No. 24-1179 (and consolidated cases)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MINNESOTA TELECOM ALLIANCE, et al.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION;
UNITED STATES OF AMERICA,

Respondents.

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

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Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc., 576 U.S. 519 (2015) 17

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47 C.F.R. § 16.5(a) 12

Other Authorities

Ban the Box Campaign, "Frequently Asked Questions," http://bantheboxcampaign.org/faq 8

Carvin, Michael, *Disparate Impact Claims Under the New Title VII*, 68 NOTRE DAME L. REV. 1153 (1993) 10

Chaplin, Cathy, *The Doughnut Kids Are All Right*, EaterLA, June 1, 2022, https://la.eater.com/2022/6/1/23064652/los-angeles-cambodian-doughnut-shops-next-generation 7

Equal Emp. Opportunity Comm'n, EEOC-CVG-2012-1, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act* (2012) 8

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INTEREST OF AMICI CURIAE

Founded in 1973, Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt California corporation established for the purpose of litigating matters affecting the public interest. PLF provides a voice in the courts for limited constitutional government, private property rights, and individual freedom. PLF is the most experienced public-interest legal organization defending the constitutional principle of separation of powers in the arena of administrative law.

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INTRODUCTION AND SUMMARY OF ARGUMENT

On November 15, 2023, the Federal Communications Commission adopted a final rule ("Order") implementing Section 60506 of the Infrastructure Investment and Jobs Act (IIJA), over the objections of two

of the five Commissioners and contrary to many public comments. The Order defines the IIJA term "digital discrimination" as encompassing any covered practice or policy that "differentially impact[s] consumers' access to broadband internet access service based on their income level, race, ethnicity, color, religion, or national origin or are intended to have such differential impact." 47 C.F.R. § 16.2.

In other words, the Order prohibits not only practices or policies that actually treat consumers differently because of race or other covered characteristics (disparate treatment) but practices and policies that have a differential impact (disparate impact). The Order prohibits such "digital discrimination" not only by broadband access providers, but also by their contractors and any other entity "facilitating," "maintaining," "upgrading," or "otherwise affect[ing]" broadband internet service or architecture. *Id.* The Order also reaches beyond the deployment of broadband infrastructure, regulating "marketing," "customer service," "pricing," "installation time" and "promotional rates." *Id.*

Besides the reasons Petitioners advance, the Order is illegal on at least three grounds. First, when Congress grants lawmaking authority to a federal agency, it must "lay down by legislative act an intelligible

principle" to which the agency can conform. Section 60506 directs the FCC to adopt rules that "facilitate equal access" including by "preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin." Petitioners persuasively explain that this language does not permit the FCC to implement disparate impact liability. But if it did, then that language violates the nondelegation doctrine by failing to provide an "intelligible principle" governing such liability. Virtually any action that a regulated entity can take will have a disparate impact along one or more dimensions of income level, race, ethnicity, color, or religion. That's especially true because of the inclusion of "income level," which means that any decision by a covered entity lowering or raising prices will have a disparate impact based on income and thus come within the FCC's enforcement authority.

Second, authority to promulgate disparate impact rules is a major question to which Congress is required to speak clearly. Because Congress did not speak clearly to this particular question in the IIJA, the Order is invalid.

Finally, the Order requires covered entities to treat people differently based on race, in violation of the constitutional guarantee of equal protection.

ARGUMENT

I. If it is as broad as the FCC claims, Section 60506 violates the nondelegation doctrine.

The nondelegation doctrine requires Congress, when granting authority to an executive branch agency, to "lay down by legislative act an intelligible principle to which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). In *A.L.A. Schechter Poultry v. United States*, the Supreme Court applied the doctrine when addressing a portion of the National Industrial Recovery Act, in which Congress delegated authority to the President to prescribe "code[s] of fair competition" for the purpose of "rehabilitation of industry and the industrial recovery." 295 U.S. 495, 525, 536 (1935). The Court rejected this broad delegation because it "does not undertake to prescribe rules of conduct to be applied to particular states of fact determined by appropriate administrative procedure." *Id.* at 541. In a concurring opinion, Justice Cardozo called this delegation "unconfined and vagrant" and said that the codes of competition acted as

a "roving commission to inquire into evils and then, upon discovering them, do anything he pleases." *Id.* at 551 (quoting *Panama Refining Co. v. Ryan*, 293 U.S. 388, 435 (1935)).

