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; UNITED STATES OF AMERICA,

*Respondents*.

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

## BRIEF OF NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., ASIAN AMERICANS ADVANCING JUSTICE | AAJC, AMERICAN CIVIL LIBERTIES UNION, COMMUNICATIONS WORKERS OF AMERICA, AND UNITED CHURCH OF CHRIST, OFFICE OF COMMUNICATION, INC. AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS


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## DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4), *amici curiae* are non-profit organizations that have no parent corporations and that no publicly held corporations own 10% or more of their stock.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* further state that no party's counsel authored this brief in whole or in part; that no party or party's counsel has contributed money that was intended to fund preparing or submitting this brief; and that no person other than *amici*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief.

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## INTERESTS OF AMICI CURIAE

The NAACP Legal Defense & Educational Fund, Inc. (LDF) is the nation's first and foremost civil rights law organization. Through litigation, advocacy, public education, and outreach, LDF strives to secure equal justice under the law for all people in the United States and to break down barriers that prevent Black people from actualizing their basic civil and human rights.

Throughout its history, LDF has advocated for disparate impact liability under various statutes as an essential tool for rooting out persistent discrimination and expanding equal opportunities and access for Black people and other communities of color. *See, e.g., Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519 (2015); *Lewis v. City of Chi.*, 560 U.S. 205 (2010); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). LDF has a substantial interest in the outcome of this case, which will affect the ability of the Federal Communications Commission ("FCC") to effectuate Congress' mandate to facilitate equal access to broadband internet by promulgating rules that address disparate impact.

Asian Americans Advancing Justice | AAJC ("Advancing Justice-AAJC") is a nonprofit, nonpartisan organization that seeks to advance the civil and human rights of Asian Americans and to build an equitable society for all. Advancing Justice-AAJC is a leading expert on issues of importance to the Asian American

community, including telecommunications and technology, voting, census, educational equity, immigrant rights, and anti-racial profiling.

Advancing Justice-AAJC submitted comments to the FCC in response to the Notice of Proposed Rulemaking for the challenged regulation highlighting the digital divide and its effect on the Asian American community. It has also submitted *amicus* briefs in other cases to promote equity in and access to critical technology and services for Asian Americans, including in *X Corp. v. Bonta*, No. 24-271 (9th Cir. 2024) and *METROPCS California LLC v. Picker*, No. 18-17382 (9th Cir. 2018).

This brief is also submitted on behalf of the American Civil Liberties Union, Communications Workers of America, and the United Church of Christ, Office of Communication, Inc.

The American Civil Liberties Union ("ACLU") is a nationwide, non-partisan organization with more than 1.7 million members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Since its founding in 1920, the ACLU has litigated numerous cases aimed at ending segregation and racial discrimination in all its forms, including at the intersection of technology and civil rights, and it has appeared frequently as amicus curiae in cases implicating these issues. *See, e.g.*, *NAACP v. Am. Family Mut. Ins. Co.*, 978 F.2d 287 (7th Cir. 1992) (plaintiffs' counsel in Fair

Housing Act challenge to redlining in homeowner's insurance business); *Adkins v. Morgan Stanley*, No. 12-CV-7667 (S.D.N.Y. filed Oct. 15, 2012) (plaintiffs' counsel in Fair Housing Act challenge to discrimination in mortgage securitization); Br. of Amici Curiae, *Liapes v. Facebook, Inc.*, 95 Cal. App. 5th 910 (Cal. Ct. App. 2023) (No. A164880); Br. of Amici Curiae in Supp. of Pls-Appellants' Appeal for Reversal, *Henderson v. Source for Pub. Data*, L.P., 53 F. 4th 110 (4th Cir. 2022).

The Communications Workers of America (CWA) is the largest communications and media labor union in the United States. Its membership consists of workers in the communications and information industries, as well as the news media, airlines, broadcast and cable television, public service, higher education, health care, manufacturing, video games, and high tech. CWA takes an active role advocating for its members, which includes participating in litigation as a party or amicus.

The United Church of Christ, Office of Communication, Inc. (UCC OC Inc.) is the United Church of Christ Media Justice Ministry. The UCC is a faith community rooted in justice that recognizes the unique power of the media and technology to shape public understanding and thus society. Established in 1959, UCC OC Inc. established the right of all citizens to participate at the Federal Communications Commission as part of its efforts to ensure a television

broadcaster in Jackson, Mississippi served its African-American viewers during the civil rights movement and continues to press for media justice and communications rights in the present day. The Cleveland-based United Church of Christ has almost 5,000 local congregations across the United States, formed in 1957 through union of the Congregational Christian Churches and the Evangelical and Reformed Church.

