Statement of Matthew A. Brill
Partner, Latham & Watkins LLP

Hearing on House Bill No. 957
Economic Matters Committee
February 26, 2020

Chairman Davis, Vice Chairwoman Dumais, and Members of the Committee, I appreciate the opportunity to testify today on behalf of NCTA – the Internet & Television Association, the leading national association for the cable industry. My name is Matthew Brill, and I am a partner at the law firm of Latham & Watkins LLP and Chair of the firm's Communications Practice Group. I have represented NCTA and individual cable operators in net neutrality proceedings before the Federal Communications Commission (FCC), in the courts, and before other state legislatures. Prior to joining Latham & Watkins in 2005, I served as Senior Legal Advisor and Chief of Staff to a Commissioner at the FCC, so my involvement with this issue stretches back to its origins and its many different iterations over the years.

EXECUTIVE SUMMARY

It is Unnecessary and Would Be Unwise and Unlawful for Maryland to Enact State-Level Net Neutrality Rules

- Broadband providers are fully committed to maintaining the open Internet. Leading broadband providers have all made public, legally enforceable commitments to refrain from blocking, throttling, and unfairly discriminating against lawful Internet content, and to remain transparent regarding their network management practices, prices, and service attributes.

- The broadband industry also strongly supports federal legislation that will ensure net neutrality is the permanent law of the land, thereby maintaining a free and open Internet for consumers and encouraging broadband providers to continue to invest and innovate. Congress is currently focusing on these issues, and Maryland can play a productive role by joining consumers, the industry, and other stakeholders in calling for national legislation. The broadband industry urges Congressional Democrats and Republicans to reach a sustainable, nationwide resolution to these issues.

- In the meantime, federal and state regulators—FCC, FTC, and state attorneys general—have all the tools they need to enforce broadband providers' net neutrality commitments and to protect consumers.

- Under the conflict preemption doctrine, which is grounded in the Supremacy Clause of the Constitution and reinforced by well-established Supreme Court precedent, states lack the power to enact statutes that conflict with federal law. Yet that is exactly what H.B. 957 would do by attempting to undo binding determinations issued by the FCC in its Restoring Internet Freedom Order (*RIF Order*), and by subjecting information service providers to common carrier regulation in contravention of the Communications Act of 1934, as amended. In addition, because broadband Internet access is an inherently interstate service, subjecting it to a patchwork of state regulations would impose significant burdens on interstate commerce and stifle investment and innovation.

- That is why similar efforts to impose state-level net neutrality mandates in California and Vermont have spurred legal challenges. In each of those pending federal court cases, the State has agreed not to enforce its law until the appeals process arising from the FCC's *RIF Order*—which the D.C. Circuit upheld in *Mozilla v. FCC*, 940 F.3d 1 (D.C. Cir. 2019)—has been completed (including consideration of any requests for Supreme Court review). But those lawsuits are expected to resume in the coming months and likely will confirm the limits of state authority in this arena. Maryland was a party to the appeal of the *RIF Order*, and at a minimum it should await the outcome of the pending lawsuits against California and Vermont before considering legislation that would invite invalidation under the conflict preemption doctrine.

- Ultimately, state or local net neutrality measures—and the resulting litigation they inevitably would cause—are entirely unnecessary. The broadband industry is and will remain committed to providing access to a free and open Internet as it has done for decades, with unprecedented investment and innovation. Broadband providers will do so even in the absence of ill-advised "Title II" regulatory mandates—because of their strong *business* interest in providing consumers with the Internet experience they want, expect, and deserve.

INTRODUCTION

NCTA's members—which are leading providers of broadband Internet access service across the country, including in Maryland—are united in their commitment to maintaining the open Internet. Regardless of any legal mandates, broadband Internet service providers will not block or throttle lawful Internet traffic or engage in unfair discrimination against lawful Internet content, applications, or devices. Broadband providers also will remain fully transparent regarding their network management practices and service attributes. These 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.

