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; United States of America,
Respondents.

On Petition for Review from the
Federal Communications Commission
(No. 22-69, FCC 23-100)

BRIEF OF AMICI CURIAE GEORGIA AND 19 OTHER STATES SUPPORTING INDUSTRY PETITIONERS

Christopher M. Carr
Attorney General of Georgia
Stephen J. Petrany
Solicitor General
Paul R. Draper
Deputy Solicitor General
Office of the Georgia
Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 458-3602
pdraper@law.ga.gov
Counsel for Amici States

(Additional counsel listed on signature page)

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INTRODUCTION AND INTERESTS OF AMICI STATES

Amici Curiae, the States of Georgia, Alabama, Alaska, Arkansas, Florida, Idaho, Indiana, Iowa, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Ohio, South Carolina, South Dakota, Tennessee, Texas, and Utah, respectfully submit this brief in support of the Industry Petitioners. *See* Fed. R. App. P. 29(a)(2). The States, as separate sovereigns, have a strong interest in ensuring that federal agencies remain within the bounds of their statutory authority and respect the role of States in our federal system. Unfortunately, the rule at issue here fails on both counts.

The Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429 (2021), is exactly what its title suggests: a funding statute that commits more than a trillion dollars to public infrastructure projects—everything from roads and railways to clean water and green energy. One part of the sprawling law is dedicated to broadband internet services, *see id.* Div. F, appropriating roughly 65 billion dollars to support the deployment of "affordable, reliable, high-speed broadband" throughout America. 47 U.S.C. § 1701(1); *see also* The White House, *Fact Sheet: The Bipartisan Infrastructure Deal* (Nov. 6, 2021),

https://bit.ly/3x6WLA9. Tucked away in this part of the law is a single section, taking up less than a page, that instructs the Federal Communications Commission to "adopt … rules to facilitate equal access to broadband internet access service." 47 U.S.C. § 1754(b).

Based on this alone, the Commission now seeks to erect a far-reaching and intrusive regulatory scheme. For the first time ever, this rule threatens to impose financial liability and unfunded build mandates on broadband industry participants whose business practices are insufficiently equitable in the eyes of the Commission. The rule will apply not just to private broadband providers, but to *any* entity that "affect[s] consumer access to broadband," including local governments that either regulate broadband services or provide it themselves. 89 Fed. Reg. 4128, 4129, 4141–42 (Mar. 22, 2024) (to be codified at 47 C.F.R. pts. 0, 1, 16). It will govern *every* aspect of the industry: deployment, pricing, advertising, customer contracts, data speeds, and more. *Id.* at 4144. And it will impose liability not just for intentional discrimination, but for disparate impacts as well. *Id.* at 4133.

The Commission's rule is flawed on many fronts. Most concerningly for Amici, the rule's incredible scope will marginalize the States' role in facilitating broadband access. In particular, its

disparate impact liability standard threatens to undermine the States' (not to mention the federal government's) efforts to incentivize broadband development through targeted subsidies; the threat of liability for failing to provide equitable broadband everywhere will discourage providers from deploying broadband anywhere.

The rule also exceeds the Commission's statutory authority. Section 60506 simply instructs the Commission to "facilitate" equitable broadband access; it does not give it the power to implement a novel and intrusive regulatory regime. 47 U.S.C. § 1754(b). Even if it gives the Commission some regulatory power, it certainly doesn't include liability for actions that merely have a disparate impact on broadband access. The structure of the Act and every relevant canon of interpretation confirm this conclusion.

Of course, the States oppose discrimination, and many have already taken steps to eliminate disparities in broadband access. But this rule goes well beyond traditional antidiscrimination laws. This Court should not condone the Commission's overreach. It should hold that the rule impermissibly sidelines the States and exceeds the Commission's statutory authority.

ARGUMENT

I. The Commission's rule disregards the role of States in our federal system and imposes a one-size-fits-all liability regime.

"As every schoolchild learns, our Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). The States are governments of plenary power, while the federal government has only those powers specifically enumerated in the Constitution. *See* The Federalist No. 45 (James Madison). Among its many benefits, this system empowers the States to function as laboratories of democracy. *See Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015). "[A] single courageous state may … try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting). If that experiment proves successful, other States can follow suit. If not, then other States need not repeat the mistake.

