Written Testimony of

Sarah Morris, Open Internet Policy Director
Eric Null, Policy Counsel
New America's Open Technology Institute

Respectfully submitted to the

Joint Committee on Energy and Technology
Connecticut General Assembly

In Support of

S.B. No. 2, Session Year 2018

Submitted March 8, 2018

Introduction and Summary

Thank you senators for your interest in network neutrality and for designating this hearing today as spaces to examine solutions for protecting an open internet. Our organization works on a variety of issues related to protecting consumers and encouraging equitable, affordable access to the internet. We were one of the leading public interest organizations in support of strong network neutrality rules at the Federal Communications Commission (FCC or Commission). Those rules were adopted by the Commission in February 2015, and were met with a resoundingly positive public response. The D.C. Circuit Court of Appeals subsequently upheld the rules in full. Unfortunately, new Chairman Ajit Pai repealed those rules and undermined the strong legal authority they were enacted under. He took these actions over the outcry of advocates, internet companies, Members of Congress in both chambers and from both parties, and the public.

The Commission's repeal of the network neutrality rules and, indeed, its utter abdication of its responsibility to oversee the internet access market more generally, will affect the internet and the online marketplace for the immediate and foreseeable future. In this testimony, we will try to explain those effects and the harms that consumers may experience without net neutrality protections.

ISPs can exert great leverage in the internet ecosystem because they are gatekeepers to the internet. In the absence of legal protections requiring an open internet, ISPs can engage in a variety of harmful conduct, including blocking or throttling content, or cutting preferential deals to provide "fast lanes" for some websites that leave other websites in the "slow lane." Virtually every company has some online presence, whether or not the firm is immediately recognized as a "tech company." Businesses rely on the internet to sell products and services, to reach customers, and to market themselves to a bigger audience. This competitive market exists because of net neutrality.

We have seen the lengths to which internet service providers (ISPs) will go to engage in behavior that is harmful to consumers, even when the Commission has clear network neutrality protections in place. Since 2004, the Commission has had some form of net neutrality protections in place. Nonetheless, a near-constant stream of consumer harms continued to unfold, culminating in the most dramatic and significant example in 2014, when ISPs began allowing the traffic hand-off points between the ISPs and transit providers with which they interconnect to artificially congest, leaving many of their customers with essentially unusable internet access, in some cases for months on end.

And now, it is an even darker time for the open internet. Although the 2015 rules were pro-consumer, based on sound legal reasoning, and resoundingly upheld by the D.C. Circuit, the Commission has repealed them in a dramatic break from decades of regulatory oversight. There are now no rules and no threat of rules, thus leaving the ISPs in charge of whether the open internet remains. The potential impacts on the internet ecosystem are significant and grave. Whereas previous FCC chairmen have danced back and forth between different ways to protect net neutrality, this chairman has wiped his hands of any responsibility toward preserving an open internet.

Connecticut should move forward confidently and quickly in codifying network neutrality protections, much like the states of Washington and Oregon, which recently passed net neutrality laws.[1] Connecticut should consider looking to other state efforts to strengthen its already laudable approach. Vermont in particular offers some guidance in terms of process and scope that may help shield state efforts from preemption and dormant commerce clause challenges.

We commend this committee for beginning this work, and for taking a hard look at how it can ensure that Connecticut consumers can continue to enjoy an open internet, free from ISP discrimination. We look forward to opportunities to

[1] Tom Banse, *Washington Net Neutrality Bill Signed Into Law, Oregon on Deck*, Or. Pub. Broadcasting (Mar 6. 2018), https://www.opb.org/news/article/net-neutrality-protections-law-washington-oregon/

work with the Senate to fully protect an open internet in the absence of federal regulation.

I. The internet was designed as a neutral network, and neutrality has been central to its success.

Although opponents of strong network neutrality protections frequently claim that something dramatically new occurred in 2015 with the adoption of the Commission's 2015 Open Internet Order ("2015 Order"), the simple reality is that the principles of network neutrality have been woven into the fabric the internet since its inception. The only thing that changed in 2015 was the fact that the Commission finally codified those principles into federal rules that were grounded in solid legal authority.

