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 and United States of America,

Respondents.

BRIEF OF THE AMERICAN CIVIL RIGHTS PROJECT AS *AMICUS CURIAE* IN SUPPORT OF INDUSTRY PETITIONERS

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Rule 29(a)(4)(A) Corporate Disclosure Statement

The ACR Project is a nonprofit corporation organized under the laws of Texas. The ACR Project issues no stock, and is neither owned by, nor the owner of, any corporate entity in whole or in part.

Statement of Compliance with Rule 29

All parties have consented to the filing of this brief. No counsel for a party authored any part of this brief. And no one other than the *amicus curiae* financed the preparation or submission of this brief.

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Interest of *Amicus Curiae*

The American Civil Rights Project (the "ACR Project") is a public-interest law firm, dedicated to protecting and where necessary restoring the equality of all Americans before the law.

This case interests the ACR Project both because it involves the appropriate application of constitutional principles central to the rule of law and because it focuses on the impact of a novel expansion of American nondiscrimination law that promises to have widespread ramifications across the nation.

Background

On November 15, 2023, the Federal Communications Commission (the "FCC") issued a Report and Order and Further Notice of Proposed Rulemaking (the "Order"). The FCC issued the Order pursuant to Congress's instruction in the Infrastructure Investment and Jobs Act (the "IIJA") to "adopt final rules to facilitate equal access to broadband internet access service[.]"[1] The FCC promulgated the related final rule (the "Rule") on January 22, 2024.[2] In due course, the petitioners filed the complaints giving rise to this litigation.

Summary of the Argument

This policy is unprecedented. Congress included a first-of-its-kind provision in the IIJA, on which the Order and the Rule then expanded. Unlike any prior Congressional legislation, the IIJA extends the frame across which Congress bars discrimination beyond the kind of demographic characteristics American nondiscrimination law often polices to address that "based on income level[.]" The Order and the Rule impose into this uncharted territory disparate-impact liability for every entity "facilitating," "maintaining," "upgrading," or "otherwise affect[ing]" broadband service and infrastructure,[3] through everything ranging from "deployment of broadband infrastructure, network, network upgrades, and network maintenance" to "customer service" to "pricing[.]"[4]

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1 Pub. L. No. 117-58, 135 Stat. 429 (2021) (codified at 47 U.S.C. § 1754).

2 Fed. Reg. Vol 89, No. 14, pp. 4128-4164.

3 *Id.*, § 16.2.

4 *Id*.

The IIJA (as the FCC interprets it) exhibits serious Constitutional problems. The petitioners have addressed (and presumably other *amici* will thoroughly debate) whether the IIJA adopts or authorizes the FCC to adopt a disparate-impact standard or whether the Rule violates the major questions doctrine. The ACR Project does not recapitulate any of these arguments.

Instead, the ACR Project assumes *arguendo* that the IIJA *does* impose (or authorizes the FCC to impose) a disparate-impact standard and focuses on the Constitutional ramifications for the IIJA if this is the case. Specifically, the ACR Project argues: (a) it's impossible for regulated parties to structure their affairs as to avoid presumptive violation of the IIJA (as the FCC interprets it); (b) the IIJA (as the FCC interprets it) therefore is unconstitutionally vague and violates equal protection rights; and (c) by presumptively denying private parties *any* apparent legal use of their assets, the IIJA imposes an unconstitutional regulatory taking absent *billions* in compensation.

Argument

I. Congress and the FCC Take Unprecedented Action

The IIJA established a pair of similar sounding, but conflicting, policies of the United States. As the first, the IIJA establishes that "*subscribers* should benefit from equal access to broadband internet access service within the service area of a provider of such service[.]"[5] Fair enough. In the same sentence, as a second policy, the IIJA establishes that the FCC "should take steps to

[5] 47 U.S.C. § 1754(a)(1) (emphasis added).

ensure that *all people* of the United States benefit from equal access to broadband internet access service."[6]

The words are similar but bear a material difference. The first policy requires provision of equal access to all *subscribers*. The second requires the provision of the same equal access to all *people*. Subscribers are surely people, but they differ from others in that *they have subscribed*. "Subscribers" is undefined in the IIJA, but its ordinary meaning—as the subject-noun derivation of "subscribe," which means "to set one's name to a paper in token of promise to give something (such as a sum of money)" or "to receive or have access to something (such as a periodical or service) as part of an arrangement to receive a certain number of regular deliveries or a certain period of continuous access especially by prepayment"[7]—applies.[8] *Subscribing* necessarily entails *paying* for a subscription and, so, having the ability-to-pay that comes from one's income level.

The IIJA's next relevant provisions heighten the distinction. Congress instructs the FCC to "adopt final rules to facilitate equal access to broadband internet access service[,]"[9] without specifying whether the Rule should do so

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6 47 U.S.C. § 1754(a)(3) (emphasis added).

