



**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

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

Comments of the American Consumer Institute

The American Consumer Institute Center for Citizen Research (ACI) is a nonprofit (501c3) educational and research institute with the mission to identify, analyze, and project the interests of consumers in selected legislative and rulemaking proceedings in information technology, health care, insurance, energy, and other matters. ACI submits these comments in response to the Federal Communications Commission (“Commission”) Notice of Proposed Rulemaking (“NPRM”) In the Matter of Implementing the Infrastructure Investment and Jobs Act (IIJA) regarding the Prevention and Elimination of Digital Discrimination, in the above-referenced docket.

To summarize, our comments will: 1) highlight a number of viewpoints that we believe should carry substantial weight in this rulemaking; 2) show that a disparate impact approach could make standard investment and deployment decisions appear to be discriminatory when they are not; and 3) warn that as a result, internet service providers could become overly cautious and reluctant to invest and deploy broadband services due to added legal risks from potential litigation and regulatory scrutiny.

It is, therefore, our conclusion that the legislative goal of the IJA — to encourage more broadband investment in order to enable widespread consumer connectivity — will, instead, become unachievable under a disparate impact approach.

Highlights Comments for Consideration

A number of commentors have made key points that we believe should carry substantial weight in this rulemaking. Comments by the [U.S. Chamber of Commerce’s Chamber Technology Engagement Center](#) encapsulate the issue of congressional intent.¹ The crux of this issue has to do with the difference between discrimination in the deployment of broadband and intentional discrimination. Section 60506 of the IJA provides the outline for how the Commission is to handle issues of discrimination. When examining the wording of this section, it is clear that the Commission was delegated the task to “facilitate equal access” with the objectives of “preventing digital discrimination of access based on” protected characteristics and “identifying necessary steps for [it] to take to eliminate discrimination described in paragraph.” This implies that the Commission is to be focused on future implementation, not punishment for past conduct. Division F of the IJA would support this reading since it refers to discrimination in the context of the \$14 billion allocated to low-income households.

Furthermore, for this section to grant the Commission new punitive tools for nondiscrimination enforcement would be highly unusual since it is not a civil rights statute nor written like one. As the Free State Foundation points out, for this section to refer to anything more than intentional discrimination, language like “results in” or “otherwise adversely affects” would have been used.² This is also consistent with prior Supreme Court rulings on the issue,

¹ Ms. Marlene H. Dortch, “Re: Proposed Rule, Federal Communications Commission; Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination (88 Fed. Reg. 3,681-3,704, January 20, 2023),” *U.S. Chamber of Commerce*, Fed. 21, 2023.

² Randolph J. May and Seth L. Cooper, “FCC Should Rely on Pro-Deployment Actions to void Digital Discrimination,” *Free State Foundation*, November 30, 2022.

such as *Smith v. City of Jackson*³ and *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*⁴

President of TechFreedom, Berin Szóka, summed up this critique, saying, “If Congress had wanted the Commission to implement a new civil rights law for broadband, it would have legislated a clear prohibition on discrimination—the essential element in all civil rights laws. Instead, Congress wrote a law entirely about ‘facilitation.’”⁵

The standard that the Commission is trying to argue for is based on disparate impact, not disparate intent. A disparate impact standard examines the results of infrastructure deployment and implies discrimination based on inequalities in distribution. The [American Enterprise Institute’s \(AEI\) comment](#) illustrates how this standard creates a slew of unintended consequences and ultimately proves to be too unwieldy to use effectively.⁶

One unavoidable problem is that business behavior that is otherwise normal and necessary could be deemed discriminatory when it is not. An example laid out by AEI is that of credit discrimination for banking and renting. A bank or landlord needs to evaluate credit in order to deem an investment safe and to adjust interest accordingly. Unintentionally, this will result in a higher number of applicants of color being rejected due to a correlation between race and credit score. Is this racial discrimination, and if so, how can banks and landlords conduct business without using credit scores?