Amici curiae are committed to ensuring equal opportunities and access to broadband internet for Black people, Asian Americans, and other communities of color, low-income communities, and rural communities.

## INTRODUCTION

Communities of color, low-income communities, and rural communities disproportionately lack access to affordable broadband internet. Over a quarter of all households in the Black Rural South lack access to broadband internet, and over a third of all households in the Black Rural South lack internet access altogether.[1] Meanwhile, nearly a quarter of Asian American households in California lack internet access entirely, with an additional six percent only able to access the internet via a smartphone.[2] This "digital divide"[3] has real consequences, as "broadband internet [access] is necessary for Americans to do their jobs, to participate equally in school learning, to access health care, and to stay connected."[4] Recognizing the harms that flow from the lack of broadband access, Congress passed a prohibition on digital discrimination as part of the Infrastructure Investment and Jobs Act ("IIJA"), codified at 47 U.S.C. § 1754 ("Section 1754").

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[1] *See infra* Part I.

[2] Mark DiCamillo, Inst. of Gov't Stud., Univ. of Cal., Berkeley, *Internet Connectivity and the "Digital Divide" in California – 2019*, tbl.4a, (Mar. 12, 2019), https://escholarship.org/uc/item/7rj7p5vw (accessed July 25, 2019).

[3] The Merriam-Webster dictionary defines the term "digital divide" as "the economic, educational, and social inequalities between those who have computers and online access and those who do not". MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/digital%20divide (last visited Jun. 20, 2024).

[4] White House, *Factsheet: The Bipartisan Infrastructure Deal* (Nov. 6, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/06/fact-sheet-the-bipartisan-infrastructure-deal/.

This bipartisan piece of legislation required the FCC to "ensure that all people of the United States benefit from equal access to broadband internet access service." 47 U.S.C. § 1754(a)(3). Congress also ordered the FCC to adopt rules "preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin." 47 U.S.C. § 1754(b)(1).

Consistent with Congress' statutory mandate, the FCC promulgated the Digital Discrimination Rule ("Rule"), which makes it unlawful for "any broadband provider, or covered entity . . . to adopt, implement or utilize policies or practices, not justified by genuine issues of technical or economic feasibility, that differentially impact 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. § 16.3(b). Industry Petitioners challenge the Rule, arguing that Congress did not authorize the FCC to adopt a rule that includes disparate impact liability, and that allowing for disparate impact liability under these circumstances would lead to disastrous business consequences.

Amici respectfully urge this Court to reject the Industry Petitioners' arguments. As explained below, the digital divide is a pressing problem impacting the economy, health, education, employment, among other areas, that Congress sought to remedy. To do so, Congress drafted Section 1754 with the purpose of

ensuring *equal access* to broadband internet service for people in the United States. By focusing on equality of access, the language of Section 1754 explicitly covers more than just intentional discrimination. Construing Section 1754 to allow for disparate impact liability likewise accords with how the Supreme Court has construed other critical federal civil rights statutes. The Industry Petitioners' claims of disaster within the broadband sphere are speculative and provide no basis to override the plain text of Section 1754 or the FCC's reasonable judgments in crafting the Rule. Indeed, many of these same industries have long been subject to disparate impact liability under Title VII of the Civil Rights Act of 1964, Public Law 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. § 2000a *et seq*.), the Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified at 29 U.S.C. § 621 *et seq*.), and other state anti-discrimination statutes to no ill effect. This Court should uphold the FCC's adoption of disparate impact liability in the Rule.

## ARGUMENT

### I. The Digital Divide Harms Communities of Color, Low-Income Communities, and Rural Communities.

Access to reliable, broadband internet is critical to full and equal participation in American society. Internet access affects education, healthcare, and employment, and is necessary for building and maintaining healthy social connections. Unfortunately, reliable, high-speed internet service is not equally available to all people within the United States. The digital divide disproportionately affects communities of color, rural communities, and low-income communities, with the impacts felt most heavily by communities that sit at the intersection. The digital divide, however, is not a coincidence. It flows directly from decades of explicit government policy, specific industry practices, and persistent disinvestment.

As the FCC record reflects, today's digital divide "significantly tracks housing redlining that came into existence under the National Housing Act of 1934."[5] "Redlining" refers to the historical federal government-sponsored policy[6]

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[5] FCC, Report and Order and Further Notice of Proposed Rulemaking in GN Docket No. 22-69, FCC 23-100, at 6 (Nov. 20, 2023) (hereinafter "Nov. 20, 2023 Report and Order"), *available at* https://docs.fcc.gov/public/attachments/FCC-23-100A1.pdf.