7 *See, e.g.*, *Subscribe*, MERRIAM-WEBSTER.COM DICTIONARY, Merriam-Webster, https://www.merriam-webster.com/dictionary/subscribe (accessed Apr. 19, 2024).

8 E.g., *Tanvin v. Tavir*, 141 S.Ct. 486, 491 (2020), citing *FCC v. AT&T, Inc.*, 562 U.S. 397, 403 (2011) ("When a statute does not define a term, we typically give the phrase its ordinary meaning.").

9 47 U.S.C. § 1754(b).

for "subscribers" or for "people." The IIJA then continues to require the FCC's rules to "tak[e] into account the issues of technical and economic feasibility presented by that objective, including—(1) preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin[.]"[10]

This phraseology is problematic. In no sense can "preventing digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin" be construed as "includ[ed]" among the "issues of technical and economic feasibility presented by" Congress's objective of "facilitat[ing] equal access to broadband internet access service." It is a separate goal, not a feasibility challenge arising from facilitating equal broadband access. As set out in Sections I.A.2. and I.A.2.iii, below, the Rule's definition of "feasibility" and explanation of how the FCC anticipates employing it certainly do not help.

Next, the IIJA instructs the FCC to "ensure that Federal policies promote equal access to robust broadband internet access service by prohibiting deployment discrimination based on—(1) the income level of an area; (2) the predominant race or ethnicity composition of an area; or (3) other factors the [FCC] determines to be relevant[.]"

Together, these provisions extend the panorama of the federal government's nondiscrimination laws in an unprecedented direction, directly

[10] *Id.*

highlighting the conflicting policies the IIJA establishes and indirectly choosing among them. While they echo many of the classifications familiar from our civil rights laws in barring discrimination based on race, ethnicity, color, religion, and national origin,[11] they are the *first* federal enactments of which we are aware (and we are specialists in this field, who have looked) to add to such a list "income level[.]" Through that addition, they prioritize the second

[11] Conspicuously absent from this list is the usual requirement of equality across *sex*. The Rule includes, and the ACR Project has uncovered, no explanation for this omission, which we presume to have been rooted—rightly or wrongly—in an assumption that sex does not correlate with geographic location or access to broadband. Given established sex-differences in average earnings (Rakesh Kochhar, *The Enduring Grip of the Gender Pay Gap*, PEW Research Center, Mar. 1, 2023 (https://www.pewresearch.org/social-trends/2023/03/01/the-enduring-grip-of-the-gender-pay-gap/); see also, Katherine Haan, *Gender Pay Gap Statistics in 2024*, FORBES ADVISOR, Mar. 1, 2024 (https://www.forbes.com/advisor/business/gender-pay-gap-statistics/)) and security preferences (e.g., Richard C. Eichenberg, Mary-Kate Lizotte, and Richard Stoll, *Socialized to Safety? The Origins of Gender Difference in Personal Security Dispositions*, POLITICAL PSYCHOLOGY, Summer 2021 ("Gender identity is clearly the strongest and most consistent correlate of fear and anxiety. For example, women are more likely to fear crime…"); and David P. Schmitt, Ph.D., *The Truth About Sex Differences*, PSYCHOLOGY TODAY, Nov. 7, 2017 ("The dramatic physical and behavioral differences between men and women, including … pervasive differences in risk-taking … attest to the likelihood that evolution sculpted adaptations into men and women that make us somewhat different creatures."), such an assumption is almost surely wrong, without even considering the geographic sorting that occurs based on sex-adjacent classifications (like gender identity and sexual preference) that some score as covered by the usual prohibitions on sex discrimination. Regardless of the Congressional reasoning or lack thereof, the IIJA includes no prohibition on sex-based digital discrimination.

IIJA policy (the equal treatment of *people*), over the first (the same for *subscribers*), and bar at least those subscription practices that intentionally treat differently those of differing income levels and abilities to pay.

Then—rightly or wrongly—through the Order and Rule, the FCC imposed a prohibition on any covered entities taking any covered actions that would have a *disparate impact* across any of the IIJA's broader set of covered classifications. Again assuming *arguendo* the administrative-law legitimacy of that imposition, the result is unprecedented. It bars every entity "facilitating," "maintaining," "upgrading," or "otherwise affect[ing]" broadband service and infrastructure,[12] from taking any act (including everything from "deployment of broadband infrastructure, network, network upgrades, and network maintenance[,]" to "customer service" to "pricing"[13]) that disparately impacts any demographic group or group with a divergent ability to pay.

II. Extraordinary Ramifications of IIJA (as the FCC Interprets It)

The IIJA (as the FCC interprets it) presents all regulated parties with an impossibility—*no* action they could ever take could possibly avoid presumptively violating the IIJA, subject only to avoiding liability by meeting a burden of establishing a "feasibility" defense. The IIJA (as the FCC interprets it) so imposes an unconstitutionally vague standard, which could *only ever* be applied in a way that was arbitrary and capricious. That unconstitutionally

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[12] Rule, § 16.2.

