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Distinguished members of the Committee. My name is Russell Hanser. I am a partner at the law firm Wilkinson Barker Knauer, LLP, where I focus on communications, privacy, cybersecurity, and artificial intelligence issues. I appreciate the opportunity to testify today on H5054 for Cox Communications ("Cox"), which among other things provides broadband internet access service in Rhode Island.

For the past 15 years I have represented wireless, wireline, and cable broadband providers in net neutrality and other proceedings before the Federal Communications Commission (FCC) and in the courts. In all, I have practiced communications law for more than two decades. Prior to joining Wilkinson Barker Knauer in 2005, I served as Legal Advisor to a Commissioner at the FCC, as Special Counsel to the FCC's General Counsel, and as Special Counsel to the Chief of the Competition Policy Division in the FCC's Wireline Competition Bureau. During that time, I worked on network neutrality and other issues. My involvement with these issues thus stretches back to the origins of the broadband Internet. I also have been an Adjunct Professor of Communications Law at the Catholic University of America's Columbus School of Law and previously at the University of New Hampshire Law School. I hold a B.A. from Amherst College, a J.D. from Harvard Law School, and a Master of Arts in Global Policy from Johns Hopkins University.

INTRODUCTION

Cox and other leading providers of broadband Internet access service are united in their commitment to maintaining the open Internet. Regardless of any legal mandates, broadband Internet service providers have made binding commitments not to block or throttle lawful Internet traffic or engage in unfair discrimination against lawful Internet content, applications, or devices. Broadband providers such as Cox also remain fully transparent regarding their network management practices, service attributes, and data practices. These various commitments flow from the business imperative to deliver high-quality services in a manner that meets customers' needs, but they also are enforceable as a matter of federal and state law.

Cox and other stakeholders across the country support bipartisan federal legislation to enshrine the principles of Internet openness on a uniform basis for all broadband providers nationwide. Congress can ensure that consensus net neutrality safeguards remain in place throughout the nation despite changes in administration, while preserving strong incentives for investment and innovation.

At the same time, Cox opposes any effort by Rhode Island or any other state to establish its own, unique net neutrality regime, whether through outright mandates or limitations on state contracting. State regulation of broadband Internet access service is unnecessary and would be unworkable, counterproductive, and unlawful. As Congress, the FCC, and administrations since President Clinton's have long recognized on a bipartisan basis, broadband Internet access is an inherently interstate service that must be regulated at the federal, not state, level. Imposing state-specific mandates on broadband providers would inappropriately subject them to a patchwork of different and even conflicting requirements, creating operational burdens and significant barriers

to investment and innovation, with potentially disastrous effects for the Internet ecosystem. This is not just a theoretical concern; there are significant differences among the various legislative and executive measures adopted and under consideration by states to protect net neutrality. Disparate state net neutrality laws would leave ISPs in the impossible position of attempting to adopt different practices in different states, notwithstanding the fact that Internet traffic crosses state borders, and that the broadband providers themselves typically provide service on a regional or nationwide basis. The net effect of multiple state net neutrality regimes is debilitating uncertainty for ISPs along with confusion and a poorer online experience for consumers. To prevent such harms, even the FCC's 2015 *Title II Order*, spearheaded by President Obama's appointee Chairman Tom Wheeler, expressly preempted states and localities from adopting their own net neutrality requirements. Many congressional leaders are currently focused on this issue and have introduced legislation to address it. Cox respectfully urges Rhode Island to marshal its interest in this important issue to encourage the federal government to act.

Below I address the key reasons why Rhode Island should not adopt H5054.

I. H5054 IS UNNECESSARY

In 2015, the FCC adopted the *Title II Order*, which broke with decades of precedent and held that broadband Internet access was a "telecommunications service," not an "information service," under the federal Communications Act.[1] This reclassification subjected broadband ISPs to a host of regulatory burdens designed for telephone monopolies during the 1930s – obligations often known collectively as "common carrier requirements," which are set out in

[1] *Protecting and Promoting the Open Internet*, WC Docket No. 14-28, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd 5601 (2015) ("*Title II Order*").

