, unemployed, aged, and ***otherwise vulnerable populations*** in order to provide educational and employment opportunities to members of such populations."[42] Congress also instructed the NTIA to work with the

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[39] Broadband Data Improvement Act, Title I, §§ 101-106, Pub. L. No. 110-385, codified at 47 U.S.C. §§ 1301-1304.
[40] BDIA Senate Report 5-7.
[41] American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5 (2009).
[42] 47 U.S.C. § 1305(g)(4) (emphasis added).

Commission to develop and publish "non-discrimination . . . obligations that shall be contractual obligations under this section."[43] Finally, Congress required the Commission to develop a "National Broadband Plan" to "ensure that all people of the United States have access to broadband capability" and to "establish benchmarks for meeting that goal."[44] Congress carefully considered whether the growing disparity in adoption flowed from the supply side (*i.e.*, carrier decisions not to serve communities adequately) or the demand side (either from inability to afford access or the broadband adoption).

Again, we see the same pattern from Congress as it combines subsidies with an effort to push the FCC to ensure deployment to traditionally unserved and underserved communities. Contrary to the arguments of Petitioners, there is nothing unusual in Congress combining subsidy carrots with regulatory sticks in its effort to ensure universal access to broadband.

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[43] 47 U.S.C. § 1305(j).
[44] 47 U.S.C. § 1305(k)(2).

A. 2010-2016 FCC Action Brings Communications Disparities Into Focus.

In response to this more explicit Congressional directive, the FCC began to require more detailed reports from ISPs concerning their efforts to close the digital divide beginning in 2011.[45] This increased granularity of reporting made visible the extent of the growing disparity in availability of high-speed broadband as providers consistently under-invested in low-income communities and traditionally redlined communities.[46] During the period when broadband was classified as a Title II service, several residents of communities of color low-income communities filed formal complaints under Section 202(a) arguing that the failure to offer comparable broadband services to those offered in

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[45] Inquiry Concerning the Deployment of Advanced Telecommunications Capability in a Reasonably and Timely Fashion to All Americans and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, *Order on Reconsideration*, *Report and Order*, 26 FCC Rcd 8008 (2011).

[46] *See* Hernan Galperin et al., *Who Gets Fast Broadband? Evidence from Los Angeles County*, GOV'T INFO. Q. (July 2021); Leon Yin and Aaron Sankin, *How We Uncovered Disparities in Internet Deals*, THE MARKUP (Oct. 19, 2022), https://themarkup.org/show-your-work/2022/10/19/how-we-uncovered-disparities-in-internet-deals; Bill Callahan and Angela Siefer, TIER FLATTENING: AT&T AND VERIZON HOME CUSTOMERS PAY A HIGH PRICE FOR SLOW INTERNET, National Digital Inclusion Alliance (July 31, 2018), https://www.digitalinclusion.org/wp-content/uploads/2018/07/NDIA-Tier-Flattening-July-2018.pdf;

wealthier, non-minority communities constituted unjust and unreasonable discrimination.[47] Before these claims could be adjudicated, the Commission reclassified broadband as a Title I service not subject to the prohibition on unjust and unreasonable discrimination under Section 202(a),[48] and the complainants voluntarily dismissed their complaints.[49]

B. COVID-19 Pandemic and the RIFO Remand Make the Need for Direct Congressional Action Clear.

The public health and economic crisis caused by the destruction of COVID-19 made the impact of digital discrimination—and the negative impacts on those who have broadband as well as those denied equal access to broadband—impossible to ignore. As the country sheltered in place, virtually every activity that could be shifted from the physical to the virtual world moved online. As Congress had presciently feared in 1996, the lack of equal access fell particularly hard on low-income

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[47] *See* Sean Buckley, *AT&T Denies Claims It Is Redlining Ohio Broadband Customers*, FIERCE WIRELESS (August 25, 2017); Harper Neidig, *AT&T Hit With Second Complaint of Discrimination Against Low-Income Neighborhoods*, THE HILL (September 25, 2017).
[48] Restoring Internet Freedom, *Declaratory Ruling, Report and Order, and Order*, 33 FCC Rcd 311 (2017).
[49] Elkins, et al, EB Docket No. 17-223, ID No. EB-17-002 (F.C.C. Feb. 20, 2018) (granted jt. mot. to dismiss with prejudice).