A few months prior, the Court had applied the nondelegation doctrine in *Panama Refining Co. v. Ryan*, a dispute about a Code of Fair Conduct for the Petroleum Industry, one section of which gave the President "unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit." 293 U.S. at 415. The Court held that the relevant section was an invalid delegation of legislative authority. If the relevant statutory section were held to be a legitimate delegation of congressional power, "it would be idle to pretend that anything would be left of limitations upon the power of the Congress to delegate its law-making function" and would "invest [the President] with an uncontrolled legislative power." *Id.* at 430, 432.

Although the Supreme Court has not used the nondelegation doctrine to strike down a statute since *A.L.A. Schecter Poultry*, the Court's recent treatment of the doctrine shows that it is very much alive. In *Gundy v. United States*, 139 S. Ct. 2116 (2019), all eight Justices who heard the case agreed that the Sex Offenders Registration and

Notification Act would present a nondelegation question if read as petitioner Gundy read it. The plurality upheld the statute only because they interpreted the statute more narrowly than Gundy did. *Id.* at 2123-24. Also, Chief Justice Roberts and Justices Alito, Thomas, and Gorsuch expressed a willingness to revisit the nondelegation doctrine in future cases. *Id.* at 2131-32.

If Section 60506 is broad enough to allow disparate impact liability, as the FCC claims, then it violates the nondelegation doctrine. As in *A.L.A. Schecter Poultry* and *Panama Refining*, the broad disparate impact authority the FCC claims would give it virtually limitless power, untethered to any intelligible principle.

A. Background on disparate impact liability in employment.

Disparate impact was born in the employment discrimination context, and it has given agencies enforcing employment laws almost limitless authority, raising nondelegation problems. As law professor and United States Commission on Civil Rights member Gail Heriot has observed, virtually every job qualification has a disparate impact on some group covered by the employment discrimination laws. Gail L. Heriot, *Title VII Disparate Impact Liability Makes Almost Everything*

Presumptively Illegal, 14 N.Y.U. J. L. & LIBERTY 1, 33-42 (2020). Sometimes the disparate impact reflects past or present bias or discrimination. But often the causes of the disparate impact are more benign. For example, jobs requiring experience in the doughnut industry disproportionately benefit Cambodian Americans because many persons of this ethnicity followed a successful fellow immigrant entrepreneur into this business. *See* Cathy Chaplin, *The Doughnut Kids Are All Right*, EaterLA, June 1, 2022, https://la.eater.com/2022/6/1/23064652/los-angeles-cambodian-doughnut-shops-next-generation. Likewise, Vietnamese Americans are disproportionately represented in the nailcare industry because actress Tippi Hedren helped Vietnamese refugee women go to manicure school in the 1970s. *See* Regan Morris, *How Tippi Hedren Made Vietnamese Refugees Into Nail Salon Magnates*, BBC News, May 3, 2015, https://www.bbc.com/news/magazine-32544343.

Because just about every employment practice has a disparate impact on some group covered by Title VII of the Civil Rights Act of 1964, the agencies that enforce disparate impact rules have virtually unlimited power to regulate employers. The Equal Employment Opportunity Commission's choices about what violations to pursue have therefore

often seemed driven by partisan politics or ideology than by principles laid forth in Title VII.

For example, in 2012, the EEOC published major guidance on the use of criminal background checks in employment and made a push to crack down on what they believed to be unlawful use of these checks. Equal Emp. Opportunity Comm'n, EEOC-CVG-2012-1, *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act* (2012). The impetus for this push seemed to come from the "ban the box" movement, which aimed to better integrate ex-offenders into the workforce. Ban the Box Campaign, "Frequently Asked Questions," http://bantheboxcampaign.org/faq. Worthwhile though this goal might be, it is not an anti-discrimination goal and has little to do with the core purpose of Title VII.

In contrast, the first round of employer Covid vaccine requirements likely also had a disparate impact on African Americans because they were at least initially less likely to get vaccinated. But the EEOC never published guidance on vaccine disparate impact or investigated employers' use of these mandates. The explanation for the discrepancy between these two scenarios seems not to be any principle set forth in

Title VII, but that the EEOC staff dislike criminal background checks and like vaccine mandates for ideological reasons that have little to do with discrimination prevention.

