Before the

Federal Communications Commission

Washington, D.C. 20024

Comments of the

Competitive Enterprise Institute

In the Matter of	)	
	)	
Federal Communications Commission	)	FCC-22-98
	)	GN Docket No. 22-69
	)	
Preventing Digital Discrimination	)	
Noticed of Proposed Rulemaking	)	

February 20, 2023

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Introduction. On behalf of the Competitive Enterprise Institute (CEI), we respectfully submit the following comments in response to the Federal Communications Commission's (FCC) notice of proposed rulemaking (NPRM) and request for comment regarding the proposed regulation on digital discrimination of access.[1] Founded in 1984, the Competitive Enterprise Institute is a non-profit research and advocacy organization focusing on regulatory policy from a pro-market perspective. CEI experts research and advocate policies to boost American technological innovation and economic competitiveness through technology and regulatory policy reforms related to telecommunications and broadband policy, spectrum policy, and other issues.

The Competitive Enterprise Institute appreciates the FCC's intention to prevent digital discrimination of access and seek comment on its proposal to create a disparate impact standard for broadband access and impose affirmative obligations on broadband service providers. In the NPRM, the FCC proposes to define "digital discrimination of access" as "policies or practices, not justified by genuine issues of technical or economic feasibility" that "differentially impact" and/or "are intended to differentially impact" "consumers' access to broadband internet access service based on their income level, race, ethnicity, color, religion, or national origin."[2] We share the FCC's concerns to prevent digital discrimination and ensure a free and dynamic Internet, but we believe that this proposed rule is contrary to the FCC's statutory authority. Every rule must attempt to implement the legislation that the rule is based on; this rule attempts to implement the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429, § 60506

[1] Federal Communications Commission, *Notice of Proposed Rulemaking in the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination,* (released December 22, 2022), https://www.fcc.gov/fcc-announces-comment-due-dates-preventing-digital-discrimination-nprm.
[2] *Id*. at 2–3.

(2021) (codified at 47 U.S.C. § 1754). The rule under consideration currently allows disparate impact analysis. However, as explained below, the text of the legislation at issue blocks the inclusion of disparate impact analysis.

Summary of the textual and logical structures that require disparate impact analysis. In every single case relied upon in the proposed rule that discusses disparate impact analysis, the relevant statutes each contain all three of the following elements:

1. A statutory prohibition on "discriminating … because of" various protected characteristics;
2. Text that refers to the consequences of discriminatory actions, not just to the mindset of actors; and
3. A statutory purpose that is consistent with disparate impact analysis.

The second and third elements above illuminate the function of the first. The first element, standing alone, requires causation generally. Absent the second and third elements, however, the nature of the causation is ambiguous: the causation could either be *intentional* (that is, an outcome caused by an actor's mental state) or *systemic* (that is, a state of affairs that is understood to be caused by disparate outcomes). Further examination and analysis of the statutory and decisional text are necessary to resolve the ambiguity of the required causation at issue.

The Commission seeks comment about whether disparate impact analysis is logically implied or consistent with the statute. FCC 22-98 pp. 10-11. As explained below, disparate impact analysis is required only when the three elements described above are present in the statute. These three elements work together; to eliminate any one

of them from a textual analysis is a mistake, mainly because the second and third elements illuminate the interpretation of the "discriminate . . . because of" phrase.

The Supreme Court's reliance on this tripartite structure of disparate impact analysis. Examples of this standard being applied by the Supreme Court include:

Title VII of the 1964 Civil Rights Act, as interpreted in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Court examined the statutory prohibition: we must not "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin." Section 703(a). But the Court didn't stop there since the causation referred to by the "because of" phrase—if standing alone—could be either intentional or systemic. Instead, in examining the entire statute, it found that "Congress directed the thrust of [§ 703(a)(2)] to the consequences of employment practices, not simply the motivation." *Id.* at 432.