[13] *Id*.

vague standard, in making *every* possible decision of *every* regulated party presumptively illegal (unless saved by proving a "feasibility" defense), effects a regulatory taking of the entire broadband industry (and all other entities "facilitating," "maintaining," "upgrading," or "otherwise affect[ing]" it). As a Constitutional matter, that regulatory taking commits the FCC to compensate *every* such entity for the value of the property so taken—the value of the related industries runs into at least the hundreds of billions of dollars, without Congress having budgeted or appropriated any related funds or, by all appearances, having knowingly contemplated the need to do so.

These are real and serious constitutional issues, rendering the IIJA unconstitutional. Unless some kind of saving throw allows the Court to avoid the merits of these constitutional issues, they will require the Court to invalidate the IIJA, the Rule, and the Order.[14]

A. No Regulated Party Could *Ever* Avoid Presumptive Violation of the IIJA (as the FCC Interprets It)

1. Disparate-Impact Regimes' Perennial Problems

U.S. Civil Rights Commissioner Gail Heriot argued in 2020 that disparate-impact regimes make *almost everything* presumptively illegal.[15]

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[14] Potentially, one route to avoiding this necessity would be for the Court to deploy the canon of constitutional avoidance. If the Court determines (based on the arguments presented by the petitioners and other *amici*) that there is a valid reading of the IIJA *precluding* the interpretation advanced in the Order and Rule as arbitrary and capricious, it could rely on the canon to invalidate *them* instead of the IIJA itself.

[15] Heriot, Gail L., *Title VII Disparate Impact Liability Makes Almost Everything Presumptively Illegal* (2019). 14 N.Y.U. J. L. & LIBERTY 1 (2020),

Every rule of decision—or so nearly so as to be indistinguishable—has a disparate impact on some group. The ACR Project makes this statement confidently, because since long before she published that article, Commissioner Heriot has held open a standing bet: identify *any* job qualification that has made a difference in *any* real case that has *no* disparate impact on *any* race, color, religion, sex, or national-origin group and she will donate $10,000 to your favorite charity. Over the years since she first made that offer, *no one* has called on Commissioner Heriot to make that directed donation.

Some examples Commissioner Heriot identified will help show why. On average, men are stronger than women, while women are generally more capable of fine handiwork.[16] Chinese Americans and Korean Americans score higher on standardized math tests than most other national-origin groups and are more likely to hold B.S., B.Eng., M.S., and Ph.D. degrees in hard sciences and engineering.[17] South Asian Americans are disproportionately likely to

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Available at SSRN: https://ssrn.com/abstract=3482015 or http://dx.doi.org/10.2139/ssrn.3482015.

[16] A.E.J. Miller et al., *Gender Differences in Strength and Muscle Fiber Characteristics*, 66 EUR. J. APPLIED PHYSIOLOGY & OCCUPATIONAL PSYCH. 254 (1993), archived at https://perma.cc/3U4T-PML3 (demonstrating that men are generally stronger than women); Michael Peters et al., *Marked Sex Differences on a Fine Motor Skill Task Disappear When Finger Size Is Used as Covariate*, 75 J. APPLIED PSYCHOL. 87 (1990), archived at https://perma.cc/LZF2-SQ8A (finding that women performed significantly better than men on a fine motor skill test).

[17] Chuansheng Chen & Harold Stevenson, *Motivation and Mathematics Achievement: A Comparative Study of Asian-American, Caucasian-American, and East Asian High School Students*, 66 CHILD DEV. 1215 (1995),

have experience in hotel management.[18] African American college students earn a disproportionate share of public administration and social service degrees.[19] Cambodian Americans disproportionately work at doughnut shops.[20] Successful horse-racing jockeys are more likely to be Hispanic males.[21] And so on.

Since *all* rules of decision have disparate impacts on some group, a regulated party choosing *any* rule to guide its decisions presumptively violates a disparate-impact regime. *No* party subject to such a regime can *ever* choose *any* course of conduct without risking liability. At best, to minimize exposure, they may do as they are told by an agency dictating which rules-having-disparate-impacts to employ (while knowing that choice still leaves them exposed to potential liability in private enforcement actions) or they may prepare to try to meet a burden of persuasion to a trier of fact that their adoption of *every* rule-of-decision used in their business is driven by "business necessity"

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archived at https://perma.cc/9GX7-K9MU (finding that Asian Americans outperformed whites on a standard mathematics exam).

[18] *See* Pawan Dhingra, *Life Behind the Lobby: Indian American Motel Owners and the American Dream* 1 (2012) (observing that South Asian Indian Americans own about half of all motels in the United States).

