

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

**In the Matter of
Infrastructure Investment and Jobs Act: Prevention and
Elimination of Digital Discrimination**

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) **GN Docket No.**
) **22-69**
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REPLY COMMENTS OF THE NATIONAL HISPANIC MEDIA COALITION

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I. INTRODUCTION

The National Hispanic Media Coalition (NHMC) respectfully submits the following reply comments to the Federal Communication Commission (FCC) in response to the Commission’s request for comment via Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination.¹ NHMC is a 37-year-old nonprofit organization that advocates for civil rights and eliminating hate, racism, and discrimination against the Latino community. NHMC utilizes education, policy work, and media advocacy to achieve these goals. As a nonprofit focused on digital equity, we understand the importance of addressing the barriers that are sustaining the digital divide and believe that it is crucial that the Commission produces a final rule that protects equal access to reliable broadband internet service.

Our current world is overwhelmingly digital, and the absence of reliable, high-speed internet continues to disproportionately affect communities of color. The Latino community’s success, sustainability, and prosperity are directly associated with our ability to safely and meaningfully access the internet. This is why NHMC’s 2023 policy priorities are centered around the belief that “We are the rule, not the exception.”² Reliable and equitable internet access should be available to all, not just the few. Therefore, NHMC is glad to provide comments to the Commission on the Infrastructure Investment and Jobs Act as it is crucial to increase equity for Latinos in the U.S.

II. THE COMMISSION SHOULD ADOPT A DISPARATE IMPACT FRAMEWORK TO SERVE ALL THOSE IMPACTED BY DIGITAL DISCRIMINATION.

The National Hispanic Media Coalition, much like our civil rights allies, such as The Leadership Conference on Civil and Human Rights, Common Cause, and the American Civil

¹ *Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination*, Notice of Proposed Rulemaking, 23 FCC Rcd 00551("NPRM").

² *National Hispanic Media Coalition 2023 Policy Priorities*, <https://www.nhmc.org/2023-priorities/> (last visited Feb. 21, 2023).

Liberties Union, believes the Commission should take a compendious approach in defining digital discrimination with a definition rooted in disparate impact that is comprehensive and goes beyond the scope of service for consumers and non-consumers.³ Digital discrimination is a universal and intersectional issue; not including non-consumers in the consideration for regulations surrounding digital discrimination, millions will be left out, further increasing the lack of connection with an increasingly digital world.

By definition disparate impact centers on the crux of unintentional discrimination. While unintentional, the effects of discrimination create barriers to participation and participation. Disparate impact continues to be the “norm” for civil rights protection against discrimination, and was reaffirmed as the proper framework of analysis for discrimination cases by the Supreme Court within the last decade.⁴ As NHMC and allies laid out in our original comments, adopting a disparate treatment requirement as a part of the Commission’s definition of digital discrimination also limits this rulemaking’s enforcement capabilities by allowing Internet Service Providers (ISPs) the opportunity to use a lack of evidentiary proof of discriminatory intent as a defense against fault or remedy.⁵ This effectively removes the “teeth” of this rulemaking and misaligns the purpose of the Commission’s intervention in instances of digital discrimination in favor of corporate interests and deep pockets, as opposed to the protection of all consumers and their access to universal service. NHMC reiterates our position that it is crucial the Commission adopt a definition of digital discrimination that is rooted in and aligns with disparate impact in order to capture and include all forms of digital discrimination.

³ The Leadership Conference on Civil and Human Rights, American Association of People with Disabilities, American Civil Liberties Union, Common Cause, Communications Workers of America, et al. Comments at 2-4.

⁴ *Texas Department of Housing and Community Affairs v. The Inclusive Communities Project*, 135 S. Ct. 2507 (2015).

⁵ National Hispanic Media Coalition Comments at 7.

III. THE COMMISSION SHOULD ADOPT A DEFINITION OF DIGITAL DISCRIMINATION THAT CENTERS DISCRIMINATORY EFFECTS.

NHMC strongly supports the interpretations of our civil rights allies who have argued in favor of disparate impact throughout the docket of this *Notice*. The comments of The Leadership Conference on Civil and Human Rights, The Lawyers’ Committee for Civil Rights Under Law, and the collective comments of the National Urban League (NUL), the National Coalition on Black Civic Participation (NCBCP), Black Women’s Roundtable (BWR), and National Action Network (NAN) effectively demonstrate that both Congress’ directive and the Commission’s legal authority support a comprehensive interpretation of digital discrimination that includes disparate impact.⁶ NHMC urges the Commission to consider the arguments made in these previous comments and ensure that the definition of digital discrimination centers on the *discriminatory effects* that the policies and practices of Internet Service Providers (ISPs) have on historically and intentionally marginalized people.