Title II of the federal Communications Act.[2] In the 2017 *Restoring Internet Freedom Order*, or "*RIF Order*," the FCC overturned much of the *Title II* Order, classifying broadband Internet access once again as an information service, and exempting it from the Title II "common carrier" regime.[3] As detailed below, H5054 seeks to reimpose the majority of the requirements of the *Title II Order*. This is unnecessary (and, as detailed below, unlawful).

Broadband providers in Rhode Island do not and will not block, throttle, or unfairly discriminate against lawful Internet content. These behaviors would be bad not only for consumers, but also for broadband providers themselves, which hope to win and maintain consumers' trust and *long-term* business. That is why ISPs across the country have made binding, enforceable, public commitments to uphold net neutrality principles.[4] Cox, for its part, expressly states on its website that it "does not shape, block or throttle Internet traffic or engage in other network practices based on the particular online content, protocols or applications a customer uses or by a customer's use of the network."[5]

In addition to these commitments, broadband providers remain subject to the FCC's transparency rule, which requires broadband providers to disclose – publicly, prominently, and in an easily digestible format – their network management practices, their offerings' performance attributes, and their commercial terms of service, as well as any practices related to blocking, throttling, affiliated or paid prioritization, and related matters. This information must be sufficient to "enable consumers to make informed choices regarding the purchase and use of

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[2] 47 U.S.C. § 201 *et seq.*

[3] *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd 311, *petitions for review denied in pertinent part, Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019) ("*RIF Order*").

[4] For discussion of ISPs' commitments in this regard, see https://www.ncta.com/whats-new/reaffirming-our-commitment-an-open-internet.

[5] Cox, Cox Internet Service Disclosures (Jan. 13, 2021), *available at* https://www.cox.com/aboutus/policies/internet-service-disclosures.html.

such services and entrepreneurs and other small businesses to develop, market, and maintain Internet offerings."[6]

In the event any broadband provider runs afoul of these disclosure obligations, both the FCC and the FTC have authority to enforce the commitments in those disclosures, as do state attorneys general. Section 5 of the FTC Act grants the FTC authority to bring enforcement action against companies that engage in "unfair or deceptive acts or practices" or "unfair methods of competition."[7] The FTC also can use its broad antitrust authority to bring enforcement action against any broadband provider that attempts to harm online competition, including, for example, through practices that unreasonably or unfairly disfavor certain online content.[8] Moreover, under Rhode Island's Deceptive Trade Practices Act, the state's Attorney General can take action if an ISP does not abide by its commitments.[9] Thus, if a broadband provider is alleged to have reneged on a public net neutrality commitments, the FTC and/or the Rhode Island Attorney General can investigate and bring an enforcement action to ensure that consumers are treated fairly and in accordance with expectations.[10]

In addition to the above, market forces themselves protect broadband consumers. ISPs would be loath to alienate their own customers, and there is simply no meaningful prospect that

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[6] 47 C.F.R. § 8.1.

[7] 15 U.S.C. § 45.

[8] *See id.* at 23-29 (explaining that the antitrust laws provide a proven framework for addressing various Internet business practices, including unilateral exclusionary conduct that overlaps with traditional open Internet concerns, and determining whether they are procompetitive or anticompetitive). *See also RIF Order* ¶¶ 87, 116-17, 122.