The internet began, and has continued to develop, as an open, end-to-end network.[2] Traffic flows have long been dictated by users at the edge, with internet service providers historically playing a largely passive role in traffic delivery. This architecture has created a platform for development of tools, services, and content that many characterize as one of "permissionless innovation." An ISP provides a customer with internet service for a monthly fee, and beyond that, historically had little if any involvement in what the user did or where the user went online. As a result, the internet flourished—content-hungry internet users created the demand for new services online, which spurred investment in internet companies, and in turn creating demand for more bandwidth and faster speeds. The dynamic environment of internet tools for every need imaginable, from education, to transportation, to energy management, to political organizing and engagement.

Since at least 2004, the Commission has sought to protect the open internet through a series of agency documents, proceedings, and rulemakings. For more than a decade, the Commission has had rules on the books, policy statements

[2] Tim Wu, *How the FCC'S Net Neutrality Plan Breaks With 50 Years of History*, Wired (Dec. 6, 2017), https://www.wired.com/story/how-the-fccs-net-neutrality-plan-breaks-with-50-years-of-history/.

favoring net neutrality protections, and clear enforcement actions against discriminatory conduct, all of which reduced incentives for broadband providers to discriminate based on content. These actions occurred under both Republican and Democratic administrations. In February 2004, Republican FCC Chairman Michael Powell argued that "consumers are entitled to 'internet freedom'" and challenged the industry to honor four specific net neutrality principles.[3] The following year, the Commission adopted these principles in an informal policy statement.[4]

The Commission enforced these principles early on: prior to issuing the informal policy statement, the Commission took action in response to complaints that an internet service provider was blocking VoIP traffic which resulted in a consent decree;[5] the Commission forced broadband providers to accept the principles as binding conditions on the approval of mergers in 2005[6] and 2007.[7] The Commission then opened a proceeding in 2007 to formalize these principles, which resulted in the 2010 Open Internet Order.[8] In 2014, the D.C. Circuit vacated much of that order, arguing that the Commission lacked authority to pass such rules under so-called "Title I" authority, so the Commission initiated another proceeding to again determine how to best protect network neutrality. After extensive public comment, the Commission finally put the open internet rules on firm legal grounding by reclassifying broadband providers as Title II telecommunications carriers. This shift in classification provided the Commission with the authority necessary to enact strong open internet protections.

---

[3] Michael K, Powell, Preserving Internet Freedom: Guiding Principles for the Industry, at 5 (Feb. 8, 2004), http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-243556A1.pdf.
[4] Policy Statement, Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, 20 FCC Rcd 14986, para. 4-5 & n. 15 (2005).
[5] Order, Madison River Communications LLC, 20 FCC Rcd 4295 (2005).
[6] Memorandum Opinion & Order, SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, 20 FCC Rcd 18290 (2005).
[7] Memorandum Opinion & Order, AT&T Inc. and BellSouth Corporation Application for Transfer of Control, 22 FCC Rcd 5662, app. F, at 5814-15 (2007).
[8] Report & Order, *Preserving the Open Internet*, 25 FCC Rcd 17905 (2010).

For 14 years, the Commission has implemented regulatory frameworks to protect network neutrality. This oversight helped keep many threats to internet openness largely at bay. However, the harms outlined below demonstrate that ISPs have a strong desire to push the envelope even with regulations, or threat of regulations, in place.

II. Despite near constant net neutrality oversight from the Federal Communications Commission, significant threats to consumer welfare and innovation have continued to occur.

Even with essentially unbroken regulatory oversight since 2004, documented, direct threats to internet openness have persisted. In 2005, Madison River, a North Carolina ISP, blocked Voice Over Internet Protocol telephone calls, a practice that prevented Madison River users from using third-party VoIP services such as Vonage.[9] Consequently, Madison River customers who had disconnected their traditional phone lines and relied solely on Vonage lost their ability to make calls, even to emergency 911 services.

