Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination	)	GN Docket No. 22-69
	)	
	)	

REPLY COMMENTS OF
THE FREE STATE FOUNDATION

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I. Introduction and Summary

These reply comments are submitted in response to the Commission's proposed rulemaking to address digital discrimination of access to broadband Internet access service. In these reply comments, we again urge the Commission to adopt an intent-based definition of digital discrimination because it is consistent with the text of Section 60506 of the Infrastructure Investment and Jobs Act. These reply comments emphasize that the record in this proceeding does not support the claims made in some comments that there is systemic digital discrimination in America. Also, in the context of responding to other parties, these reply comments identify requirements that should be satisfied before the Commission can impose liability on broadband Internet service providers (ISPs), as well as identifying limits on the scope of the Commission's rules and their enforcement.

Claims made in certain comments that there is clear evidence of pervasive digital discrimination rely on largely the same handful of studies that have significant limitations and defects, including reliance on outdated deployment data and a myopic focus on a particular ISP's

[*] These reply comments express the views of Randolph J. May, President of the Free State Foundation and Seth L. Cooper, Senior Fellow and Director of Policy Studies. The views expressed do not necessarily represent the views of others associated with the Free State Foundation. The Free State Foundation is a nonpartisan, non-profit free market-oriented think tank.

footprint within a geographic area while ignoring that residents in the footprint are served by a competing provider offering comparable service. Moreover, purported low adoption rates do not constitute evidence of digital discrimination as consumers have many reasons for not adopting broadband – such as concerns about privacy, security, lack of a PC, and other personal considerations – that are outside the control of ISPs.

Instead of relying on faulty and outdated studies claimed to prove that digital discrimination of access is pervasive, current data based on accurate maps should be required for the Commission's adjudication of any digital discrimination complaint. And no finding of liability should be made absent the availability of accurate current data regarding existing broadband deployments.

Additionally, it would be wrong to find an ISP liable for digital discrimination of access if residents of the area already have access to one or more other broadband providers offering comparable services, and the Commission's rules should not recognize liability in such circumstances. The underlying purpose of Section 60506 is to ensure equal access, not to try to find back door traps to mandate fiber overbuilds. New entrants into the broadband market face financial risks in going head-to-head with incumbents. Rules that ignore the presence of already available services and high adoption rates would unreasonably expand the basis for liability and make entry even more financially risky for providers seeking to expand into new geographic areas. This would have the perverse effect of curtailing deployment.

The Commission should recognize that an available service is comparable whenever it can reliably support online edge services and applications that have relatively wide use among consumers. The rules should embody the principle of technological neutrality. So long as

alternative platforms can meet speed and latency benchmarks, they should be deemed to be comparable services.

Importantly, there is research evidence that the presence of a local government-owned broadband network deters network investment and deployment by private market providers, and there should be a "safe harbor" from liability when an ISP's non-deployment decision is based on a refusal to overbuild and compete against a government-owned network.

Notably, there are a variety of instances in which laws and regulations control the deployment decisions of ISPs. Aside from any direct strings attached to the expenditure of federal and state subsidies which have the effect of dictating deployment decisions beyond ISPs' control, state and localities will continue to exercise authority to approve, limit, or prohibit the construction of new facilities and upgrades to existing ones. Accordingly, ISPs should enjoy a "safe harbor" from any liability when their deployments are made pursuant to federal or state subsidy awards. And ISPs should receive safe harbor when actions by federal, state, or local governments regarding permit or other approval processes have prohibited, limited, or delayed infrastructure construction and upgrades.

Similarly, ISPs should receive safe harbor from liability when they can show they were denied access to utility poles or that pole owners delayed approval of attachments or pole upgrades necessary for new attachments. And ISPs should be permitted to proffer evidence showing the technological and/or economical infeasibility of deploying to a given area due to the high cost of attachments, particularly where attachments would be needed for high numbers of poles.

The Commission's authority under Section 60506 almost certainly will be limited by the major questions doctrine. As explained in *West Virginia v. EPA* (2023), the major questions

doctrine holds that there are certain "extraordinary cases" involving decisions of such "political and economic significance" that a "clear congressional authorization" by Congress is required in order for the agency to exercise the powers that it claims. The broader the extent to which the Commission's rules seek to impose liability on ISPs and the more onerous the restrictions and obligations they impose – particularly if the agency adopts a disparate impact definition and imposes pervasive restrictions and obligations on ISPs' deployment practices that effectively constitute unfunded buildout mandates and price controls – the more likely it is that such rules would be deemed unlawful under the major questions doctrine.