B. Attempts to limit the scope of disparate impact in employment have been unsuccessful.

While there are theoretical limitations on the EEOC's use of disparate impact, none have proven much use in practice. First, some have proposed that Title VII disparate impact should apply only to employer practices that have an adverse effect on racial minorities and women. *See, e.g.*, Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims By White Males*, 98 NW. U. L. REV. 1505 (2004). But as the Supreme Court has long held, Title VII prohibits all race and sex discrimination, not just discrimination aimed at disfavored groups. *See, e.g.*, *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273 (1976) (interpreting Title VII and 42 U.S.C. § 1981 to cover discrimination against white employees). If Title VII only protected women and minorities from disparate impact discrimination, that would raise constitutional equal protection problems.

Second, although the business necessity defense is sometimes seen as a limit on Title VII disparate impact liability, in practice it has not

proven much of a limitation at all. Disagreement persists among courts and academics on how strong the business necessity defense is. Michael Carvin, a prominent attorney who served in the Civil Rights Division under President Reagan, has proposed that the business necessity defense is satisfied so long as the practice is "connected with" or "related to" the job. *Disparate Impact Claims Under the New Title VII*, 68 NOTRE DAME L. REV. 1153, 1158 (1993). That narrow standard of liability would allow virtually any employment practice that has some business-related purpose and is not a pretext for discrimination.

On the other hand, William and Mary law professor Susan Grover argues that an employer can use the defense only when "the goal it seeks to achieve through the practice is crucial to its continued viability and, in turn, that the practice selected is crucial to the achievement of that goal." *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 430 (1996). She suggests that "continued viability" means that "relinquishing the discriminatory practice will compel the employer to cut back its business, resulting in employee layoffs." *Id.* at 387 n.5.

Elsewhere, law professor Andrew Spiropoulos tried to discern an elusive "golden mean" among different interpretations of business necessity and argues that there should be "different standards for different types of jobs. A more flexible standard of business necessity should be applied to qualifications for positions that, because of their difficulty, great responsibility, or special risks to the public, require skills or intangible qualities that cannot be measured empirically." *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479, 1485 (1996). Whatever is the best of those competing interpretations, the practical result of the confusion as to the proper standard has been that many employers take the most risk averse course and act as though business necessity gives them no real protection from disparate impact enforcement.

C. The Order's disparate impact standard raises similar nondelegation concerns.

For the same reasons that Title VII disparate impact poses a nondelegation problem, an interpretation of Section 60506 that allows the FCC to promulgate disparate impact rules violates the Constitution's prohibition on delegation of legislative authority. Virtually every practice that the FCC regulates will have a disparate impact on some group,

meaning that the Order gives the FCC virtually unlimited power to go after any practices it dislikes, even if its objection is not really related to preventing actual discrimination. The Order thus encourages enforcement driven by naked political and ideological favoritism, untethered to any kind of "intelligible principle" set forth in the relevant statute. It transforms the FCC into the "unconfined and vagrant" "roving commission to inquire into evils" forbidden by the canonical nondelegation cases. *A.L.A. Schechter Poultry*, 295 U.S. at 551. Congress cannot lawfully delegate such legislative power to the FCC.

Like the Title VII business necessity defense, the technical and economic feasibility defense set forth in the Order is no real limit on the vast authority the Order confers on the FCC and does not cure the nondelegation problem. The Order provides that a covered entity may escape liability for a policy or practice that has a disparate impact if the policy or practice is nonetheless "justified by genuine issues of technical or economic feasibility." 47 C.F.R. § 16.5(a). Summarizing relevant precedent concerning the meaning of similar terms elsewhere in the Communications Act, the FCC said in comments accompanying the Order that technical and economic feasibility are "concepts operating at

the margins of what is technically and economically *convenient* on the one hand, or what is technically and economically *possible* on the other." *In re Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, FCC No. 23-100, 36 (2023). The FCC "emphasize[s]" that it "do[es] not define technical and economic feasibility as simple deference to a single [regulated] entity's judgment" and that it agrees with those commenters "asserting that Congress did not adopt section 60506 to enshrine the current industry status quo."