In 2007, Comcast was found to have installed software to selectively interfere with certain BitTorrent peer-to-peer file-sharing communications as well as other protocols, a finding the Commission deemed "significantly" impeded "consumers' ability to access the content and use the applications of their choice."[10] Because of these actions, Comcast customers were impeded from downloading public domain works and proper use of non-P2P software like Lotus Notes.[11]

More recently, ISPs have favored their own affiliated content over competitors, which directly harms consumers and has clear implications for competition. In 2009, AT&T blocked the Sling media player from streaming

[9] Open Internet Order ¶ 69; Electronic Frontier Foundation Comments, Dkt. 17-108, July 17, 2017 ("EFF Comments") at 34, https://ecfsapi.fcc.gov/file/1071761547058/Dkt.%2017-108%20Joint%20Comments%20of%20Internet%20Engineers%2C%20Pioneers%2C%20and%20Technologists%202017.07.17.pdf.
[10] Open Internet Order ¶ 69; EFF Comments at 34; *Generally* 2008 Comcast Order.
[11] EFF Comments at 34.

video over AT&T's 3G network, but streaming video from AT&T's commercial partners such as DirecTV's SuperFan application *were* allowed on the network.[12] In 2012, AT&T blocked Apple's FaceTime application on its network, prompting significant consumer complaints.[13] AT&T's customers were prevented from using a key application on their phones, which AT&T admitted it was doing *"as a lever to get users to switch over to the new plans which charge for data usage in tiers."*[14] Also in 2012, Comcast began exempting from its artificially-imposed data cap traffic that went through its Xbox Live streaming video app.[15] The favoritism exhibited by AT&T and Comcast in these situations likely pushed consumers away from competitive offerings and toward the ISPs offerings, even if the consumers disfavored the ISP service.

In 2011, Verizon blocked access to third-party tethering apps on Android devices, which required customers to buy expensive tethering plans. Verizon's actions harmed consumers and the tethering market as it edged out competitors and distorted the marketplace while harming users who were forced to buy one expensive service rather than shop around among several (potentially better and cheaper) choices.[16]

In 2013, Verizon and T-Mobile blocked their customers' access to the Google Wallet mobile payment app in 2013.[17] Verizon claimed it was blocking the

---

[12] Sling Media Inc. Comments, Preserving the Open Internet Broadband Industry Practices, GN Dkt. No. 09-91, WC Dkt. No. 07-52, 5-6 (filed Jan. 14, 2010).
[13] Open Internet Order ¶ 96; EFF Comments at 34.
[14] David Kravets, *AT&T: Holding FaceTime Hostage Is No Net-Neutrality Breach*, Wired (Aug. 22, 2012), https://www.wired.com/2012/08/facetime-net-neutrality-flap/.
[15] Kyle Orland, *Comcast: Xbox 360 On Demand streams won't count against data caps,* Ars Technica (March 26, 2012), https://arstechnica.com/gaming/2012/03/comcast-xbox-360-on-demand-streams-wont-count-against-data-caps/; EFF Comments at 35.
[16] Terrence O'Brien, *Carriers crack down on Android tethering apps, rain on our mobile hotspot parade*, Engadget (May 2, 2011), https://www.engadget.com/2011/05/02/carriers-crack-down-on-android-tethering-apps-rain-on-our-mobil/.
[17] Sarah Perez, *Google Wallet Rolls Out To More Devices – Nope, Still No Love For Verizon, AT&T Or T-Mobile Owners*, TechCrunch (May 16, 2013), https://techcrunch.com/2013/05/16/google-wallet-rolls-out-to-more-devices-nope-still-no-love-for-verizon-att-or-t-mobile-owners/.

application for security reasons,[18] but T-Mobile admitted they were blocking Google's payment system to favor their own service.[19]

Mobile carriers have also been favoring their own content and affiliated content through "zero-rating" programs. With zero-rating, providers need not block or throttle traffic; they can simply impose an artificial data cap and then exempt their own affiliated services from that cap, accomplishing the same end as if the ISP throttled the traffic.

Among these problematic zero-rating schemes is AT&T's Sponsored Data program. AT&T offers Sponsored Data to third party content providers at terms and conditions that are "effectively less favorable than those it offers to its affiliate, DirecTV," according to the Commission's Wireless Telecommunications Bureau January 2017 report on zero-rating programs.[20] Although Chairman Pai has since retracted the report, the harms outlined by the Wireless Telecommunications Bureau staff are significant and worth consideration by the state of Connecticut.

Verizon also offers customers a problematic zero-rating program. It recently began zero-rating its own video service, go90, while charging third party content providers more money to zero-rate data.[21] Verizon manipulates the market in a similar way to AT&T by favoring its own content at the expense of consumer choice and market competition. As the Commission noted of the Verizon program in the since-retracted zero-rating report, "[t]here is the same potential

---

[18] Karl Bode, *Verizon: We're Blocking Google Wallet for Good Reason, Honest*, Techdirt (Dec. 13, 2012), https://www.dslreports.com/shownews/Verizon-Were-Blocking-Google-Wallet-for-Good-Reason-Honest-122415.

