

United States Senate
WASHINGTON, DC 20510

November 10, 2023

The Honorable Jessica Rosenworcel
Chairwoman
Federal Communications Commission
45 L Street N.E.
Washington, D.C. 20554

Dear Chairwoman Rosenworcel,

We write in response to your recently circulated *Draft Order* on “Digital Discrimination” that would turn section 60506 of the Infrastructure Investment and Jobs Act (IIJA) into a sweeping mandate for heavy-handed Internet regulation and expose every nook and cranny of the broadband business to liability under a “disparate impact” standard.¹ Your *Draft Order*, which largely follows a Biden administration diktat,² will create crippling uncertainty for the U.S. broadband industry, chill broadband investment, and undermine Congress’s objective of promoting broadband access for all Americans. We urge you to adhere to the will of Congress and conform to the plain meaning of section 60506 to avoid causing serious damage to the competitive and innovative U.S. broadband industry.

When Congress passed the IIJA, it gave the Federal Communications Commission (FCC) a discrete task in section 60506: “preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin.”³ After two years of studying the issue—including the creation of a Communications Equity and Diversity Council;⁴ the formation of a cross-agency Task Force to Prevent Digital Discrimination;⁵ the solicitation of consumer complaints;⁶ and holding of “public listening sessions” in New York City, Chicago, Los Angeles, Baltimore, Washington, D.C., Seattle, Tacoma, WA, Ferndale, WA, and Topeka, KS—the FCC has found “little or no evidence in the legislative history of section 60506 or the record of this proceeding indicating that intentional discrimination by industry participants based on the listed characteristics substantially contributes to disparities in access to broadband Internet service

¹ *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 Order*), <https://docs.fcc.gov/public/attachments/DOC-397997A1.pdf>.

² See Ex Parte Comments of the National Telecommunications and Information Administration (NTIA), GN Docket No. 22-69 (filed Oct. 6, 2023), <https://www.fcc.gov/ecfs/document/100674533858/1> (NTIA *Ex Parte*).

³ IIJA, Pub. Law. No. 117-58 § 60506(b)(1).

⁴ *FCC Seeks Nominations for Membership on Communications Equity and Diversity Council*, Public Notice, 36 FCC Rcd 10391, 10391 (2021).

⁵ Federal Communications Commission, Task Force to Prevent Digital Discrimination, <https://www.fcc.gov/taskforce-prevent-digital-discrimination>.

⁶ Federal Communications Commission, Broadband Access Experience Form, <https://consumercomplaints.fcc.gov/hc/en-us/articles/12303650382868-Broadband-Access-Experience-Form>.

across the Nation.”⁷ The Biden administration appears to agree, acknowledging a point by broadband providers and industry stakeholders that “documented evidence of disparate treatment in this area is nearly non-existent.”⁸

Apparently displeased by that result, the Biden administration instructed the FCC to broaden its inquiry under section 60506.⁹ Your recently circulated *Draft Order* follows suit, perversely worrying that section 60506 would be “largely meaningless” if interpreted by its plain language.¹⁰ The corresponding rules—buttressed by the theory that the lack of actual discrimination somehow authorizes the FCC to redefine digital discrimination to expand its authority—turn section 60506 on its head and constitute a major abuse of the agency’s power.

First, your *Draft Order*’s “disparate impact” standard of liability is unlawful. Congress was aware of decades of decisions interpreting civil rights legislation and chose language for section 60506 that instructed the FCC to address “digital discrimination of access *based on*” enumerated characteristics.¹¹ The Supreme Court has consistently held that such phrasing indicates legislative intent to condition liability on a showing of disparate treatment. Effects-based language must be explicit, like the “or otherwise adversely affect” language from *Griggs v. Duke Power Co.*, the “or otherwise adversely affect” language from *Smith v. City of Jackson*, and the “or otherwise make available” language from *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*¹²—language that is entirely and conspicuously absent from section 60506. Absent effects-based language, agencies cannot expand the scope of a statute to impose disparate impact liability. This is for good reason: disparate impact liability must be limited so as not to punish “the practical business choices and profit-related decisions that sustain a vibrant and dynamic free enterprise system.”¹³ The FCC has no authority to ignore the plain meaning of the IIIA.

Second, your *Draft Order* would subject an untenably broad array of broadband business decisions to intrusive regulation. The FCC explicitly contemplates regulating a broadband provider’s deployment decisions, network reliability, network maintenance, the equipment it distributes to customers, pricing, promotional discounts, customer service, language options, credit checks, marketing and advertising, and more.¹⁴ The *Draft Order* makes clear its authority is “not limited” to this list (or apparently at all) and covers “both actions and omissions.”¹⁵ In other words, if a broadband provider offered a new discount yet failed to advertise it in a

⁷ *Draft Order* at ¶ 38.

⁸ NTIA *Ex Parte* at 4 (emphasis omitted).

⁹ *Id.* at 4–5.

¹⁰ *Draft Order* at ¶ 36.

¹¹ IIIA § 60506(b)(1) (emphasis added).