[9] Chap. 6-13.1 *et seq.*

[10] *See* Comments of FTC Staff, *Restoring Internet Freedom*, WC Docket No. 17-108, at 20-21 (July 17 , 2017) (explaining that the FTC's "unfair and deceptive practices . . . standard has proven to be enforceable in the courts" and "has also proven adaptable to protecting consumers in a wide range of industries and situations, including online privacy and data security"), *available at* https://www.ftc.gov/system/files/documents/advocacy_documents/comment-staff-bureau-consumer-protection-bureau-competition-bureau-economics-federal-trade/ftc_staff_comment_to_fcc_wc_docket_no17-108_7-17-17.pdf.

an ISP could implement a strategy of blocking, throttling, or unfairly discriminating against Internet content in the heavily scrutinized broadband marketplace. A wide array of stakeholders, including customers, consumer advocacy groups, academics and engineers who closely monitor Internet traffic and activity, would immediately and vociferously object to any such conduct. Indeed, the fact that there have been no credible allegations of blocking, throttling, or unfair discrimination since the FCC repealed the *Title II Order* is a testament to the effective legal framework and powerful market forces that apply in the broadband ecosystem today.

II. THE REGULATIONS THAT H5054 SEEKS TO REINSTATE CAUSED NEEDLESS HARMS WHILE DOING NOTHING TO PROTECT CONSUMERS

While the FCC's *RIF Order* preserved important protections for consumers, it also wisely restored the light-touch regulatory framework for broadband service that had applied from the earliest days of the Internet to the FCC's 2015 *Title II Order*, and resulted in the rapid development and growth of the Internet that is unparalleled in human history. That approach, originally adopted the Clinton Administration and then embraced on a bipartisan basis for nearly two decades, played a decisive role in spurring the Internet's dynamism.

The FCC's controversial decision in 2015 to break from this bipartisan consensus and to instead apply an antiquated and burdensome "Title II" regulatory framework to the 21st-century broadband marketplace ushered in a period of debilitating uncertainty.[11] The FCC's open-ended general conduct rule (mirrored in H5054's Chap. 39-19-10.4(4)), combined with Title II's amorphous and vague restrictions and the prospect of even more intrusive utility-style rate regulation and related mandates, caused broadband providers to forgo billions of dollars in investments and delay innovative new service offerings. In fact, the FCC reported in 2018 that,

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[11] As noted, "Title II" refers to the collection of provisions in the federal Communications Act that govern traditional telephone service, applying far-reaching common carrier requirements to telephone offerings.

between 2015 and 2017 (i.e., roughly from the *Title II Order*'s adoption until its repeal), new wireline broadband deployments declined by 55 percent, and wireless broadband deployments by 83 percent, compared to the two years preceding the *Title II Order*.[12] I am sometimes asked why ISPs would oppose resuscitation of the *Title II Order*'s requirements if they have no intention to block, throttle, or unfairly discriminate against traffic. The answer is that the Title II requirements themselves, including the general conduct rule, went well *beyond* the bright-line bans on blocking, throttling, and paid prioritization, establishing a system in which any practice an ISP implemented could, months or years later, be declared unlawful for reasons the ISP could never have anticipated. This substantially increased risk undercut investment and innovation, harming consumers and broadband providers alike.

III. H5054 IS PREEMPTED BY FEDERAL LAW

The enforcement of net neutrality principles by the FCC and FTC underscores the importance of a unified national approach to these issues. In the 2015 *Title II Order*, the Obama FCC under Chairman Wheeler "reaffirm[ed] the Commission's longstanding conclusion that broadband Internet access service is jurisdictionally interstate for regulatory purposes" citing the "Internet's inherently global and open architecture," and emphasizing that states were precluded from applying network neutrality obligations of their own.[13] The *RIF Order* agreed, finding that "it is well-settled that Internet access is a jurisdictionally interstate service" that "should be governed by a uniform set of federal regulations, rather than a patchwork that includes separate state and local requirements." This is because, as has been widely recognized, interstate and

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[12] *See* 2018 Broadband Deployment Report, *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 33 FCC Rcd. 1660 ¶ 4 (2018), *available at* https://docs.fcc.gov/public/attachments/FCC-18-10A1.pdf.