[6] Comments by Electronic Frontier Foundation et al. in response to Notice of Proposed Rulemaking, Prevention and Elimination of Digital Discrimination, GN Docket 22-69, at 5 (Feb. 21, 2023), available at

under which certain communities were declared "too risky" and denied access to mortgages, insurance loans, and other financial services based solely on where people lived.[7] The federal government created color-coded maps that corresponded to the loan worthiness of various neighborhoods, with the parts colored red considered unworthy for participation in federal government home ownership programs.[8] "Redlined" neighborhoods were predominately Black communities,[9] but also targeted other communities of color, including both Hispanic and Asian American communities.[10] These maps were used to exclude Black families, low-income families, and families from other minority groups from designated white neighborhoods.[11] As such, federal policy entrenched racial housing segregation, the effects of which are still felt today.[12]

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https://www.fcc.gov/ecfs/document/10221167617633/1 (hereinafter "Joint Advocates Comments") (citing R. Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America*, at 64 (2017)).

[7] *See* Candace Jackson, *What is Redlining*, N.Y. TIMES (Aug. 17, 2021), https://www.nytimes.com/2021/08/17/realestate/what-is-redlining.html.

[8] *Id.*

[9] *Id.*

[10] Ryan Best & Elena Mejia, *The Lasting Legacy of Redlining*, FIVETHIRTYEIGHT (Feb. 9, 2022), https://projects.fivethirtyeight.com/redlining/.

[11] *See* Daniel Aaronson, et al., FED. RSRV. BANK OF CHI., Working Paper No. 2017-12, *The Effects of the 1930s HOLC "Redlining" Maps*, at 5 (Aug. 3, 2017), https://www.econstor.eu/bitstream/10419/200568/1/1010730592.pdf; Rothstein, *supra* note 6, at 64–73.

[12] *See* Stephen Menendian, *U.S. Neighborhoods Are More Segregated than a Generation Ago, Perpetuating Racial Inequality*, NBC NEWS (Aug. 16, 2021), https://www.nbcnews.com/think/opinion/u-s-neighborhoods-are-more-segregated-generation-ago-perpetuating-racial-ncna1276372.

These government-sponsored policies in turn facilitated racial discrimination and exclusion by private actors. State-regulated actors like insurance companies refused to insure Black families seeking to live in non-Black neighborhoods.[13] And because redlining concentrated and perpetuated poverty, retailers refused to invest in Black and low-income communities, intentionally discriminating through a process known as "retail redlining."[14] The results of these sustained policies are both divestment from communities of color *and* overinvestment in white communities.[15]

Today, disparate deployment of high-speed broadband technology by Internet Service Providers (ISPs) continues to perpetuate the effects of historic redlining. Because communities with lower household incomes and communities that were historically redlined based on race overwhelmingly overlap,[16] the legacy

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[13] Rothstein, *supra* note 6, at 64-73.

[14] Naa Oyo A. Kwate, et al., *Retail Redlining in New York City: Racialized Access to Day-to-Day Retail Resources*, 90 J. URB. HEALTH 632-652 (July 10, 2012), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3732689.

[15] *See* Angela Hanks, et. al., *Systematic Inequality How America's Structural Racism Helped Create the Black-White Wealth Gap*, CENTER FOR AMERICAN PROGRESS (Feb. 21, 2018), https://www.americanprogress.org/article/systematic-inequality/; *see also* Joint Advocates Comments, at 8-9 (Feb. 21, 2023).

[16] Comments by Lawyers' Committee for Civil Rights Under Law in response to Notice of Proposed Rulemaking, Prevention and Elimination of Digital Discrimination, GN Docket 22-69, at 36-37 (Feb. 21, 2023), https://www.fcc.gov/ecfs/document/1022130736466/1 (hereinafter "Lawyers' Comm. Comments") (citing Tracy Jan, *Redlining Was Banned 50 Years Ago. It's Still Hurting Minorities Today*, WASH. POST (Mar. 28, 2018),

of historic redlining created circumstances "where wealthy broadband users are getting the benefits of cheaper and faster internet access through fiber, and low-income broadband users are being left behind with more expensive slow access by that same carrier."[17]

Other communities of color also experience disparities in access to broadband. According to a 2021 study by the Pew Research Center, 65% of Hispanic Americans have high-speed internet at home compared to 80% of white people.[18] Asian American, Native Hawaiian, and Pacific Islander communities ("AANHPI") also struggle to access broadband internet. For example, a 2024 study showed that in San Francisco's Chinatown, 44% of households do not have an internet broadband subscription.[19] Additional indicators suggest there are likely

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https://www.washingtonpost.com/news/wonk/wp/2018/03/28/redliningwas-banned-50-years-ago-its-still-hurting-minorities-today/.)