communities, communities of color, and rural communities.[50] But the impacts were not limited to those without broadband. Communities experiencing substantial digital discrimination were required to spend millions of additional dollars to try to extend virtual schooling to those offline, and maintain additional analog services for those unable to access critical services online. Those forced to increase their exposure to COVID as a consequence of unequal access to online services increased the cost of COVID care and increased the risk of virus transmission for everyone.

Nevertheless, the FCC continued to take no action to address the digital divide. To the contrary, the Commission's 2021 report on broadband deployment—over the vigorous objections of then-

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[50] Digital Discrimination on the basis of race and income is not limited to urban America. *See* Dominique Harrisson, AFFORDABILITY & AVAILABILITY: EXPANDING BROADBAND IN THE BLACK RURAL SOUTH, Joint Center for Political and Economic Studies (2021) (even controlling for income, majority-minority rural communities have poorer access to broadband than comparable majority-white rural communities). Tribal areas remain among the worst connected in the United States, which greatly exacerbated the harm to the communities caused by the Covid-19 Pandemic. *See* Darrah Blackwater, *For Tribal Lands Ravaged by Covid-19, Broadband Access Is a Matter of Life and Death*, AZCentral.com (May 9, 2020), https://www.internetsociety.org/blog/2020/05/for-tribal-lands-ravaged-by-covid-19-broadband-access-is-a-matter-of-life-and-death/.

Commissioner Jessica Rosenworcel and Commissioner Geoffrey Starks, found that broadband was being deployed in a timely manner to all Americans.[51]

C. Congress Gives the Commission Unambiguous Direction.

Congress' inclusion of Section 60506 in the Infrastructure Investment and Jobs Act of 2021[52] must be understood with this lengthy history. Contrary to Petitioners' arguments, it did not arise *sui generis* to address only cases of specific discriminatory intent. As the FCC properly interpreted, Congress drafted Section 60506 to provide direct instruction to the Commission to address the "persistent digital divide" that "disproportionately affects communities of color, low-income areas and rural areas" because this persistent digital divide harms not only the individuals without equal access to broadband, but "the economic competitiveness of the United States and equitable

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[51] Inquiry Concerning Deployment of Advanced Telecommunications Capabilities to All Americans in a Reasonable and Timely Manner, *Fourteenth Annual Broadband Deployment Report*, 36 FCC Rcd 836 (2021).

[52] Infrastructure Investment and Jobs Act, Pub. L. 117-58, Sections 60101-60506, codified at 47 U.S.C. §§ 1701-1754 ("IIJA").

distribution of public services, including health care and education."[53] These harms accrue to the United States and associated communities without regard to the reason for the digital divide. These findings—and the requirement that the FCC act "to facilitate equal access to broadband" by "preventing" and "eliminating" digital discrimination[54] are consistent with the ninety year history of the Communications Act generally, the specific history and legislation beginning with the 1996 Act, and are "underscored" by the "2019 novel coronavirus pandemic."[55]

VI. CONGRESS CREATED 47 U.S.C. § 1754 TO COMPEL THE FCC TO MEET ITS MANDATE OF ENSURING UNIVERSAL SERVICE FOR ALL AMERICANS.

A. The Structure of Section 1754 and How Its Sections Work Together

Congress would not have needed to enact the digital non-discrimination provision had broadband remained a Title II service and subject to Sections 201 and 202. While Congress remained deadlocked on the matter of Title II and therefore continued to leave the ultimate classification of broadband to the agency's discretion, it clearly intended

[53] 47 U.S.C. §§ 1701(2)-(3).
[54] 47 U.S.C. § 1754(b).
[55] 47 U.S.C. § 1701(5).

the agency to replicate the functions of Section 201 and 202 insofar as necessary to achieve the statutory purpose of universal service. And, as is the case with Sections 201 and 202, a specific finding of intent is irrelevant.[56] Instead, Congress required the Commission to take into account issues of technical and economic feasibility."[57] While this phrase is absent from traditional civil rights statutes cited by Petitioners, it is used frequently in the Communications Act.[58] Concern for "technical and economic feasibility" makes sense in this context because while Congress does not care about motive, it does not demand the impossible.

