U.S. Chamber of Commerce

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August 31, 2023

Via Electronic Submission

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
45 L Street, NE
Washington, DC 20554

Re: In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination (GN Docket No. 22-69)

Dear Ms. Dortch:

The U.S. Chamber of Commerce ("Chamber") respectfully submits these supplemental comments to the above referenced proceeding,[1] regarding the Federal Communications Commission's ("Commission") implementation of Section 60506 of the Infrastructure Investment and Jobs Act ("IIJA").[2] These supplemental comments address the Supreme Court's recent decision in *Biden v. Nebraska*,[3] which reinforces the applicability of the "major questions doctrine" to this proceeding.

The Court's decision in *Biden* further supports the conclusion in the Chamber's previous comments that the Commission should refrain from adopting new unfunded mandates on broadband providers, backed by civil penalties, and instead focus on promoting transparency and the IIJA's broadband deployment and affordability programs.

As noted in our previous comment letter, Section 60506 does not authorize the Commission to create and enforce new, punitive liability rules. Section 60506 directs the Commission to "facilitate equal access to broadband internet access service" by supporting broadband deployment and affordability programs and promoting

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[1] Comments of the U.S. Chamber, GN Docket No. 22-69 (filed Feb. 21, 2023) (hereinafter "Chamber Comments"), https://www.fcc.gov/ecfs/document/1022176172320/1; *see also* Reply Comments of the U.S. Chamber, GN Docket No. 22-69 (filed June 30, 2022), https://www.fcc.gov/ecfs/document/10630265882333/1.

[2] In the Matter of Implementing the Infrastructure Investment and Jobs Act: Prevention and Elimination of Digital Discrimination, Notice of Proposed Rulemaking, GN Docket No. 22-69 (rel. Jan. 20, 2023) ("NPRM").

[3] *Biden v. Nebraska*, 600 U.S. __, __ (2023) (slip op. at 21).

transparency.[4] Reading the statutory command to "facilitate" such programs as instead an authorization to impose new unfunded deployment mandates or pricing rules on broadband providers would violate the Supreme Court's holding that Congress must "speak clearly" to authorize an administrative agency to resolve a "major policy question" that Congress would ordinarily be expected to reserve for itself.[5] Whether broadband providers should be subject to utility-style pricing or deployment mandates as a means to promote universal service is a "major policy question" that Congress almost certainly would not have resolved in such an elliptical fashion in the IIJA.

The Court's recent decision in *Biden* supports that conclusion. In *Biden*, the Court held that the Secretary of Education exceeded the authority granted by a statute permitting him to "waive or modify" student loans when he relied on it to establish a comprehensive student loan forgiveness program.[6] "'A decision of such magnitude and consequence' on a matter of 'earnest and profound debate across the country,'" the Court explained, "must 'res[t] with Congress itself, or an agency acting pursuant to a clear delegation from that representative body.'"[7] In determining that student loan cancellation was an issue that Congress would be likely to address itself, the Court observed that "Congress is not unaware of the challenges facing student borrowers," that Congress had itself considered "student loan legislation" in a recent session, and that the program was "cost[ly]."[8] The Court found that these indicia supported its conclusion that the text of the relevant statute was not intended to convey the authority claimed by the Secretary.

Similar considerations are present here. Congress is fully aware of the challenges surrounding broadband deployment and universal service and has adopted specific, alternative means to address it. Since 1996, the Communications Act has provided for collection of contributions from covered "telecommunications carriers" and others to be used as a support mechanism to subsidize deployment.[9] The IIJA itself authorized an unprecedented $65 billion in new direct broadband subsidies "to bridge the digital divide," including $42.5 billion to incentivize broadband deployment and $14 billion to facilitate internet affordability.[10] Meanwhile, Congressional proposals that would make broadband a Title II service—and thus potentially subject to some of the nondiscrimination and pricing rules contemplated by the NPRM—have

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[4] 47 U.S.C. § 1754(b); *see* Chamber Comments, at 2-3.
[5] Chamber Comments, at 5–6.
[6] *Id.* at __ (slip op. at 13) (quoting 20 U.S.C. § 1098bb(a)(1)).
[7] *Id.* at __ (slip op. at 22-23) (quoting *W. Virginia v. EPA*, 142 S. Ct. 2587, 2615 (2022)).
[8] *Id.* at __ (slip op. at 21-22) (citation omitted).
[9] *See* 47 U.S.C. § 254.
[10] 47 U.S.C. § 1702(b)(1).

been unsuccessful.[11] It is thus highly unlikely that Congress adopted, via bipartisan vote, a provision of the IIJA that would impose onerous utility-style regulations and liability rules on broadband providers, given the longstanding Congressional preference—including in the IIJA itself—for a lighter-touch, subsidies-based approach.

For these reasons, *Biden v. Nebraska* shows that the decision whether to impose new utility-style regulations and liability rules on broadband providers is not one that Congress would have been likely to leave to administrative discretion through vague statutory language. Just as authorization to "waive or modify" certain student loan requirements cannot reasonably be read to authorize cancellation of student loans *en masse*, a requirement that the Commission "facilitate" equal access to broadband cannot reasonably be read to authorize onerous rules and mandates on ISPs. That is especially so because Congress elsewhere in Section 60506 merely instructed the Commission to "identify[]" any steps necessary to "eliminate" discrimination.[12] Therefore, as the Chamber's comments explain, the fact that Section 60506 does not clearly authorize new liability rules is an indication that the Commission lacks authority to impose them.

The Chamber thanks the Commission for considering this supplemental comment based on the Supreme Court's recent decision in *Biden v. Nebraska*. If you have any questions, please reach out to Matt Furlow, Policy Director, at mfurlow@uschamber.com.

Sincerely,

Jordan Crenshaw
Senior Vice President
Chamber Technology Engagement Center
U.S. Chamber of Commerce

[11] *See e.g.,* H.R. 8573, 117th Cong. (2022) (seeking to classify broadband as telecommunications service); S. 1981,
113th Cong. (seeking to restore FCC rules "relating to preserving the open Internet and broadband industry practices").

[12] 47 U.S.C. § 1754(b).