The threat of litigation has already caused behavioral changes in the real estate market due to the Fair Housing Act. Realtors may fear answering questions from some home buyers about the racial composition of a neighborhood school because it may be interpreted as “steering” the applicant to or from a neighborhood based on race.⁷ Otherwise innocuous, or

³ *Smith v. City of Jackson*, 544 U.S. 228 (2005).

⁴ *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015).

⁵ “FCC Must Not Overstep Authority to Prevent Digital Discrimination,” *TechFreedom*, May 17, 2022.

⁶ Daniel Lyons, “What do we mean when we say digital discrimination?” *American Enterprise Institute*, December 14, 2022.

⁷ “Steer Clear of ‘Steering,’” *National Association of Realtors*, 2020, July 10, 2020.

even useful, information can become the subject of potential litigation, making the overall process less efficient and less satisfactory for consumers.

Not only does the disparate impact standard make certain forms of normal business decisions and operations potentially illegal, but it obfuscates the underlying issue of inequality of broadband connectivity, which is that it has nothing to do with race and everything to do with income, age, education, cost of rural deployment, and adoption.

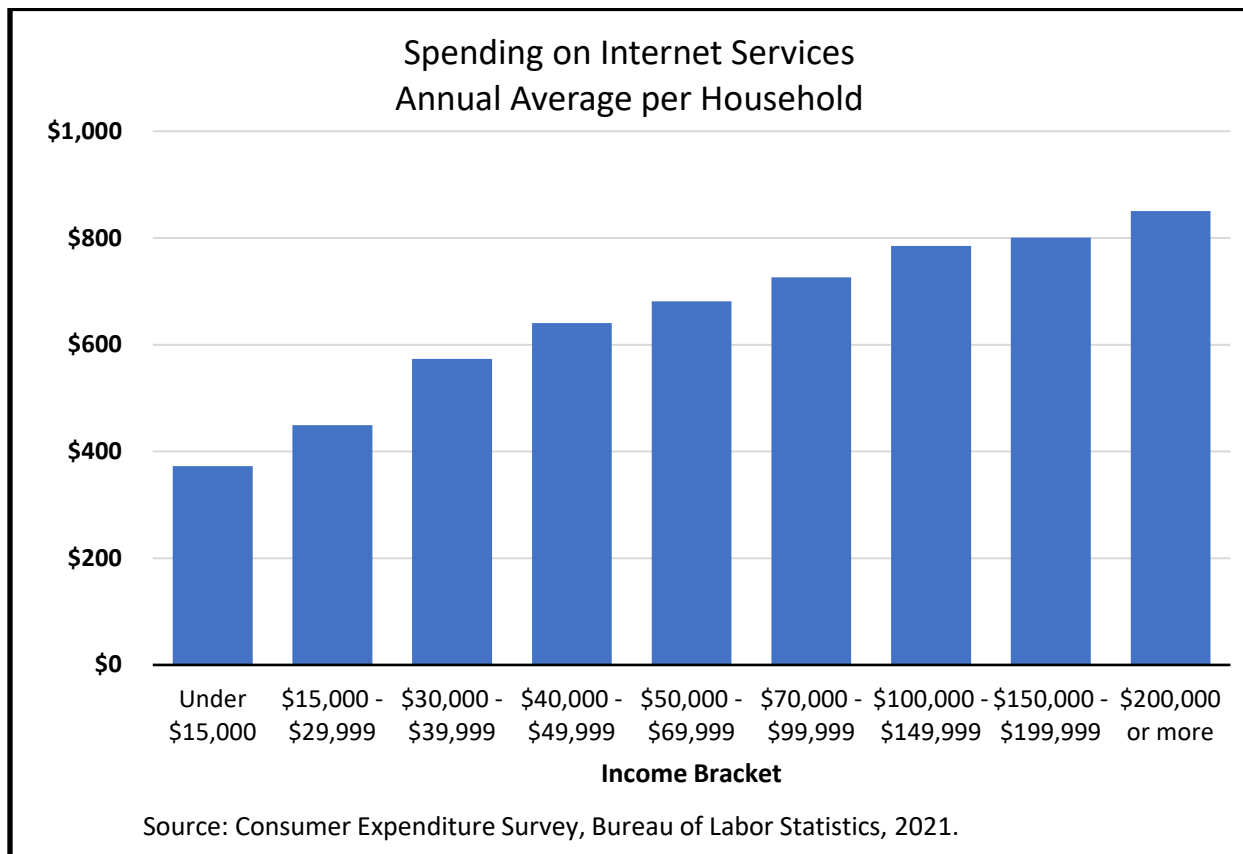
Reasons for the disparity in connectivity have many causes which are not connected to any discriminatory conduct. For example, in a report by the Bipartisan Policy Center, it was shown that broadband access in urban communities with large nonwhite populations was high while adoption rates were still low.⁸ Focusing on just infrastructure could even lead to “overbuilding” in low-income communities. The Commission’s efforts to address disparate impact ultimately ignore the underlying issue of income inequality and broadband adoption.