NCTA and many other industry groups and other stakeholders across the country strongly 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, NCTA opposes any effort by Maryland or any other state to establish its own, unique net neutrality regime because state legislation is unnecessary and would be counterproductive and unlawful. As Congress, the FCC, and Administrations since President Clinton's in 1996 have long recognized on a bipartisan basis, broadband Internet access is an inherently interstate service that must be regulated at the federal level. Imposing state-specific mandates on broadband providers would inappropriately subject them to a patchwork of different and even conflicting requirements, thereby creating insurmountable 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 by states to protect net neutrality. For example, the treatment of "zero rating" is illustrative: California's law (like H.B. 957) purports to ban most zero-rating arrangements outright, some state laws might (or might not) preclude zero-rating under their versions of the FCC's Internet conduct standard, and yet other state laws permit such arrangements. The net effect is debilitating inconsistency and uncertainty for ISPs and confusion for consumers.

In its decision upholding the *RIF Order*'s core rulings, the D.C. Circuit recognized that, although the FCC could not expressly preempt all state net neutrality laws in advance on a blanket basis, a state law is subject to invalidation under the conflict preemption doctrine if it conflicts with the FCC rulings upheld by the *Mozilla* court, including the classification of broadband Internet access service as an information service (which means it cannot be subject to common carrier requirements) and the FCC's decisions to eliminate the previously applicable bans on blocking, throttling, and paid prioritization and the Internet conduct standard. While NCTA respects this Committee's work and shares its commitment to safeguarding the Internet, this issue of paramount national concern must be resolved in the United States Congress rather than in the State House.

I. NCTA'S MEMBERS ARE AND WILL REMAIN COMMITTED TO PRESERVING THE OPEN INTERNET

NCTA's members have always been committed to maintaining an open Internet, and that commitment has not wavered in the two-plus years since the FCC adopted the *RIF Order*. Opponents of the FCC's *RIF Order* have used scare tactics in an attempt to convince legislators, regulators, and consumers that broadband providers are likely to engage in nefarious conduct that would undermine their relationships with their own customers. Nothing could be further from the truth. Broadband providers in Maryland do not and will not block, throttle, or unfairly discriminate against lawful Internet content. Doing otherwise not only would be bad for consumers, it would be bad for broadband providers who hope to win and maintain consumers' trust and long-term business. That is why NCTA members and broadband providers across the

country have made binding, enforceable, public commitments to uphold net neutrality principles.[1]

In addition to making these commitments, broadband providers remain subject to the FCC's transparency rule, which requires providers to keep customers clearly informed of key information they need to evaluate broadband service offerings. Specifically, the FCC's updated transparency rule requires broadband providers to disclose—publicly, prominently, and in an easily digestible format—their network management practices, performance attributes, and commercial terms of service, as well as any practices related to blocking, throttling, affiliated or paid prioritization, and related matters, in order to "enable consumers to make informed choices regarding the purchase and use of such services and entrepreneurs and other small businesses to develop, market, and maintain Internet offerings." *RIF Order* ¶ 215. 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, provided they do not assert positions that conflict with federal law.

II. TITLE II REGULATION CAUSED NEEDLESS HARMS WHILE DOING NOTHING TO PROTECT CONSUMERS

While the FCC's *RIF Order* preserves important protections for consumers, it also wisely restores broadband Internet access service as an "information service" under Title I of the federal

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[1] *See, e.g.*, *Supporting an Open Internet*, NCTA, https://www.ncta.com/positions/supporting-an-open-internet (last visited Feb. 21, 2020) ("[ISPs] have always been committed to and offered American consumers a powerful, open internet experience so they can enjoy the web content, services and applications of their choosing."); *Xfinity Internet Broadband Disclosures*, Xfinity, https://www.xfinity.com/policies/internet-broadband-disclosures (last visited Feb. 21, 2020) ("Comcast does not discriminate against lawful Internet content, applications, services, or non-harmful devices."); *Why We Will Continue to Support an Open Internet*, Charter Communications (Dec. 14, 2017), https://policy.charter.com/blog/will-continue-support-open-internet/ ("[W]e don't interfere with the lawful online practices of our customers and we have no plans to change our practices.").

