



*Perspectives from FSF Scholars*  
*October 3, 2023*  
*Vol. 18, No. 43*

**FCC Rules Should Focus on Intentional Digital Discrimination Only**

by

**Seth L. Cooper \***

The FCC faces a November 15 due date for adopting rules that prohibit digital discrimination of access to broadband Internet services. Congress's dedication of over \$100 billion toward universal access to broadband – including \$65 billion in the Infrastructure Investment and Jobs Act of 2021 – reflects the federal policy priority of expanding broadband access to all Americans. The Infrastructure Act grants the Commission clear authority to prohibit intended discrimination against protected classes. By adopting an intent-based definition of digital discrimination, the Commission would be able to hold broadband providers responsible for their actions and promote timely deployment of broadband networks to all.

Conversely, the Commission should *not* impose a liability standard for *unintentional* disparate impacts because the statute does not authorize it to do so. And imposing liability for unintended differences in broadband access outcomes would create uncertain legal risks for broadband providers and reduce investments in service deployments to unserved and underserved Americans.

Section 60506 of the Infrastructure Investment and Jobs Act of 2021 directs the FCC to formulate rules to facilitate "equal access" to broadband Internet services and prevent "digital discrimination of access based on income level, race, ethnicity, color, religion, or national

**The Free State Foundation**  
**P.O. Box 60680, Potomac, MD 20859**  
**[info@freestatefoundation.org](mailto:info@freestatefoundation.org)**  
**[www.freestatefoundation.org](http://www.freestatefoundation.org)**

origin." In the Act, "equal access" is defined as "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." The Act also requires that its rules take into account "issues of technical and economic feasibility" in providing equal access.

The text of the Infrastructure Act requires an intent-based standard for proving digital discrimination. Section 60506(b) authorizes the Commission to adopt rules that prevent digital discrimination "based on" categories of income level, race, ethnicity, religion, or natural origin. The Act's use of the words "based on" in connecting discrimination with membership in a protected class indicates that proof of intent is a necessary element for a successful claim of digital discrimination. Also, the Act's requirement that the rules for facilitating equal access take into account "issues of technical and economic feasibility" also are directed to the intentions behind broadband providers' business decisions and not merely raw outcomes for users. A fuller discussion of the reasons why the Infrastructure Act supports an intent-based standard – and not a disparate impact standard – is provided in the Free State Foundation's February 2023 [public comments](#) in the FCC's digital discrimination proceeding.

Under a disparate impact liability standard, broadband providers could be liable for unintended failure to provide equal access to all protected classes in a given area. But the Infrastructure Act does *not* give the FCC authority to impose unintentional disparate impact liability for digital discrimination. The Act lacks key "catchall" terms like "results in" or "otherwise adversely affects." In *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.* (2015), the Supreme Court concluded that those catchall terms provided the basis for federal agencies to apply a disparate impact liability standard under certain civil rights statutes. Congress was well aware of *Inclusive Communities Project* when it drafted the Infrastructure Act. Yet Congress chose not to include any such catchall terms when it passed the Act.

Moreover, imposing an unintentional disparate impact liability standard for digital discrimination likely would reduce private investment and infrastructure buildout to harder-to-reach areas. Under a disparate impact standard, broadband providers could be liable for good faith efforts to provide equal access to local members of protected classes if access outcomes are later shown to be unequal using some sort of metric. Broadband providers also could be liable for not providing equal access to members of protected classes that they didn't know about because of incomplete or mistaken knowledge of geographic or demographic data. The FCC's laborious broadband mapping initiative shows that it is difficult to timely and accurately determine who has access and who does not.

Indeed, as explained in FSF's April 2023 [reply comments](#) in the FCC's digital discrimination proceeding, if the Commission were to impose a disparate impact standard, the Commission could run afoul of the major questions doctrine. According to the Supreme Court's jurisprudence, 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. Section 60506 does not contain clear congressional authorization for redrawing the regulatory landscape of broadband Internet services under the Communications Act.

The more wide-ranging and onerous the restrictions that the Commission places on broadband providers under an unintentional disparate impact liability regime, the more likely it is that the Commission's digital discrimination rules would be of vast political and economic significance. The Commission's December 2022 notice of rulemaking is extraordinarily open-ended, posing over 150 questions about what its digital discrimination rules ought to cover and require. For instance, the notice of rulemaking asks whether the Commission's digital discrimination rules should require new fiber entrants to overbuild in areas already served by a provider, make providers responsible for increasing adoption levels for protected classes, expand the categories of protected classes beyond those expressly listed in the statute, and regulate providers' non-deployment practices. The notice also asks whether the Commission should put the burden of persuasion and production in discrimination complaints on broadband providers rather than complaining parties in enforcement proceedings. It also asks whether the Commission should make standing for filing complaints open to anyone rather than limited to real parties in interest. To the extent that the Commission imposes many or all of those requirements or imposes other restrictions and obligations that amount to unfunded deployment mandates and price controls, the resulting regulatory apparatus – and legal liability risks it poses – will more likely be deemed an extraordinary case and unlawful under the major questions doctrine.

Rather than risk legal setbacks in court or undermine efforts to provide equal access to broadband services through disparate impact liability, the FCC should adopt digital discrimination rules that closely follow the Infrastructure Act by prohibiting intentional discrimination. If future evidence yields credible evidence of unintended unequal access among protected classes in specific areas, that evidence can be brought to the attention of Congress and the Commission, and subsidies can be targeted to those areas in order to connect residents who want broadband access.

\* Seth L. Cooper is Director of Policy Studies and a Senior Fellow of the Free State Foundation, a free market-oriented think tank in Rockville, MD. The views expressed in this *Perspectives* do not necessarily reflect the views of others on the staff of the Free State Foundation or those affiliated with it.

### **Further Readings**

Randolph J. May "[Spotlighting the FCC's Key Digital Discrimination Rulemaking](#)," *Perspectives from FSF Scholars*, Vol. 18, No. 37 (September 15, 2023).

Randolph J. May and Seth L. Cooper, "[FCC 'Digital Discrimination' Rules Should Steer Clear of Burdensome Regulation](#)," *Perspectives from FSF Scholars*, Vol. 18, No. 33 (August 16, 2023).

[Comments of the Free State Foundation](#), Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69 (February 21, 2023).

[Reply Comments of the Free State Foundation](#), Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, GN Docket No. 22-69 (April 20, 2023).

Randolph J. May and Seth L. Cooper, "[FCC Should Rely on Pro-Deployment Actions to Avoid Digital Discrimination](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 60 (November 30, 2022).

Randolph J. May and Seth L. Cooper, "[The FCC Should Reject a Disparate Impact Standard: Targeted Subsidies Should Be Used to Address Deployment Gaps](#)," *Perspectives from FSF Scholars*, Vol. 17, No. 60 (October 14, 2022).