In terms of income, the Information Technology & Innovation Foundation examined the underlying factors behind the disparity in connectivity, and what they found was that the racial composition of neighborhoods played no statistically relevant part in connectivity inequalities.⁹ Income, on the other hand, was highly correlated with differences in connectivity. Since race and income are also correlated, it can appear as though broadband access has a racial component, but as this study indicated, income was the underlying cause of these differences.

For obvious reasons, lower-income consumers typically temper their spending, prioritizing some goods and services over others. For example, based on data from the Bureau of Labor Statistics’ latest Consumer Expenditure Survey, the chart below clearly shows that consumers in households with higher incomes tend to spend more on internet services than those with lower incomes.

⁸ Alex Trollip, “Understanding the Urban Digital Divide,” *Bipartisan Policy Center*, March 5, 2021.

⁹ Joe Kane and Jessica Dine, “Broadband Myths: Do ISPs Engage in “Digital Redlining?” *Information Technology & Innovation Foundation*, April 2022.



Essentially, this shows internet services to be what standard microeconomics calls a *normal good*. For normal goods, as consumers’ income increases, so does their demand for goods and services. The implication here is that some consumers with tight budgets may skip purchasing internet services altogether or buy services at lower speeds, while those with less of a budget constraint are more willing to choose to buy more. This sheds some light on the importance of subsidies as an incentive for increasing broadband connectivity and alleviating these economic constraints.

Similarly, according to a PEW survey covering February 8, 2021, a comparison of adults with incomes greater than \$75,000, adults between \$50,000 and \$75,000, adults between \$30,000 and \$50,000, and adults with less than \$30,000 reported having broadband in their home at penetration rates of 92%, 87%, 74%, and 57%, respectively.¹⁰ Clearly, consumers with

¹⁰ “Internet/Broadband Fact Sheet,” Pew Research Center, April 7, 2021, at <https://www.pewresearch.org/internet/fact-sheet/internet-broadband/#panel-2ab2b0be-6364-4d3a-8db7-ae134dbc05cd>.

lower incomes had a higher propensity to forgo broadband services, presumably due to budget constraints, compared to consumers with higher incomes. The same survey also found that older adults (64%), Hispanic adults (65%), and adults with less than high school education (46%) were less likely to subscribe, as were adults living in rural communities (74%).

A study by Li, Spoer, Lampe, and others showed similar results, as well as a disparity of penetration rates across income quartiles — disparities that even exist within the same racial demographic.¹¹ Specifically, comparing the lowest and highest income quartiles, the study found connectivity rates averaging 58.8% and 87.2%, respectively. Moreover, for the lowest income quartile, Asian, Black, Hispanic, and White consumers all had lower broadband penetration rates when compared to the highest income quartile — comparatively averaging 56.3% vs. 87.3%, 53.2% vs. 81.2%, 56.3% vs. 82.3%, and 65.7% vs. 87.6%, respectively. Essentially, within the same racial group, household income influences spending habits and, hence, produces a marked disparity in digital connectivity.