[19] *See* Peter L. Hinrichs, *Racial and Ethnic Differences in College Major Choice*, FED. RES. BANK OF CLEVELAND (March 31, 2015), archived at https://perma.cc/M4JC-7SQG.

[20] *See* Seth Mydans, *Long Beach Journal: From Cambodia to Doughnut Shops*, N.Y. TIMES, May 26, 1995, at 10.

[21] Maggie McGrath, *Top-Earning Jockeys*, FORBES, June 29, 2016, at 28.

or, here, the IIJA's apparent equivalent that such a decision was compelled by the need to maintain "technical and economic feasibility[.]"[22]

2. Applying Disparate-Impact Analysis to Groups Defined by Income-Levels Heightens Those Problems

The Rule and Order declare into existence a disparate-impact regime, subject to all these problems. They go further. They add "income level" to the usual list of characteristics to be policed across for disparate impacts. Given the well-established correlations between—on the one hand—race, ethnicity, color, religion, and national origin, and—on the other—income level, this may not mean much. To the extent it means anything, though, that addition heightens the aforementioned issues, in so far as income levels are far more gradient and those gradations are universal.

Bear in mind a few laws of economics. *Every* actor of *every* kind *always* functions under a budget constraint.[23] Since actors' budget constraints vary with their income levels,[24] and since the marginal value of every dollar for every actor varies with them,[25] every action that impacts costs or benefits

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[22] Rule, pp. 4135-4136, ¶¶ 56-58.

[23] Richard A. Epstein, *Recognizing the Limits of Judicial Remedies: The Remote Causes of Affirmative Action, or School Desegregation in Kansas City, Missouri*, 84 CALIF. L. REV. 1101, 1109 (July, 1996) ("The basic state-wide budget constraint cannot be wished away: money spent in one locale cannot be spent in another. Public officials cannot tap any hidden cornucopia to fund their most treasured projects. Like the rest of us, they live in a world of scarcity and constraint.").

[24] Paul Wonnacott & Ronald Wonnacott, *Economics*, 4th Ed., John Wiley & Sons (1990), p.397-398.

[25] *Id.*, p. 382.

(which is to say, every action) disparately impacts actors based on their income levels.

These economic laws will play out with regular precision when applied to *any* action affecting the broadband industry and the Rule and Order's bar on disparate impacts across income-level. *No* action any entity "facilitating," "maintaining," "upgrading," or "otherwise affect[ing]" broadband service and infrastructure could ever take will fail to have such a disparate impact. This assures that *no* decision *any* covered entity could make would comply with the IIJA (as interpreted by the FCC), unless an entity proves a "feasibility" defense.

The Rule's contentions to the contrary notwithstanding, the Rule makes "feasibility" precisely such an affirmative defense. Yes, the Rule expressly rejects comments suggesting that "feasibility" "should only be considered as an affirmative defense[.]"[26] Nonetheless, it explains that when conducting its disparate-impact analysis, if the FCC "believes there is credible evidence that a … policy … differentially impacts access … on the basis of income level, race, [or] ethnicity…, the covered entity will have the opportunity to prove that the policy is nevertheless 'justified by genuine issues of technical or economic feasibility.'"[27] That is what an affirmative defense *is*.[28]

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[26] Rule, p. 4137, ¶ 68.

[27] *Id*., at p. 4135, ¶ 56.

[28] *Cooper v. Harris*, 581 U.S. ___; 137 S.Ct. 1455, 1464 (2017). *See also, e.g.*, *Veith v. Jubelirer*, 541 U.S. 267, 297 n.10 (2004, Scalia, J.) (recognizing as creating an "affirmative defense[,]" despite dissent's avoidance

Furthermore, despite the FCC's assurances, that defense provides little comfort. The Rule states that, while the FCC will define feasibility on "a case-by-case basis[,]"[29] it "anticipate[s]" the defense will allow accused business to provide "proof that there is not a reasonably available and achievable alternative policy or practice that would serve the entity's legitimate business objectives with less discriminatory effect."[30] If taken at face value, the latter would require a business to prove a negative to avoid ruinous fines. But it can't even be taken at face value, when the Rule's definitions of "technical feasibility" and "economic feasibility" in no way *allow* such "proof" to establish any such thing.[31] Under the Rule, what is "technically feasible" will turn on the "prior success by covered entities under similar circumstances or demonstrated technical advances[;]" what is "economically feasible" will turn on "prior success by covered entities under similar circumstances or

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of the term, the dissent's proposed rule assigning defendant a burden following an initial evidentiary showing); *Rocky Mt. Christian Church v. Bd. of County Comm'rs*, 605 F.3d 1081 (10th Cir. 2010) (analyzing whether an "affirmative defense" such as the "strict scrutiny defense" applies to a claim for violation of the Religious Land Use and Institutionalized Persons Act, as it would to a claim under the First Amendment); *Am. Acad. of Pediatrics v. Lungren*, 940 P.2d 797, 851 (Cal. 1997) (holding that when plaintiff makes required showing on constitutional claim, "[o]nly then does the burden shift to the [government] to plead and prove 'as an affirmative defense, that the [otherwise unconstitutional action] is justified[.]'") (internal citation omitted).