Furthermore, Section 60506 provides for Commission enforcement of its rules via its complaint procedures, and the statute provides no basis for state or local government enforcement. Also, there is no explicit rights-creating terms in Section 60506 that manifest an intent to create a private remedy. Creating a private right of action would conflict with the statutory scheme established by Congress.

II. There Is No Evidence of Systemic Digital Discrimination

As explained in the Free State Foundation's initial comments in this proceeding,[1] the scope of the Commission's rules against "digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin" is primarily a matter of properly reading the text of Section 60506 of the Infrastructure Investment and Jobs Act, with the interpretation of those terms aided by Supreme Court precedents. Accordingly, we agree with comments that recognize that Section 60506 and relevant jurisprudence requires an intent-based definition of

[1] *See* Comments of the Free State Foundation, GN Docket No. 22-69 (February 21, 2023), at 9-12, available at: https://www.fcc.gov/ecfs/document/102212765029016/1.

digital discrimination of access.[2] And we disagree with comments that argue for a disparate impact definition.[3]

It also is important that the Commission's rules be premised on a factually accurate description of the state of broadband access – and not on assertions that are unsupported by record evidence. A correct assessment of broadband access and deployment practices is necessary to identify the types of polices that are best suited to achieving the policy goals of equal access for all to broadband services. An incorrect assessment of the state of broadband deployment and ISP practices would result in rules that are a mismatch with market realities and that will either fail to improve broadband access or actually inhibit future deployments that are needed to ensure equal access.

The Free State Foundation's initial comments pointed to affirmative evidence of non-discrimination in broadband deployment.[4] While some comments declare that digital discrimination is "systemic,"[5] "pervasive,"[6] "widespread,"[7] "evidenced clearly,"[8] or long documented[9] – the record in this proceeding does not support such claims.

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[2] *See, e.g.*, of AT&T, GN Docket No. 22-69 (February 21, 2023), at 16-29; Comments of CTIA, GN Docket No. 22-69 (February 21, 2023), at 18-23; Comments of NCTA, GN Docket No. 22-69 (February 21, 2023), at 19-23; Comments of USTelecom, GN Docket No. 22-69 (February 21, 2023), at 21-28; Comments of Verizon, GN Docket No. 22-69 (February 21, 2023), at 12-16.

[3] *See, e.g.*, Comments of Electronic Frontier Foundation (EFF), *et al*., GN Docket No. 22-69 (February 21, 2023), at 13-16; Comments of Free Press, GN Docket No. 22-69 (February 21, 2023), at 12-14; Comments of Lawyers' Committee for Civil Rights Under Law, GN Docket No. 22-69 (February 21, 2023), at 11-14; Comments of The Leadership Conference on Civil and Human Rights, GN Docket No. 22-69 (February 21, 2023), at 2-3; Comments of the Multicultural Media, Telecommunications, and Internet Council (MMTC) and the U.S. Black Chambers, GN Docket No. 22-69 (February 21, 2023), at 2-14; Comments of the National Digital Inclusion Alliance and Common Sense Media, GN Docket No. 22-69 (February 21, 2023), at 4-6; Comments of the National Urban League, *et al*., GN Docket No. 22-69 (February 21, 2023), at 4-5; Comments of Public Knowledge, *et al*., GN Docket No. 22-69 (February 21, 2023), at 49-56.

[4] Comments of the Free State Foundation, at 4-7.

[5] Comments of EFF, at 2; Comments of the Nat'l Urban Lg., at 6; Comments of MMTC, at 4; Comments of Public Knowledge, at 9.

[6] Comments of EFF, at 31.

[7] Comments of PK, at 3.

[8] Comments of MMTC, at 3.

[9] Comments of Nat' Urban Lg., at 3.

A. There Is No Record Evidence of Intentional Digital Discrimination

If it were true, as some comments claim, that there is systemic digital discrimination, then there would likely be at least some known or likely instances of intent by broadband ISPs to engage in invidious discrimination identified in this proceeding. But there are not.

No comments filed appear to allege any recent or ongoing specific instances of broadband ISPs intentional discriminating on the basis of deployment decisions. Indeed, no comments appear to allege instances of intentional discrimination – either by overt means or by means of facially neutral criteria that further a hidden discriminatory intent.