Similarly, a recent study by the Phoenix Center found no “systematic evidence of digital discrimination” by income or race.¹² From this study and the other empirical sources provided here, it is clear there are a multitude of demographic factors that influence broadband penetration rates without regard to discriminatory conduct.

Disparate Impact is the Wrong Approach: A Statistical Analysis

As we have shown earlier in our comments, demographic factors, such as income, race, and age often influence broadband connectivity issues, and not redlining. In our comments to follow, we demonstrate how the disparate impact approach could be misused to show the presence of discrimination when there is no actual discrimination. If this were to occur, then: 1) a disparate impact standard could inadvertently punish ordinary (and sometimes necessary)

¹¹ Y. Li, B.R. Spoer, T.M. Lampe, P.Y. Hsieh, I.S. Nelson, A. Viers, L.E. Thorpe and M.N. Gourevitch, “Racial/Ethnic and Income Disparities in Neighborhood-Level Broadband Access in 905 Cities, 2017—2021,” *Public Health*, Vol 217, April 2023, pp. 205-211, at <https://www.sciencedirect.com/science/article/pii/S0033350623000550>.

¹² T. Randolph Beard and George S. Ford, “Digital Discrimination: Fiber Availability and Speeds by Race and Income,” Phoenix Center, Policy Paper 58, September 2022, <https://phoenix-center.org/pcpp/PCPP58Final.pdf>.

business operations as being discriminatory, thereby raising the potential for legal jeopardy and deployment costs, which will ultimately reduce broadband deployment; and 2) the result would be a chill on deployment, which would be completely inconsistent with the congressional intent of the IJA. The goal of the IJA was to encourage investment and not encourage legal jeopardy for internet service providers.

Small geographic areas can oftentimes exhibit statistical clustering of homogeneous demographic characteristics. For example, in the same general geographic area, the average income and age of adults living in apartments may be lower than the average income of adults living in single family homes, *ceteris paribus*. Some areas with retirement communities may, for instance, have older populations than those communities near a university or a military installation. In other words, small geographic areas may have statistically different compositions of income, race, age, and other demographic characteristics. This is a testable hypothesis.

Why does this matter? Because clustering may affect comparative differences in demographic characteristics across small geographic areas, a broadband investment in one particular area could be shown to have benefited some demographic groups while disadvantaging other demographic groups. In other words, virtually any investment in any area could be deemed discriminatory.

Given our hypothesis that “small” geographic areas may be statistically different from one another in terms of income, race, and age, we picked six census block groups located near the business office of American Consumer Institute (ACI) — all in the northern half of what is said to be the smallest (by land size) self-governing county in the U.S. — in Arlington, Virginia:¹³

- Block Group 3, Census Tract 1002 — an area with somewhat larger homes located near the edge of McLean, Virginia;
- Block Group 2, Census Tract 1008 — an area with generally modest homes near Virginia Hospital Center;
- Block Group 2, Census Tract 1014.05 — an area with new condos several blocks from ACI’s office;

¹³Arlington Fast Facts, Arlington County Government, <https://www.arlingtonva.us/Government/Projects/Data-Research/Fast-Facts>, downloaded April 18, 2023. Granted, these census block groups were not randomly selected but chosen to demonstrate a potential risk to investors.

- Block Group 2, Census Tract 1014.09 — an area that includes retirement condos and where ACI's business office is located;
- Block Group 1, Census Tract 1015.03 — an area with predominately single-family homes in an area about a half mile north of ACI's office; and
- Block Group 1, Census Tract 1020.03 — an area with predominantly apartments located an area about a half mile south of ACI's office.

