Written Testimony of
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Before the Rhode Island House Committee on Innovation, Internet, and Technology Hearing on House Bill No. 5054, An Act Relating to Public Utilities and Carriers—Internet Service Providers—Net Neutrality

February 23, 2021

Thank you for allowing me to testify today. I am a professor at Boston College Law School, where I teach and research in the areas of telecommunications, Internet law, and federalism. I am also a Visiting Fellow at the American Enterprise Institute, where I have published over 100 blog posts on tech policy issues, including the net neutrality issues addressed in H 5054. But I should note that I am testifying on behalf only of myself in today's proceeding.

I wish to make two points about H 5054. First, it is unlikely that Rhode Island has authority to enact the bill's net neutrality provisions, as the bill conflicts with the Federal Communications Commission's carefully balanced regulatory approach and is probably preempted under the Supremacy Clause. Second, even if Rhode Island could enact H 5054, there are good arguments about why net neutrality rules are bad policy.

I. H 5054 is Likely Preempted

A. H 5054 Likely Frustrates a Federal Objective

In the 2018 *Restoring Internet Freedom (RIF) Order*,[1] the Federal Communications Commission repealed federal regulations similar to those that H 5054 seeks to impose on broadband Internet service providers as a condition of doing business with the state. The Commission found that rules prohibiting blocking, throttling, paid prioritization, and the general conduct standard were likely to inhibit consumers and competition. Instead, the agency chose to rely on enhanced transparency and disclosure requirements, against the backdrop of antitrust and consumer protection laws, to promote innovation while protecting against the risk of consumer harm. In *Mozilla v. Federal Communications Commission*, the D.C. Circuit Court of Appeals upheld this rule and found the agency's explanation reasonable.[2]

The *RIF Order* expressly preempted "any state or local measures that would effectively impose rules or requirements" that the order repealed or rules that would otherwise be "inconsistent with the federal deregulatory approach" taken in the order.[3] This is consistent with the FCC's long-time approach to state regulation of ISP network traffic management practices. Though the agency has flip-flopped over the years on what the rules should be, it has consistently explained

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[1] Restoring Internet Freedom, 33 FCC Rcd. 311 (2018) ("RIF Order").
[2] Mozilla v. Federal Communications Commission, 940 F.3d 1 (2019).
[3] *RIF Order* at 427.

on a bipartisan basis that traffic management rules are primarily a federal function. For example the Obama-era FCC's 2010 *Open Internet Order* explained that the Commission had authority to preempt state regulations that interfere with valid federal objectives and announced it would preempt state laws on a case-by-case basis.[4] The 2015 *Open Internet Order* (upon which H 5054's requirements are modeled) was more explicit, explaining it would preempt "state regulations that would conflict with the federal regulatory framework or otherwise frustrate federal broadband policies."[5]

The *Mozilla* court vacated the RIF Order's express preemption provision, finding that the agency failed to ground the clause in a lawful source of statutory authority.[6] But while vacating the *express* preemption provision, the court was careful to preserve the issue of *conflict* preemption, labeling it "wholly premature."[7] Conflict preemption occurs when a state law "frustrate[s] the accomplishment of a federal objective."[8] The agency cannot assert conflict preemption in the abstract; as the *Mozilla* court explained,

> Because a conflict-preemption analysis involves fact-intensive inquiries, it mandates deferral of review until an actual preemption of a specific state regulation occurs. Without the facts of any alleged conflict before us, we cannot begin to make a conflict-preemption assessment in this case, let alone a categorical determination that any and all forms of state regulation of intrastate broadband would inevitably conflict with the 2018 Order.[9]

At first blush, it may seem odd that *Mozilla* can strike down the *RIF Order*'s preemption clause, and yet leave the door open for a future court to nonetheless find a state law is preempted. The resolution of this seeming conundrum lies in the difference between express and conflict preemption. Whereas express preemption turns on congressional intent—whether Congress has granted the agency authority to preempt state law in an area—conflict preemption focuses on the effect of dual sovereigns pursuing different objectives in an area of shared regulatory authority. Where state law frustrates the accomplishment of a federal objective, the state law must yield—preempted not by some express statutory or regulatory command, but by the Supremacy Clause itself.[10]

The Supreme Court's decision in *Geier v. American Honda Motor Co.* illustrates how conflict preemption works in an analogous regulatory environment.[11] *Geier* involved an automobile safety standard promulgated by the Department of Transportation pursuant to the National Traffic and Motor Vehicle Safety Act of 1966, which granted the agency broad authority to