[13] *Title II Order* ¶¶ 431-433.

intrastate communications all travel over the same Internet connection (and often do so in response to a single query), making it impossible or impracticable to distinguish between intrastate and interstate communications over the Internet or to apply different rules in each circumstance. For this reason, among others, the FCC has found *on a bipartisan basis* that state-by-state regulation of broadband would thwart key federal objectives. In the *Title II Order*, the Obama FCC announced its "firm intention to … preclude states from imposing obligations on broadband service that are inconsistent with the carefully tailored [federal] regulatory scheme" and to "act promptly, whenever necessary, to prevent state regulations that would conflict with the federal regulatory framework or otherwise frustrate federal broadband policies."[14] The FCC's subsequent *RIF Order* likewise held that, were state and local governments to adopt their own net neutrality regulations, they would "significantly disrupt the balance" struck by the FCC and impede the deployment and provision of broadband facilities and services.[15]

Given broadband's inherently interstate nature and the bipartisan consensus that broadband policy must be effectuated at the federal level, H5054 is preempted by federal law. It is a bedrock tenet of our federalist system – as codified in the Constitution's Supremacy Clause – that where state and federal laws conflict, the state law must yield. Although the D.C. Circuit in *Mozilla v. FCC* held that the FCC lacked authority to expressly preempt *all* state broadband regulation on a prospective *blanket basis* – *i.e.*, without examining whether and to what extent any individual state law actually conflicts with federal law, regulations, or associated objectives – it made clear that individual state laws would nevertheless be invalid under the conflict preemption doctrine if they are inconsistent with the FCC's regulatory framework. In fact, the

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[14] *Id.* ¶ 433.

[15] Declaratory Ruling, Report and Order, and Order, *Restoring Internet Freedom*, 33 FCC Rcd. 311 ¶ 194 (2018), *petitions for review denied in pertinent part, Mozilla Corp. v. FCC*, 940 F.3d 1 (D.C. Cir. 2019).

court rejected as a "straw man" the argument that its opinion in any way prejudges whether state laws may be preempted under conflict preemption.[16]

The Supreme Court has repeatedly reaffirmed the vitality of the conflict preemption doctrine, and has applied it in circumstances analogous to those here. For example, in *Capital Cities Cable*, the Court held that FCC regulations encouraging the carriage of out-of-state broadcast signals and cable channels on cable systems preempted an Oklahoma law prohibiting televised advertisements of alcoholic beverages.[17] The Court explained that, "when federal officials determine . . . that restrictive regulation of a particular area is not in the federal interest, 'States are not permitted to use their police power to enact such a regulation.'"[18] The Supreme Court likewise has held that a federal agency's decision not to impose a particular mandate preempts state attempts to establish such a mandate.[19]

Based on these precedents, a reviewing court almost certainly would conclude that H5054 is preempted under the conflict preemption doctrine because it directly conflicts with the federal Communications Act, the *RIF Order*, and federal policy. The *RIF Order* expressly repealed *the very same rules* that H5054 now proposes to enact into state law, making the conflict readily apparent. In addition, the FCC's determination that those conduct rules are unnecessary and counterproductive forecloses states from enacting laws based on a contrary

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[16] 940 F.3d at 85.

[17] *Id.* at 705-11.

[18] *Id.* at 708 (quoting *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978)).

[19] *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 886 (2000) (holding that federal policy that deliberately gave automakers flexibility to utilize different types of passive restraints preempted state tort claims premised on an alleged duty to install airbags); *see also id.* at 837 (explaining that state laws that conflict with federal policy are "nullified by the Supremacy Clause").

policy judgment.[20] By the same token, H5054 would replicate the Internet conduct standard, which the FCC's *Title II Order* made clear was a common carrier requirement and contrary to the public interest.[21]