[17] *Id.* at 37 (quoting Ernesto Falcon, *The FCC and States Must Ban Digital Redlining*, ELEC. FRONTIER FOUND. (Jan. 11, 2021), https://www.eff.org/deeplinks/2021/01/fcc-and-states-must-ban-digital-redlining).

[18] Andrew Perrin, *Mobile Technology and Home Broadband 2021*, PEW RSCH. CTR. (June 3, 2021), https://www.pewresearch.org/internet/2021/06/03/mobile-technology-and-home-broadband-2021/.

[19] Chinese for Affirmative Action, *San Francisco's Digital Deserts How San Francisco Chinatown and Other Neighborhoods are Left Behind in the Digital Divide*, at 19 (March 2024), https://caasf.org/wp-content/uploads/2024/03/CAA-Digital-Equity-Report-Web-Final-Pages.pdf.

millions of people within AANHPI communities who lack access to broadband internet.[20]

Beyond disparate broadband deployment between communities of color and white communities, rural communities generally do not have the same access to broadband services and are underserved in comparison to urban communities.[21] The FCC found that rural communities "have fallen behind urban and suburban levels of fixed broadband by 54 percent."[22] Research further shows that these disparities compound where they intersect, particularly in the Black Rural South where, in 2021, 38% of Black people reported lacking home internet access all together, compared to 23% of white Americans.[23] Even those individuals with

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[20] Asian Americans Advancing Justice - AAJC, *Digital Divide in the Asian American, Native Hawaiian, and Pacific Islander Communities*, 2-3 (May 2024), https://www.advancingjustice-aajc.org/sites/default/files/2024-06/1399_DigitalDivide-Quantitative_Charter_Digital_Pages.pdf.

[21] Lawyers' Comm. Comments, *supra* note 16, at 36 (citing CBS Mornings, *The Digital Divide Between Rural and Urban America's Access to Internet*, CBS NEWS (Aug. 4, 2017), https://www.cbsnews.com/news/rural-areas-internet-access-dawsonville-georgia/).

[22] Nicol Turner Lee, et. al, *Why the Federal Government Needs to Step Up Efforts to Close the Rural Broadband Divide*, BROOKINGS INST. (Oct. 4, 2022), https://www.brookings.edu/articles/why-the-federal-government-needs-to-step-up-their-efforts-to-close-the-rural-broadband-divide/.

[23] Dominique Harrison, *Affordability & Availability: Expanding Broadband in the Black Rural South*, JOINT CTR. FOR POL. & ECON. STUD., at 3, n.2 (Oct. 6, 2021), https://jointcenter.org/affordability-availability-expanding-broadband-in-the-black-rural-south/ (defining the "Black Rural South" as 156 counties that, per 2013-17 data, were 35% Black and designated as rural by the USDA, and citing Harin Contractor & Spencer Overton, *An Introduction to the Future of Work in Black Rural South*, JOINT CTR. FOR POL. & ECON. STUD., at 36-38 (Feb. 2020)).

internet lack access to broadband; according to FCC data, in 2021 in the Black Rural South, 25.8% of residents lacked the option to subscribe to high-speed broadband.[24] Beyond that, even where broadband was available in the Black Rural South, it was unaffordable for many.[25]

Data also indicate that access to the internet is significantly worse for Indigenous communities. For example, a study by the Center for Indian Country Development found that the share of households with internet access is 21% lower in tribal areas than in neighboring non-tribal areas.[26] Compared to these non-tribal areas, download speeds—whether measured using fixed or mobile broadband networks—were approximately 75% slower in tribal areas, even though the lowest price for basic Internet services in tribal areas was 11% higher.[27] The same research revealed that a "sizable amount of the variation in the access and home connection gap between tribal and non-tribal" communities across geographies was "left unexplained" by the traditional cost factors.[28]

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[24] *Id.* at 2.
[25] *Id.*
[26] Matthew T. Gregg, et al., *The Tribal Digital Divide: Extent and Explanations*, CTR. FOR INDIAN COUNTRY DEV., Fed. Rsrv. Bank of Minneapolis, at 1 (Mar. 2021, rev. June 2022), *available at* https://www.minneapolisfed.org/research/cicd-working-paper-series/the-tribal-digital-divide-extent-and-explanations.
[27] *Id.*
[28] *Id.*