Several comments alleging that digital discrimination is a pervasive problem seem quick to concede that intentional digital discrimination is *not* a problem, if not "irrelevant."[10] But the existence or non-existence of intentional discrimination is significant because it is widely recognized that Section 60506 prohibits and calls for the elimination of intentional discrimination. The Commission ought to acknowledge the absence of any record evidence that intentional digital discrimination is actually taking place.

B. There Is No Evidence of Systemic Digital Discrimination Based on Disparate Impact

Although some comments claim that there is clear evidence of systemic or widespread disparate impact discrimination in broadband access, there is insufficient record evidence to support those bold claims. Comments alleging that there is widespread disparate impact discrimination cite the same handful of studies to support that proposition. However, other comments have rightly identified major shortcomings with those studies. For example:

> *The Markup Study*[11] – Although it ostensibly shows demographic and income disparities in broadband capabilities offered to residences in certain geographic areas, the study

[10] *See, e.g.*, Comments of Public Knowledge at 35 ("Intent and animus are irrelevant"); Comments of EFF, at 18 ("Provider Intent is Irrelevant").

[11] Leon Yin and Aaron Sankin, "Dollars to Megabits, You May Be Paying 4000 Times As Much As Your Neighbor for Internet Service, "*The Markup* (Oct. 19, 2022), available at: https://themarkup.org/still-

ignores or at least downplays the fact that those same areas are primarily served by cable broadband operators. The study's findings appear to have been rebutted by comments in this proceeding insofar as "the Commission's mapping fabric shows that more than 99% of households in the census blocks where Markup queried an address have access to at least one provider of 100/20 Mbps+ service."[12] Indeed, the presence or lack of presence of incumbent broadband providers and their adoption rates in a given area undeniably impacts the business case for a provider to invest in new entry or network upgrades in that area. And a study that ignores or disregards those investment effects cannot be relied upon as showing clear evidence of discrimination. Additionally, we believe that the Commission should take seriously criticisms raised in comments regarding *The Markup* study's demographic and statistical methodologies.[13]

USC Annenberg Study [14] – The study looks only at Los Angeles County, California, and finds a purported "cherry-picking" of wealthier areas for infrastructure upgrades to high-speed services. But as comments in this proceeding rightly point out, a non-randomized study of one narrow geographic area that refuses to look at an ISP's overall deployment footprint and deployment strategy is insufficient to yield evidence of a systemic disparate impact or pattern of discriminatory conduct by the provider.[15] As comments observe, this study also focuses on one technology solution – fiber – and disregards high-speed cable and wireless broadband services.[16] Significantly, the USC Annenberg Study relies on old data from 2014-2017, when high-speed broadband, including fiber, was far less widespread. Data sets from over five years ago area are woefully outdated and unreliable for reaching evidence-based conclusions about the current existence or non-existence of digital discrimination.

NDIA Cleveland Redlining Study[17] – The study purportedly shows that residences in lower-income neighborhoods in Cleveland lacked access to fiber broadband upgrades compared to other neighborhoods, and that this was evidence of income-based digital redlining by AT&T. However, the value of this study is, at best, minimal because it is non-randomized and looks at only one geographic neighborhood,[18] downplays or ignores the availability of cable broadband services, and it is based on old data from June 2016.

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loading/2022/10/19/dollars-to-megabits-you-may-be-paying-400-times-as-much-as-your-neighbor-for-internet-service. For comments citing *The Markup* study as evidence of digital discrimination, *see, e.g.*, Comments of EFF, at 34-35; Comments of MMTC, at 5-6; Comments of NDIA, at 13; Comments of Public Knowledge, at 62.

[12] Comments of AT&T, at 29. *See also* Comments of US Telecom, at 52-53.

[13] *See* Comments of AT&T, at 30; Comments of USTelecom, at 52-53.

[14] Hernan Galperin, François Bar, Annette M. Kim, Thai V. Le, and Kurt Daum, *Who Gets Access to Fast Broadband? Evidence from Los Angeles County , Spatial Analysis Lab at USC Price at p.5*, Annenberg School for Communication (Sept. 2019), available at https://arnicusc.org/wp-content/uploads/2019/10/Policy-Brief-4-final.pdf. For comments citing the USC Annenberg study as evidence of digital discrimination, *see, e.g.*, Comments of EFF, at 9-10; Comments of Public Knowledge, at 9, 19.

[15] *See* Comments of AT&T, at 31-32; Comments of USTelecom, at 54.

[16] *See* Comments of US Telecom, at 54.