In addition to any affirmative actions the Commission takes to "facilitate equal access," Congress explicitly required the Commission to create rules that prohibit discrimination on the basis of the specific characteristics the evidence shows are persistently denied "equal

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[56] Rural Call Completion, *Report and Order and Further Notice of Proposed Rulemaking*, 28 FCC Rcd 16154 (2013). Investigation Into the Quality of Equal Access Services, TDX Petition for Rulemaking, RM-5196, Memorandum Opinion and Order, FCC 86-248 (adopted May 9, 1986) (discrimination defined as whether customer perceives difference in quality without regard to intent).

[57] 47 U.S.C. § 1754(b).

[58] *See* n.18 *supra.*

access." Because history and existing evidence show that this inequality is already entrenched, and will persistently reassert itself due to the incentives and structure of communications markets, Congress also required the Commission to "identify necessary steps" to eliminate existing inequalities of service and prevent them from recurring. As the Commission properly understood, this speaks not to individual motives but to systemic disparate impacts that flow from the realities of the market and Congress' specific findings as to which communities are impacted by the "persistent" digital divide.

B. Disparate Impact Flows Naturally From the Inclusion of "Low-Income" as a Protected Class.

There is nothing "unique" or even unusual in Congress' determination to prohibit discrimination against low-income individuals and broader low-income communities. Section 1 of the Communications Act since its inception has listed as one of the primary purposes of the Act "to make available to all people of the United States . . . service with adequate facilities at reasonable charges." Sections 201 prohibited any "unjust and unreasonable" rates or practices[59] and Section 202

[59] 47 U.S.C. § 201(b).

prohibited any other discrimination, including on the basis of income.[60] When Congress passed the Cable Act of 1984, it explicitly prohibited discrimination on the basis of income, in particular requiring service throughout a franchise area without regard to the income of the residents.[61] When Congress regulated mobile telephony, it again prohibited discrimination on the basis of income (and race) by classifying the new CMRS service as a Title II service and prohibiting the Commission from using its new forbearance authority on Sections 201 or 202.[62] As discussed in considerable detail above, Congress continued to express its historic concern with regard to discrimination based on income (and race) as part of the 1996 Act.

The identification of "low-income" as a protected class underscores the Commission's correct determination to apply both disparate impact analysis and to limit relevant defenses to the "technical and economic feasibility" language common throughout the Communications Act. The desire to avoid low-income customers and focus investment on wealthier communities is generally regarded as a substantial, legitimate

[60] 47 U.S.C. § 202(a).
[61] 47 U.S.C. § 541(c).
[62] 47 U.S.C. § 332(c)(1)(A).

nondiscriminatory interest. It is precisely ***because*** a functioning market of rational actors will bypass these customers that the Communications Act traditionally (and Section 1754 specifically) does not require a showing of specific motivation but simply requires a demonstration of discriminatory impact.

Similarly, there is nothing novel or unusual in Congress' decision to prohibit discrimination on the basis of race, religion or ethnicity. Nor does identifying race, ethnicity or religion as indicia that a community is at risk for exclusion uproot Section 1754 from the tradition of the Communications Act. As noted above, Congress augmented the pre-existing prohibitions on discrimination based on race as part of the 1996 Act in what the Conference Report described as a "general prohibition" intended to apply to all services under Commission jurisdiction.[63] Had this approach succeeded, Congress would not have found it necessary to draft Section 1754. Instead, as Congress found, the digital divide "disproportionately affects communities of color," as well as other communities. Congress accordingly directed the Commission to address this ongoing disparity.