[19] Karl Bode, *T-Mobile Blocking Google Wallet to Benefit Isis*, Techdirt (May 17, 2013), https://www.dslreports.com/shownews/TMobile-Blocking-Google-Wallet-to-Benefit-Isis-124298.

[20] FCC Wireless Telecommunications Bureau Zero-Rating Report ("WTB Report"), January 2017, http://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0111/DOC-342982A1.pdf.

[21] WTB Report at 16; Anu Passary, *Verizon Go90 Goes Zero Rating, Allows Customers To Watch Video Without Worrying About Data Cap,* Tech Times (Feb. 6, 2016), http://www.techtimes.com/articles/131330/20160206/verizon-go90-goes-zero-rating-allows-customers-to-watch-video-without-worrying-about-data-cap.htm.

for discriminatory conduct in favor of affiliated services, and its competitive impacts in the short-form portion of the market exist today."[22]

The violations of net neutrality detailed above resulted in substantial and concrete harms for consumers, but are not limited to these cases. The Commission has received over 47,000 consumer complaints alleging harmful behavior from ISPs that violated the Open Internet Order. These complaints reflect that American consumers have continued to experience what they considered to be harmful behavior from ISPs even since 2015.[23]

Finally, nondiscrimination issues do not exist solely between ISPs and their end users. In recent years, some of the most egregious network discrimination occurred between ISPs and transit providers, content delivery networks, and edge services with whom they interconnect. Based largely on research from the Open Technology Institute, the Commission developed a strong body of evidence to support its conclusions about interconnection in the 2015 Open Internet Order.[24] OTI documented widespread interconnection disputes in 2013 and 2014. This evidence cannot be easily swept aside. The interconnection points between access and transit networks are a vulnerable and manipulable part of the internet's architecture, and the impact of these interconnection disputes on consumers has been devastating: when interconnection disputes arise, millions of people end up not receiving the broadband service they paid for, in some cases experiencing speeds that fell to nearly unusable levels for months on end.[25]

These documented harms indicate a clear pattern of behavior. For example, Level 3 Communications explained in the Commission's most recent net neutrality record that before the Commission's assertion of jurisdiction over interconnection disputes in the 2015 Open Internet Order, many of the largest

---

[22] *Id.*
[23] National Hispanic Media Coalition, NHMC Releases New Net Neutrality Documents to Public Showing Importance of Open Internet Order, Urges FCC to Open New Comment Period to Examine, http://www.nhmc.org/foia-release/.
[24] *Beyond Frustrated: The Sweeping Consumer Harms as a Result of ISP Disputes,* New America (Nov. 12, 2014), https://www.newamerica.org/oti/policy-papers/beyond-frustrated-the-sweeping-consumer-harms-as-a-result-of-isp-disputes/; Open Internet Order ¶ 205.
[25] *Id.*

consumer BIAS providers "refused to augment interconnection capacity with Level 3 unless Level 3 would agree to pay new, recurring tolls."[26] The tolls levied by these ISPs for interconnection contracts were "entirely unrelated to costs," which the ISPs admitted, according to Level 3. Because of these large ISPs' actions, interconnection points between the Level 3 network and the ISPs' networks became extremely congested, and consumers' experiences were subsequently harmed.[27] ISPs are interested in monetizing their gatekepeer role in ways that did not exist in the first decades of the internet. These schemes violate the principles of net neutrality and risk destroying the internet as we know it. The Commission was right to act against these threats by asserting jurisdiction over interconnection disputes in 2015, and the absence of oversight in the wake of the Commission's 2017 repeal portends a significant area of potential future harm.

These harms occurred during periods of oversight by the Commission. Even when the Commission was between regulatory frameworks—for example, in the immediate aftermath of court decisions that overturned prior agency attempts at regulation—there still existed a recognizable threat of imminent agency action as the Commission teed up new regulatory proceedings. In the wake of complete abdication of oversight by the Commission, harms are likely to increase.

III. The Federal Communications Commission's 2015 Open Internet Order provided important consumer protections, and rested on a solid legal framework.