Communications Act—a decision the D.C. Circuit upheld in *Mozilla*. This regulatory classification for broadband service applied from the earliest days of the Internet through 2015. The rapid development and growth of the Internet is unparalleled in human history, and the light-touch regulatory approach to broadband that was originally adopted by a Democratic Congress and Administration under President Clinton, 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 devised for telephone common carriers in the 1930s to the 21st-century broadband marketplace ushered in a period of debilitating uncertainty. The FCC's open-ended Internet conduct rule, 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, we now know that in the wake of the 2015 *Title II Order*, the deployment of broadband slowed significantly. The FCC reported in 2018 that 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*.[2] The FCC's *RIF Order* removed the overhang and uncertainty of Title II regulation and

[2] *See* 2018 Broadband Deployment Report, *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, FCC 18-10, GN Docket No. 17-199, ¶ 4 (Feb. 2, 2018), available at https://docs.fcc.gov/public/attachments/FCC-18-10A1.pdf; *see also Mozilla Corp. v. FCC*, 940 F.3d 1, 49-50 (D.C. Cir. 2019) ("We find that the agency's position as to the economic benefits of reclassification away from 'public-utility style regulation,' which the Commission sees as 'particularly inapt for a dynamic industry built on technological development and disruption,' is supported by substantial evidence" (citations omitted)).

appropriately reinstated the light-touch regulatory framework under Title I that promoted substantial broadband investment, innovation, and deployment for the preceding two decades.

Critically, rescinding the harmful effects of Title II does not mean eliminating net neutrality. Title II regulation and net neutrality are entirely distinct and independent things. The Internet was free and open before the FCC's Title II reclassification decision in 2015, and the same will be true now that the detrimental effects of that reclassification have been undone.

III. FEDERAL LEGISLATION REPRESENTS THE BEST PATH FORWARD

Although the broadband industry strongly supports the FCC's decision to undo the harmful Title II classification, broadband providers, like many other stakeholders, are frustrated by the continuing regulatory whiplash as Administrations change and policies shift. That is why NCTA and other industry groups across the country are urging Congress to enact bipartisan legislation that will permanently preserve and solidify net neutrality protections for consumers, while providing regulatory certainty to broadband providers. 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. This tumult has been needlessly disruptive to America's Internet economy, constraining the growth of new technologies. Fast, reliable, and ever-present broadband is the life-blood 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.[3] Rather than remaining mired in years of

[3] *See, e.g.*, Sen. Roger Wicker & Sen. Kyrsten Sinema, *We need to prepare for internet of the future. Here's how Congress can help.*, USA Today (Dec. 23, 2019, 6:00 AM),

litigation, NCTA strongly urges Members of 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.

IV. EFFECTIVE FEDERAL ENFORCEMENT OF NET NEUTRALITY REMAINS IN PLACE

Even in the absence of federal legislation, the FCC and FTC will continue to ensure that broadband providers deliver on their commitments to preserve the open Internet that consumers expect and deserve. As noted earlier, the FCC's *RIF Order* establishes a robust transparency regime that requires broadband providers to keep customers clearly informed of their net neutrality practices. Providers will be held accountable for any failure to abide by these disclosures, as the Communications Act authorizes the FCC to impose substantial fines for any violations.

While the FCC's misguided decision in 2015 to classify broadband providers as Title II common carriers temporarily revoked the FTC's authority over broadband Internet access, the *RIF Order*'s restoration of the longstanding classification of broadband as an information service enables the FTC to return to its work of policing broadband providers alongside other Internet companies. 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." Both of these provisions allow the FTC to take action against any broadband providers that fail to deliver an open Internet to their customers.

The FTC has long exercised authority under Section 5 to enforce a company's public commitments; when a company makes a promise to consumers, the FTC has authority to ensure

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https://www.usatoday.com/story/opinion/2019/12/23/net-neutrality-requires-bipartisan-effort-promote-innovation-column/2684989001/.

that the promise is kept. Thus, if a broadband provider is alleged to have reneged on a public commitment to abide by core net neutrality principles of no blocking, no throttling, no unfair discrimination against lawful Internet content, and transparent disclosures, the FTC can investigate and bring an enforcement action to ensure consumers are treated fairly and in accordance with expectations.[4] The FTC (alongside DOJ) 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.[5] Indeed, the FTC has expressly committed to use its authority to protect consumers online, agreeing to do just that in a Memorandum of Understanding with the FCC.[6] Broadband providers take seriously their obligation to be truthful, reasonable, and fair, and consumers can expect the FTC to hold broadband providers accountable. Notably, even apart from the FTC's expansive oversight authority, and leaving aside the fact that ISPs would be loath to alienate their own customers, there is simply no meaningful prospect that an ISP could implement a strategy of blocking, throttling, or unfairly discriminating against Internet content in

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[4] *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.