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[4] Preserving the Open Internet, 25 FCC Rcd. 17905, 17970 n.374 (2010).
[5] Protecting and Promoting the Open Internet, 30 FCC Rcd. 5601, 5804 (2015).
[6] *Mozilla*, 940 F.3d at 86.
[7] Id.
[8] Geier v. American Honda Motor Co., Inc., 529 U.S. 861, 873 (2000).
[9] *Mozilla*, 940 F.3d at 81-82.
[10] *Geier*, 529 U.S. at 873.
[11] Id. at 861.

establish "appropriate Federal motor vehicle safety standards" in the public interest.[12] After experimenting with several different standards over time that varied in onerousness, the agency settled on requirement that automobile manufacturers equip some, but not all, of their vehicles with passive restraints such as airbags.[13] After being injured in an automobile crash, the plaintiff sued the manufacturer, arguing that failure to provide an airbag violated state tort law despite being in compliance with the federal standard.[14] The Act contained an express preemption clause, but the court found this inapposite, as the clause did not address tort claims. Nonetheless, the court found that the tort claim conflicted with the federal standard.

The plaintiff argued that the agency merely set a minimum airbag standard, and states were free to adopt more stringent requirements above that minimum.[15] But the court found otherwise, noting the agency "deliberately provided the manufacturer with a range of choices among different passive restraint devices" designed to "bring about a mix of different devices introduced gradually over time."[16] The agency specifically rejected an all-airbag standard, in part because of concerns about public backlash.[17] The court found the state law claim was preempted because a "rule of state tort law imposing a duty to install airbags in cars such as petitioners' would have presented an obstacle to the variety and mix of devices that the federal regulation sought and to the phase-in that the federal regulation deliberately imposed."[18]

The *RIF Order* reflects a similar exercise of the agency's judgment regarding the appropriate way to regulate the broadband industry. In *Brand X*, the Supreme Court held that the Telecommunications Act's definitions were ambiguous, and therefore the Commission was free to classify broadband Internet access service as either a Title I information service or a Title II telecommunications service.[19] The scope of the agency's Title I power ranges, based upon how the agency interprets ambiguous grants of authority like Section 706 and what rules the agency determines are helpful to execute its clearly defined statutory powers. Similarly, the scope of Title II varies, as the statute gives the agency the power to forbear from applying particular provisions if the agency determines that "enforcement of the regulation or provision is not necessary" or if forbearance is otherwise "consistent with the public interest."[20]

This flexibility creates a broad menu of potential regulatory options for the agency to choose from, all of which are permissible under the Communications Act as interpreted by *Brand X*. On one end of the spectrum, the agency could opt for a policy of complete nonregulation, disclaiming any interest in broadband whatsoever. On the other end, it could apply the full

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[12] National Traffic and Motor Vehicle Safety Act of 1966, 80 Stat. 718, 15 U.S.C. § 1381 et seq. (repealed by Pub.L. 103-272 § 7(b), July 5, 1994, 108 Stat. 1379).
[13] *Geier*, 529 U.S. at 864.
[14] Id. at 865.
[15] Id. at 874.
[16] Id. at 874-875.
[17] Id. at 879.
[18] Id. at 863.
[19] Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs., 545 U.S. 967 (2005).
[20] 47 U.S.C. § 160 (2018).

panoply of Title II obligations to broadband providers, up to and including rate regulation pursuant to tariffs filed with the Commission. Between these poles lie a host of potential regulatory bundles, including minimalist Title I requirements, a more robust common-law regulatory structure constructed using a more intensive Title I process, or a Title II-lite regime that waives most, some, or virtually none of that chapter's traditional common carriage requirements.[21]

The *RIF Order* represents the agency's policy judgment regarding the optimal regulatory bundle from among these options. Contrary to the claim made by some net neutrality advocates, the agency did not foreswear any jurisdiction over broadband access and abandon the field. Rather, it opted to classify broadband as an information service and subject it to specific transparency and disclosure obligations, coupled with enforcement of existing consumer protection and antitrust laws. But it decided against more intensive common carrier-like economic restrictions, which were likely to harm consumers and innovation. Significantly, the *Mozilla* court found this analysis to be a reasonable exercise of the Commission's authority.[22]

My sense is that courts are likely to find that H 5054 "frustrate[s] the accomplishment of a federal objective" by imposing precisely those duties that the Commission explicitly repealed as harmful, and by reducing the flexibility that the Commission recognized as important to future growth. Here, as in *Geier*, the agency has adopted a careful regulatory scheme that balances trade-offs between more and less onerous requirements. More onerous state restrictions upset that balance and therefore are likely to be found preempted by the Supremacy Clause.

