

No. 24-1179 (and consolidated cases)

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

MINNESOTA TELECOM ALLIANCE, *et al.*,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

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

**BRIEF OF THE NATIONAL ASSOCIATION OF
MANUFACTURERS AS *AMICUS CURIAE*
IN SUPPORT OF INDUSTRY PETITIONERS**

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CORPORATE DISCLOSURE STATEMENT

Pursuant to the Federal Rule of Appellate Procedure 26.1 and 8th Circuit Rule 26.1A, *amicus curae* the National Association of Manufacturers (“NAM”) makes the following disclosure:

The NAM is a nonprofit trade association representing small and large manufacturers in every industrial sector and in all 50 states. The NAM has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTEREST OF *AMICUS CURIAE*¹

The National Association of Manufacturers (“NAM”) is the largest manufacturing association in the United States, representing small and large manufacturers in all 50 states and in every industrial sector. Manufacturing employs nearly 13 million men and women nationally, contributes \$2.85 trillion annually to the U.S. economy, has the largest economic impact of any major sector, and accounts for over half of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. Because an important function of the NAM is to represent its members’ interests before the courts, the NAM regularly files briefs in cases presenting issues of importance to manufacturers.

This case presents deeply consequential questions regarding the future of broadband for U.S. manufacturers. Manufacturing is an

¹ Pursuant to Fed. R. App. P. 29(a)(4)(E), no counsel for a party authored this brief in whole or in part. No person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Pursuant to Fed. R. App. P. 29(a)(2), the parties have consented to the filing of this brief.

increasingly interconnected field, especially as pivotal new technologies become available. These technologies, and the innovative products they help create, produce an incredible amount of data, which requires fast, reliable connections. The NAM believes that its members' dependence on the availability and advancement of broadband technology allows it to provide a unique perspective that will assist the Court in resolving this case. *See* Fed. R. App. P. 29(a)(3).

INTRODUCTION AND SUMMARY OF ARGUMENT

The Federal Communications Commission (“FCC”), in implementing its “Prevention and Elimination of Digital Discrimination” Rule (“Digital Discrimination Rule” or “Rule”), has gone far beyond what Congress intended. *See* The Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, 89 Fed. Reg. 4128 (Jan. 22, 2024) (to be codified at 47 C.F.R. pts. 0, 1, 16) [hereinafter FCC Rule]. Congress passed the Infrastructure Investment and Jobs Act of 2021, Pub. L. 117-58, 135 Stat. 429 (2021) (“IIJA” or “Act”), to address the many and varied infrastructure challenges facing modern America, including the availability and reliability of high-speed internet. Section 60506 of the IIJA provides that intentional discrimination in the

deployment of broadband based on race and class (among other factors) is prohibited, and orders the FCC to pass rules to implement that prohibition. 47 U.S.C. § 1754(b). But the Digital Discrimination Rule goes much further and bans not just *intentional* discrimination, but also any deployment that has a disparate impact on specified groups within a service area. FCC Rule at 4133.

The disparate impact standard unilaterally imposed by the Rule will hobble broadband deployment. Because no broadband provider can deploy everywhere at once, any broadband provider could find itself under investigation and facing substantial liability for engaging in “discrimination” under the FCC’s standard even if it bases capital-investment decisions on neutral factors other than income or race, such as household density, relative construction costs, and expected demand. By basing significant liability on a broad and nebulous standard—presenting providers with a choice between not expanding their networks or expanding in the face of potentially devastating liability—the Rule will deter investment in critical broadband infrastructure. That will harm manufacturers, which increasingly need high-speed, reliable broadband to process the enormous amount of data they create and use. Mfg.

Leadership Council, *Manufacturing In 2030 Project: The Next Phase of Digital Evolution* 14-15 (2022).

By enacting the Rule, the FCC impermissibly attempts to resolve a major question—one with extraordinary nationwide social, economic, and political consequences—without clear congressional authorization. *See West Virginia v. EPA*, 597 U.S. 697, 723 (2022). Nowhere in the IIJA does Congress instruct the FCC to penalize broadband employers for expanding broadband access unevenly. *See id.* Congress instructed the FCC only to create rules to prevent *intentional* discrimination in the deployment of broadband, not deployments that have disparate impacts. *Id.* Because the FCC can point to no clear congressional authorization for the disparate impact provision in its Rule, the Rule is invalid.