[17] Bill Callahan, "AT&T's Digital Redlining," NDIA (March 10, 2017), available at: https://www.digitalinclusion.org/download/14998/. For comments citing the NDIA study as evidence of digital discrimination, *see, e.g.*, Comments of Free Press, at 8; Comments of Public Knowledge, at 19.

[18] Comments of AT&T, at 31.

In view of the glaring defects of those studies, it is highly unlikely that any of those alleged negative outcomes that they describe would amount to digital discrimination of access via disparate impact under Section 60506. Of course, constitutional due process of law requires that the agency's future rules apply on a prospective basis only.[19]

C. Conflation of Broadband Availability and Broadband Adoption Does Not Demonstrate the Existence of Digital Discrimination

Some comments alleging the existence of systemic disparate impact digital discrimination have conflated or blurred the distinction between adoption and access.[20] Such comments have cited purportedly low adoption rates among certain protected classes compared to others – and then seemingly treat the purported differential adoption rates as evidence indicative of digital discrimination of access. But adoption and access are different things: a consumer might have the ability to access broadband service – and even have multiple choices among providers – yet choose not to adopt broadband services. In fact , the Commission's Notice treats availability and adoption as distinguishable concepts.[21] Individual consumers may have one or more reasons for choosing to not adopt broadband services – including lack of awareness, lack of interest, costs of service, lack of a PC or other device, privacy concerns, security and safety worries, concerns about psychological wellbeing, or other personal considerations – that are outside the control of ISPs. Thus, low adoption of broadband in a given geographic area by a protected class, by itself, does not constitute digital discrimination of access. And the Commission's rules should not treat low adoption, by itself, as discriminatory or evidence of discrimination.

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[19] Comments of the Free State Foundation, at 18-19. *See also, e.g.,* Comments of CTIA, at 23-24; Comments of USTelecom, at 49-50; Comments of Verizon, at 24-26.
[20] *See, e.g.*, Comments of Lawyers' Committee, at 37. *See also* Comments of NCTA, at 33-35 (arguing that the Commission should *not* conflate broadband availability with broadband adoption).
[21] See Notice, at ¶ 25.

III. Specific Requirements Must Be Satisfied in Order to Impose Liability on ISPs

Instead of relying on faulty and outdated studies that claimed to prove that digital discrimination of access is pervasive, specific requirements should be satisfied before the Commission imposes liability on broadband ISPs.

A. Findings of Liability Must Be Based on Current Deployment Data

Current data should be required for the Commission's adjudication of any digital discrimination complaint, and no finding of liability should be made in the absence of current data of existing broadband deployments. Obtaining timely accurate data regarding deployment can be difficult, as evidenced by the fact that the Commission is still in the process of refining its own broadband maps. Relying on deployment surveys or anecdotes from several or even a few years ago is insufficient, given that broadband is far more widely deployed than it was several years ago. Available data from 2020 to the present shows the rapid rollout of next-generation networks, including fiber, 5G mobile, fixed wireless access (FWA), and satellite services, have deployed.[22] And availability of these services will increase further as ongoing buildouts continue, including deployments backed by subsidy support through the Rural Digital Opportunity Fund (RDOF) and the Broadband Equity Access and Deployment (BEAD) Program, and other federal and state subsidized programs. Thus, any Commission adjudications of digital discrimination complaints and any findings of liability must be based on data that stays current with these significant ongoing buildouts.

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[22] *See* Comments of the Free State Foundation, at 5-6. See also Seth L. Cooper, "The 2022 Communications Marketplace Report: Timely FCC Action Could Accelerate Next-Gen Broadband Deployment," *Perspectives from FSF Scholars*, Vol. 18 No. 2 (January 19, 2023), at 2-5 (highlighting FCC report findings and other publicly available reports and studies regarding progress in deploying broadband in 2020 through 2022), available at: https://freestatefoundation.org/wp-content/uploads/2023/01/The-2022-Communications-Marketplace-Report-011923.pdf.

B. The Commission Must Consider the Presence of Competition and Adoption Rates in a Service Area

According to Section 60506(a)(2), "equal access" 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." It does not support finding an ISP liable for digital discrimination of broadband access if residents of the area already have access to one or more other providers offering comparable services, and the Commission's rules should not recognize liability in such circumstances. The underlying purpose of Section 60506 is to ensure equal access, not to try to mandate or incentivize fiber overbuilding. New entrants in the broadband services market already face financial risks in going head-to-head with incumbents and gaining sufficient market share to make their entry profitable. Ignoring the presence of already available services would unreasonably expand the basis for liability and make entry even more financially risky for providers seeking to expand into new geographic areas.