B. Rhode Island Likely Cannot Sidestep Preemption Through Procurement Law

Nor can the state avoid preemption by substituting the power of the purse for the power of regulation. H 5054 proposes not to regulate broadband providers directly, but to prevent the state from contracting with broadband providers unless they guarantee net neutral practices for consumers in the state. My home state of Massachusetts has previously learned the limits on using procurement to skirt federal policies with which it disagreed. In the late 1990s, Massachusetts felt that the federal government was not going far enough to sanction human rights abuses in Burma. So to put additional pressure on the regime, the state refused to contact with companies that did business in Burma. Like the recent executive order, the goal was to pressure companies to adopt voluntary practices that federal law refused to impose directly. But the Supreme Court ruled unanimously that because the state's action interfered with the federal government's policy toward Burma, and so struck down the law.[23]

The use government contracts to shape interstate commerce likely violate the Dormant Commerce Clause. The Dormant Commerce Clause prohibits state interference with interstate

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[21] See, e.g., Daniel A. Lyons, *Net Neutrality and Nondiscrimination Norms in Telecommunications*, 54 ARIZ. L. REV. 1029, 1041 n.64 (2012) (discussing Title II–lite regime).

[22] *Mozilla*, 940 F.3d at 72-73.

[23] See *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363 (2000).

commerce and often serves as a bar to state efforts to regulate activity online.[24] The Supreme Court has recognized a narrow exception to the Dormant Commerce Clause, known as the "market participant doctrine," which gives states more leeway when acting as a purchaser than as a regulator. But that narrow exception does not apply when a state attempts to sue its purchasing power to affect contracts with third parties. The Supreme Court explained that states cannot use their purchasing power to "encourage a general policy rather than address a specific proprietary problem."[25] And that is, of course, precisely what H 5054 seeks to do: to use the state's purchasing power to affect the terms of contracts between broadband providers and individual consumers. Rhode Island is free to require that service to government agencies abide by net neutral terms, but the executive order exceeds its constitutional boundary by demanding the same terms in third-party contacts, and a bill making similar demands would meet a similar fate.

C. H 5054 May Clash with Biden Administration Policies

Of course, the incoming administration has very different views about net neutrality and has signaled a desire to revisit the *RIF Order*. At present, the Federal Communications Commission is deadlocked and so there is not a majority to overturn the order. But if the Commission repeals the *RIF Order* and adopts net neutrality rules at the federal level, H 5054 will be at best superfluous and at worst it could conflict with the Commission's future plans.

As noted above, H 5054 adopts the language of the 2015 Open Internet Order prohibiting blocking, throttling, and paid prioritization, as well as the unreasonable interference/disadvantage standard. It is quite possible that a future FCC Order may adopt different language, which would leave H 5054 in potential conflict with the Commission's objectives. But even if the FCC uses the same language, there is a risk that federal and state authorities interpreting the same language differently. This is particularly true of vague, relatively open-ended standards such as the command not to "unreasonably interfere with or disadvantage" relationships between consumers and edge providers.

II. Net Neutrality Rules May Produce Unintended Consequences

A. One-Size-Fits-All Rules May be Bad Policy

Moreover, even if Rhode Island could enact state net neutrality requirements, it's not clear that it should do so. The committee should consider carefully the unintended consequences of a ban on all paid prioritization. Net neutrality proponents are correct that prioritization can be misused for anticompetitive purposes. But the reality is that there are good and bad reasons why a network might prioritize some traffic over others. A flat ban on prioritization risks jeopardizing these benefits because of fear the practice will be abused—yet the abuse feared is already largely prohibited by antitrust law.

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[24] See, e.g., American Libraries Ass'n v. Pataki, 969 F.Supp. 160 (S.D.N.Y. 1997) (invalidating New York statute regulating online activities).

[25] See, e.g., *Cardinal Towing & Auto Repair v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999).

Net neutrality advocates often argue that without a ban on paid prioritization, internet service providers (ISPs) would divide the network into fast lanes and slow lanes. This rhetoric envisions broadband networks as segmented into various lanes of travel, with packets sorted into channels that move at different maximum speeds at all times. But this is only a metaphor, and distorts how the Internet actually works. All Internet traffic on a network moves at the same speed. The problem is congestion: what happens when users want to transmit more data than the wire can physically manage at a particular moment. In this case, the network must drop some packets and allow others to go through. The dropped packets then must be resent, which delays the delivery of the service.