[29] Rule, p. 4140, ¶ 82.

[30] *Id.* at ¶ 56.

[31] *Id.*, p. 4121, ¶ 3, and p. 4138, ¶ 72 – p. 4140, ¶ 85.

demonstrated new economic conditions[.]" The presence or absence of less discriminatory alternatives would be irrelevant to these definitions.

Regardless of the bald palliatives included in the Rule, the defense will fail, resulting in liability, wherever "(1) there is a differential in access to broadband service; (2) the differential is caused by a specific policy or practice of the covered entity; and (3) the covered entity fails to prove that the policy or practice is justified on genuine technical or economic grounds."[32]

a. Impact on Infrastructure Investments

Consider any decision regarding infrastructure investments. *Every* area's income level varies to some degree from that of every other.[33] Add a new cell tower, *anywhere*, without adding them *everywhere* and it will have a disparate impact on the quality of service across income levels.

For a concrete example, imagine a Minnesota broadband provider has the resources available to place one (1), but only one (1), new cell tower in the neighborhoods southeast of downtown Minneapolis. That tower will improve the signal (and, so, the broadband access) the provider affords area subscribers. The tower's impact will be greatest on subscribers closest to it, with diminishing returns for those further afield.

Where may the provider safely place the tower?

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[32] *Id*. at ¶ 58.

[33] For details on variations in income level between and within neighborhoods, see, Elizabeth A. La Jeunesse and Christopher H. Wheeler, 2007; Neighborhood Income Inequality, Federal Reserve Bank of St. Louis Working Paper, 2006-039. (https://doi.org/10.20955/wp.2006.039) (visited March 14, 2024).

Technically and economically, it would be *feasible* to put it anywhere, but it can only put it in one place. Can it place the tower in Seward (average household income of $87,497; median household income of $57,458)?[34] How about in next-door-to-the-West Ventura Village (average household income of $57,243; median household income of $37,029)[35] or, next-door-to-the-North Cedar Riverside (average household income of $32,258; median household income of $23,634)?[36]

Placing the new tower in *any* of these neighborhoods will have a disparate impact on subscribers of different income levels. *No* location could avoid that result or take advantage of the statutory defense of technical and economic feasibility, for the simple reasons that: (a) no "genuine technical or economic grounds" the FCC is willing to consider—the FCC expressly rejects consideration of relative profitability as part of a "feasibility" assessment[37] and, as discussed above, the absence of less-discriminatory alternatives is irrelevant to the terms as defined in the Rule—would justify placement in *any* specific location; and (b) even if the latter were relevant, no legitimate metric would

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[34] *Seward, Minneapolis, MN Demographics*, Point2 Homes (https://www.point2homes.com/US/Neighborhood/MN/Minneapolis/Seward-Demographics.html) (last visited March 14, 2024).

[35] *Ventura Village, Minneapolis, MN Demographics*, Point2 Homes (https://www.point2homes.com/US/Neighborhood/MN/Minneapolis/Ventura-Village-Demographics.html) (last visited March 14, 2024).

[36] *Cedar Riverside, Minneapolis, MN Demographics*, Point2 Homes (https://www.point2homes.com/US/Neighborhood/MN/Minneapolis/Cedar-Riverside-Demographics.html) (last visited March 14, 2024).

[37] Rule, p. 4137, ¶ 64.

prove any location's disparate impact to be more or less discriminatory—the impact will be the *same* wherever the tower goes, with location only varying whose ox is gored.

b. Impact on Store Placement

The same will be true for a provider's placement of any storefront, for precisely the same reasons.

Should AT&T decide to open one (1) such location—say, in metropolitan Kansas City—the ubiquity of income level variance across geography would assure that anywhere it goes will generate a disparate impact across income levels. Whatever its reasoning, a decision to open a location in Independence Center, a suburban mall in Independence, Missouri (average household income varying by zip code from $56,767 to $95,343; median household income varying by zip code from $42,452 to $77,214),[38] rather than a storefront in the more urban Blue Valley neighborhood (average household income $41,753; median household income $29,648),[39] will have such a disparate impact. So would the opposite, of exactly the same scope. Either option would be technically and economically feasible, even if expected profit margins make one or the other more appealing to AT&T. Again, that wouldn't be

[38] *Independence, MO Demographics*, Point2 Homes (https://www.point2homes.com/US/Neighborhood/MO/Independence-Demographics.html) (last visited March 27, 2024).