But with this new digital discrimination rule, the Commission has taken the opposite approach. Rather than allow each State to determine how best to promote broadband access within its borders, the Commission's rule imposes a top-down, one-size-fits-all rule that "micromanage[s] nearly every aspect of how the

Internet functions" in *every* State. Order, FCC 23-100, 2023 WL 8614401, at *168 (Nov. 15, 2023) (Dissenting Statement of Commissioner Carr). It purports to govern infrastructure deployment, pricing, advertising practices, customer contracts, and much more. *See* 89 Fed. Reg. at 4144.

If the Commission is allowed to enforce this intrusive regime, it will leave little room for the States to develop broadband policies tailored to the needs of their respective residents. Plus, because it holds broadband providers liable based on disparate impact alone, it will chill broadband development and undermine the States' efforts to incentivize broadband coverage in underserved areas. In other words, the Commission will fundamentally alter the division of regulatory responsibility between the States and the federal government. But Congress did not authorize such a change in the clear language of § 60506, so that effort must fail.

A. The States have traditionally taken a leading role in facilitating access to telecommunications services. Through the 20th century, for example, States were, "for all practical purposes, exclusively responsible" for the expansion of telephone services within their borders. *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S.

366, 402 (1999) (Thomas, J., concurring in part and dissenting in part).

The same is true of broadband today; States have adopted a wide range of policies to encourage broadband development. Many States, for example, offer subsidies or tax credits to broadband providers who deploy broadband infrastructure in underserved areas or invest in newer broadband technologies. *See, e.g.*, O.C.G.A. § 50-40-81; Ala. Code § 41-23-213; Idaho Code. Ann. § 63-3029I; Iowa Code Ann. § 427.1(40); Minn. Stat. § 116J.396; Tex. Const. art. 3, § 49-d-16; Wis. Stat. Ann. § 196.504; Wyo. Stat. Ann. § 9-12-1501. As noted below, many States specifically empower local governments to operate their own broadband services, *see infra* 14, while other States rely on private enterprise to satisfy demand for broadband, *see, e.g.*, Mont. Code Ann. § 2-17-603(1); Neb. Rev. Stat. § 86-594; Tex. Utils. Code Ann. § 54.202.

Especially relevant here, some States already have consumer-protection and antidiscrimination laws in place that cover internet services like broadband. *See, e.g.*, 220 Ill. Comp. Stat. Ann. § 5/21-1101(a); Tenn. Code Ann. § 7-59-311; Reuters, *AOL Settles with States on Cancellation Complaints* (July 11, 2007), https://reut.rs/3Vy1hSj (detailing a settlement between AOL and

48 States in which AOL agreed to reform its cancellation policies and refund customers for charges imposed after cancellation of service). But even those States that have adopted antidiscrimination statutes for telecommunications companies find liability only when a provider *intentionally* discriminates. *See* 220 Ill. Comp. Stat. Ann. § 5/21-1101(a); Tenn. Code Ann. § 7-59-311(a) (both defining discrimination to mean denial of access "because of" a protected characteristic); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013) (explaining that "because of" means the characteristic "was the reason that the [party] decided to act" (quotation omitted)).

Of course, the States have not been the only players in the game. The federal government has also enacted legislation, like the Communications Act of 1934 and the Telecommunications Act of 1996, to "secure the maximum benefit of [communications technology] to all of the people of the United States." *FCC v. Nat'l Citizens Comm. For Broadcasting*, 436 U.S. 775, 795 (1978) (quotation omitted). But Congress has traditionally opted for *partnership* with the States—a "system of cooperative federalism"—not a federally dominated regime. *T-Mobile S., LLC v. City of Roswell*, 574 U.S. 293, 303 (2015) (quotation omitted).

Federal broadband policy has generally reflected that choice. In fact, Congress has specifically "recognize[d] and encourage[d] complementary State efforts to improve the quality and usefulness of broadband data." Pub. L. No. 110-385, § 102, 122 Stat. 4096, 4096 (2008). Accordingly, it has focused on promoting competition in the broadband market and has pursued that goal chiefly by offering subsidies to incentivize broadband deployment in underserved areas. *See Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 638 (2002); *Reno v. ACLU*, 521 U.S. 844, 857 (1997) (both noting Congress's desire to encourage broadband deployment through market competition). That approach complements the States' own subsidy programs and leaves ample room for the States to enforce their various consumer protection and infrastructure regulations.