When it comes to ascertaining comparability of services, we agree with the views of Public Knowledge to the limited extent that the Commission should take a "consumer-focused approach" to the end that "if there is a truly comparable service, such that a consumer is going to be equally well-served with that service as the unavailable one, then equal access can be achieved."[23] However, the practical application of a consumer-focused approach must entail a realistic analysis, based on market data, about advanced capabilities that at least a preponderance of American consumers use or demand. The Commission should recognize that an available

[23] Greg Guice, "It's Past Time To End Digital Discrimination – No More Excuses," Public Knowledge (March 7, 2023), available at: https://publicknowledge.org/it-is-past-time-to-end-digital-discrimination-no-more-excuses/.

service is comparable whenever that service can reliably support online edge services and applications that have relatively wide and frequent use among consumers.

When considering the presence of competitors and "comparable services" in a geographic area, the Commission's analysis should not be limited to fiber or other wireline providers and exclude the presence of ISPs that use different platform technologies, such as fixed wireless access and satellite broadband. The Commission's rules should embody the principle of technological neutrality. So long as alternative platforms can deliver speeds that meet broadband definitional speed and latency benchmarks, they should be deemed to be comparable services. The Commission's overarching aim should be achieving equal access, and not – as some comments appear to suggest[24] – in selecting fiber deployment as the only means for providing equal access and effectively imposing financially costly fiber overbuild mandates on areas that are already served by cable broadband or other technologies that deliver broadband capabilities.

Furthermore, there is research evidence that the presence of local government-owned broadband networks deters network investment and deployment by private market providers.[25] The Commission's rules should recognize that the economic feasibility of deployment is likely to be diminished in areas currently served or soon to be served by government-owned networks. There should be safe harbor from liability when an ISP's non-deployment decision is based on a refusal to overbuild and compete against government-owned networks.

C. The Commission Must Consider Regulatory Barriers That Inhibit ISPs' Discretion in Deploying Broadband

There are a variety of instances in which laws and regulations control the deployment decisions of ISPs. For example, the massive $45 billion in BEAD Program subsidies will be

[24] *See, e.g.*, Comments of Free Press, at 32.
[25] *See* Tianjiu Zuo and Michelle Connolly, Impact of Municipal and Cooperative Internet Provision on Broadband Entry and Competition (September 29, 2022), at: https://ssrn.com/abstract=4178663.

distributed by states, which will have a large say in determining where new facilities will be built. Thus, ISPs that are awarded BEAD Program grants will not have unbridled discretion regarding the location of their buildouts. Aside from any direct strings attached to the expenditure of BEAD and other federal subsidies, state and localities will continue to exercise authority to approve, limit, or prohibit the construction of new facilities and upgrades to existing ones through zoning, rights-of-way, facility sites permitting, franchise agreements, as well as fees and taxes. These state and local actions impact the location and timing of buildouts and improvements to facilities in unserved or underserved areas. In some instances, rules regarding historical locations and environmental protection might impede buildout or upgrading of facilities. It would be unjust to hold ISPs responsible when deployment decisions are outside of their control. Accordingly, under the Commission's rules, ISPs should have safe harbor from liability when their deployments are made pursuant to a federal or state subsidy award. And ISPs should receive safe harbor from liability when actions by federal, state, or local governments regarding permit or other approval processes have prohibited, limited, or delayed infrastructure construction and upgrades by that provider.

Ownership of utility poles can pose barriers to broadband availability. Lack of access to poles and high costs for attaching to or building new poles can pose barriers to deployments – particularly to areas that are low-population density, geographically isolated, or in or near physical terrain that makes broadband connectivity difficult to achieve and maintain. New entrants that do not own poles are limited in their ability to reach desired areas, so deployment decisions can be beyond their control in such areas. ISPs should receive safe harbor from liability when they can demonstrate that they were denied access to utility poles or that a pole owner delayed in approving attachments or pole upgrades necessary for new attachments. Or, at the

very least, ISPs should be given opportunity to cure in instances where non-deployment or delays are due to lack of timely access to poles. Additionally, ISPs should be permitted to proffer evidence to show the technological and/or economical infeasibility of deploying to a given area due to the high cost of attachments, particularly where attachments would be needed for a high number of poles.