[39] *Blue Valley, Kansas City, MO Demographics*, Point2 Homes (https://www.point2homes.com/US/Neighborhood/MO/Kansas-City/Blue-Valley-Demographics.html) (last visited March 27, 2024).

enough to make out a "feasibility" defense,[40] and, agency assurances notwithstanding, neither would the absence of a less discriminatory alternative.

The only possible result? Wherever AT&T opens a location, the Rule imposes liability for that selection.

c. Impact on Every Other Kind of Decision Affecting the Industry

More sweepingly, since income levels don't *just* vary by geography, the same will be true for *every possible decision* affecting the broadband industry. Under the IIJA (as the FCC interprets it), even decisions as innocuous as where and how to advertise or how to allocate customer service resources will be fraught, liability generating acts. After all, there are observable income-level differences in almost everything. Indeed, by all appearances, merely *charging* for broadband services—at all—appears illegal under the IIJA.

i Customer Service Preferences

Generational cohorts have well-established, divergent preferences for interacting with customer service.[41] Inevitably, their divergent stations of life

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[40] Rule, p. 4137, ¶ 64.

[41] *See The Generation Gap: How Customer Service Needs Vary by Age*, ITEL, Oct. 20, 2022 (Last Updated: Aug. 16, 2023) (last visited Mar. 14, 2024) (asserting: (a) a majority of Baby Boomers "still prefer the phone for most customer service issues;" while (b) Gen Xers split almost evenly between preferring to receive customer service by phone (46%) and email (40%); (c) 68% of Millennials prefer "omnichannel," impersonal options ("email, live chat, text"); and (d) Gen Z overwhelmingly prefers "self-serve" "online forms" of customer service to phone interactions (with 85% preferring automated AI-agents and only 24% willing to call customer service).

yield present-tense divergences in generations' average levels of income.[42] The correlation between the two assures that *any* relative investment in *any* kind of customer service will have a disparate impact across income levels.

To see how, imagine that our same Minnesotan broadband provider now has the budget to add to its customer service options, but only marginally. It could afford to: (a) hire one (1), and only (1), additional employee to either: (i) take calls; or (ii) man a desk responding to emails and texts; or, alternatively, (b) invest in the development and deployment of an AI-bot to field questions online. But it only has the budgetary room to select one (1) of these choices.

Each option is technically and economically feasible.

Generational differences in income levels and preferences assure that *whatever* choice the company makes will be wrong—its decision will have a disparate impact across income levels and expose the company to liability. And it will not be able to escape that liability through arguing "feasibility," when it genuinely *could* afford any of these options, which are all *equally* disparate in their impacts across income levels (to the extent that matters).

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[42] Phil Gramm, Robert Ekelund, and John Early, *The Myth of American Inequality: How Government Biases Policy Debate*, Rowman & Littlefield (2022), pp. 121-122.

ii Media Consumption

Print subscribers to the *New York Times* have a median income of $191,000.00;[43] Hulu viewers weigh in at a median income of $96,000.00;[44] FOX News viewers at $66,000.00.[45] That spectrum continues upwards and downwards across digital, print, streaming, and broadcast media.

Where can our Minnesotan broadband provider safely advertise a new bundling program? Advertising is scalable, so at an appropriate exposure, any option is both technically and economically feasible. That leaves no right answer.

Indeed, this can be put more starkly: advertising companies claim the ability to discretely microtarget their placements based on either "Socio Economic Status Indicator Score" or "Wealth[.]"[46] If every placement option can be targeted with such fine-grain by advertising companies, any placement of

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[43] Junming Huang, Gavin G. Cook & Yu Xie, *Large-Scale Quantitative Evidence of Media Impact on Public Opinion Toward China*, Humanit. Soc. Sci. Commun. 8, 181 (2021). https://doi.org/10.1057/s41599-021-00846-2.

[44] Lisa Claybrook, *All You Need to Know About Hulu's Self-Serve Advertising*, Nov. 7, 2022, DIGITAL ADVERTISING (https://dashtwo.com/blog/all-you-need-to-know-about-hulus-platform/) (last visited, Mar. 14, 2024).

[45] James Williams, *76 Fascinating Fox News Viewer Stats & Demographics*, Oct. 19, 2023, TECHPENNY (https://techpenny.com/fox-news-viewer-stats-demographics/) (last visited, Mar. 14, 2024).

[46] *See Digital Taxonomy: Access Thousands of Data Axle Audiences within Digital Marketplaces and Data Exchanges*, Data Axle (https://www.data-axle.com/wp-content/uploads/2024/01/Data-Axle-Digital-Taxonomy-2024.pdf) (last visited, Mar. 14, 2014).

any kind definitionally will have a disparate impact across the income levels that it differently reaches.