Section 4(a) of the Age Discrimination in Employment Act of 1967 (ADEA), as interpreted in *Smith v. City of Jackson*, 544 U.S. 228 (2005). Under ADEA's prohibition, an employer must not "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's age." 29 U.S.C. § 623(a). Again, the Court did not end its analysis there. Instead, the Court relied upon the broader ADEA text to explain the nature of the causation at issue, finding that the appropriate textual analysis necessarily "focuses on the effects of the action on the employee rather than the motivation for the action of the employer" *Id*. at 236.

The *Fair Housing Act (FHA),* as interpreted in *Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Communities Project, Inc.*, 576 U.S. 519 (2015). The FHA made it unlawful to "refuse to sell or rent ... or otherwise make unavailable or deny, a dwelling to a person because of race." 42 U.S.C. § 3604. Once again, the Court did not end its analysis there: it highlighted the nature of the causation at issue, noting that the statutory phase "'otherwise make unavailable' refers to the consequences of an action rather than the actor's intent." *Id.* at 534.

Importantly, the Court made this requirement explicit: "Together, *Griggs* holds and the plurality in *Smith* instructs that antidiscrimination laws must be construed to encompass disparate-impact claims when their text refers to the consequences of actions and not just to the mindset of actors and where that interpretation is consistent with statutory purpose." *Id.* at 533.

This rulemaking must apply the Court's standard to the statutory text the proposed rule interprets. "As in any case of statutory construction, [the Supreme Court's] analysis begins with the language of the statute. And where the statutory language provides a clear answer, it ends there as well." *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999) (internal quotations and citations omitted). The following is the text of the statute at issue:

> Not later than 2 years after November 15, 2021, the Commission shall adopt final rules to facilitate equal access to broadband internet access service, taking 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; and
> >
> > (2) identifying necessary steps for the Commissions to take to eliminate discrimination described in paragraph (1).

47 U.S.C. § 1754(b).

Notably, this statute does not use the terminology of "discriminate … because of …"; instead, this statute uses a new and distinct phrase: "discrimination … based on …" This language is substantially different than every one of the previous disparate impact analysis cases relied upon by the Commission. Those previous analyses are based on different texts: "based on" cannot be assumed to have the same meaning as "because of." Instead, to understand this new and distinct phrase, what is needed is a direct examination of the words used in the legislative text.

Textual analysis and the Court's interpretation of the phrase "based on". The dictionary definitions of this new and distinct phrase help to reveal its meaning. As defined by Macmillan Dictionary, to base one thing on another is "to use particular ideas or facts to make a decision, do a calculation, or develop a theory." The Cambridge English Dictionary explains, "If you base something on facts or ideas, you use those facts or ideas to develop it." The Oxford Learner's Dictionaries define the phrase as "to use an idea, a fact, a situation, etc. as the point from which something can be developed."

In contrast to the relatively narrow definition of "based on", the phrase "because of" has an expansive definition that focuses on consequences. In Macmillan Dictionary, "because of" is "used for showing the reason something happens or the reason why it is described in a particular way." The Cambridge English Dictionary defines "because of" as meaning "as a result of." Oxford Learner's Dictionaries explains that "because of" is "used before a noun or noun phrase to say that somebody/something is the reason for something." In short, these definitions focus almost exclusively on ultimate result.

When we use those definitions to understand the statutory text, we see that its domain consists of a person or persons who use protected characteristics as a fact or idea to develop a decision to discriminate. In other words, the phrase "based on" refers directly to the mindset of actors, not the consequences of actions.

There are two other statutes with very similar language to the text at issue, but they are explicitly designed and routinely interpreted to limit or prohibit disparate impact analysis. The first is the Equal Pay Act of 1963, which prohibits paying people of different sexes different amounts using disparate impact; however, 29 U.S.C. § 206 (d)(1)(iv) of that Act makes an exception for "a differential *based on* any other factor other than sex." The Supreme Court understands this clause as prohibiting disparate impact analysis in *Smith v. City of Jackson, Miss.*, 544 U.S. 228, 239 n.11 (2005). Similarly, the Age Discrimination in Employment Act of 1967 contains a traditional disparate impact prohibition in § 623(2), but § 623(f)(1) then limits that to prohibit liability "where the differentiation is *based on* reasonable factors other than age." In both cases, the "based on" language was interpreted by the Supreme Court to prohibit disparate impact analysis for that provision.