Broadband providers should not be subject to devastating liability under a far-reaching rule that expands their responsibilities light years beyond the statute and addresses a major question without appropriate congressional authorization. This Court should vacate the Rule.

ARGUMENT

I. The Disparate Impact Standard Will Discourage the Development of High-Speed Internet, Harming American Businesses and Manufacturers.

American manufacturers rely on high-speed internet to innovate and succeed in the modern global economy. Manufacturers increasingly produce and use massive amounts of data, all of which is of little value to them without the ability to analyze and share it across high-speed broadband networks. Mfg. Leadership Council, *supra*, at 15 (2022). Despite purporting to “address policies and practices that impede equal access to broadband,” the Rule will serve to make access to broadband more difficult to achieve by discouraging providers from expanding their networks. Though the enabling Act prohibits intentional discrimination in broadband deployment, the Rule goes far beyond that, penalizing deployment that is not sufficiently even in all sections of a broadband provider’s service area. *See* 47 U.S.C. § 1754. By subjecting broadband providers to the risk of significant liability for unintentional discrepancies in access under a broad and vague standard, the Rule will discourage critical broadband investment, making it impossible for American manufacturers to compete in the global economy.

A. American Manufacturers Rely on High-Speed Internet to Innovate

The Fourth Industrial Revolution, often referred to as Industry 4.0, is the digitization of the manufacturing process upending American manufacturing by offering manufacturers the ability to process enormous amounts of data faster than ever before using “smart factories.” McKinsey & Co., *What are Industry 4.0, the Fourth Industrial Revolution, and 4IR?* (Aug. 17, 2022), <https://bit.ly/3W1TDzQ>; Mfg. Leadership Council, *supra*, at 14. “Smart factories,” or cyber-physical systems, are interconnected networks of smart machines that form “The Internet of Things.” They use advanced technology such as artificial intelligence to analyze manufacturing data, drive automated production processes, and learn as they go.² This innovation offers particular advantages, including the ability to sense when machinery needs maintenance before it breaks and the power to monitor production status instantly. Anil Bhaskar, *How IoT Is Transforming the Manufacturing Industry*, FORBES (Sep. 28, 2022,

² Alejandro Lavopa & Michele Delara, *What is the Fourth Industrial Revolution?*, INDUS. ANALYTICS PLATFORM (Jan. 2021), <https://bit.ly/43Zrn2K>; *What Is a Smart Factory?*, SAP (last visited Apr. 16, 2024), <https://bit.ly/3xyCyTT>.

10:15 AM), <https://bit.ly/3xwbbd8>. Smart factories also allow just-in-time supply chains to base their inventories on real-time data collected from smart manufacturing machines along the supply chain, reducing excess inventory and increasing efficiency. *What Is a Smart Factory?*, *supra*, note 2. Smart factories depend on reliable high-speed internet to process the large amounts of data generated in the production process. *How Close Is the Smart Factory of the Future?*, Nat'l Ass'n of Mfrs. (Mar. 7, 2024, 9:45 AM), <https://bit.ly/3UhytMM>. Industry 4.0 is taking place as middle-class spending power is increasing globally, creating a large potential consumer base and creating immense opportunity for American manufacturers to reestablish their competitive edge in the global economy. Mfg. Leadership Council, *supra*, at 11.

These technological advances are not a given. Their success depends upon the expansion of broadband. The promise of smart factories and the Internet of Things can be realized only if internet speed and capacity continue to grow at a historic pace. Lee Rainie et al., Pew Rsch. Ctr., *Killer Apps in the Gigabit Age* 8 (2014), <https://bit.ly/4aB8e9T>. The huge amount of data produced and consumed by each of these innovations requires advances in communications technology; fast

broadband is the lynchpin of these new technologies.³ Manufacturing data volumes are expected to balloon by 200% to 500% in the coming years. Mfg. Leadership Council, *supra*, at 14 (2022). American manufacturers increasingly report that they intend to spend on information, operational, and communications technologies to capitalize on the opportunities presented by the growth of the global middle class. *Id.* at 12-13. 5G networks offer higher bandwidth and lower latency than older forms of cellular technology, and they are rapidly becoming the new standard: 27% of manufacturers are already invested in 5G networks, and 52% are either actively planning investments or are considering investing in the near future. *Id.* at 15 (2022). With the transition to 5G well underway, the advent of 6G networks—which can support data rates of one terabyte per second, over 100 times faster than 5G networks—present even greater opportunities. *See id.*; Bernard Marr, *6G Is Coming: What Will Be the Business Impact?*, FORBES (Mar. 17, 2023),

³ *See* Ann Bosche et al., Bain & Co., *Unlocking Opportunities in the Internet of Things* 1 (2018), <https://bit.ly/3Q4gRBx>; Rainie et al., *supra*, at 2.