As these examples highlight, *any* decision our Minnesotan might make will be wrong, will have a disparate impact across income levels, will be indefensible based on "feasibility," and will so expose it to liability.

iii Price Setting

We can take this one step further. The imposition of a disparate-impact regime policed across income levels may prove to be *less* forgiving than would declaring all broadband providers to be common carriers. Common carriers have long faced regulations of their prices,[47] *but they can legally <u>have</u> prices*. Under the IIJA, the Order, and the Rule, *any* pricing decision will have a disparate impact across income levels. Scarcity and budget constraints dictate that no price could ever not.

Setting *any* subscription price *at all* would expose a broadband provider to liability, until and unless it persuades the FCC of the applicability of a feasibility defense. The Rule seems to afford that possibility, but as a statutory matter, even the *reductio ad absurdum* of *having* a price should not qualify. The Congressional objective of "facilitat[ing] equal access to broadband internet access service," when advanced by "preventing digital discrimination

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[47] *See Southern Motor Carriers Rate Conference v. U.S.*, 471 U.S. 48, 50 n. 1 (1985) (noting decades ago that the Interstate Commerce Commission fixes common carrier rates for interstate transportation of commodities, while the Interstate Commerce Act "expressly reserves to the States" their historical role in "the regulation of common carriers' intrastate rates").

of access based on income level" *through any uniformly imposed price*, may pose an "issue[ ] of technical and economic feasibility." But the IIJA expressly *requires* that means—the FCC *must* "prevent[ ] digital discrimination of access based on income level" as part of *how* it "tak[es] into account the issues of technical and economic feasibility presented by" Congress's "objective[.]" No provider could safely rely on the Rule's contrary specifics for the "anticipate[d]" operation of the FCC's disparate-impact regime—if the provider *has* a subscription price, it will have a disparate impact across income levels and the IIJA's actual language will not allow a "feasibility" defense to justify it.

The IIJA, the Order, and the Rule appear, then, to make the mere *existence* of a price for a broadband subscription presumptively illegal. By all appearances, they make it *impossible* for any provider to justify any price for its services *at all*. The IIJA (as the FCC interprets it) assures that any operation of any broadband provider as a business will presumptively violate the statue and result in liability.

B. The IIJA (as the FCC Interprets It) is Unconstitutional

This is definitional arbitrary power. Everything is presumptively illegal. The government will decide after the fact, on a case-by-case basis, for any reason or none, what illegal acts it will choose to pursue when committed by whomever it chooses to prosecute. The regulated can only avoid liability for picking among their (all presumptively illegal) options when they can *prove* they were compelled to so act. As defined by statute, they likely never can.

Such a system cannot be constitutional, on at least two (2) scores: (a) the IIJA (as the FCC interprets it) requires an all-but definitional denial of equal protection; and (b) the resulting scheme fails as void for vagueness.

1. Equal Protection

All governments have finite resources.[48] Disparate-impact regimes force governments to decide how to deploy them among a sea of violations. Thus, they invite governments, in arbitrarily prioritizing which presumptively illegal acts to functionally prohibit through guidance or enforcement, to pick those protecting their preferred beneficiaries.

When the proscribed forms of discrimination are those dealing with race, color, national origin, and religion, such prioritizations *definitionally* deny all other groups the equal protection of the law. That cannot be squared with the constitutional constraint on federal power paralleling the requirements the equal protection clause imposes on the states.[49]

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[48] See Richard A. Epstein, *supra* at n. 23.

[49] At least seven (7) of the Justices have recognized such a constraint on federal power. The Chief Justice did so, at least, in *Sessions v. Morales-Santana*, 198 L.Ed.2d 150, 159 n. 1 (2017), and – with Justice Alito – in *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). Justices Sotomayor and Kagan have done so repeatedly, including in *Sessions*. In *U.S. v. Madero*, 142 S.Ct. 1439, 1544 (2022), Justice Thomas agreed, anchoring this constraint in the Fourteenth Amendment's citizenship clause. Justice Gorsuch's concurrence in *Madero*, slightly less explicitly, does the same. *Madero*, 142 S.Ct., at 1556 (noting that the majority, on the theory that the relevant Constitutional provision of the Fifth Amendment was "fundamental," had applied it, and had held it to have been satisfied, but writing separately to object to the analysis of what portions of the Constitution are sufficiently "fundamental" to apply in insular territories). In 2021, Justice Kavanaugh

2. Vagueness

While the "degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment," with "economic regulation … subject to a less strict vagueness test[,]"[50] here, the IIJA (as the FCC interprets it) clearly falls short of even that more forgiving standard. "In reviewing a business regulation for facial vagueness… the principal inquiry is whether the law affords fair warning of what is proscribed."[51]

The IIJA (as the FCC interprets it) proscribes anything and everything that every regulated party does, subject only to the FCC's capricious enforcement of the resulting non-standard. In other words, the IIJA (as the FCC interprets it) affords regulated parties *no* real notice *at all* of what to do to avoid liability. Wherever the line falls defining sufficiently fair notice, no notice at all falls short of it.