The Order also rejects safe harbors. FCC No. 23-100 at 37–38. It states that "the Commission will not defer to the entity to justify policies and practices alleged to be discriminatory" and that it will "require proof by a preponderance of the evidence that the policy or practice in question is justified by genuine issues of technical or economic feasibility." *Id.* at 42.

But as Commissioner Simington asked in dissent, it is entirely unclear "[h]ow much profitability" a company is "supposed to sacrifice in pursuit of digital equity goals" before it can establish a technical or economic infeasibility defense. FCC No. 23-100 at 232. The rule provides

"neither guidance nor safe harbors." *Id.* Also, as he asks, what about losses? Companies routinely choose to lose money in pursuit of long-term goals—why not to pursue digital equity? The technical and economic feasibility defense does not appear to be much defense, or much limitation on the FCC's power, at all. Instead, the Order creates a situation where "everyone is guilty, and enforcement is discretionary" and "the only real rule is to stay on the good side of the prosecutor." *Id.* This is exactly the kind of wielding of arbitrary enforcement power, unconstrained by meaningful limitations from Congress, that the nondelegation doctrine exists to prevent.

D. The inclusion of "income level" is particularly problematic.

The inclusion of disparate impact based on "income level" goes beyond Title VII and every other federal civil rights statute. Including it as a basis for disparate impact liability only compounds the problems associated with essentially limitless agency authority. Essentially all goods and services in a modern economy cost money. People with lower incomes have less money to spend on goods and services, so any business decision that raises the cost of a good or service arguably has a disparate impact on those with lower incomes. In other words, the power to regulate

disparate impacts based on income is the power to regulate all goods and services that cost money. No intelligible principle set forth in the IIJA justifies or limits this vast grant of power.

II. Disparate impact authority is a major question to which Congress did not clearly speak in the Infrastructure Investment and Jobs Act.

When reviewing an agency's authority to act under a federal statute, an important interpretative question is: did Congress intend the agency to have that authority? *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). Agencies have only those powers given to them by Congress, and enabling legislation is not "an 'open book to which the agency [may] add pages and change the plot line.'" *West Virginia v. EPA*, 597 U.S. 697, 723 (2022) (quoting Ernest Gellhorn & Paul Verkuil, *Controlling* Chevron-*Based Delegations*, 20 CARDOZO L. REV. 989, 1011 (1999)). In some cases, the "history and the breadth of the authority" that the agency has asserted and the "economic and political significance" of the underlying issue provide a "reason to hesitate before concluding that Congress" meant to confer such authority. *Id.* at 721 (quoting *Brown & Williamson Tobacco*, 529 U.S. at 159-60). That is because the issue presents a major question that Congress would not

have delegated to an agency without clearly saying so. *Ala. Ass'n of Realtors v. Dep't of Health & Human Services*, 594 U.S. 758, 764 (2021) (per curiam). Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." *West Virginia v. EPA*, 597 U.S. at 723 (quoting *Whitman v. Am. Trucking Assn's*, 531 U.S. 457, 468 (2001)). Or, as the Supreme Court once put it, Congress rarely "hide[s] elephants in mouseholes." *Whitman*, 531 U.S. at 468.

Regulation of disparate impact under the IIJA is a major question to which Congress would be required to speak clearly, and Congress did not do so. The statute's text does not directly authorize the FCC to promulgate disparate impact rules. Rather, it requires the FCC to develop rules geared at preventing discrimination "based on" certain enumerated characteristics. In other areas of anti-discrimination law, "based on" is interpreted to prohibit only disparate *treatment* discrimination, or discrimination that is actually motivated by particular characteristics. *See, e.g.*, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 174 (2005) ("[T]he 'normal definition of discrimination' is 'differential treatment.'") (citation omitted); *Univ. of Tex. Sw. Med. Ctr.*

v. Nassar, 570 U.S. 338, 350 (2013) ("'[B]ecause of ' means 'based on' and . . . '"based on" indicates a but-for causal relationship.'") (citation omitted). If it wanted to require or allow regulation of disparate impact, Congress would have used a different term.