Of course, congestion is not constant; it is more likely to occur at times of peak use. The solution to chronic congestion is to expand network capacity. But additional capacity is expensive. It is often uneconomic to build a network with zero congestion at peak time because this would create significant excess capacity at off-peak periods—like building an 8-lane highway that sits empty for 23 hours each day. And a zero-congestion network today may nonetheless face congestion in the future, as consumers' appetites for data grow. So some amount of congestion is inevitable.

So how can we address that congestion? One can drop packets randomly, which seems to align with net neutrality's ethos that all traffic should be treated the same. But there's a problem with this model: Different internet content and applications have different susceptibility to congestion. A user loading an email or a webpage is unlikely to notice if some packets are dropped and resent. But streaming video or FaceTime may buffer, which erodes the consumer's experience and makes the product less reliable.

An alternative would be to drop packets intelligently, by deprioritizing traffic that is less sensitive and prioritizing traffic that is more sensitive to congestion. This would improve the experience for streaming video (for example) without measurably degrading the web surfer's experience. But this is precisely the solution that many net neutrality advocates would prohibit. Note, though, that because different applications have different susceptibility to congestion, a ban on prioritization is anything but neutral: it favors apps like email and web-browsing that are not congestion-sensitive, over more bandwidth-intensive services that are. My concern is that requiring the Internet to always function exactly as it does now can have unintended consequences for innovation, as companies seeking to develop the next big application are stymied by an Internet architecture that cannot change to meet their needs.

When pressed, some net neutrality advocates will concede the value of intelligent traffic management. The problem isn't prioritization, they claim, but paid prioritization: the protection against congestion in exchange for a fee. But once one acknowledges the need to prioritize traffic, one then needs a method of prioritization. One solution is a central planning model: An expert (likely either a government bureaucrat or a broadband company engineer) can develop a master list of all internet-based applications and sort it by priority. This raises difficult questions about the sorting rule. Is it based entirely on how quickly the service erodes, or is the expert choosing, say, telemedicine over cat videos because he or she feels telemedicine is more

important? This raises the prospect of government or ISPs picking winners and losers, which is precisely what net neutrality is supposed to prevent. The expert may miscalculate an application's sensitivity. And even if the expert gets the list right, it's hard to maintain in a dynamic environment where new services are being added and existing services are being improved, which makes today's congestion-sensitivity calculations less relevant tomorrow.

Alternatively, we can use the price mechanism, which is the way we generally allocate scarce resources (like bandwidth) in a capitalist society. Hayek taught that prices reveal information that markets can use to sort claims on a decentralized basis. An application developer will only purchase prioritization if its service is congestion-sensitive. When it is willing to do so, and at what price, reveals how susceptible it is compared to other apps. This sorts apps with less error and fewer value judgment than a centrally planned solution.

The concern, of course, is that the price mechanism harms those who cannot afford to pay for prioritization. But these concerns are somewhat overrated. First, apps that are not congestion-sensitive have no need to pay for prioritization. Second, even in a net-neutral world, there are other ways that well-funded companies can — and do — pay to reduce their exposure to congestion. Netflix, for example, has built its own private content delivery network to bypass the public internet as a way to improve the quality of service it gives to its consumers. In essence, it paid a premium to assure its traffic receives an advantage over that of its competitors. It is facile to assume that this distortion happens only on last-mile broadband networks.

B. Restricting Procurement May Adversely Affect State Government Operations

Finally, it is unwise to limit the number of competitors eligible to bid for state contracts. As the Committee is likely aware, customers—including state agencies—have few options to choose from when purchasing broadband service. Technological innovation may soon provide additional competition from 5G wireless networks or satellite providers such as Elon Musk's SpaceX program, but these new competitors may not adhere to H 5054's principles. If a broadband provider cannot or will not offer service to consumers on a net neutral basis, H 5054 excludes that provider from competing for government service contracts. Reducing an already small pool of eligible bidders could increase the price that state agencies pay for fixed or mobile broadband service.

III. Conclusion

It's worth noting that the current light-touch regulatory framework for traffic management is the historical approach under which the Internet as we know it grew and flourished. For most broadband providers, the rules that H 5054 seeks to impose were binding only during a brief period from 2015 through 2017. Contrary to claims by some advocates, the restoration of that traditional light-touch regulation did not amount to abandoning the field, leaving a regulatory void that states like Rhode Island must rush to fill. Although broadband providers do have some incentives to behave in an anticompetitive fashion, antitrust law protects consumers from the harms that net neutrality advocates fear most, just as it shields consumers from anticompetitive

harm everywhere else in American society. It is a mistake to adopt prophylactic state rules because of the specter of a few bad actors that antitrust law already disciplines, particularly given the risk that these new rules may have severe unintended consequences.