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joined a concurrence to a denial of certiorari, which agreed (by citation to *Sessions* and other authorities) that the "Fifth Amendment to the United States Constitution prohibits the Federal Government from discriminating" in terms paralleling the Court's application of the Equal Protection Clause of the Fourteenth Amendment. *Nat'l Coal. for Men v. Selective Srv. Sys.*, 141 S.Ct. 1815, 1815 (2021).

[50] *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498 (1982).

[51] *Id*., at 503.

C. The IIJA (as the FCC Interprets It) Works a Regulatory Taking, Committing FCC to at Least Hundreds of Billions of Dollars in Compensation

A final point is worth considering: the real-world impact *on the federal government* of the IIJA (as the FCC interprets it), should the Rule ever become effective.

For decades, the Supreme Court has recognized that "where regulation denies all economically beneficial or productive use of" property, that regulation works a regulatory taking.[52] The Court has recognized that regulations that "entirely deprive an owner of property rights" in personal property may constitute exactly the same kind of regulatory taking as would such a deprivation of the economically beneficial uses of real property.[53]

The IIJA (as the FCC interprets it) makes *all* economically beneficial uses of the entire broadband industry presumptively illegal. Making the setting of *any* price, the placement of *any* infrastructure, the deployment of *any* personnel, or the expenditure of *any* funds in advertising illegal must qualify.

This means that, should the IIJA (as the FCC interprets it) take effect, the Rule would work a regulatory taking of *all* the businesses affecting any portion of the broadband industry. Conservatively speaking, the resulting liability would run into *at least* the hundreds of billions of dollars.[54]

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[52] *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992) (citing *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), among other authorities).

[53] *Horne v. Dep't of Agric.*, 576 U.S. 351, 364 (2015).

[54] "In 2022 the US broadband space generated $111.73 billion in total revenue[.]" John Fletcher, *The History of U.S. Broadband*,

Conclusion

The IIJA (as the FCC interprets it) would be unconstitutional.

Its more familiar components would compel the FCC to racially classify Americans and to incorporate racial balancing into their assessment of every act by every participant in a vast industry (with those assessments backed by potentially massive, punitive fines). Such race-based governmental policies are only ever constitutional when they meet strict scrutiny.[55] The IIJA (as the FCC interprets it) plainly could not meet that standard. There is no proof or even reason to believe that any—much less every—covered actor is engaged in widespread, intentional discrimination. Even if such a showing could be made in some specific context, it would be impossible for the IIJA and Rule's blanket prohibition on facially neutral, evenhandedly applied policies with disparate-impacts—applicable *everywhere* the broadband industry is involved at the discretion of the FCC—to be narrowly tailored to address that context.

Its novel addition of income level to the dimensions across which no disparate impacts will be allowed approaches the platonic form of voidness for vagueness, barring everything and providing no notice of any kind to anyone of what behavior will and won't result in prosecution and massive liability.

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https://www.spglobal.com/marketintelligence/en/news-insights/research/the-history-of-us-broadband. At a conservative x6 revenue multiple (https://eqvista.com/revenue-multiples-by-industry/), this implies an industry value of at least $670.38 billion. By no means is it clear that so low a multiple would be the appropriate gauge for an entire, rapidly expanding industry. The actual value could potentially be far, far higher.

[55] *See Students for Fair Admissions v. President and Fellows of Harvard College*, 143 S.Ct. 2141, 2162 (2023).

These prohibitions are so sweeping as to threaten to impose on the government *at least* hundreds of billions of dollars of liabilities, with no Congressional assessment of such costs, no Congressional budgeting or appropriation made to cover them, and no evidence that Congress ever contemplated that its acts might incur such obligations.

Unless the Court embraces a saving throw advanced by some petitioner or *amicus*,[56] the IIJA (as the FCC interprets it) clearly violates the Constitution and the Court must declare it void.

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[56] As mentioned in footnote 14, *supra*, the most likely candidate appears to be deployment of the canon of constitutional avoidance. *N.L.R.B. v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979); *Rust v. Sullivan*, 500 U.S. 224, 238 (1991) (applying canon to a regulation); *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) (requiring deployment of "canon of constitutional avoidance" to challenge to a regulation, even at expense of "*Chevron* deference" when "it 'presents serious constitutional difficulties.") (citing *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-577 (1988) and *Rep. Nat'l Comm. v. FEC*, 316 U.S. App. D.C. 139 (D.C. Cir. 1996)). This would require the Court to find available a plausible reading of the IIJA lacking constitutional infirmity. The ACR Project has not pursued determining whether there is such a plausible reading, but flags that if the IIJA could legitimately be read to bar only intentional disparate treatment across its broadened field of classifications, it is *possible* that such a reading—coupled with a liberal application of *Personal Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979)—could allow the IIJA to withstand the required judicial scrutiny.

Respectfully submitted,

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