Nor does the rest of Section 60506 use any of the terminology Congress ordinarily uses or bear any of the hallmarks of legislation intended to prohibit policies or practices with a disparate impact. Anti-discrimination laws create a cause of action for disparate impact when "their text refers to the consequences of actions and not just to the mindset of actors, and where that interpretation is consistent with statutory purpose." *Tex. Dep't of Hous. & Cmty. Affairs v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 533 (2015). The IIJA does not refer to consequences, and there is nothing in its legislative history suggesting any intention to give the FCC power to promulgate broad disparate impact rules.

Given how broad the power to make disparate impact rules based on income is, the lack of legislative history indicating intent to create disparate impact rulemaking power is especially striking. Although not conclusive, Congress's not intending regulation of disparate impact is

shown by a letter to the FCC from 28 Senators who voted for the IIJA, stating that they did not understand the statute to authorize the FCC's digital equity rules. *See* Letter from Sen. Ted Cruz, Ranking Member, Senate Comm. on Commerce, Sci. and Tech., et al., to Hon. Jessica Rosenworcel, Chair, FCC, at 1 (Nov. 10, 2023)[1] (urging the FCC "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").

And perhaps most importantly, by its very nature disparate impact is an issue of political and economic significance. As noted by Commissioner Brendan Carr, the Order allows "the FCC to exert unprecedented control over Internet services and infrastructure" and "sweep[s] entire industries into the FCC's jurisdiction for the first time ever." FCC No. 23-100 at 225.

A case addressing Title VI of the Civil Rights Act confirms that the issue of disparate impact is a major question. In *Louisiana v. EPA*, the court held that EPA's disparate impact rules, promulgated under Title

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[1] https://www.commerce.senate.gov/services/files/25A46EEF-7441-460C-9C23-2C9121A6BBDD

VI, involved major questions to which Congress was required to speak clearly. Case No. 2:23-CV-00692, 2024 WL 250798, at *30 (W.D. La. Jan. 23, 2024). Title VI prohibits discrimination based on race, color, and national origin. 42 U.S.C. § 2000d, *et seq*. The Supreme Court has interpreted this prohibition to ban disparate treatment but explicitly left open the question of whether this provision gives agencies authority to promulgate disparate impact regulations. *Alexander v. Sandoval*, 532 U.S. 275, 281-82 (2001). The EPA responded by promulgating a broad disparate impact rule prohibiting federal funding recipients from taking actions with disparate impact. *See* 40 C.F.R. § 7.35(b), (c).[2] Because imposing disparate impact rules on EPA-regulated entities had "extraordinary" "economic and political significance" and would allow the EPA "to regulate beyond the Statute's plain text and . . . invade the purview of the State's domain," the court held that EPA's disparate

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[2] Although agencies that enforce Title VI may have limited authority to promulgate disparate impact targeted at correcting disparate treatment violations, *see* Gail Heriot & Alison Somin, *The Department of Education's Obama-Era Initiative on Racial Disparities in School Discipline: Wrong for Students and Teachers, Wrong on the Law*, 22 TEX. REV. L.& POL'Y 473, 533-44 (2018) (discussing the Department of Education's authority to enact disparate impact school discipline rules under Title VI), EPA's regulation went well beyond any permissible scope.

impact rules addressed a major question to which Congress was required to speak clearly. *Louisiana*, 2024 WL 250798, at *30.

The FCC's Order is like the EPA's disparate impact rules, and the same analysis should apply. Both cases involve an agency construing language prohibiting disparate treatment discrimination as authority for a disparate impact rule. In both cases, the economic and political significance of a rule prohibiting disparate impacts would be vast. Nor is there any evidence that the FCC's disparate impact rule is a prophylactic measure to deter disparate treatment violations.[3] A broad disparate impact rule cannot be congruent and proportional to a basically non-existent disparate treatment problem. This rule thus goes well beyond the authority given to the FCC by the IIJA. This Court should therefore find that the Order constitutes a major question to which Congress has not clearly spoken. Because disparate impact is a major question to which

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[3] The FCC's findings of fact suggest the opposite: "it is our considered view that most of the gaps in broadband internet service in our country" do not stem from "intentionally discriminatory conduct on the part of covered entities." FCC No. 23-100 at 21. Also, "[a]fter nearly two years and several rounds of comments, the FCC concludes that 'there is little or no evidence' in the agency's record to even indicate that there has been any intentional discrimination in the broadband market." *Id.* at 223.