B. The Commission's new rule, however, does an about-face. Breathtaking in both scope and detail, the rule purports to govern not just broadband providers, but anyone even tangentially involved in the industry. *See* 89 Fed. Reg. at 4129 (covering any entity that "affect[s] consumer access to broadband"). And it regulates a broad set of practices that the Commission has never before claimed the power to oversee: infrastructure deployment, infrastructure upgrades and maintenance, data speeds, pricing,

credit checks, advertising, customer contracts, and customer service, for a start. *Id.* at 4144. Anytime a covered entity does anything that has even an incidental disparate impact on consumers, the Commission's rule kicks in. *Id.* (specifying that the rule applies not just to "recurring" practices but whenever "a single instance" of disparate impact occurs).

This will inevitably marginalize the States' role in the broadband industry. For one thing, the rule will undermine many carefully considered and tailored state policies because it requires adherence to a disparate-impact standard out of step with the States' own standards for liability. *Compare, e.g.*, 220 Ill. Comp. Stat. Ann. § 5/21-1101(a) *and* Tenn. Code Ann. § 7-59-311(a) (prohibiting discrimination when a broadband provider intentionally denies access based on a protected trait) *with* 89 Fed. Reg. at 4128 (applying much broader disparate impact liability).

More significantly, because the rule adopts a regime of punitive regulation, it will undermine the States' entire approach to broadband policy. The States (and, until now, the Commission) have largely opted to encourage broadband development in underserved areas through free market competition and targeted subsidies. Georgia, for example, has invested more than a billion dollars to expand broadband access in the last few years alone, in

addition to "hundreds of millions" in "public-private partnerships." Press Release, Office of Gov. Brian P. Kemp, *Gov. Kemp Dedicates $240M for New Grant Program to Expand High-Speed Internet, Help Close Digital Divide* (Aug. 12, 2022), https://bit.ly/4amdJc3. And this approach has had great success, leading the private sector to deploy trillions of dollars' worth of broadband infrastructure, much of it in historically underserved areas, in recent decades. *See* U.S. Chamber of Commerce Comment Letter on Draft Final Order at 3–4 (Nov. 6, 2023), https://bit.ly/4ajR8gN.

A regulation that punishes providers for building insufficiently equitable broadband systems or compels them to provide financially impractical services to remedy those perceived inequities will make it much more difficult for the States to incentivize broadband development in the first place. "[T]he specter of disparate-impact litigation [will] caus[e] private developers to" retreat from the market altogether, and the Commission's rule will have "undermine[d] its own purpose as well as the free-market system." *Tex. Dep't of Hous. & Cmty. Affs. v. Inclusive Cmtys. Project, Inc.*, 576 U.S. 519, 544 (2015).

This power grab runs afoul of the most "basic principles of federalism embodied in the Constitution," *Bond v. United States*, 572 U.S. 844, 859–60 (2014) (citation omitted), which permit

federal intrusion on the States' traditional police powers only when Congress authorizes that intrusion in "exceedingly clear language," *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.,* 594 U.S. 758, 765 (2021). Infrastructure, consumer protection, antidiscrimination—these are all fundamental aspects of the States' police power. The Commission cannot intrude on that sphere of authority, and effectively eject the States from broadband policy altogether, based on nothing more than a vague instruction to "facilitate" nondiscriminatory broadband access. 47 U.S.C. § 1754(b); *see also infra* 18–20 (explaining why the instruction to "facilitate" is not a clear delegation of regulatory authority).