Statistical analyses were performed that compared each census block group in terms of income, age, and race. Specifically, each census block group was divided into: the number of households earning \$200,000 or more versus households earning less than \$200,000; the population of those below versus above the age of 55 years; and the population of white versus nonwhite. The Census data used in the statistical analysis is available in the appendix at the conclusion of these comments.

The demographic composition of these six census block groups was compared and tested to see if any were significantly different from the others. If that is shown to be the case, then any broadband investment in one census tract would appear to be discriminatory against another based on income, age, and race. In that case, the internet service provider could be subject to lawsuits or regulatory action such as fines. Under such scrutiny and potential liability, it would not be wise for them to invest in any of these six small geographic areas.

Chi-squared tests were performed to see if any of the six census block groups were statistically different from one another. This was done by comparing high and low income households between the six groups, followed by comparing younger and older populations, and then comparing white and nonwhite populations, as defined earlier.¹⁴ In every case, the census block groups were significantly different from each other with respect to each demographic category with a 95% level of confidence.

Therefore, many investments could be statistically shown to have disparate impact — essentially favoring residences in one area over another. Because of demographic differences that exist between small geographies — be it by age, religion, income, race, or other factors —

¹⁴ Each test used a four by four contingency table, comparing one block group for one characteristic to another group, and so on. Because the cell sizes were sufficiently large, a Yates' correction was unnecessary.

statistical tests such as these could be used to find many investments to be discriminatory, which could subject internet service providers to complaints, lawsuits, and potential fines. A disparate impact standard would serve as a deterrent for broadband investments. This should not be the outcome that the Commission hopes to produce.

Conclusion

These comments demonstrate by example that small geographic areas can often exhibit statistically significant differences between one another in terms of the clustering of homogeneous demographic characteristics. In other words, small geographic areas may have very different compositions of income, race, age, and other characteristics. This means that broadband investment in any one area could often be statistically shown as favoring or disadvantaging another area. This also means that statistical significance testing could show investment decisions as appearing to be discriminatory, when in fact they are not.

A disparate impact approach would produce an unnecessary burden on investors — one rife with allegations of discrimination, as well as a goldmine for complaints and lawsuits — when broadband investment and upgrades are simply the normal course of business decision-making. Therefore, a disparate impact approach is the wrong approach for addressing equal access and the prevention of discrimination.

Respectfully,

Steve Pociask
President/CEO
American Consumer Institute

ATTACHMENT: Appendix

**APPENDIX: U.S. Census Demographic Data
For Select Block Groups**

Household Counts for Six Arlington County Block Groups by Income

	Block Group 3, Census Tract 1002	Block Group 2, Census Tract 1008	Block Group 2, Census Tract 1014.05	Block Group 2, Census Tract 1014.09	Block Group 1, Census Tract 1015.03	Block Group 1, Census Tract 1020.03
Total:	293	295	587	747	415	898
Less than \$10,000	10	7	54	37	0	46
\$10,000 to \$14,999	0	5	6	0	0	14
\$15,000 to \$19,999	0	4	0	0	0	13
\$20,000 to \$24,999	0	7	0	0	0	0
\$25,000 to \$29,999	0	0	0	0	0	239
\$30,000 to \$34,999	0	34	0	13	0	42
\$35,000 to \$39,999	0	0	0	12	0	10
\$40,000 to \$44,999	0	0	0	0	0	0
\$45,000 to \$49,999	0	0	10	13	0	63
\$50,000 to \$59,999	0	2	32	11	0	39
\$60,000 to \$74,999	23	7	6	80	58	168
\$75,000 to \$99,999	21	17	109	164	19	101
\$100,000 to \$124,999	25	52	101	88	78	76
\$125,000 to \$149,999	9	24	61	26	26	19
\$150,000 to \$199,999	20	22	139	81	9	20
\$200,000 or more	185	114	69	222	225	48
Not 200k	108	181	518	525	190	850

Source: Households, American Community Survey, Census, 2021.

