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Press Release

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USING FCC'S FABRIC DATA, PHOENIX CENTER FINDS NO EVIDENCE OF "DIGITAL DISCRIMINATION"

Not only are the Digital Discrimination provisions of the Infrastructure Act unnecessary but it seems unlikely that a threshold requirement of a prima facie case of disparate impact – a difference in access – can be empirically supported

WASHINGTON, D.C. – Ubiquitous broadband deployment has been a federal goal since the enactment of Telecommunications Act of 1996. Billions have been spent to achieve it, yet the availability gap persists. In an attempt to close this gap once and for all, the Infrastructure Investment and Jobs Act of 2021 ("Infrastructure Act") allocated, among other funds, \$42.5 billion to create the Broadband Equity Access and Deployment ("BEAD") program, and the federal government has begun sending those funds to state agencies in charge of allocating the funds to unserved and underserved areas. Despite appropriating sufficient funding to ensure (near) universal availability, the Infrastructure Act also includes Section 60506—labeled "Digital Discrimination"—which requires the Federal Communications Commission ("FCC") to "take steps to ensure that all people of the United States benefit from equal access to broadband internet access service" and to issue rules to prevent "digital discrimination of access based on income level, race, ethnicity, color, religion, or national origin," all while taking into account the issues of "technical and economic feasibility." With Congress spending billions for the ostensible purpose of ensuring (near) universal availability in the Infrastructure Act, also including a provision in the same statute to ensure equal broadband availability among particular groups seems redundant but Section 60506 is now law and the Commission must develop rules to implement the Act.

In anticipation of its November 2023 Open Meeting, on October 25, 2023, the Commission posted a draft copy of its final order implementing Section 60506. In its *Draft Order*, the FCC announced that it will use "disparate impact analysis"—i.e., the agency will look at the *effects* of broadband providers' investment decisions—to determine whether a carrier has engaged in "digital discrimination of access." In a new policy paper released today entitled *Digital Discrimination Under Disparate Impact: A Legal and Economic Analysis*, the Phoenix Center finds no evidence of digital discrimination.

The Phoenix Center's scholars conduct an empirical analysis of racial discrimination in broadband access motivated by the caselaw on disparate impact analysis. Using data from the Commission's new broadband fabric data, as recommended by the Commission's draft final rules, they test for differences in broadband availability between predominantly minority and majority census block groups and find no evidence of digital discrimination. In fact, they find that, if

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anything, minority groups have better access to broadband than do Whites. Accordingly, a *prima facie* case of disparate impact is unlikely to be empirically supported.

“The FCC’s Draft Order is stunningly onerous and unnecessarily adversarial,” says study co-author Phoenix Center Chief Economist Dr. George S. Ford. “Yet the FCC did not bother to study whether there is a sufficient problem to warrant such a profound intervention. We did so and we find no evidence to support the presence of digital discrimination, rejecting the need for such an aggressive regulatory approach.”

“Net Neutrality by Title II pales in comparison to this regulatory Titanic,” says study author Phoenix center President Lawrence J. Spiwak. “Absent any credible evidence of digital discrimination—and there is none—a more measured approach to digital discrimination makes more sense.”

A full copy of PHOENIX CENTER POLICY PAPER NO. 61, *Digital Discrimination Under Disparate Impact: A Legal and Economic Analysis*, may be downloaded free from the Phoenix Center’s web page at: <https://phoenix-center.org/pcpp/PCPP61Final.pdf>.

The Phoenix Center is a non-profit 501(c)(3) organization that studies broad public-policy issues related to governance, social and economic conditions, with a particular emphasis on the law and economics of the digital age.