In response to many of the documented harms outlined above, the Commission in 2015 adopted a thoughtful, comprehensive, yet appropriately light-touch framework for preserving an open internet. Although that approach was repealed, a brief overview of the 2015 Open Internet Order's relative

[26] Level 3 Communications Comments, at 8-9 ("Level 3 itself has direct experience with large consumer ISPs engaging in precisely the kinds of harmful practices the Commission's framework is designed to address.").
[27] *Id.*

strengths may be useful for state policymakers, including those in Connecticut, as they consider approaches at the state level to fill in where the Commission has let consumers down.

The 2015 Open Internet Order included prohibitions against three well-established network neutrality threats: blocking, throttling, and paid prioritization arrangements.[28] The Commission recognized the abundance of documentation in its record about the risks of such harms, and found explicit, bright-light rules to be appropriate.

However, the Commission also recognized the fact that consumer harms have continued to evolve, and it ultimately acknowledged that there may be new behaviors that do not immediately warrant bright-line prohibitions, but from which consumers may require continued oversight from the Commission. As a result, the Commission implemented a so-called "General Conduct Standard" that included a list of potential but non-exhaustive factors that could be taken into account when evaluating potentially problematic practices by ISPs.[29]

In addition, while the 2015 Open Internet Order did not adopt explicit rules governing interconnection, the Commission asserted explicit jurisdiction over any harmful interconnection disputes that may arise.[30] This oversight was critical, as it provided an important stop-gap against what was quickly becoming a work-around for traditional network neutrality protections codified in the bright-line rules. In fact, there is evidence that since 2015, interconnection disputes have decreased.[31]

Importantly, the Commission, for the first time, uniformly extended its rules to wireless ISPs.[32] This move was fundamentally designed to avoid the absurd result that could occur without parity between mobile and fixed broadband

[28] Open Internet Order ¶ 14-19.
[29] Open Internet Order ¶ 135.
[30] Open Internet Order ¶ 30-31.
[31] Collin Anderson, Monitoring Interconnection Performance Since the Open Internet Order, Measurement Lab (Aug. 9, 2017), https://www.measurementlab.net/blog/interconnection_update.
[32] Open Internet Order ¶ 88.

services, where a user could suddenly lose network neutrality protections simply by moving, for example, from their home Wi-Fi network to a carrier's 4G network. It was also made in recognition of the potential for harms related to zero-rating.

IV. Without meaningful network neutrality rules, the internet will fundamentally change, as ISPs take actions that harm consumers and innovation.

Without strong network neutrality rules, the future of the internet looks dramatically different than the dynamic platform we have come to expect. In examining the importance of the internet in so many critical aspects of our lives, it is not difficult to imagine a new landscape going forward. As the following examples demonstrate, innovation, social and economic opportunity, civic engagement, and access to basic services all depend on a robust open internet.

Many entrepreneurs have argued that without network neutrality protections, their businesses would have never made it off the ground. More than 150 companies told the Commission in 2014 that net neutrality was "a central reason why the Internet remains an engine of entrepreneurship and economic growth."[33] Etsy, an online retail platform that hosts 1.3 million small business owners, a majority of whom are women, has noted that a lack of strong net neutrality rules would undermine its ability to attract investment capital.[34] Similarly, video streaming service Vimeo stated that it "has flourished due to network neutrality."[35] Countless other companies, from online retailers to payment service apps, rely on network neutrality to ensure their ability to compete with established, well-resourced companies.

---

[33] *See* Letter from Amazon, et. al, *Protecting and Promoting the Open Internet*, GN Dkt. No. 14-28 (May. 07, 2014), https://static.newamerica.org/attachments/9594-over-100-companies-call-on-fcc-to-protect-network-neutrality/Company_Sign_On_Letter_051414.e2e8cb6a80ce4d5d85c7728673b39668.pdf.

[34] *See* Comments of Etsy, Inc., GN Dkt. No. 14-48 (July 8, 2014).

[35] Comments of Vimeo, LLC, GN Dkt No. 14-28 (July 15, 2014) at 6.

The media landscape faces similar threats. The internet has also been a democratizing force, changing how Americans access news and information and evolving into a critical platform for grassroots organizing and political change. The internet is a level playing field for content creators that has given rise to an entirely new media landscape that was reflected in a Pew Research Center study conducted last year: Half of all adults surveyed aged 18-to-29 said they "often" get news online, as did 49 percent of adults aged 30-to-49 (pluralities in both age demographics).[36] In the modern media and information landscape, a lack of enforceable rules that prohibit ISPs from blocking, throttling, or charging for access to "fast lanes" increases the threat of an ISP favoring certain news or information over others based on the political ideology of that company's leadership, by manipulating the speeds of politically-bent news organizations' websites, or blocking content.