This difference in reliable, highspeed internet access has significant effects on people's health, education, and communities. According to one study, most U.S. adults say that those without high-speed internet at home during the COVID-19 pandemic were at a major disadvantage when it came to looking for jobs, connecting with doctors and other medical professionals, keeping up with the latest public health information, or staying in touch with family and friends.[29]

Lack of highspeed internet access also compounds disadvantages. For example, access to internet is now a routine part of K-12 education, so poor internet access can be a significant barrier to academic success. "Research shows that fourth graders without home internet score 15 to 17 percent lower on standardized math, science, and reading tests than those who have it," and "[t]hat gap only grows as students get older."[30] Children without internet, who are disproportionately children of color, not only are more likely to fare poorly in school, they also miss out on the chance to develop the digital skills vital to today's job market.[31] They

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[29] Colleen McClain, *34% of Lower-Income Home Broadband Users Have Had Trouble Paying for Their Service Amid COVID-19*, PEW RSCH. CTR. (June 3, 2021), https://www.pewresearch.org/short-reads/2021/06/03/34-of-lower-income-home-broadband-users-have-had-trouble-paying-for-their-service-amid-covid-19/.

[30] *See* Vinhcent Le & Gissela Moya, *On the Wrong Side of the Digital Divide, Life without Internet Access, and Why We Must Fix It in the Age of Covid-19*, THE GREENLINING INST. (June 2, 2020), https://greenlining.org/publications/on-the-wrong-side-of-the-digital-divide/.

[31] *See* Pippa Stevens, *Digital Racial Gap Could 'Render the Country's Minorities into an Unemployment Abyss,' says Deutsche Bank*, CNBC (Sept. 2, 2020),

are therefore likely to unequipped to be competitive in the job market, leaving them more susceptible to being trapped in a cycle of poverty.

The ramifications of the digital divide are concrete and substantial. The current digital divide effectively perpetuates a system of social stratification in the United States, under which Black communities and other communities of color, low-income communities, and rural communities are being increasingly left behind.

## II. The FCC's Digital Discrimination Rule Effectuates Congress' Mandate of *Equal Access* that is Articulated in Section 1754.

The Rule comports with Section 1754's statutory language and congressional intent. Congress passed Section 1754 with the goal of eliminating discriminatory consequences from unequal broadband access. Section 1754 charges the FCC with "adopt[ing] final rules to facilitate *equal access* to broadband internet access service, taking into account the issues of technical and economic feasibility." 47 U.S.C. § 1754(b) (emphasis added). The FCC's mandate under the statute requires that its rules "prevent[] digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin," 47 U.S.C. § 1754(b)(1), and authorizes the FCC to "identify[] necessary steps . . . to take to eliminate [digital] discrimination." 47 U.S.C. § 1754(b)(2). Section 1754's

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https://www.cnbc.com/2020/09/02/digital-racial-gap-could-render-the-countrys-minorities-into-an-unemployment-abyss-says-deutsche-bank.html.

statutory language therefore mandates the achievement of a particular goal—the FCC must adopt rules facilitating "equal access to broadband internet access service"—rather than focusing principally on the motives of a regulated entity. *See generally*, 47 U.S.C. § 1754(b). The Rule is thus authorized by the plain text of Section 1754. By incorporating a legal standard that addresses disparate impact in access to broadband when that discriminatory impact is not justified by issues of technical or economic feasibility, the Rule promotes equal access to broadband.[32] As such, by adopting disparate impact liability in the Digital Discrimination Rule, 47 C.F.R. §§ 16.3, 16.4(b), the FCC did precisely what Congress directed it to.

The Industry Petitioners nonetheless argue that Congress did not authorize the FCC to include disparate impact liability.[33] According to the Industry Petitioners, one can only be liable under the statute if they are found to engage in intentional discrimination based on a protected characteristic.[34] This Court should

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[32] Comments by NAACP Legal Defense & Educational Fund in response to Notice of Proposed Rulemaking, Prevention and Elimination of Digital Discrimination, GN Docket 22-69 (Apr. 20, 2023), https://www.fcc.gov/ecfs/document/10810524113947/1.

[33] *See, e.g.*, Pet'rs' Br. at 1-2.