[5] *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).

[6] Restoring Internet Freedom FCC-FTC Memorandum of Understanding (Dec. 14, 2017), available at https://www.ftc.gov/system/files/documents/cooperation_agreements/fcc_fcc_mou_internet_freedom_order_1214_final_0.pdf.

the heavily scrutinized broadband marketplace. A wide array of stakeholders, including consumer advocacy groups and policymakers, would immediately and vociferously object to any such conduct, and the resulting public backlash undoubtedly would spur corrective action. Indeed, that there have been no credible allegations of blocking or throttling since the FCC repealed the *Title II Order* is a testament to the powerful market forces that apply irrespective of the regulatory backstops that remain in place.

As the nation's leading consumer protection agency, the FTC has developed extensive expertise on the inner workings of the Internet, monitoring every corner of the web in order to safeguard consumers. This knowledge, along with its broad jurisdictional reach over virtually all online and offline businesses, makes the FTC well suited to safeguard Internet openness, together with privacy and data security. Importantly, the FTC's Section 5 authority extends to *all* participants in the Internet ecosystem—including the world's largest Internet companies, like Amazon, Apple, Facebook, and Google. This ensures that consumers will not be subject to disparate sets of protections depending on the platform they are using or the agency that chooses to take action. Well before the 2015 *Title II Order* was even adopted, the FTC had already taken numerous enforcement actions against broadband providers and Internet edge providers for various unfair, deceptive, or anticompetitive practices, including for violating public commitments.

State authorities also may bring enforcement actions against broadband providers, so long as they act under generally applicable statutes that do not interfere with federal objectives.

V. STATE-LEVEL NET NEUTRALITY MEASURES WOULD BE UNWISE AND UNLAWFUL

The enforcement of net neutrality principles by the FCC and FTC underscores the importance of a unified national approach to these issues. It is well-settled that Internet access is

a jurisdictionally interstate service, which warrants governance under a uniform set of federal regulations, rather than a patchwork that includes separate state and local requirements. It is simply not possible for broadband providers to distinguish between intrastate and interstate communications over the Internet or to apply different rules in each circumstance. And, in any event, H.B. 957 defines broadband as a service that connects consumers to *all* Internet end points—in every state—and thus does not purport to regulate only intrastate communications. Thus, the very nature of Internet service—which transcends state and even national boundaries—defies efforts to impose different, and potentially conflicting, standards on broadband providers in each state where they operate. Broadband providers, and the Internet as a whole, depend on a uniform set of rules with consistent federal enforcement.

Although H.B. 957 may be intended to enshrine consensus principles against blocking, throttling, and discriminatory fast lanes, the problem is that, even if various states were to impose identical restrictions (which they have not), different states inevitably will interpret comparable standards in divergent ways. What a particular state considers "throttling," for instance, may well differ from what another state considers to be "throttling" or how an ISP uses the term in making its commitments to end users. Indeed, the term "throttling" is one that can carry a wide range of meanings: Whereas the FCC defines "throttling" as a "practice (other than reasonable network management elsewhere disclosed) that degrades or impairs access to lawful Internet traffic on the basis of content, application, service, user, or use of a non-harmful device," *RIF Order* ¶ 220, the term also is often used colloquially to describe *any* slowing down of Internet traffic, even when done on a content- or application-neutral basis as part of a data plan that includes clearly disclosed data allowances. ISPs (and their customers) therefore would be harmed to the extent that Maryland or other states enforce so-called "bright-line" restrictions in a

manner inconsistent with other state interpretations or with ISPs' understanding of the principles and their own commitments.