<https://bit.ly/4aBbAcW>. These advancements are only possible if manufacturers can access reliable, high-speed broadband networks.

American manufacturers will be at a global disadvantage without the expansion of fast, reliable, and widely available 5G and 6G broadband networks. In the United States there are only 4.7 5G sites per 10,000 people; in China, there are 14.1. Dan Littman et al., Deloitte, *5G: The Chance to Lead for a Decade*, 5 (2018), <https://bit.ly/3VTR037>. The number of sites is crucial to the function of a 5G network. 5G network speed and coverage depend on network density, meaning that the less-dense American 5G network may be slower and spottier than its foreign counterparts. *Id.* at 4-5. Unless American manufacturers can process and utilize their data at the same rates, if not faster, than those of their international competitors, American manufacturers will be unable to use the technologies necessary to innovate and capitalize on growing global opportunities to the full potential. A rule that slows the rollout of these revolutionary broadband technologies could hobble American manufacturing and set our nation's manufacturers back decades.

B. The Risk of Liability Under the Rule’s Broad and Vague Standard Will Chill Broadband Deployment.

The Act is a bold attempt to solve the numerous and varied infrastructure problems facing the United States. One such problem is the availability, affordability, and adoption of high-speed internet. 47 U.S.C. § 1754. The Act aims to ameliorate delays in broadband development by, among other measures, providing subsidies to promote the deployment and adoption of high-speed internet access, promoting price transparency, and promoting broadband access. IIJA at §§ 60502(a), 60502(c), 60506. Section 60506 of the IIJA, entitled “Digital Discrimination,” declares it the policy of the United States, “insofar as technically and economically feasible,” to ensure that subscribers have equal access to broadband internet service within a given provider service area. 47 U.S.C. § 1754(a). Section 60506 directs the FCC to enact rules in furtherance of this policy, “taking into account the issues of technical and economic feasibility,” to prevent digital discrimination “based on” a number of factors, including income level, race, ethnicity, color, religion, or national origin. IIJA at § 60506(b)(1). The Act does not define “digital discrimination.” *See* IIJA § 60506.

Congress’s purposes in passing the Act are commendable. Americans increasingly need access to broadband for their everyday activities from school to work to attending doctor’s appointments. The pandemic “underscored the critical importance of affordable, high speed broadband for individuals, families, and communities to be able to work, learn, and connect remotely while supporting social distancing.” FCC Rule at 4130. Barriers to equal access to broadband do not just affect the individual: “[t]he persistent ‘digital divide’ . . . is a barrier to the economic competitiveness of the United States” as a whole. IIJA at § 60101(2). No one disputes that broadband access should not be curtailed by intentional, discriminatory acts by providers or others. But the stated federal policy of “promot[ing] equal access to robust broadband internet access service” may only be achieved by encouraging the *expansion* of networks instead of discouraging investment. *Id.* at § 60506(c).

The Rule flips the statute on its head, creating, in effect, a presumption that every decision by a broadband provider is discriminatory unless the broadband provider can provide a “genuine. . . technical or economic” justification. FCC Rule at 4137. The Rule defines “digital discrimination of access” to mean “[p]olicies or practices not

justified by genuine issues of technical or economic feasibility, that (1) differentially impact consumers' access to broadband internet access service based on their income level, race, ethnicity, color, religion[,] or national origin, or (2) are intended to have such differential impact." FCC Rule at 4158. Thus, the Rule explicitly goes beyond the intentional discrimination prohibited by the IIJA by also encompassing ordinary business decisions that have a disparate impact.⁴ But Congress "says what it means and means what it says." *Simmons v. Himmelreich*, 578 U.S. 621, 627 (2016). When Congress seeks to address conduct not animated by discriminatory intent but rather that has a disparate impact, it does so with language that "refers to the consequences of actions and not just to the mindset of actors." *Tex. Dep't of Housing and Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 533-34 (2015). Statutes that impose liability for policies with unintended disparate