Communities of color stand to feel the effects of the network neutrality repeal acutely. At an event in June 2017, activist Anika Collier Navaroli notes that "[o]ne of the largest group[s] of entrepreneurs that exists is black women. You don't hear that very much... Small businesses are being started by black women online and those voices are important and they need to be heard and they need to survive."[37] As comedian W. Kamau Bell explains, an open internet has created the space and opportunity for black comedians to succeed. "This fair internet, where everyone from an amateur comedian to a celebrity to a huge media company plays by the same rules, means you don't need a lot of money or the backing of someone with power to share your content with the world."[38]

---

[36] Amy Mitchell et al., *Pathways to News*, The Pew Research Center (July 7, 2016), http://www.journalism.org/2016/07/07/pathways-to-news.
[37] Anika Navaroli, "Net Neutrality and the Economy" [panel discussion, event at New America, Washington, DC, June 21, 2017].
[38] W. Kamau Bell, Net Neutrality: Why Artists and Activists Can't Afford to Lose It, New York Times (Oct. 31, 2017), https://www.nytimes.com/2017/10/31/opinion/net-neutrality-artists-activists.html.

For everyone, a future without strong net neutrality protections means less accessible, more centralized internet, with fewer opportunities to engage, grow, innovate, and build.

V. The Open Technology Institute supports the approach in S.B. No. 2 but also encourages the Committee to consider the scope and strategy of Vermont's proposed bill.

Connecticut's S.B. 2 is a significant and laudable effort to preserve network neutrality where the federal government has created significant gaps in oversight. The bill has the Open Technology Institute's support. However, OTI also urges the Senate to consider efforts in other states as it moves forward. Vermont offers a notable approach among the many states that are considering engaging to protect network neutrality. There are two aspects of the structure of Vermont's bill that are instructive for other states. First, the bill includes extensive legislative findings. Second, the bill points to several areas where the state has authority to impose these requirements, and it includes a severability clause.

A. Legislative findings will help reviewing courts discern legislative intent.

Legislative findings should be included in any net neutrality legislation. Such findings help reviewing courts discern the intent behind the legislation. In Vermont's case, the bill was supported by extensive legislative findings that explained in detail the history of the internet and net neutrality, the specific situation that led to the bill (including the lack of ISP competition in Vermont and the Commission's repeal of the 2015 Order), the interests Vermont has in protecting a neutral internet, and why the state believes the bill is not preempted.[39]

[39] Vermont H680, at 1-9, https://legislature.vermont.gov/assets/Documents/2018/Docs/BILLS/H-0680/H-0680%20As%20Introduced.pdf.

The Connecticut General Assembly, in considering how to move forward with its current proposed legislation, should follow this lead. Because preemption presents a complex Constitutional question, it would be prudent for any legislation in Connecticut to include extensive legislative findings.

These legislative findings should include at least the following: (1) a history of the internet, including how its openness has contributed to significant economic and social benefits; (2) how the Commission has recognized, for at least 14 years, that network neutrality protections are vital for the continued success of and innovation over the internet; (3) that Connecticut-based businesses and start-ups rely on an open internet to serve their customers; and (4) that the Commission's network neutrality repeal undermines the future of the open internet. Of course, there is no limit to the amount of legislative findings a legislature can include, so the more the better.

B. Invoking more areas of state authority, with a severability clause, will increase the likelihood that the legislation will be upheld on judicial review.

States and localities retain significant authority over communications services in their areas. The Vermont bill invokes many of these sources of authority, including state contracting, public lands, rights of way, pole attachments and cable line extensions, state universal service, and general policymaking authority.[40]

States should also use a severability clause. Severability clauses allow a court to preserve some portions of a statute even if the court overturns or finds unconstitutional other parts of the statute.[41] States often have their own

[40] Vermont H680. Another option may be cable franchising and Section 706 of the Telecommunications Act of 1996 (47 U.S.C. § 1302).