[34] *See id.* at 2. Notably, the FCC found that while Section 1754 proscribes intentional discrimination, there is little evidence in the legislative history "indicating that intentional discrimination by industry participants based on the listed characteristics substantially contributes to disparities in access to broadband internet service." Nov. 20, 2023 Report and Order at 18. Instead, "most of the gaps in access to broadband internet service in our country . . . stem from policies and practices that are neutral on their face, rather than from intentionally discriminatory

reject the Industry Petitioners' view of Section 1754 as inconsistent with the plain text of the statute. Congress' objective of *equal access* in Section 1754, as reflected in the statute's text referring to the consequences of actions, requires liability to flow from disparate impact and not solely disparate treatment. Congress did not simply direct the FCC to adopt rules turning on the motives of regulated entities. If the FCC did not include disparate impact liability in the Digital Discrimination Rule, the Commission would fail to achieve Congress' mandate of "facilitat[ing] equal access to broadband internet access service." 47 U.S.C. § 1754(b).

Consistent with the purpose of Section 1754, the Rule also furthers the FCC's ability to ferret out intentional discrimination. Disparate impact serves an essential function in not only preventing discriminatory effects but also "uncovering discriminatory intent" by permitting "plaintiffs to counteract unconscious prejudices and disguised animus that escape easy classification as disparate treatment." *Inclusive Communities*, 576 U.S. at 521. In the context of eliminating unequal broadband access, the inclusion of disparate impact in the Rule helps address harm caused by policies or practices that have discernable discriminatory effects but lack adequate justification or circumstances where implicit biases or cloaked discriminatory motives may be at play but remain

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conduct on the part of covered entities and other industry participants." *Id*. at 21.

difficult to detect. Were the Rule to foreclose disparate impact liability, the FCC would lack the tools necessary to "facilitate equal access" because the Commission could not address disparities in broadband internet access that have an unjust impact on protected groups.

## III. The Rule Parallels the Interpretation of Other Civil Rights Statutes.

The FCC's understanding of Section 1754 aligns with the Supreme Court's interpretation of other federal civil rights statutes that have the purpose of ensuring equality of opportunity to require disparate impact liability. In *Griggs*, the Supreme Court found that the text of Title VII reflected Congress' objective of enacting the statute "to achieve equality of [] opportunities" in employment. 401 U.S. at 429. Therefore the "Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Id*. at 431. Later, in *Inclusive Communities*, the Court looked at the background and instruction in both *Griggs* and its similar decision regarding the Age Discrimination in Employment Act (ADEA) in *Smith v. City of Jackson*, 544 U.S. 228 (2005), to determine whether disparate impact claims were cognizable under the Fair Housing Act ("FHA"). 576 U.S. at 520. Both cases provided that where interpretation is consistent with the statutory purpose and the text refers to the consequences of actions and not just to the mindset of actors, disparate impact liability is appropriate. *Id.* at 533. For that reason, the Court in both *Griggs* and *Smith*, construed §703(a)(2) of Title VII and

§4(a)(2) of the ADEA, 29 U.S.C. §§ 621–634, respectively, to encompass disparate-impact claims. *Id.* at 532-33.

These decisions exemplify that the Court was not simply focused on whether Congress used specific words to prohibit behavior but on whether the statute was drafted with the purpose of achieving a particular result or goal. *Accord id*. at 535 (noting that although the FHA does not reiterate Title VII's exact language Congress "chose words that serve the same purpose and bear the same basic meaning but are consistent with the structure and objectives of the FHA."). It was against the backdrop of *Griggs*, *Smith*, and *Inclusive Communities* that Congress crafted Section 1754.

Congress defines "equal access" as 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." 47 U.S.C. § 1754(a)(2) (emphasis added). As the FCC noted, similar to the text of Title VII and the ADEA, which prohibit practices that would "deprive any individual of employment opportunities," §703(a)(2) of Title VII and §4(a)(2) of the ADEA, Section 1754 defines "equal access" as the "opportunity to subscribe" and "this operative text focuses on the impact of a policy or practice on the consumer's chance or right to obtain service rather than intent."[35]

[35] Nov. 20, 2023 Report and Order at 20.

By including specific language that requires the equal opportunity to access comparable broadband internet and quality of service metrics, Congress authorized the FCC's inclusion of disparate impact liability in the Commission's Rule because the text of Section 1754 was drafted with the purpose of achieving a particular goal. As the FCC found in adopting rules pursuant to Section 1754, "to achieve the statute's *equal access purposes*, the legal standard must address not only business conduct motivated by discriminatory intent, but also business conduct having discriminatory effects."[36]

## IV. Disparate Impact Liability under Section 1754 is Consistent with How the Nation's Largest Industries are Regulated.