Federalism concerns are especially potent where, as here, it is an agency action, and not the statute itself, that purports to upset the balance between state and federal power. *See* Jonathan H. Adler, *The Ducks Stop Here? The Environmental Challenge to Federalism*, 9 Sup. Ct. Econ. Rev. 205, 221 (2001). Congress, as an elected body, is "more solicitous of state concerns than an executive agency." *Id.* So the federalism canon "should operate at its strongest in the context of administrative actions that," like the Commission's rule, "do not directly respond to an explicit legislative command." *Id.* Doubly so when it is an independent

agency, like the Commission, that is "virtually insulated from political forces" and therefore free to ignore state and local concerns. David A. Herrman, *To Delegate or Not to Delegate—That is the Preemption: The Lack of Political Accountability in Administrative Preemption Defies Federalism Constraints on Government Power*, 28 Pac. L.J. 1157, 1181–82 (1997).

On top of that, the Commission's rule ignores another provision in § 60506 that clearly contemplates an independent role for States in promoting broadband development. Subsection (d) explains that States "can" adopt "model policies and best practices" developed by the Commission to facilitate equitable broadband access. 47 U.S.C. § 1754(d). This, of course, implies that States retain the freedom, even under § 60506, to develop their own broadband policies on a state-by-state basis. More importantly, the term "can" means that the States have discretion *not* to adopt the Commission's model policies and practices if they so choose. *See New Oxford American Dictionary* (3d ed. 2010) ("be permitted to"); *cf. Jama v. Immigr. & Customs Enf't*, 543 U.S. 335, 346 (2005) ("The word 'may' customarily connotes discretion."). But that discretion will have little meaning if the Commission is allowed to impose a demanding antidiscrimination rule that

actually *undermines* the States' efforts to promote broadband access through market competition and targeted subsidies.

Simply put, the Commission's rule disregards the States' traditional role in encouraging broadband development as well as language in § 60506 designed to protect that role. Even on its own terms, the statute's general charge to adopt rules "facilitat[ing] equal access to broadband," 47 U.S.C. § 1754(b), is far too thin a reed on which to rest the Commission's novel, far-reaching, and punitive antidiscrimination rule. Congress may have the power to adopt such a regime, but if it wishes to do so, it must use "exceedingly clear language." *Ala. Ass'n of Realtors,* 594 U.S. at 764. Until then, the Commission should respect the States' traditional role in promoting broadband development.

II. The rule threatens to impose liability directly on local governments who offer affordable broadband to their residents.

The Commission's disregard for federalism is reason enough to jettison its new rule. But the rule presents another, more direct threat to the States: it would hold municipalities and other local government entities *directly liable* for perceived inequities in their broadband practices.

Many States, as part of their effort to promote broadband access, have empowered local governments to provide broadband services directly to their residents. *See, e.g.*, Ala. Code § 11-50B-3; Cal. Gov't Code § 25213(aa); Colo. Rev. Stat. § 29-27-103(2); N.C. Gen. Stat. §§ 160A-311 & 160A-340 *et seq.*; Tenn. Code Ann. § 7-52-601. By some counts, well over 400 municipally operated broadband networks already exist in the United States, with more on the way. *See* Sean Gonsalves, *New Municipal Broadband Networks Skyrocket in Post-Pandemic America as Alternative to Private Monopoly Model*, Institute for Local Self-Reliance (Jan. 18, 2024), https://bit.ly/3TpUt84. These local networks increase competition in the broadband market and fill gaps in coverage where private companies cannot afford to provide service. *See, e.g.*, *Tennessee v. Fed. Commc'ns Comm'n*, 832 F.3d 597, 600–603 (6th Cir. 2016). They can also contribute to job growth, guarantee high-speed internet for local schools, and, ideally, generate some profit. *Id.* at 600–602.

Given these benefits, one would expect the Commission to ensure that municipal broadband operations are not threatened by the new rule. After all, § 60506 instructs the Commission to "take steps to ensure that all people of the United States benefit from equal access to broadband internet access service," 47 U.S.C.

§ 1754(a)(3), which is the stated aim of municipal broadband services, *see, e.g.*, Mont. Code Ann. § 2-17-603(2)(a)(i) (providing for municipal broadband where "no private internet services provider is available").

But the rule in fact does the opposite. Instead of safeguarding municipal broadband efforts, it threatens to punish local governments who run afoul of the rule's substantive provisions. *See* 89 Fed. Reg. at 4129 (covering any entity "that facilitate[s]" or "otherwise affect[s] consumer access to broadband"); *id.* at 4142 ("[W]e decline to … carve out" "local governments … from the scope of coverage."). In fact, the Commission warns that liability for local governments will not be limited to their actions as broadband network operators; they could also face liability "based on their roles as right-of-way managers or franchise regulators." *Id.* at 4142.