For ADEA, as long as the motivating factors are exclusively based on reasonable non-age factors, the Supreme Court interpreted this clause to prohibit disparate impact analysis due to the "based on" clause. *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 609 (1993) ("We now clarify that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age."). Only when this "based on" clause doesn't apply did the Supreme Court find disparate impact analysis appropriate.

Supreme Court's express and unambiguous explanation of the "based on" clause. In *Hazen,* the Court provided the following example of a situation that did have a disparate impact, but one that was nonetheless allowed under the statute because it was "based on" such a non-age factor:

> When the employer's decision is wholly motivated by factors other than age, the problem of inaccurate and stigmatizing stereotypes disappears. This is true even if the motivating factor is correlated with age, as pension status typically is. Pension plans typically provide that an employee's accrued benefits will become nonforfeitable, or "vested," once the employee completes a certain number of years of service with the employer. See 1 J. Mamorsky, Employee Benefits Law § 5.03 (1992). On average, an older employee has had more years in the work force than a younger employee, and thus may well have accumulated more years of service with a particular employer. Yet an employee's age is analytically distinct from his years of service. An employee who is younger than 40, and therefore outside the class of older workers as defined by the ADEA, see 29 U.S.C. § 631(a), may have worked for a particular employer his entire career, while an older worker may have been newly hired. **Because age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is necessarily "age based."**

Hazen, 507 U.S.at 611 (emphasis added). Thus, *Hazen* demonstrates that as long as the motivating factor for digital discrimination of access is analytically distinct from the protected characteristic (even if one is correlated with the other, like age when set against years of service), the person who is wholly motivated by other factors wouldn't be discriminating based on protected characteristics. Therefore, the statutory language at issue in this rule cannot be squared with disparate impact analysis.

Contradictions between the rule and statutory purpose. The proposed rule may undermine poorer households' ability to acquire broadband internet access, contrary to the statutory purpose. With growing increases in private broadband investment and improved internet connectivity, affordability—rather than connectivity—has become the most important barrier to internet access. According to research by education

Superhighway, a non-profit organization dedicated to closing the digital divide, 28.2 million American households do not have high-speed broadband. Sixty-four percent of these households are not connected to the internet because they cannot afford broadband internet, despite the availability of low-cost services from Internet service providers. In contrast, only 25 percent of households, mostly in rural areas, are not connected to broadband due to insufficient wired or wireless broadband coverage —a proportion that will become even lower as rural connectivity improves due to growing private investment and recent broadband subsidies.[3] Instead of focusing on disparate impact assessment and other measures related to the connectivity gap, future broadband policy should focus on reducing the affordability gap and seek to make internet services affordable for all households. However, if the regulatory burden of disparate impact assessment is too high, the associated regulatory and compliance costs could be passed on to consumers in the form of higher prices—further reducing internet access for poorer households and thus contravening the law's statutory purpose.

Conclusion. In conclusion, the Infrastructure Investment and Jobs Act cannot be read to support disparate impact analysis. It does not use the "discriminate … because of …" language that all statutes that permit disparate impact analysis have used. Instead, this statute's "based on" phrase refers directly to the mindset of the actors and requires their decisions to be based on protected characteristics to find fault. The Supreme Court has already interpreted this language to exclude disparate impact analysis. Finally, the policy goals of the statute are contrary to the disparate impact analysis the Commission

[3] The remaining 11 per cent of households are not connected to the internet due to other factors, such as reliance on smartphones, availability of internet access outside the home, and privacy concerns. Education Superhighway, *Bridging the Affordability Gap* 6 (2021), https://www.educationsuperhighway.org/wp-content/uploads/No-Home-Left-Offline-Report_EducationSuperHighway2021.pdf.

has suggested. For these reasons, the Commission should instead issue regulations that confine the statute's application to wrongful decisions by regulated entities, based on or more of the protected characteristics listed in the statute, not to provide service.

Respectfully submitted,

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