Despite the Rule's similarities to existing disparate impact statutory schemes, Industry Petitioners contend that the FCC has done something "unusual" and "unprecedented."[37] They decry the "dramatic consequences" that they say would result from the application of a disparate impact standard.[38] Contrary to their argument, Congress has long subjected businesses to disparate impact liability and the FCC's Rule includes sufficient limits that permit practical business decisions.[39] Other industries have been subject to disparate impact liability with these same guardrails and have thrived. For similar reasons, courts have rejected similar

[36] *Id.* at 17.
[37] Pet'rs' Br. at 1-2.
[38] *Id.* at 3.
[39] Nov. 20, 2023 Report and Order, at 18-19.

allegations of "dramatic consequences" to shield industries from disparate impact liability; this Court should follow suit.

### A. Industry Actors Have Long Been Subject to Disparate Impact Liability.

For five decades, Congress has addressed systemic discrimination and disinvestment in Black communities and other communities of color by prohibiting both blatant and covert discrimination in business practices. Businesses are already, and have been for decades to no ill effect, subject to disparate impact liability under Title VII, which prohibits discrimination in employment based on race, sex, religion, and other characteristics,[40] the FHA, which prohibits discrimination concerning the sale, rental, and financing of housing and other housing-related services based on race, color, national origin, religion, sex, and other characteristics.[41] Given that most (if not all) of the entities covered by the Section 1754 are also "employers" or "persons" within the scope of these laws, these entities are already familiar with compliance with disparate impact regimes and have long been subject to them without anything resembling the impacts to their business operations that Industry Petitioners claim to fear.[42]

Disparate impact liability is a routine method of combating discrimination with which most industries are familiar and to which they are already subject.

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[40] Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964) (codified at 42 U.S.C. § 2000a *et seq*.).

[41] Fair Housing Act, Pub. L. No. 90-284, 82 Stat. 81 (1968) (codified at 42 U.S.C. § 3601 *et seq*.) Other anti-discrimination laws provide protections from both blatant and covert discrimination on the basis of additional protected

### B. The Digital Discrimination Rule is Consistent with Current Requirements on Industry Actors.

Industry Petitioners' familiarity with disparate impact liability will extend to the limitations the FCC's Rule includes, which permit practical business decisions and protects industry interests in line with current legal standards.

Petitioners' claims about widespread impacts on their operations are misplaced because the Rule makes plain that liability for disparate impact discrimination exists only when it is economically and technologically feasible to remedy the impact. Congress was clear in Section 1754 that equal access to broadband must take "into account the issues of technical and economic feasibility presented by that objective." 47 U.S.C. § 1754(b). The Commission's inclusion of "technical and economic feasibility" as a defense to disparate impact claims in the Rule is similar to Title VII's "business necessity" defense. *See* 47 C.F.R. § 16.2. Under Title VII, employers may maintain practices that cause a disparate impact

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characteristics, including the ADEA, Age Discrimination in Employment Act, Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified at 29 U.S.C. § 621 *et seq*.), which forbids age discrimination against people who are 40 and older, and the Americans with Disability Act (ADA), Pub. L. No. 101-336, 104 Stat. 328 (1990) (codified at 42 U.S.C. § 12101 *et seq*), which prohibits discrimination on the basis of disability

[42] *See* 42 U.S.C. § 2000e(b) (Title VII definition of employer); 42 U.S.C. § 3602(d) (Fair Housing Act definition of "person); 29 U.S.C. § 630(a) - (b) (ADEA definition of "person" and "employer.")

so long as the employer can prove the practice is "demonstrably a reasonable measure of job performance." *See, e.g.*, *Griggs,* 401 U.S. at 436.

Likewise, the Rule includes a corresponding metric for digital discrimination of access: an "entity will not be found liable . . . if the policy or practice is justified by genuine issues of technical or economic feasibility." 47 C.F.R. § 16.5(b). "Economically feasible" and "technically feasible" are defined as "reasonably achievable" as "evidenced by prior success by covered entities under similar circumstances or demonstrated" economic conditions or technological advances respectively, "clearly indicating that the policy or practice in question may reasonably be adopted, implemented, and utilized." 47 C.F.R. § 16.2.

The Rule also allows regulated entities to request advisory opinions "regarding the permissibility of its own policies and practices affecting access to broadband internet access service." 47 C.F.R. § 16.7(a)(1). This is similar to the Equal Employment Opportunity Commission's (EEOC) "opinion letters" under Title VII, 29 C.F.R. § 1601.93(a), and the ADEA, 29 C.F.R. § 1626.21(a), that provide for the EEOC's formal opinion on matters where the application of existing regulations or guidance is unclear.[43]

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[43] *See* U.S. EEOC, Formal Opinion Letters, https://www.eeoc.gov/formal-opinion-letters#:~:text=A%20Formal%20Opinion%20Letter%20represents,as%20approved%20by%20the%20Commission (last accessed June 24, 2024).