H5054 would not be saved by the fact that it "merely" forbids state contracting units from procuring broadband services with ISPs that do not comply with network neutrality principles, rather than codifying those principles into law directly. Settled precedent clearly establishes that states cannot regulate *indirectly* what they are preempted from regulating *directly*. In particular, a state may not escape preemption by using its procurement process to impose contractual conditions regulating a broadband provider's provision of broadband service to consumers statewide, as H5054 would require. Relatedly, a state cannot claim that it is merely acting as a "market participant" where the "primary goal" of the procurement requirement is "to encourage a general policy rather than address a specific proprietary problem."[22] According to the Supreme Court, where a procurement requirement seeks to regulate conduct outside the scope of the state contract, the action, "for all practical purposes, . . . is tantamount to regulation."[23] Therefore, a state law, regulation, executive order, or similar measure that – like H5054 – would require state agencies to enter into contracts only with broadband providers that comply with specified net neutrality principles in their provision of broadband service to consumers in the state is subject to preemption to the same degree as a law that imposes such obligations directly.

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[20] *See, e.g., Capital Cities Cable*, 467 U.S. at 711 (holding that state law was preempted because it "thwart[ed]" FCC policy).

[21] *RIF Order* ¶¶ 246-252.

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

[23] *Wisconsin Dept. of Indus. v. Gould, Inc.*, 475 U.S. 282, 289 (1986).

Ongoing litigation in California and Vermont underscores the legal risks associated with H5054. After California enacted its own net neutrality law, the U.S. Department of Justice and several associations of ISPs filed a federal lawsuit to enjoin its enforcement on preemption and Commerce Clause grounds. Tellingly, the State of California promptly agreed to a stipulation conceding that it cannot lawfully enforce the law it enacted unless and until the courts overturn the preemption ruling in the *RIF Order*. That stipulation was followed by another stay of the matter. The Department of Justice dropped out of the suit after President Biden took office, but the ISPs' suit remains active, and the federal district court responsible for the case is holding a hearing on the matter today to determine how to move forward. Industry groups filed a similar legal challenge to Vermont's statute and executive order that impose procurement restrictions designed to enforce net neutrality principles, like those set forth in H5054. Once again, the State quickly agreed to a stipulation to allow the courts to consider preemption questions. That stay will remain effective until – at the earliest – the end of next month or whenever there is a court ruling as to pending motions seeking to enjoin the California law.

These lawsuits illustrate that pursuing state legislation would invite needless and costly litigation that is almost certain to result in an order enjoining the enforcement of state law.

IV. FEDERAL LEGISLATION REPRESENTS THE BEST PATH FORWARD

Although the broadband industry strongly supports the FCC's decision to undo the harmful Title II classification, there remains a danger that the agency's approach to these issues will oscillate back and forth as presidential administrations come and go over time. The industry – and the FCC – need more definitive statutory guidance to establish a durable and sensible framework for Internet openness. That is why Cox and other stakeholders are urging Congress to enact bipartisan legislation that will permanently preserve and solidify net neutrality

protections for consumers, while providing regulatory certainty. The last decade has witnessed multiple costly and chaotic regulatory proceedings on this issue, each of which has engendered years of litigation and widespread dissatisfaction. During the Biden Administration, the FCC could well reverse the approach taken during the Trump Administration – and the next Administration could once again change course. This ping-pong effect is extremely disruptive to America's Internet economy, constraining the growth of new technologies. Fast, reliable, and ever-present broadband is the lifeblood of the 21st century economy, and the Internet is too valuable to consumers and businesses to be subject to such shifting political winds that come with each change in control of the White House.

Congressional leaders on both sides of the aisle have publicly recognized that federal legislation is the best way to cement a durable solution. To avoid still more years of litigation, Cox strongly urges the Committee and all stakeholders to support bipartisan *federal* legislation that will enshrine enduring open Internet protections while providing the flexibility to innovate and preserving incentives to invest.

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Cox will continue to work with Congress in pursuit of federal, bipartisan net neutrality legislation. Rhode Island can play a productive role by joining consumers, the industry, and other stakeholders in calling for such national legislation. In the interim, however, the State should not adopt a state-level measure that would be unnecessary, harmful to consumers, and unlawful.