



## FCC's Controversial Digital Discrimination Rules Face Federal Court Review

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In late 2021, Congress passed the 2021 Infrastructure Investment and Jobs Act (IIJA). The IIJA includes more than \$60 billion to promote deployment and adoption of broadband networks in hard-to-reach rural areas and to low-income households. At the tail end of these provisions, Congress inserted section 60506, which directed the Federal Communications Commission (FCC) to issue rules facilitating consumers' "equal access" to broadband internet access service.<sup>1</sup> Section 60506 announced a federal policy that "subscribers should benefit from equal access to broadband within the service area of a provider of such service," to the extent technically and economically feasible. It then defines "equal access" as "the equal opportunity to subscribe to an offered [broadband] service that provides comparable speeds, capacities, latency, and other quality of service metrics in a given area, for comparable terms and conditions."

To facilitate this equal access, section 60506 specifically required the FCC to adopt rules, again taking into account issues of technical or economic feasibility, that include (1) "preventing *digital discrimination of access* based on income level, race, ethnicity, color, religion, or national origin," and (2) eliminating such discrimination.<sup>2</sup> The statute also required the FCC to "revise its public complaint process" to accept digital discrimination complaints from individual consumers and organizations.

By a 3 to 2 vote, the FCC adopted the digital discrimination rules last November. The rules drew long and detailed dissents from two Commissioners.<sup>3</sup> Industry groups have also vehemently objected. As of the date of this commentary, 16 parties have filed petitions to review the FCC's order adopting the rules. The petitions have been consolidated in the U.S. Court of Appeals for the Eighth Circuit.

### Key Issues

Two overarching issues with section 60506 predominate. First, the FCC interpreted the phrase "digital discrimination of access" to incorporate a discriminatory impact standard as well as to bar intentional discrimination. Second, the FCC concluded that it can enforce its digital discrimination rules against not only providers of broadband service, but also any entity that may "affect" consumer

<sup>1</sup> Infrastructure Investment and Jobs Act, Pub. L. 117-58, 135 Stat 429 (2021) ("IIJA") § 60506 (codified at 47 U.S.C. § 1754).

<sup>2</sup> IIJA, § 60506(b) (emphasis added).

<sup>3</sup> *Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, Report and Order and Further Notice of Proposed Rulemaking, GN Docket No. 22-69, FCC 23-100 (rel. Nov. 20, 2023) (Order), available at [FCC-23-100A1.pdf](#). FCC published the rules in the Federal Register on January 22, 2024. 89 Fed. Reg. 4128. The FCC is a five-member commission with the chair nominated by the President.

access to broadband.<sup>4</sup> Based on the record before the FCC, it is likely that the appeals of the agency's interpretations will raise major questions doctrine issues. The doctrine requires a clear delegation of authority in areas of vast economic or political significance.

### **Discriminatory Impact**

After noting that little to no evidence of intentional discrimination exists, the FCC concluded that it must apply a discriminatory impact standard to effectuate the goals of section 60506. The rules bar “digital discrimination of access,” which it defined “as policies or practices, not justified by technical or economic feasibility, that differentially impact” consumers’ access based on the protected classifications or that were intended to have a differential impact. In determining that section 60506 includes a discriminatory impact standard, the FCC took guidance from the Supreme Court’s analysis in *Texas Department of Housing and Community Affairs v. Inclusive Communities*, where the Court interpreted the Fair Housing Act to include a disparate impact standard.<sup>5</sup> Under that framework, “antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just the mindset of actors and where that interpretation is consistent with statutory purpose.”<sup>6</sup>

The FCC rejected arguments that the application of the *Inclusive Communities* framework precluded an impact standard. Opponents noted that section 60506 bars discrimination “based on” the protected classifications, which is language that focuses on intent or motivation. They specifically called attention to the absence in section 60506 of results-based language such as practices “otherwise adversely affecting” a person’s status, a phrase *Inclusive Communities* found to be of “central importance.”<sup>7</sup> The FCC, on the other hand focused on the text defining equal access as affording the equal “*opportunity*” to subscribe and that consumers should “benefit,” as both these terms suggest Congress’s concerns over discriminatory effects not the mindset of the actor. The FCC also points to language requiring it to prevent and eliminate digital discrimination, which it found to suggest an effects-based orientation. Commenters also argued that the FCC’s implementation of the disparate-impact test fails to follow Supreme Court precedent on allocation of burdens in determining discriminatory impact. Therefore, the purpose and intent of the statute’s language and the FCC’s implementation of the disparate impact standard will be key issues in the pending appeals.