Altogether, the Rule provides entities with standard parameters that neutralize their ominous concerns about its adoption.

### C. Courts Have Been Unpersuaded by Speculative Allegations of the Potential "Dramatic Consequences" of Disparate Impact Liability.

In affirming disparate impact liability for other anti-discrimination laws, courts have addressed and ultimately rejected speculative concerns about the negative effects of disparate impact liability on industries; this Court should do the same. Just as many other industries have thrived while complying with disparate impact standards under Title VII, the FHA, and other statutes, so too will the broadband industry.

The Supreme Court's rejection of speculative arguments made against finding disparate impact liability in the FHA is illustrative. When holding that the FHA allows for disparate impact liability, the Court observed that "[t]he existence of disparate-impact liability in the substantial majority of the Courts of Appeals for the last several decades 'has not given rise to . . . dire consequences.'" *Inclusive Communities*, 576 U.S. at 546 (citing *Hosanna–Tabor Evangelical Lutheran Church and Sch. v. EEOC,* 565 U.S. 171, 196 (2012)). As the Court there explained, federal civil rights statutes, including those that impose disparate impact liability, are "not an instrument to force [businesses] to reorder their priorities [but] [r]ather . . . aim[] to ensure that those priorities can be achieved without arbitrarily creating

discriminatory effects or perpetuating segregation." *Id.* at 540. In other words, disparate impact liability requires businesses to be sensitive to the discriminatory effects of their decisions. It does not prevent businesses from operating and innovating.

Recent district court decisions affirming the application of FHA's disparate impact regime to homeowner's insurers despite industry concerns prove instructive. In *Nat'l Ass'n of Mut. Ins. Cos., v. HUD*, the District Court for the District of Columbia acknowledged that factors such as market dynamics, costs, traffic patterns, and historic architecture may influence housing decisions. No. CV 13-966 (RJL), 2023 WL 6142257 at *11 (D.D.C. Sept. 19, 2023), *appeal docketed,* No. 23-5275 (D.C. Cir. Nov. 27, 2023). And in the face of the insurers arguing that a disparate impact liability regime would "force [them] to reorder their priorities," the court, citing *Inclusive Communities*, assured the insurers that disparate impact liability could not be used to force entities to make different decisions "merely because some other priority might seem preferable" to plaintiffs. *Id.* With that assurance, the court refused to engage in the "hypothetical" worst case scenario raised by the insurers about disparate impact liability. *See id.* at *12.

Likewise, the Northern District of Illinois recently declined to allow insurers' speculative "parade of horribles" to ward off disparate impact liability. *Prop. Cas. Insurers Ass'n of Am. v. Todman*, No. 13 C 8564, 2024 WL 1283581, at

*22 (N.D. Ill. Mar. 26, 2024), appeal filed, No. 24-1947 (7th Cir. May 24, 2024). That court acknowledged that the insurance industry hinges on decisions and interests that are "based on relevant, mathematical and objective risk factors" that impact costs. *See id.* at *19. A disparate impact standard "simply allows litigants to challenge whether insurance practices are truly founded in risk, and if so, whether there are effective less-discriminatory alternatives that do not harm the insurer's business." *Id.* at *20. The court was convinced that a disparate impact standard would not cause insurance markets to fail, noting the lack of "the tidal wave of litigation that insurers predicted"; functional insurance industries in states with similar provisions; and use of disparate impact liability in other complex risk-based contexts such as mortgage lending, "without the need for exemptions or safe harbors." *Id.* (internal citations omitted.)

This Court should be equally skeptical about the supposed threats of disparate impact liability to the broadband industry. The Rule is consistent with existing industry requirements that aim to eliminate business practices that are "fair in form, but discriminatory in operation," *see Griggs*, 401 U.S. at 431, and will ensure broadband access can be achieved without arbitrarily creating discriminatory effects, s*ee Inclusive Communities*, 576 U.S. at 540.

## CONCLUSION

For these reasons, amici respectfully urge this Court to reject the Industry Petitioners' challenge to the FCC's Digital Discrimination Rule.

Respectfully submitted,


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## CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rules of Appellate Procedure 32(a)(7) and 29(a)(5) because it contains 5,673 words.

This brief also complies with the requirements of Federal Rule of Appellate Procedure 29(a)(5) because it was prepared in 14-point font using a proportionally spaced typeface (Times New Roman) in Microsoft Word.

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

*s/ Daniel Harawa*
Daniel Harawa

July 5, 2024

## CERTIFICATE OF SERVICE

I hereby certify that on July 5, 2024, I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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July 5, 2024