NHMC agrees that the broad, results-oriented language in section 60506 of the Infrastructure Investment and Jobs Act (IIJA) supports a disparate impact interpretation. In subsection (a), Congress charges the Commission with “taking steps to ensure that all people of the United States benefit from equal access to broadband internet access service.”⁷ In order to accomplish this goal of ensuring equal access to “all,” the Commission must be equipped to assist people who experience both intentional and unintentional discrimination. Subsection (b) reinforces this interpretation as it directs the Commission to not only “prevent” digital

⁶ Comments of the Leadership Conference on Civil and Human Rights, WC Docket 22-69 at 8 (filed May 16, 2022) (Leadership Conference Comments); Comments of Lawyers’ Committee for Civil Rights Under Law, Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, Notice of Inquiry, GN Docket No. 22-69 at 27 (filed May 16, 2022) (Lawyers’ Committee Comments); National Urban League, National Coalition on Black Civic Participation, Black Women’s Roundtable & National Action Network Comments.

⁷ Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429, §60506(a)(3) (2021), codified at 47 U.S.C. § 1754(a)(3).

discrimination of access, but also to “eliminate” this discrimination.⁸ As stated in the comments of the Lawyers’ Committee for Civil Rights Under Law, “these statements focus on getting people online, not just holding bad actors accountable for animus.”⁹ Focusing only on disparate intent would not allow the Commission to accomplish these goals as set forth by Congress, as unintended discriminatory effects would still prevent large portions of the population from equal access to broadband.

Furthermore, NHMC agrees that although the definition and application of digital discrimination is new, the Commission’s authority in cases of discrimination is not.¹⁰ Section 202 of Title 47 prohibits “any unjust or unreasonable discrimination” by common carriers and states that it is illegal to either give an advantage to certain groups or disadvantage certain groups.¹¹ By focusing on the consequences of discrimination, this section should also be interpreted as encompassing disparate impact.¹² As such, it is not beyond the scope of the Commission’s authority to apply a similar interpretation to section 60506.

Finally, as highlighted by the comments of the Leadership Conference and the National Urban League, there is an important precedent for administering disparate impact in existing civil rights law. For example, the Leadership Conference highlights the successful use of the Fair Housing Act (FHA) to support claims of “disproportionate discriminatory impact.”¹³ Their comments also point to the Affirmatively Furthering Fair Housing provision of the FHA and the Equal Credit Opportunity Act as legal blueprints for implementing the new definition of digital discrimination as outlined above.¹⁴ These acts and provisions have been especially important and

⁸ *Id.* at §60506(b)(1-2).

⁹ Lawyers’ Committee Comments at 27.

¹⁰ Leadership Conference Comments at 8.

¹¹ 47 U.S.C. § 202(a).

¹² Lawyers’ Committee Comments at 36.

¹³ Leadership Conference Comments at 9.

¹⁴ *Id.* at 10-11.

effective for addressing discrimination against historically and intentionally marginalized groups, like Latino communities, where intent is difficult to prove due to systemic discrimination; the processes that have historically disenfranchised and disadvantaged our communities are often recreated or exacerbated by new policies and practices that might not explicitly intend to discriminate, but do nothing to prevent additional discriminatory effects. The Commission must take this into account when moving forward with their own definition and implementation. The following section discusses several examples of these processes and the barriers they create to equal access of broadband and stresses the real-world significance of taking disparate impact into account.

IV. THE COMMISSION SHOULD HOLD INTERNET SERVICE PROVIDERS ACCOUNTABLE BASED ON A HISTORY OF DIGITAL DISCRIMINATION AGAINST HISTORICALLY MARGINALIZED AND INTENTIONALLY UNDERSERVED COMMUNITIES.

NHMC strongly supports the Commission’s efforts in combating digital discrimination as prior examples of digital discrimination against historically and intentionally underserved communities by Internet Service Providers demonstrates the dire need for intervention and definitive regulation by the FCC. Issues with broadband access and affordability have been long standing, maintaining the digital divide. These issues perpetuate digital redlining, now often referred to as digital discrimination. As illustrated by NUL, NCBCP, BWR, and NAN, it is imperative that the Commission recognizes the “history of how market-based approaches and state and local public policies and laws related to broadband deployment and broadband adoption have created disparities in connectivity” when defining digital discrimination.¹⁵ Digital redlining stems from the practice of redlining where geographical areas of majority People of Color were

¹⁵ The National Urban League, National Coalition on Black Civic Participation, Black Women’s Roundtable, and National Action Network Comments at 3.

labeled as “risky,” resulting in less financial investment.¹⁶ While labeling areas in this way is now illegal, the harmful effects are still pervasive with these areas having less generational wealth.¹⁷ In this digital age, it is vital for communities across America to have access to affordable and high-speed broadband in order to compete in the digital economy, utilize telehealth services, and engage with educational resources online. It is imperative that ISPs take initiative against digital discrimination and be held accountable for depriving communities of these critical resources in the digital age.