### **Entities Covered by the Digital Discrimination Ban**

A second key issue will be the FCC’s interpretation of section 60506 as authorizing it to enforce digital discrimination of access rules not only against providers of broadband service, but also against any entity that may “affect consumer access to” broadband internet. Although noting it was “not explicitly tasked with regulating entities outside the communications industry,” the FCC nevertheless concluded that various entities, such as construction companies, restaurants refusing to install Wi-Fi, government agencies, or owners of apartment buildings, “could impede equal access” to broadband and thus should fall under section 60506’s definition of “covered entities.” Whether the statute authorizes the FCC to regulate non-communications providers raises issues concerning statutory interpretation and the major questions doctrine.

### **Enforcement**

The FCC rules allow individual consumers, as well as groups and associations, to file informal complaints with the agency alleging digital discrimination. The FCC will then forward the complaints to the named entities for investigation, and the FCC may require a written response. The FCC

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<sup>4</sup> See 47 C.F.R. 16.2(d) (defining “covered entities” subject to the FCC’s rules).

<sup>5</sup> 576 U.S. 519 (2015).

<sup>6</sup> *Id.* at 533.

<sup>7</sup> *Id.* at 534.

will review this documentation and determine whether further investigation or action is needed. Additionally, local, state, or tribal officials may also bring potential discriminatory conduct to the FCC's attention. The FCC may also initiate investigations on its own.

Should the FCC conclude, after investigating, that discrimination has occurred, it may utilize all the enforcement tools at its disposal, including issuing fines or adopting remedial orders. Arguably the rules could require providers to build to certain areas or order a landlord to allow a broadband provider into the building to provide access on comparable terms to that which the provider offers to consumers in the surrounding areas.

### **The Commissioners' Dissents**

The FCC's order drew two dissents, including a lengthy and detailed dissent from Commissioner Brendan Carr. At a broad level, the Commissioner viewed the order as an element of the Biden Administration's efforts to assert granular control over the Internet, and in particular to create the opportunity to regulate virtually every aspect of broadband service from pricing to marketing to individual contract terms.<sup>8</sup> Moving to specifics of the order, Commissioner Carr argued that adoption of a disparate impact standard contravenes the statutory text, fails to adhere to the Supreme Court's process for evaluating disparate impact claims under *Inclusive Communities*, and does not provide fair notice of what is expected of entities to comply. Commissioner Carr further claimed that the order's definition of "covered entities" will "sweep entire industries within the FCC jurisdiction for the first time in the agency's 90-year history." Finally, the Commissioner stated his view that the order violates the major questions doctrine, which bars agencies from implementing rules of great economic and political significance absent clear Congressional authorization and constitutes an unconstitutional delegation of Congressional authority. Commissioner Nathan Simington similarly dissented, arguing that Congress surely "would not have authorized, in a less than one-page section of a thousand-page bill, the most open-ended liability regime that the FCC has ever seen." Many of these arguments will likely be asserted in the appeal before the Eighth Circuit.

### **Chevron Deference and the Major Questions Doctrine**

As noted above, a number of entities and industry groups have filed petitions challenging the FCC's order. Underpinning the substantive issues discussed above will be the extent to which the FCC has the power to act as it did and how much deference, if any, the Eighth Circuit should give to the FCC's order. Under the 40-year-old *Chevron* doctrine, courts defer to an agency's reasonable interpretation of ambiguous statutory language.<sup>9</sup> But the doctrine has come under increasing pressure recently and it is currently before the Supreme Court in two cases that were argued in January. Based on oral argument, some observers believe the doctrine may be discarded or limited. It is entirely possible that a Supreme Court decision could be issued in time to affect this case.<sup>10</sup> The extent to which the Eighth Circuit extends deference to the FCC's interpretations will thus be critical.

Finally, public comments filed with the FCC raised the major questions and non-delegation doctrines, which are also likely to play an important role in the pending appeals. The Eighth Circuit may be called upon to resolve whether the major questions doctrine applies to both a determination on disparate-impact liability and the definition of "covered entities," and, if so, whether Congress spoke with requisite clarity on the scope of the FCC's authority.

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<sup>8</sup> Order at pages 219-27.

<sup>9</sup> *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

<sup>10</sup> See Amy Howe, *Supreme Court likely to discard Chevron*, SCOTUSblog (Jan. 17, 2024, 6:58 PM), <https://www.scotusblog.com/2024/01/supreme-court-likely-to-discard-chevron/>.