Congress is required to speak clearly, and because Congress did not do so in the IIJA, this Order is unlawful.

III. Because disparate impact often requires regulated entities to engage in disparate treatment based on race, the Order will lead to equal protection violations.

In *Ricci v. DeStefano*—a disparate impact employment discrimination case—Justice Scalia summarized what he termed "the war between disparate impact and equal protection" as follows:

> The difficulty is this: Whether or not Title VII's disparate-treatment provisions forbid 'remedial' race-based actions when a disparate-impact violation would *not* otherwise result—the question resolved by the Court today . . . . But if the Federal Government is prohibited from discriminating on the basis of race, then surely it is also prohibited from enacting laws mandating that third parties—*e.g.*, employers, whether private, State, or municipal—discriminate on the basis of race. . . . Title VII's disparate-impact provisions place a racial thumb on the scales, often requiring employers to evaluate the racial outcomes of their policies, and to make decisions based on (because of) those racial outcomes. That type of racial decisionmaking is, as the Court explains, discriminatory.

557 U.S. 557, 594 (2009) (Scalia, J., concurring) (citations omitted).

Here, the FCC's Order essentially mandates that regulated entities discriminate on various grounds, including on the basis of race. As in *Ricci*, the Order places a racial thumb on the scale, requiring covered entities to evaluate the racial outcomes of covered policies and practices

and, when necessary, adjust their decisionmaking to obtain the racial effect the FCC desires. Just as the Constitution prohibits the FCC from directly discriminating on the basis of race, it also prohibits the FCC from promulgating rules that require third parties to discriminate based on race. It would in effect require covered entities to use racial criteria to avoid penalties: as Commissioner Simington observed in dissent, "this is an impossible standard to meet, and the only way for a company to even attempt to comply is to practice racial, ethnic, and religious discrimination in every business decision." FCC No. 23-100 at 231.

That this Order reaches beyond employment decisions and essentially imposes quotas on a much wider range of covered entities' business decisions only compounds the problem. For example, the Order regulates "marketing or advertising." 47 C.F.R. § 16.2. Imagine a broadband provider that makes television commercials selling its products; under the Order, they could face FCC investigations for using too many actors from a particular racial group, since that would have a "disparate impact" connected to race. Remember Apple's iconic Think Different campaign from the late 1990s, featuring posters of individuals known for being particularly daring and innovative in their respective

fields? Were they to rerun it in 2025, the Order requires a more racially proportionate cast of freethinkers than Apple used in the original campaign. Thomas Edison or Richard Feynman would need to be swapped out for scientists from a different racial group to satisfy the FCC's bureaucrats, per the Order.

Or what about covered firms that use credit checks when leasing smartphones? The EEOC has already found that credit checks have an adverse effect on African Americans and has sued employers who use them under Title VII. *See generally EEOC v. Kaplan Higher Educ. Corp.*, 748 F.3d 749 (6th Cir. 2014). This Order could be fairly interpreted to get covered firms to stop using those too.

CONCLUSION

The federal government is one of limited and enumerated powers. If the Constitution does not specifically grant authority to a branch of government, it does not possess that authority. Likewise, it is for Congress, not the agencies, to decide important "major questions" of political and economic significance. Yet the FCC's transformation of the IIJA's disparate treatment provisions into disparate impact rules is a fundamentally legislative act for which Congress has not provided any

principle, let alone an "intelligible" one. And the issue of disparate impact is a major question for which Congress has not clearly spoken in the IIJA. Under the FCC's rule, companies would be required to engage in active discrimination, contrary to the Constitution's guarantee of equal protection, to avoid a disparate impact. If this Order is allowed to stand, it will, as FCC Commissioner Carr observed in dissent, "make a mockery of the separation of powers." FCC No. 23-100 at 225. This Court should set aside the Order to avoid such an outcome.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rules of Appellate Procedure 29(a)(5) and 32(a), because it contains 4,667 words.

This brief also complies with the requirements of Federal Rule of Appellate Procedure 32(a) because it was prepared in 14-point font using a proportionally spaced typeface in Microsoft Word version 2403.

Pursuant to Eighth Circuit Rule 28A(h), the electronic version of this brief was scanned for viruses and is virus-free.

Dated: April 29, 2024.

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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

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.

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