Liability for local governments is concerning to the States for two reasons. First, although the rule nominally acts on local governments, it has the effect of thwarting statewide broadband policy. "[M]unicipal subdivisions … are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them in its absolute discretion." *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004) (quotation

omitted). Many States have made the decision to enlist municipal governments as a medium for providing affordable broadband to their citizens. Any regime that hinders municipal broadband efforts is a direct obstacle to those States' broadband policies.

This is especially troubling because it is unclear exactly what punishments local governments might be subjected to under the new rule. The only thing that is clear is that the Commission believes it can impose any punishment it "deem[s] necessary." 89 Fed. Reg. at 4148; *see also id.* (insisting the Commission may use any of its "existing enforcement mechanisms"). Faced with the possibility of indeterminate punishment for one-time actions that happen to have a disparate impact on customers, even where those actions were taken in good faith, many municipal broadband operators—like private operators—may opt not to provide service at all. *Cf. United States v. Santos*, 553 U.S. 507, 514 (2008) (lead opinion) ("[N]o citizen should be … subjected to punishment that is not clearly prescribed.").

Second, § 60506 cannot fairly be read to support liability for local governments. That interpretation (again) raises significant federalism concerns because it "interpose[s]" the agency "into th[e] state-subdivision relationship," an intrusion which "must come about by a clear directive from Congress." *Tennessee*, 832 F.3d at

610. And it (again) ignores important textual evidence that Congress did *not* want the Commission to interfere with state and local broadband policy. Remember, subsection (d) says that local governments, like States, "can" choose to adopt or not adopt "model policies and best practices" developed by the Commission to promote equal broadband access. 47 U.S.C. § 1754(d); *see supra* 12–13. This would be an odd if not redundant provision if the statute already empowered the Commission to *directly regulate* local governments.

III. Section 60506 does not authorize *any* direct regulation, let alone a disparate impact regime.

The rule's intrusive scope is compounded by its obvious legal errors. "Administrative agencies are creatures of statute." *NFIB v. Dep't. of Labor*, 595 U.S. 109, 117 (2022). They "possess only the authority that Congress has provided," *id.*, so a reviewing court must set aside any agency action "not in accordance with law" or "in excess of statutory jurisdiction, authority, or limitations," 5 U.S.C. § 706(2)(A), (C). Here, the Commission relies on § 60506's direction to "facilitate equal access to broadband" and "ensure that Federal policies promote equal access." 47 U.S.C. § 1754(b)–(c). The Commission says this provision empowers it to impose liability on anyone even

incidentally associated with the broadband industry whose conduct has a disparate impact on consumers' access to broadband services. *See* 89 Fed. Reg. at 4133, 4141–45.

That contention fails twice over. To start, § 60506 does not give the Commission *any* power to impose punitive antidiscrimination rules. It simply directs the Commission to ensure that federal programs, like the $65 billion in broadband grants created by the Act, are administered with an eye towards equal access. And even if the statute does permit direct regulation, it certainly doesn't authorize the incredibly broad disparate impact regime established by the Commission's new rule.

A. The Commission's argument is on shaky ground from the get-go. On the Commission's reading, the statute empowers it, for the first time ever, to directly police the broadband industry for alleged discrimination. 89 Fed. Reg. at 4141–42. But that assertion has no basis in the text and ignores basic canons of construction.

Start with the text. Section 60506 begins by laying out the goal of federal broadband policy: "equal access to broadband internet." 47 U.S.C. § 1754(a)(1). To that end, the statute then directs the Commission to "adopt rules [that] facilitate equal

access" and reduce digital discrimination based on specified protected criteria like race, religion, and income. *Id.* § 1754(b). The Commission hangs much on the word "facilitate." *See, e.g.*, 89 Fed. Reg. at 4144–45 (arguing that, because "Congress directed the Commission … to facilitate equal access," the Commission can regulate all aspects of broadband service). But, properly read, that term simply instructs the Commission to support government agencies and broadband providers in their efforts to expand broadband services. *See New Oxford American Dictionary* (3d ed. 2010) ("make (an action or process) easy or easier"); *Black's Law Dictionary* (11th ed. 2019) ("To make the occurrence of (something) easier; to render less difficult."). It does not erect an entire system of regulation and liability for broadband providers whose services are insufficiently equitable in the eyes of the Commission.