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[63] 1996 Conference Report at 143.

C. The FCC Properly Found It Has Authority to Act.

It is hornbook administrative law that an agency is governed by its governing statute and its precedents interpreting that statute.[64] Additionally, when Congress delegates authority to an agency via statute, it is presumed to know how that agency works and that the agency has authority to act in any way "reasonably related" to its enabling statute.[65] As a general rule it should be presumed that Congress meant what it said and said what it meant. In particular, although the statute recognizes that other federal agencies are engaged in the important work of preventing discrimination,[66] Congress delegated creation of the rule preventing and eliminating digital discrimination to the Commission. It instructed the Commission to make rules, and to advise other federal agencies on how to prohibit digital discrimination on the basis of race or income or "other factors ***the Commission*** determines to be relevant." (emphasis added). In light

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[64] *See City of Arlington, TX v. FCC*, 569 U.S. 290 (2013).
[65] *See Wash. All. of Tech. Workers v. DHS*, 50 F.4th 164, 178-79 (D.C. Cir 2021) (even though specific action not specified in statute, rule not arbitrary because agency "articulated rational reasons related to its statutory responsibility" (citing *Keating v. FERC*, 569 F.3d 427, 433 (D.C. Cir. 2009)).
[66] 47 U.S.C. § 1754(c).

of such a clear delegation of authority, and given the history reviewed above, Petitioners' arguments must fail.

VII. AN ADVERSE DECISION HERE MAY HAVE BROAD DELETERIOUS CONSEQUENCES.

As discussed at length above, Congress has never found that the Commission must find a specific intent to discriminate when acting to ensure universal service. Additionally, Congress has generally grouped rural communities with low-income communities as requiring attention to ensure equitable access.[67] Pursuant to the direction of Congress to ensure access to all Americans, the Commission has imposed obligations on communications providers without making any specific finding of direct animus and relying entirely on disparate impact. For example, the Commission uses its Section 303(b) and 303(r) authority to require wireless providers to offer service in rural areas.[68] The Commission has used its Section 202(a) authority to require providers to ensure calls made to rural exchanges are completed—despite the

[67] *See, e.g.,* 47 U.S.C. §§ 254(b)(3); 1701(3).
[68] *See, e.g., WTB Announces for Relicensing 700 MHz Spectrum in Unserved Areas supra* n.3.

higher cost of completing calls to rural exchanges.[69] The Commission has used its authority under Section 214 to require providers continue to serve rural communities unless a reasonable alternative of similar or better quality exists.[70]

A finding here that discrimination requires not only a disparate impact, but an actual intent to discriminate based on the protected class of low-income will call into question all other actions taken by the Commission to ensure universal access. Congress' inclusion of "low income" as a protected criteria in Section 60506 is no different from the general requirement that the Commission prevent discriminatory impacts on low-income communities or rural communities generally. Petitioners offer no way to distinguish the command to ensure equal access here from other such commands over the ninety year history of the FCC. A finding in favor of Petitioners would therefore open to challenge previous—and future—FCC rules designed to ensure universal access to communications infrastructure.

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[69] *See* Rural Call Completion, *Report and Order and Further Notice of Proposed Rulemaking*, 28 FCC Rcd 16154, ¶ 7 (2013).
[70] *See* Implementation of Section 402(b)(2)(A) of the Telecommunications Act of 1996 *supra* n.4.

CONCLUSION

In conclusion, the Court should interpret Section 60506 for what it is: simply the latest in a long line of statutes directing the Commission to ensure universal access to new communications technology.

Dated: July 5, 2024

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the Brief of Public Knowledge and Electronic Privacy Information Center as Amici Curiae in support of respondents with the Clerk of the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system on July 5, 2024. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

I further certify that I caused 10 paper copies of the Brief to be filed with the Clerk of the United States Court of Appeals for the Eighth Circuit, and that all parties either consented to electronic service or were served with paper copies.

Dated: July 5, 2024

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 29(a)(5) because it contains 6,300 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6).

Dated: July 5, 2024

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