[41] *See* Mark Movsesian, Severability in Statutes and Contracts, St. Johns L. Scholarship Repository (1995), http://scholarship.law.stjohns.edu/cgi/viewcontent.cgi?article=1113&context=faculty_publications.

severability requirements and norms, and each should of course follow their own requirements.[42]

Invoking all areas of authority, in combination with a severability clause, increases the chances that a reviewing court, should it strike down any particular source of authority, upholds the requirements for at least some communications providers in the state.

C. Preemption concerns should not deter the Connecticut General Assembly from moving forward now.

In its repeal of network neutrality, the Commission claimed broad preemption power and then purported to preempt all states and localities from enacting rules that the Commission refrained from adopting in the order. There are at least three reasons Connecticut should not wait to advance net neutrality legislation.

First, it may take years for the Commission's authority over preemption to be sorted out in the courts. Petitioning and intervening parties in the appeal will likely argue the Commission lacks authority to so broadly preempt states. Notably, 23 state attorneys general have challenged the Commission's repeal order, including Connecticut[43] and Washington, which has passed a bill protecting net neutrality.[44] The appeal process will be lengthy, and the Connecticut legislature should not wait until all those cases resolve before enacting network neutrality protections.

Second, the Commission's claimed preemption is extraordinarily broad. Typically the Commission does not attempt to preempt so broadly, and certainly

---

[42] Savings Clauses, National Conference of State Legislatures, http://www.ncsl.org/documents/lsss/Saving_Clauses.pdf.
[43] Gregory Seay, *CT Joins Multi-State, 'Net-Neutrality' Appeal,* Hartford Business (Jan. 16, 2018), http://www.hartfordbusiness.com/article/20180116/NEWS01/180119920/ct-joins-multi-state-net-neutrality-appeal
[44] Chris Boyette & Madison Park, *Washington Becomes First State to Pass Law Protecting Net Neutrality*, CNNtech (Mar. 6, 2018), http://money.cnn.com/2018/03/06/technology/washington-state-net-neutrality-law/index.html.

does not at the same time as it disclaims its authority over broadband.[45] In most cases, the Commission will claim preemption power but then will review potentially problematic laws on a case-by-case basis.[46] The sheer breadth of the preemption in the order increases its likelihood that it will not be upheld in court.[47]

Third, states and localities retain significant authority in communications practices (especially intrastate practices) and consumer protection. For instance, the states have authority over some aspects of universal service, while the federal government retains authority over other parts.[48] The Commission's repeal order took great pains to clarify that its extraordinarily broad claims of preemption did not "disturb or displace the states' traditional role in generally policing such matters as fraud, taxation, and general commercial dealings…"[49] Thus, there are areas, as discussed above, where states can invoke authority and increase their chances of surviving a preemption challenge.

Conclusion

On behalf of consumers, I urge you to consider the points presented above. The Commission has abdicated its oversight of the internet and is shirking its duty to protect consumers. The Connecticut state legislature's attention to this important issue is commendable, and we welcome the opportunity to work with

---

[45] To see a thorough argument that the Commission lacks preemption authority here, see Harold Feld, Can the States Really Pass Their Own Net Neutrality Laws? Here's Why I Think Yes, Wet Machine (Feb. 6, 2018), http://www.wetmachine.com/tales-of-the-sausage-factory/can-the-states-really-pass-their-own-net-neutrality-laws-heres-why-i-think-yes.

[46] Report and Order, Protecting the Privacy of Customers of Telecommunications and Other Services, 31 FCC Rcd 13911, ¶ 326 (2016), https://apps.fcc.gov/edocs_public/attachmatch/FCC-16-148A1.pdf.

[47] There are yet other reasons the preemption may be overturned, including the lack of notice of state preemption in the Notice of Proposed Rulemaking. *See* Open Technology Institute, Notice of Ex Parte, Dkt. 17-108 (Dec. 7 2018), at 1, https://ecfsapi.fcc.gov/file/1207093350065/OTI%20Preemption%20Ex%20Parte.pdf.

[48] *E.g.*, 47 USC § 254(a), (f).

[49] RIF Order, ¶ 196. *See also* 47 USC § 152(b); Danielle Citron, The Privacy Policymaking of State Attorneys General, 92 Notre Dame L. Rev. 747, 753-54 (2017), https://scholarship.law.nd.edu/ndlr/vol92/iss2/5.

this institution on how to best protect consumers, innovators, and the open internet.