Population Counts for Six Arlington County Block Groups by Age

	Block Group 3, Census Tract 1002	Block Group 2, Census Tract 1008	Block Group 2, Census Tract 1014.05	Block Group 2, Census Tract 1014.09	Block Group 1, Census Tract 1015.03	Block Group 1, Census Tract 1020.03
Total:	761	846	926	991	1,018	1,735
Male:	392	461	487	410	626	936
Under 5 years	37	82	36	0	20	75
5 to 9 years	23	50	0	0	9	32
10 to 14 years	54	9	0	0	40	133
15 to 17 years	17	10	0	0	22	70
18 and 19 years	0	0	0	0	0	1
20 years	0	0	0	0	0	0
21 years	0	3	6	0	0	1
22 to 24 years	0	22	26	108	101	11
25 to 29 years	0	47	169	34	171	45
30 to 34 years	16	32	68	128	65	47
35 to 39 years	20	26	20	20	9	83
40 to 44 years	16	33	86	0	9	1
45 to 49 years	21	27	8	0	91	175
50 to 54 years	37	36	24	26	68	169
55 to 59 years	92	13	0	32	17	32
60 and 61 years	0	13	0	0	2	0
62 to 64 years	14	0	0	0	0	9
65 and 66 years	23	13	0	0	0	23
67 to 69 years	0	6	0	6	0	13
70 to 74 years	11	6	44	0	2	16
75 to 79 years	11	14	0	0	0	0
80 to 84 years	0	0	0	16	0	0
85 years and over	0	19	0	40	0	0
Female:	369	385	439	581	392	799
Under 5 years	17	12	0	0	0	0
5 to 9 years	21	8	0	0	9	89
10 to 14 years	0	22	0	0	17	91
15 to 17 years	16	35	18	0	0	0
18 and 19 years	0	22	19	0	0	0
20 years	0	0	0	0	0	0
21 years	0	16	0	0	0	0
22 to 24 years	8	0	77	37	35	8
25 to 29 years	20	14	164	85	157	87
30 to 34 years	36	83	0	91	11	19
35 to 39 years	0	0	33	43	9	32
40 to 44 years	30	16	21	25	72	263
45 to 49 years	40	15	20	13	17	61
50 to 54 years	58	36	11	0	30	41
55 to 59 years	50	8	36	28	34	34
60 and 61 years	0	31	0	0	0	0
62 to 64 years	24	13	0	0	0	0
65 and 66 years	0	10	0	56	0	0
67 to 69 years	0	2	40	0	0	0
70 to 74 years	11	12	0	22	0	18
75 to 79 years	10	10	0	0	0	56
80 to 84 years	28	4	0	46	1	0
85 years and over	0	16	0	135	0	0

Source: American Community Survey, Census, 2021.

Population Counts for Six Arlington County Block Groups by Race

Label	Block Group 3, Census Tract 1002	Block Group 2, Census Tract 1008	Block Group 2, Census Tract 1014.05	Block Group 2, Census Tract 1014.09	Block Group 1, Census Tract 1015.03	Block Group 1, Census Tract 1020.03
Total:	883	849	1,251	947	1,079	2,019
Hispanic or Latino	78	177	71	40	69	1,107
Not Hispanic or Latino:	805	672	1,180	907	1,010	912
Population of one race:	737	613	1,107	865	947	859
White alone	669	302	796	732	824	366
Black or African American alone	6	235	46	19	33	340
Amer. Indian/Alaska Native	0	0	0	0	2	4
Asian alone	49	70	256	114	83	144
Native Hawaiian/Pacific Islander	0	0	0	0	1	0
Some Other Race alone	13	6	9	0	4	5
Two or more races:	68	59	73	42	63	53
Two races	65	57	71	41	57	49

Source: U.S. Census Bureau, 2020 Census Redistricting Data.