In reality, § 60506 doesn't purport to regulate the broadband industry *at all*. Unlike a normal civil rights statute, nothing in § 60506 actually makes it unlawful for broadband providers (or anyone else) to adopt business practices that affect different customers differently. Title VII and Title IX, for example, specifically prohibit employers and educational institutions from discriminating on the basis of protected characteristics, and *then*

they empower federal agencies to adopt regulations enforcing those statutory prohibitions. *See* 42 U.S.C. §§ 2000e-2, 2000e-12(a); 20 U.S.C. §§ 1681, 1682. Section 60506, by contrast, has no such prohibition, and "it would be improper to conclude that what Congress omitted from the statute is nevertheless within its scope." *Nassar*, 570 U.S. at 353 (citation omitted). Yet that is precisely what the Commission does here, where it claims that § 60506 empowers it to enforce an imagined prohibition against discriminatory broadband practices.

The other provisions in § 60506 likewise indicate that it does not confer powers as broad as the Commission claims. Subsection (c), for example, directs the Commission to review the federal government's *own* policies to ensure they "promote equal access." 47 U.S.C. § 1754(c). And subsection (d) instructs the Commission to "develop model policies and best practices" that States and local governments can, at their discretion, adopt to reduce broadband discrimination. *Id.* § 1754(d). These are not broad grants of regulatory authority; if anything, they *limit* the Commission's discretion as to how best to promote broadband access. Section 60506 would be a perplexing statute indeed if it conferred sweeping regulatory powers alongside these relatively minor ministerial responsibilities. *Cf. City of Philadelphia v. Att'y*

Gen. of the U.S., 916 F.3d 276, 288 (3d Cir. 2019) ("[H]iding such a broad power … in a statute outlining ministerial duties … would be akin to hiding an elephant in a mousehole.").

Statutory context also suggests the Commission's power should be understood narrowly. Section 60506 is merely a small part of the Infrastructure Act, a *funding* bill whose main function is to allocate hundreds of billions of dollars for infrastructure projects. *See, e.g.*, 47 U.S.C. §§ 1702(b)(2), 1752(i)(2). In light of that, § 60506 is best read as establishing general guidelines for how the government should spend that immense sum of money, i.e., with an eye towards equal access.

The Commission's alternative reading—interpreting § 60506 to authorize punitive regulation—would be a radical departure from the Act's general function. *Contra FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (encouraging courts to interpret statutes "with a view to their place in the overall statutory scheme" (quotation omitted)). After all, "Congress … does not alter the fundamental details of a regulatory scheme," let alone create an entirely new one, "in vague terms or ancillary provisions." *Whitman v. Am. Trucking Ass'ns*, 531 U.S 457, 468 (2001).

On the other hand, if § 60506 really *did* give the Commission the power to police private entities and local governments for digital discrimination, then we would expect it to include some kind of enforcement mechanism. But it has none. And Congress opted not to make § 60506 enforceable through the Communications Act. *See* 89 Fed. Reg. at 4148 (noting that Congress did not "incorporate section 60506 into the Communications Act"); 47 U.S.C. § 502 (limiting Communications Act enforcement power to violations of that Act). The absence of such mechanisms confirms that § 60506 is most naturally read as a "statemen[t] of federal policy," not an enforceable mandate. *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 23 (1981).

Canons of construction bolster that conclusion. As noted above, the Commission's rule disregards basic principles of federalism, upsetting the traditional balance of regulatory power between the States and the federal government. It also flies in the face of the major questions doctrine. Regulating nearly every instance of discrimination (defined to include even disparate impacts) across an entire industry is an enormous power, with considerable implications for both the regulating agency and the regulated industry. When an agency purports to exercise a power

of such "vast economic and political significance," it must show that Congress clearly authorized the agency's action. *NFIB*, 595 U.S. at 117 (citation omitted). The Commission cannot clear this high bar merely by referencing § 60506's instruction to adopt rules "facilitating" equitable broadband development. "Extraordinary grants of regulatory authority," after all, "are rarely accomplished through … vague terms" or "implicit delegation." *West Virginia v. EPA*, 597 U.S. 697, 722–23 (2022) (quotation omitted).