In addition to protecting consumers, one of the FCC's chief goals—directed by Congress and shared by state policymakers—is to promote the widespread deployment of advanced broadband networks. The FCC has found that state-by-state regulation of broadband would thwart that key objective. If state and local governments were to adopt their own net neutrality regulations, they would significantly disrupt the balance struck by the FCC and impede the provision of broadband facilities and services.

A. State or Local Laws That Are Inconsistent with the Communications Act or the Judicially Affirmed Rulings in the *RIF Order* Are Foreclosed by the Conflict Preemption Doctrine

It is a bedrock tenet of our federalist system—as codified in the Supremacy Clause of the Constitution—that where state and federal laws conflict, the state law must yield. Accordingly, although the D.C. Circuit in *Mozilla* 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 may well be invalidated under the conflict preemption doctrine if they are inconsistent with the FCC's light-touch regulatory framework. In fact, the court rejected the notion that conflict preemption was inapplicable as a "straw man." 940 F.3d at 85.

Applying the conflict preemption standard, because the D.C. Circuit upheld (i) the FCC's classification of broadband as an information service, and (ii) the agency's elimination of prohibitions against blocking, throttling, and paid prioritization and the Internet conduct standard (on the ground that such requirements are unnecessary, counterproductive, and even harmful), those binding federal determinations preempt any conflicting state laws. Such a conflict arises

where compliance with both state and federal law is impossible or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Capital Cities Cable v. Crisp*, 467 U.S. 691, 699 (1984); *see also id.* (holding that FCC actions "have no less preemptive effect" than acts of Congress (citation omitted)).

The U.S. Supreme Court has repeatedly reaffirmed the validity of the conflict preemption doctrine and has applied it in closely analogous circumstances. 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. *Id.* at 705-11. 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.'" *Id.* at 708 (quoting *Ray v. Atl. Richfield Co.*, 435 U.S. 151 (1978)). The same principle applies here. 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. *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").

Based on such precedent, a reviewing court almost certainly would conclude that H.B. 957 is preempted under the conflict preemption doctrine, because it directly conflicts with binding federal directives set forth in the Communications Act and the *RIF Order*. In particular, the D.C. Circuit has previously concluded that categorical bans on blocking, throttling, and paid prioritization—as H.B. 957 would impose—constitute common carrier mandates, *see Verizon v.*

FCC, 740 F.3d 623, 650 (D.C. Cir. 2014), and both the Communications Act and the *RIF Order* leave no doubt that broadband providers—as information service providers—may not be saddled with common carrier regulation. *See* 47 U.S.C. § 153(51) (establishing that common carrier regulation may be imposed only on telecommunications carriers, not on providers of information services); *RIF Order* ¶¶ 26-64 (classifying broadband as an information service and rejecting common carrier regulation).

Independently, the FCC's determination that those conduct rules are unnecessary and counterproductive forecloses states from enacting laws based on a contrary policy judgment. *See, e.g.*, *Capital Cities Cable*, 467 U.S. at 711 (holding that state law was preempted because it "thwart[ed]" FCC policy). By the same token, H.B. 957 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. *RIF Order* ¶¶ 246-52. Moreover, H.B. 957 would expressly prohibit most forms of zero-rating, a practice that even the *Title II Order* declined to prohibit and that the *RIF Order* found to be generally procompetitive. Finally, H.B. 957 would reinstate the very type of economic regulation of traffic-exchange agreements that the *RIF Order* rejected as "unnecessary and . . . likely to inhibit competition and innovation." *Id.* ¶ 167. In sum, such stark conflicts between H.B. 957 and federal law are all but certain to result in invalidation of the state law. (The attached chart summarizes the conflicts between the *RIF Order* and H.B. 957.)

B. States Cannot Avoid the Preemptive Effects of the Communications Act and the *RIF Order* by Regulating Net Neutrality Through the Guise of Contract Procurement or Similar Measures

Judicial precedent also 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 H.B. 957 would require.