¹² *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519, 530–35 (2015) (discussing *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), and *Smith v. City of Jackson*, 544 U.S. 228 (2005)).

¹³ *Id.* at 533.

¹⁴ *Draft Order* at ¶ 102.

¹⁵ *Id.*

particular language that was correlated with signups that fell outside the FCC’s preferred quotas, the FCC could impose a multi-million dollar forfeiture and a wide-ranging remedial order to “fix” the business.

This cannot reasonably follow from the statutory language. Congress does not “hide elephants in mouseholes,”¹⁶ and there is no plausible reading of the IIJA’s definition of “equal access” that would give the FCC an unlimited mandate to regulate every aspect of a provider’s business.¹⁷ Indeed, the *Draft Order* gives the FCC more sweeping authority over broadband than under its proposal to regulate broadband as a public utility under Title II of the Communications Act.¹⁸ And while you have repeatedly promised that the FCC was not interested in regulating prices, “no how, no way,”¹⁹ and even proposed to forbear from *ex post* rate regulation in the Title II proceeding,²⁰ the *Draft Order* makes clear that broadband prices are fair game for scrutiny.²¹ Since you sweep practically every business decision—including marketing, pricing, and promotional discounts—into the ambit of your rules and declare even the most well-intentioned practices forbidden if they don’t result in equal impacts, you have set the FCC to second-guess every single decision of every broadband provider in this country. This is not only at odds with the plain meaning of section 60506 but also contradicts your promises to Congress.

Third, your *Draft Order* is flippant when it comes to the real-world impact of these burdensome rules on broadband deployment in the United States. The *Draft Order* casually dismisses concerns over chilled investment in rural areas, including the Biden administration’s own request that BEAD-funded broadband builds be exempt from compliance with the disparate-impact standard.²² Rather than adopt a rule to give room for a business’s legitimate decisions in a fast-moving world, the FCC sets a “feasibility” standard—and explicitly makes clear that the profitability of a decision is irrelevant if some other action is “feasible.”²³ The idea these regulations will not impact rural deployment defies credulity: If practically every business decision is subject to potential liability, companies will inevitably shift resources that would have otherwise been spent on deployment and innovation to hiring more lawyers and asking the FCC “mother-may-I.” Your *Draft Order*’s sweeping scope, ambiguous, open-ended guidance, extensive enforcement framework, and expansive claimed remedial authority, would prevent

¹⁶ *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001).

¹⁷ IIJA § 60506(a)(2) (“[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[.]”).

¹⁸ *Safeguarding and Securing the Open Internet*, Notice of Proposed Rulemaking, WC Docket No. 23-320 (rel. Oct. 20, 2023) (*Title II NPRM*), <https://docs.fcc.gov/public/attachments/FCC-23-83A1.pdf>.

¹⁹ Remarks of Chairwoman Jessica Rosenworcel, The National Press Club, at 5 (Sept. 26, 2023) <https://docs.fcc.gov/public/attachments/DOC-397257A1.pdf>.

²⁰ *Title II NPRM* at ¶ 105.

²¹ *Draft Order* at ¶¶ 102, 104.

²² *Draft Order* at ¶ 76.

²³ *Draft Order* at ¶¶ 58, 60–79.

providers from making such decisions without risking endless complaints and potential liability untethered from the statute's objectives.

As you approach the statutory deadline for issuing rules to implement this section, we strongly urge you to reconsider your *Draft Order*. Instead, do your job: Follow the statutory text, implement rules that will incentivize rather than deter private investment, and promote rather than undermine the goal of ubiquitous broadband.

Thank you for your attention to this matter.

Sincerely,



Ted Cruz
United States Senator



John Thune
United States Senator



Chuck Grassley
United States Senator



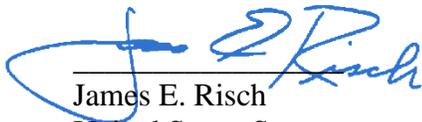
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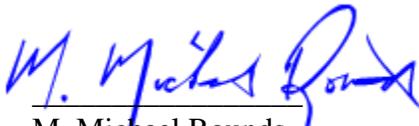
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United States Senator



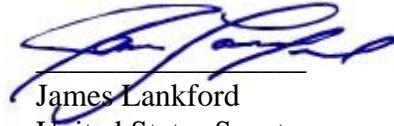
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Dan Sullivan
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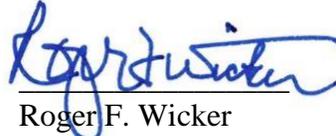
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Katie Boyd Britt
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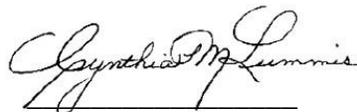
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Pete Ricketts
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Joni K. Ernst
United States Senator



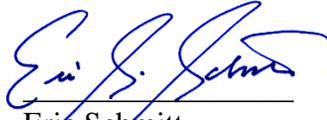
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Shelley Moore Capito
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Todd Young
United States Senator



Eric Schmitt
United States Senator



Deb Fischer
United States Senator



Kevin Cramer
United States Senator



Steve Daines
United States Senator