Internet service providers, whether intentionally or not, have continued to discriminate against historically redlined areas. A study done by The Markup highlighted the disparity between the quality of internet offered to low-income communities and to affluent communities.¹⁸ Internet service providers, including AT&T, Verizon, Earthlink, and CenturyLink, consistently offered lower-speed internet access at a worse value in areas of lower income or areas populated by People of Color. For example, in 60 percent of the cities studied, providers offered the worst deals to the least-White communities.¹⁹ Internet service providers, such as Verizon, cite economic feasibility as the main explanation for providing slow internet to lower-income communities.²⁰ As discussed by The Leadership Conference, “providers must not be able to use claims of ‘technical and economic feasibility’ to circumvent the statute,” as ISPs should be held accountable for the long standing discrimination that deprives these communities of internet access. In addition, Latinos and Black Americans have a limited selection for

¹⁶ Shara Tibken, *The Broadband Gaps Dirty Secret: Redlining Still Exists in Digital Form*, (June 28, 2021), <https://www.cnet.com/home/internet/features/the-broadband-gaps-dirty-secret-redlining-still-exists-in-digital-form/>

¹⁷ *Id.*

¹⁸ *Dollars to Megabits, You May Be Paying 400 Times as Much as Your Neighbor for Internet Service*, (October 19, 2022), <https://themarkup.org/still-loading/2022/10/19/dollars-to-megabits-you-may-be-paying-400-times-as-much-as-your-neighbor-for-internet-service>

¹⁹ *Id.*

²⁰ *Comments of Verizon*, GN Docket 22-69 (2023).

broadband providers at every speed.²¹ In urban areas, White people have an average of 2.03 wired ISPs offering service at downstream speeds of 3Mbps and higher, while ISPs for Latinos have an average of 1.97 and 1.98 for Black people.²² The disparities are consistent with rural populations as well, with Latinos and American Indians/Alaska Natives having much lower speeds. Marginalized communities are more likely to have one wired-internet provider or no wired options at all.²³ Areas with the worst broadband offers are the same communities that have been historically redlined because of discriminatory practices.²⁴ In addition, the Asian Americans Advancing Justice comments highlight the intersectionality of marginalized communities and non-English speakers, as these populations are most vulnerable to digital discrimination.²⁵ The FCC and ISPs should ensure that funding is allocated to non-English programs and resources to extend equitable access to non-English speaking households, mainly of immigrant backgrounds.²⁶ Steps must be taken by the FCC to prevent internet service providers from using this excuse to limit marginalized communities' access to the internet. Otherwise the consequences of digital redlining will continue to negatively impact low-income communities and communities of color.

V. CONCLUSION

On behalf of the Latino community across America, NHMC values the FCC for recognizing the importance of addressing digital discrimination in our legislation. We want to amplify the comments of our civil rights allies as well as highlight the disparate impact and

²¹ The Leadership Conference Comments at 6.

²² S. Derek Turner, *Digital Denied: The Impact of Systemic Racial Discrimination on Home-Internet Adoption*, (December 2016), https://www.freepress.net/sites/default/files/legacy-policy/digital_denied_free_press_report_december_2016.pdf

²³ *Id.*

²⁴ *Dollars to Megabits, You May Be Paying 400 Times as Much as Your Neighbor for Internet Service*, (October 19, 2022),

<https://themarkup.org/still-loading/2022/10/19/dollars-to-megabits-you-may-be-paying-400-times-as-much-as-your-neighbor-for-internet-service>

²⁵ Asian Americans Advancing Justice Comments at 2.

²⁶ *Id.*

examples of discrimination by Internet Service Providers nationwide. As an organization, we are committed to holding institutions, agencies, and corporations accountable. The Latino community and our fellow marginalized communities should not be limited in this digital age. It is imperative that ISPs are held accountable and take action to ensure that broadband access is accessible, affordable, and at the same speeds for all, because digital rights are human rights.