⁴ Compare IIJA at § 60506(c) (directing the FCC and Attorney General to ensure that "Federal policies. . .prohibit[] deployment discrimination based on. . .") (emphasis added) with FCC Rule at 4141 ("Our prohibition thus forbids both intentionally discriminatory conduct. . .as well as conduct that produces discriminatory effects (that is, applies a disparate impact standard).").

impacts make this purpose clear by using phrases such as “results in,”⁵ “have the effect of,”⁶ or “otherwise adversely affect.”⁷ By barring intentional discrimination “based on” factors like race and income level, Congress made clear its intent only to prohibit intentional discrimination. IIJA § 60506(b)(1). If Congress had wanted to address disparate *impacts*, it would have said so.

The risk of liability stemming from the Rule’s broad and vague disparate impact provision will greatly reduce investment by broadband providers. In response to the FCC’s Notice of Proposed Rulemaking, advocacy groups urged the FCC to define digital discrimination broadly, as “any time when one community,”—or “even . . . just one address”—“has better broadband service than another, when the meaningful difference between the communities [or addresses] is the demographic characteristics, including the economic status, of its residents.” Public Knowledge, Comment Letter on Notice of Inquiry in the matter of

⁵ 52 U.S.C. § 10301(a) (Section 2 of Voting Rights Act).

⁶ 42 U.S.C. §§ 12112(b)(3)(A), 12182(b)(1)(D)(i) (Americans with Disabilities Act).

⁷ 42 U.S.C. § 2000e-2(a)(2) (Title VII of Civil Rights Act of 1964).

implementing the Infrastructure Investment and Jobs Act: prevention and elimination of digital discrimination (May 16, 2022) at 6, 20. While that language was not adopted in the final FCC Rule, the same radical effect may be achieved through the Rule as written.

Broadband providers hardly decide to expand a network on a whim. The decision is based on a number of factors, including an area’s average household density, occupancy rates, landlord restrictions, the provider’s strength in the area, and the presence or absence of another provider or a high-performing incumbent with loyal subscribers. AT&T, Comment Letter on Proposed Rule to Implement the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination (Feb. 21, 2023), at 5. These factors differ from neighborhood to neighborhood. It is logistically impossible for a broadband provider to expand its service evenly everywhere at once. If any expansion causes even a temporary difference in broadband service presence or quality between households of different socioeconomic or racial backgrounds, the broadband provider risks public accusations of “discrimination” and potentially crippling liability under the Rule’s vague standard. The risk of liability will discourage broadband networks from making investments—creating a

further obstacle to eliminating the “digital divide” rather than a solution to it.

Language in the Rule provides that “there can be no liability determination for disparate impact unless . . . the covered entity fails to prove that the policy or practice is justified on genuine technological or economic grounds.” FCC Rule at 4136. But that provides little comfort. To begin with, it suggests that a *presumption of liability* arises merely from unequal broadband access, and the burden is on the provider to make a showing to avoid severe penalties. Moreover, what technological or economic grounds the FCC would consider “genuine” is anyone’s guess. The Rule posits that “genuine” technical or economic constraints may limit deployment “[i]f the technology does not yet exist to provide a particular broadband internet access service to a particular geographic area, or the technology to provide the service does exist but utilizing it to reach the area in question would be prohibitively expensive.” *Id.* at 4137.

The standard is not just vague and indeterminate—it is impossibly difficult to meet. Ordinary business considerations such as household density, occupancy rates, landlord restrictions, and the presence or absence of competitors are not relevant to the standard, and technical

difficulties and significantly higher expenses will not save a provider if covered groups in an area are later found to have disparate broadband access. Under the exacting standard laid out by the FCC the provider has a defense only if the technology necessary to deployment in an area is *nonexistent* or *prohibitively expensive*.