IV. The Imposition of Onerous Requirements on ISPs Under Section 60506 Would Fail Under the Major Questions Doctrine

We agree with comments that the Commission's interpretation of Section 60506 is limited by the major questions doctrine.[26] As explained by the Supreme Court in *West Virginia v. EPA* (2023), the doctrine holds that there are certain "extraordinary cases" involving decisions of such "political and economic significance" that a "clear congressional authorization" by Congress is required in order for the agency to exercise the powers that it claims.[27] Section 60506 does not contain clear congressional authorization for redrawing the regulatory landscape of broadband Internet services under the Communications Act.

The broader the extent to which the Commission's rules impose liability on ISPs and the more onerous the restrictions and obligations they impose on the details of deployment undertakings, the more likely it is that such rules would be of vast political and economic significance. More particularly, insofar as the Commission's rules do any of the following: impose disparate impact definition of liability; deem or presume that next-generation wireless or satellite service technologies that offer high speeds and low latency are not comparable with wireline technologies such as fiber; require or presume that deployment to an entire geographic area is technologically and economically feasible merely because such deployment is possible

[26] 597 U.S. ___, Case Nos. 20-1530, 20-1531, 20-1778, 20-1780 (June 30, 2022).
[27] *West Virginia v. EPA*, 597 U.S. ___, Slip Op. at 24 (internal cite omitted).

rather than reasonable from a business judgment standpoint; require new fiber entrants to overbuild in areas already served; make ISPs responsible for increasing adoption levels for different protected classes; exclude or narrowly construe safe harbors; expand the categories of protected classes beyond those expressly listed in the statute; regulate ISPs' non-deployment practices; put the burden of persuasion and production on ISPs rather than complaining parties in any enforcement proceedings; make standing for filing complaints open-ended rather than limited to real parties in interest; or impose other restrictions and obligations that amount to unfunded deployment mandates and price controls,[28] the resulting regulatory apparatus is decidedly more likely to be considered an extraordinary case that would be unlawful under the major questions doctrine.

V. Section 60506 Provides No Basis for State, Local, or Private Enforcement

Section 60506 declares it to be "the policy of the United States" that "the Commission should take steps to ensure that all people of the United States benefit from equal access to broadband Internet service."[29] The statute states that it is federal policy that "[t]he Commission and the Attorney General shall ensure that Federal policies promote equal access to robust broadband internet access service by prohibiting deployment discrimination."[30] And it directs the Commission to adopt rules and modify its complaint procedures to further federal policies.[31] Thus, the statute nowhere recognizes an enforcement role for state and local governments. Nor does the statute recognize a private right of action to enforce the Commission's rules. Instead, Section 60506 charges the Commission to adopt model policies and best practices "that can be

[28] *See* Comments of AT&T, at 43-45; Comments of CTIA, at 12-14.
[29] 47 U.S.C. § 1754(a)(3).
[30] 47 U.S.C. § 1754(c).
[31] 47 U.S.C. § 1754(b), -(e).

adopted by States and localities."[32] This reading of Section 60506's express terms appears to be the subject of little or no dispute in the record of this proceeding. Accordingly, the Free State Foundation agrees with comments that have concluded that Section 60506 does not imply any enforcement authority for state and local governments.[33]

We similarly agree with comments that conclude that the statute does not impliedly establish a private right of action.[34] As the Supreme Court stated in *Gonzaga University v. Doe* (2002), even if a statute contains "explicit rights-creating terms, a plaintiff suing under implied right of action still must show that statute manifests intent 'to create not just a private *right*, but also private r*emedy*.'"[35] But there is nothing in Section 60506 that manifests an intent to create a private remedy. Moreover, as observed in *Stoneridge Investment Partners, LLC v. Scientific-Atlanta, Inc.* (2008), "it is settled that there is implied cause of action only if underlying statute can be interpreted to disclose the intent to create one."[36] But nothing in the words or structure of Section 60506 provides a basis for inferring that Congress intended a private right of action and a private remedy. To the contrary: recognition of a private right of action and private remedy would conflict with the scheme that Congress established for rules to be adopted by the Commission and enforced through a modified version of the agency's consumer complaint procedures.

[32] 47 U.S.C. § 1754(d).
[33] *See, e.g.*, Comments of NCTA, at 35-37.
[34] *See, e.g.*, Comments of NCTA, at 37-38; Comments of USTelecom, at 43-47.
[35] 536 U.S. 273, 284 (*quoting Alexander v. Sandoval*, 532 U.S. 275, 286 (2001) (emphasis added in *Doe*).
[36] 552 U.S. 148, 164 (internal cites omitted).

VI. Conclusion

For the foregoing reasons, the Commission should act in accordance with the views expressed herein.

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