That is especially true where, as here, the rule diverges significantly from how the agency has engaged with the industry in the past. *See Ala. Ass'n of Realtors*, 594 U.S. at 765 (applying the major questions doctrine where no prior regulation had "even begun to approach the size or scope of" the agency's claimed power). Converting from a system of affirmative support, like grants and subsidies, to a system of punitive regulation and unfunded build mandates is not a mere fill-in-the-blank situation; it is a significant policy choice that Congress would presumably spell out in clear terms.

If, somehow, the Commission is right that § 60506 gives it the authority to adopt *any* kind of antidiscrimination regime (disparate treatment or disparate impact) and enforce it against *any* entity (private or municipal) even *tangentially* involved in the

broadband industry, then the statute itself is constitutionally suspect under the non-delegation principle. Congress may not give up its quintessential legislative powers to a federal agency. *Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019). Of course, it can confer rulemaking authority, but it must articulate an "intelligible principle" to guide the agency's discretion. *Id.* Yet while this statute identifies a general goal (less discrimination in the broadband industry), on the Commission's view, it apparently gives no direction on fundamental policy questions. Does the prohibition on discrimination cover disparate impact or only disparate treatment? Who is subject to the rule? What penalties should the Commission impose on noncompliant broadband providers? On these core issues, "Congress has declared no policy, has established no standard, has laid down no rule." *Panama Refining Co. v. Ryan*, 293 U.S. 388, 430 (1935).

Ensuring that fundamental policy choices remain with Congress—in the broadband context and elsewhere—is particularly important to the States. Unlike federal agencies, members of Congress are incentivized to consider state interests because they are accountable to local and statewide constituencies. *See* Adler, *The Ducks Stop Here?*, 9 Sup. Ct. Econ. Rev. at 221; *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 908

(2000) (Stevens, J., dissenting). And when the federal government ignores structural "constraints" like the separation of legislative and executive functions, it accrues "more power than the Constitution contemplates, at the expense of state authority." Bradford R. Clark, *Separation of Powers as a Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1324 (2001).

Thankfully, the constitutional concerns raised by the Commission's interpretation can be avoided. Instead of reading the statute to "push the limit of congressional authority," as the Commission does, this Court should hold that § 60506 does not confer the unbounded regulatory power claimed by the Commission. *Union Pac. R.R. Co. v. U.S. Dep't of Homeland Sec.*, 738 F.3d 885, 893 (8th Cir. 2013) (quotation omitted).

B. Even if § 60506 permits some kind of regulation for the broadband industry, it does not give the Commission the power to punish practices that merely have a disparate impact. *See* 89 Fed. Reg. at 4128 (defining "digital discrimination" as any practice "that differentially impact[s] consumers' access to broadband"). At most, the statute covers intentional discrimination. The Commission's claim to the contrary ignores the language of the statute and relevant caselaw.

Again, the text is clear. The Commission is directed to "preven[t] digital discrimination of access *based on* income level, race, ethnicity, color, religion, or national origin." 47 U.S.C. § 1754(b)(1) (emphasis added); *see also id.* § 1754(c) (using the same "based on" language). And discrimination is "based on" a characteristic only when that characteristic was the principal "justification" or "reaso[n] behind" the discriminatory action. *Basis*, *New Oxford American Dictionary* (3d ed. 2010); *see also Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 63–64 & n.14 (2007) (explaining that "based on" is the equivalent of "because of" and indicates a "but-for causal relationship"). In other words, the phrase "based on" requires discriminatory *purpose*.

By contrast, nothing in § 60506 suggests Congress meant to cover disparate impacts. Statutes targeting discriminatory effects generally include language "looking to consequences" rather than intent. *Inclusive Cmtys. Project, Inc.*, 576 U.S. at 534–35. The Voting Rights Act, the Americans with Disabilities Act, and Title VII, for example, all include language prohibiting actions that "resul[t] in" or "have the effect of" disadvantaging, or "otherwise adversely affect," protected groups. *See* 52 U.S.C. § 10301(a); 42 U.S.C. §§ 12112(b)(3)(A), 12182(b)(1)(D)(i); 42 U.S.C. § 2000e-2(a)(2). Congress clearly knows how to target disparate impact

discrimination when it wants to. It chose not to do that here, and the Commission must respect that choice.