There is no definition of what “prohibitively” means. There is no way to know what costs the FCC would deem sufficiently “prohibitive.” Suppose a broadband provider supplies high-speed internet access to every home in a service area except for one at the top of a mountain. Is that prohibitively expensive in the eyes of the FCC? Or suppose a broadband provider declines to provide the most expensive, cutting-edge broadband to users in a particular service area because analytics show users in that region do not have a need for the additional bandwidth. Is that prohibitively expensive in the eyes of the FCC? Or imagine that a broadband provider chooses not to deploy to a neighborhood in which the inhabitants practice a religion which prevents them from using the internet. Would that be prohibitively expensive? As a result of the FCC’s rule, a broadband provider who has made what everyone would agree was a well-founded business decision to limit deployment in an area

because of significantly higher costs now risks devastating liability. In the face of such uncertainty, the only safe course for broadband providers is *not to invest*. A chill in the deployment of broadband under the Rule is thus inevitable. Companies will simply opt not to undertake projects if expansion may expose them to catastrophic liability under murky standards.

Expansion is already a financially precarious endeavor. The many major financial risks broadband providers face when deciding whether to deploy to a new area include: (1) many households in the affected area will continue ordering service from their existing cable providers; (2) occupancy rates in the affected areas will fall or fluctuate; and (3) many customers in those areas will forgo fixed-line broadband in favor of wireless broadband connections. *AT&T, supra*, at 13. If any of these dangers come to pass, the significant expense the provider has poured into expanding its network will become a financial burden. Verizon Wireless, Reply Comment on Proposed Rule to Implement the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination (Apr. 20, 2023), Appendix A, at 9. Increased legal liability only exacerbates these risks. Given the serious financial risks

associated with the expansion of a broadband provider's network even under the best of circumstances, the added financial and administrative burden of demonstrating compliance with a broad and uncertain standard *will chill the expansion of broadband*.

In sum, manufacturers are major consumers of broadband. This demand will only continue to grow as manufacturers invest in high-tech systems to stay ahead of their international competition. Mfg. Leadership Council, *supra*, at 13. A chill in the expansion of this necessary resource will prevent American manufacturers from achieving the growth and innovation possible with the advent of 5- and 6G networks and from competing effectively on the global stage.

II. The Disparate Impact Rule's Effects on the Manufacturing Sector Highlight its Economic Significance, Confirming That It Involves A Major Question.

The Rule's disparate impact provision, anchored nowhere in the text of the Act, will hamstring the entire broadband industry without congressional authorization and thus runs afoul of the major questions doctrine. Agencies cannot act without authorization from Congress. *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate

legislative regulations is limited to the authority delegated by Congress.”). The major questions doctrine provides that, where an agency action takes on an issue of major national import, the agency must have unequivocal authorization from Congress. *West Virginia v. EPA*, 597 U.S. at 723. When an agency Rule “seek[s] to regulate a significant portion of the American economy,” it likely addresses a major question and would need “clear congressional authorization” to stand. *Id.* at 723, 744. Broadband impacts almost every aspect of American life. FCC Rule at 4130. By attempting to regulate the deployment of broadband, an industry implicating hundreds of billions of dollars and affecting every corner of American life, the FCC reaches far beyond the Act’s authorization and into decisions left to Congress’s purview alone. John Fletcher, *The History of US Broadband*, S&P Global Market Intelligence (May 11, 2023), <https://bit.ly/49B6qwj>.

A. This Case Presents a Major Question.

Given the crushing impact the Rule will have on the manufacturing sector, the major questions doctrine precludes it. Under the major questions doctrine, where enabling legislation is ambiguous, an agency must point to “clear congressional authorization” to make major policy

decisions. *West Virginia v. EPA*, 597 U.S. at 723. In deciding whether a rule addresses a “major question,” courts will consider factors like whether the rule will “resolve a matter of great political significance,” and whether it “seeks to regulate a significant portion of the American economy.” *Id.* at 743-44 (Gorsuch, J., concurring). If these factors indicate that an agency is attempting to use a rule to resolve a major policy question and the agency lacks clear authorization by Congress to issue the rule, the rule cannot stand.