Courts have made clear that a state cannot claim that it is merely acting as a "market participant" where the procurement conditions it seeks to impose extend beyond the state's pecuniary interest in the contractual conditions of its purchase. The "market participant" exception to preemption does not apply where the "primary goal" of the procurement requirement is "to encourage a general policy rather than address a specific proprietary problem." *Cardinal Towing & Auto Repair, Inc. v. City of Bedford*, 180 F.3d 686, 693 (5th Cir. 1999). As courts have explained, "[e]xtracontractual effect is an indicator of regulatory rather than proprietary intent." *Bldg. Indus. Elec. Contractors Ass'n v. City of New York*, 678 F.3d 184, 189 (2d Cir. 2012). And 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." *Wisconsin Dept. of Indus. v. Gould, Inc.*, 475 U.S. 282, 289 (1986). Therefore, a state law, regulation, executive order, or similar measure that—like H.B. 957—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.

C. State or Local Net Neutrality Regulation Also Would Violate the Commerce Clause of the U.S. Constitution

Beyond the clear preemption that applies under conflict preemption principles, H.B. 957 also would violate the Commerce Clause of the U.S. Constitution, which prohibits states from adopting regulations that reach beyond their borders to dictate business conduct in other states. Because of the inherently interstate nature of the Internet and the impossibility of distinguishing between intrastate and interstate Internet communications, any state or local regulation of broadband providers' service offerings or network management practices will have an unavoidable and significant impact on interstate commerce. Indeed, H.B. 957 defines

"broadband Internet access service" as connecting to all Internet end points, making clear that the state law would regulate communications that are overwhelmingly interstate in nature. And it is highly unlikely that a court would disregard that impact on interstate commerce based on a state's asserted interest in establishing protections already ensured through nationwide FCC and FTC enforcement.

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Of course, if states wish to challenge the FCC's chosen policy approach, they may continue to do so in the courts. Notably, Maryland joined a number of other states in pursuing precisely such a challenge to the *RIF Order* in the D.C. Circuit, which upheld the FCC's core rulings in October 2019. And Maryland may work with Congress to enshrine additional net neutrality protections at the federal level—which NCTA itself supports. What states may *not* do is enact or adopt their own net neutrality laws, regulations, executive orders, or the like, which would directly contravene the FCC's binding determinations.

Notably, recent litigation in California and Vermont underscores that it would be inappropriate for Maryland to take legislative action on net neutrality. After California enacted its own state net neutrality law, the U.S. Department of Justice and several associations of ISPs, including NCTA, filed a federal lawsuit to enjoin its enforcement. Industry groups have filed a similar legal challenge to Vermont's statute and executive order that impose procurement restrictions designed to enforce net neutrality principles, just like those set forth as an alternate basis for enforcement in H.B. 957. In both cases, the states agreed to suspend enforcement of the laws until the appellate process involving the *RIF Order* has been completed, so those cases will resume once the period for seeking Supreme Court review has expired (or following any Supreme Court review, if it grants certiorari). These lawsuits illustrate that pursuing state

legislation would invite needless and costly litigation that almost certainly results in an order enjoining the enforcement of state law. At a minimum, Maryland should await the outcome of those pending federal lawsuits before considering enacting its own net neutrality requirements.

Ultimately, state-level net neutrality measures—and the court challenges they would spur—are entirely unnecessary. The broadband industry is and will remain committed to providing access to the Internet without blocking, throttling, or unreasonable discrimination. They will be honest and open with consumers, disclosing detailed information about their service offerings as well as network management and performance. They will be subject to the federal consumer protection and antitrust laws that will ensure that these commitments to Internet openness are maintained and enforced. They will do these things even in the absence of ill-advised Title II regulatory mandates—because of their strong *business* interest in providing consumers with the Internet experience they want, expect, and value. And federal and state regulators—the FCC, FTC, and state consumer protection authorities—have all the tools they need to enforce broadband providers' public net neutrality commitments and to protect U.S. consumers.

NCTA and the broadband industry will continue to work with Congress in pursuit of federal, bipartisan net neutrality legislation. Maryland can play a productive role by joining consumers, the industry, and other stakeholders in calling for such national legislation. The broadband industry looks forward to reaching a permanent nationwide resolution to these issues in the months ahead.

Thank you for giving me the opportunity to testify today. I look forward to answering your questions.