Statutory structure and context shed some light here as well. Construing § 60506 to potentially hold providers and local governments liable when they deploy broadband somewhere, but not everywhere at the same time and not always on the same terms, discourages them from deploying broadband *anywhere*. The specter of liability will chill development. And that will, in turn, frustrate the Infrastructure Act's core function: committing billions of dollars to encourage broadband development in underserved locations. For the same reason, it will also undermine the States' efforts to promote broadband development through their own grant programs. *See supra* 9–10; *see also County of Maui v. Hawaii Wildlife Fund*, 590 U.S. 165, 185 (2020) (warning that agency decisions should not contradict "statutory objectives" or "ris[k] … undermining state regulation"). Surely Congress did not write a statute so at war with itself.

A rule focusing on *intentional* discrimination would avoid this problem. It would guard against discrimination while ensuring that broadband providers and local governments are able to focus their efforts on the most cost-effective projects that bring broadband service to the greatest number of people. *See* AT&T

Comment Letter on Notice of Inquiry at 17 (May 16, 2022), https://bit.ly/3PvEz9E (explaining that "investing in lower cost or higher demand areas" improves "the overall pace of deployment and adoption"). It would actually further the Infrastructure Act's general purpose rather than thwart it. And it would complement, rather than undermine, the States' parallel efforts to encourage equitable broadband development.

* * *

The Commission's rule will not help the broadband industry. Nor will it help Americans who still lack access to affordable broadband services. Instead, it will impose difficult-to-predict liability and burdensome compliance costs on broadband providers who simply seek to provide cost-effective and profitable service to as many customers as possible. And it will make it much harder for States to help broadband providers in those efforts. Congress plainly did not contemplate such a regime when it passed the Infrastructure Act.

CONCLUSION

The Commission's novel antidiscrimination rule goes well "beyond what Congress has permitted it to do." *City of Arlington v. FCC*, 569 U.S. 290, 298 (2013). This Court should remedy that overreach, hold the Commission's order unlawful, and set it aside.

Respectfully submitted,

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/s/ *Paul R. Draper*
Christopher M. Carr
Attorney General of Georgia
Stephen J. Petrany
Solicitor General
Paul R. Draper
Deputy Solicitor General
Office of the Georgia
Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 458-3602
pdraper@law.ga.gov
Counsel for Amici States

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General of Alabama

TREG TAYLOR
Attorney General of Alaska

TIM GRIFFIN
Attorney General of Arkansas

ASHLEY MOODY
Attorney General of Florida

RAÚL R. LABRADOR
Attorney General of Idaho

THEODORE E. ROKITA
Attorney General of Indiana

BRENNA BIRD
Attorney General of Iowa

RUSSELL COLEMAN
Attorney General of Kentucky

LIZ MURRILL
Attorney General of Louisiana

LYNN FITCH
Attorney General of Mississippi

ANDREW BAILEY
Attorney General of Missouri

AUSTIN KNUDSEN
Attorney General of Montana

MICHAEL T. HILGERS
Attorney General of Nebraska

DAVE YOST
Attorney General of Ohio

ALAN WILSON
Attorney General of South Carolina

MARTY J. JACKLEY
Attorney General of South Dakota

JONATHAN SKRMETTI
Attorney General of Tennessee

KEN PAXTON
Attorney General of Texas

SEAN D. REYES
Attorney General of Utah

CERTIFICATE OF COMPLIANCE

Under Fed. R. App. P 29(a)(4)(G), Fed. R. App. P. 32(g) and Local R. 25A, I certify the following:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 5,558 words, excluding those parts exempted by Fed. R. App. P. 32(f), as counted by the word-processing system used to prepare the document.

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April 29, 2024

/s/ *Paul R. Draper*
Paul R. Draper

CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

April 29, 2024

/s/ *Paul R. Draper*
Paul R. Draper