The Fifth Circuit found a major question in the hotly-debated political issue surrounding the disposal of nuclear waste, a problem the Nuclear Waste Policy Act of 1982 created a \$40 billion dollar fund to address.⁸ The Western District of Louisiana also found a major question where the EPA had provided \$1 billion in federal funding grants over 34 years, with the current grants totaling around \$120 million. *Louisiana v. EPA*, No. 2:23-CV-00692, 2024 WL 250798, at *30 (W.D. La. 2024). The

⁸ *Texas v. Nuclear Regul. Comm’n*, 78 F.4th 827, 844 (5th Cir. 2023) (holding that major question exists where nuclear waste disposal has been debated for decades and decisions of such magnitude and consequence have great economic and political consequences); Nicole Feldman, *The Steep Costs of Nuclear Waste in the U.S.*, Stanford Doerr School of Sustainability (July 3, 2018), <https://bit.ly/3vJ6qg1>.

broadband industry, an economic behemoth generating over \$111.73 billion in revenue in 2022 alone, dwarfs these examples. John Fletcher, *supra*.

The economic impact of the Rule on the American manufacturing industry further shows that this is a major question case with profound economic and social implications. The manufacturing industry, which depends on fast and reliable internet to innovate and stay abreast of international competition,⁹ accounts for nearly 11% of the total output in the country, employs over eight percent of the workforce, and exports over \$1.4 trillion in manufactured goods each year.¹⁰ The chilling effects of the rule will disincentivize the very high-speed deployments that manufacturers increasingly rely on.

The collateral consequences for manufacturers are just the tip of the iceberg, as literally every industry and every consumer in the United States will be affected in some way by the FCC's rule. The finance industry, which represents 8.3 percent or \$1.7 trillion of the U.S. gross

⁹ Dan Littman et al., Deloitte, *5G: The Chance to Lead for a Decade* (2018), <https://bit.ly/3VTR037>.

¹⁰ John Fletcher, *supra*; Nat'l Ass'n of Mfrs., *United States Manufacturing Facts*, (last visited Apr. 10, 2024), <https://bit.ly/3WhPEzx>.

domestic product, uses data-intensive processes that depend on high-speed internet to make high-stakes decisions quickly and accurately. SelectUSA, *Financial Services Industry*, (last visited Apr. 17, 2024), <https://bit.ly/3JnJFkU>. The healthcare industry generates roughly 30 percent of the world’s data volume to detect, prevent, and treat illness, all of which has been made possible by high-speed connections. Gred Wiederrecht, Sasson Darwish & Andrew Callaway, *The Convergence of Health and Technology*, RBC Capital Markets (last visited Apr. 17, 2024), <https://bit.ly/4aD1qZu>. Without the expansion of high-speed, reliable broadband networks, the innovative sectors that drive the American economy will be stunted.

B. Section 60506 Lends No Clear Congressional Authorization for the Rule.

The Act does not provide the clear authorization necessary for the FCC to take such extreme steps. This Court has already noted that “skepticism may be merited when there is a mismatch between an agency’s challenged action and its congressionally assigned mission.” *Mandan, Hidatsa & Arikara Nation v. United States Dep’t of Interior*, 95 F.4th 573, 580 (8th Cir. 2024) (citing *West Virginia v. EPA*, 597 U.S. 697,

748 (2022) (Gorsuch, J., concurring)). The Rule is deserving of this skepticism. Congress could have prohibited disparate impacts on broadband access in the IIJA, but it barred only intentionally discriminatory actions. IIJA at § 60506(c). Nowhere in the IIJA did Congress authorize the FCC to punish providers who make good-faith business decisions to limit expansions because of technical, economic, and business considerations that fall short of infeasibility and prohibitive cost. *See id.* Without any clear congressional authorization, the Rule makes a major, sweeping policy decision which will hobble the broadband industry and, in the process, block American manufacturers from accessing the technology they need to succeed. The Agency's overreaching Rule should be invalidated.

CONCLUSION

The Court should hold unlawful, vacate, enjoin, and set aside the Order, and grant such additional relief as may be appropriate.

Respectfully submitted,

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April 29, 2024

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 4,328 words, excluding the parts exempted by Fed. R. App. P. 32(f).

I also certify that the foregoing brief complies with the requirements of Fed. R. App. P. 32(a)(5)-(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point New Century Schoolbook.

I further certify that this PDF file was scanned for viruses, and no viruses were found on the file.

/s/ John Elwood
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CERTIFICATE OF SERVICE

I hereby certify that on April 29, 2024, I caused the foregoing brief to be electronically filed using the CM/ECF system. I certify that counsel for the parties are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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