Attachment to the Testimony of Matthew A. Brill

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Maryland H.B. 957 Conflict Preemption Summary

FCC Rulings Upheld by *Mozilla*	Conflicts Caused by H.B. 957
Information Service Classification: The FCC's RIF Order reinstated the agency's longstanding classification of broadband Internet access service as an information service (which had applied for decades before the 2015 Open Internet Order changed course), and the D.C. Circuit upheld that classification decision. Section 3(51) of the Communications Act provides that a "telecommunications carrier shall be treated as a common carrier under this chapter *only to the extent that it is engaged in providing telecommunications services.*" 47 U.S.C. § 153(51). The D.C. Circuit expressly found that common carrier regulations could not be imposed on Internet service when it was classified as an information service. *See Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014) (citing 47 U.S.C. § 153(51)).	Because the D.C. Circuit upheld the FCC's classification of broadband Internet access service as an information service, it cannot be subject to common carrier obligations. The D.C. Circuit has concluded that requirements substantially identical to those imposed by H.B. 957—i.e., the prohibitions against blocking, throttling, and paid prioritization—are common carrier obligations. *See Verizon*, 740 F.3d at 650. In addition, the 2015 Open Internet Order made clear that the Internet conduct standard adopted therein was a common carrier requirement, and that standard has been replicated in H.B. 957. *The RIF Order and the Communications Act therefore preempt H.B. 957's imposition of common carrier obligations on broadband Internet access service providers.*
Repeal of Blocking & Throttling Bans: The FCC expressly repealed no blocking and no throttling rules because it deemed them unnecessary and counterproductive. *See, e.g.*, *RIF Order* ¶ 263 ("We find the no-blocking and no-throttling rules are unnecessary to prevent the harms that they were intended to thwart.").	H.B. 957 §§ 14-4203(A)(1)-(2) provide: "A fixed Internet service provider, in the course of providing fixed broadband Internet access service, may not: (1) Subject to reasonable network management, block lawful content, applications, or services, or nonharmful devices; [or] (2) Impair or degrade lawful Internet traffic on the basis of Internet content, application, or service, or the use of a nonharmful device." *Because the D.C. Circuit upheld the FCC's decision to repeal these very same rules as unnecessary and counterproductive, see* Mozilla Corp. v. FCC*, 940 F.3d 1, 55-56 (D.C. Cir. 2019), H.B. 957's attempt to undermine that binding federal determination by reinstating bans on blocking and throttling directly conflicts with the FCC's Order and is foreclosed by the conflict preemption doctrine.*
Repeal of Paid Prioritization Ban: The FCC expressly repealed its previous ban on paid prioritization as unnecessary, overbroad, and counterproductive. *See, e.g.*, *RIF Order* ¶ 253 ("We . . . decline to adopt a ban on paid prioritization" and "expect that eliminating the ban . . . will help spur innovation and experimentation, encourage network investment, and better allocate the costs of	H.B. 957 §§ 14-4203(A)(3)-(4) provide: "A fixed Internet service provider, in the course of providing fixed broadband Internet access service, may not:

infrastructure, likely benefiting consumers and competition.").	(3) Require consideration, monetary or otherwise, from an edge provider, including in exchange for: (I) Delivering Internet traffic to and carrying Internet traffic from the Internet service provider's end users; (II) Avoiding having the edge provider's content, application, service, or nonharmful device blocked from reaching the Internet service provider's end users; or (III) Avoiding having the edge provider's content, application, service, or nonharmful device impaired or degraded; [or] (4) Manage the Internet service provider's network to directly or indirectly favor certain Internet traffic over other Internet traffic, including through the use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either: (I) In exchange for consideration, monetary or otherwise, from a third party; or (II) To benefit an affiliated entity." *Because the D.C. Circuit upheld the FCC's decision to repeal its ban on paid prioritization as unnecessary and counterproductive, see* Mozilla Corp.*, 940 F.3d at 55-56, H.B. 957's attempt to undermine that binding federal determination by reinstating the very same ban on paid prioritization directly conflicts with the FCC's Order and is foreclosed by the conflict preemption doctrine.*
Elimination of Internet Conduct Standard: As with the bright-line conduct rules, the FCC expressly eliminated the Internet conduct standard adopted in the 2015 Open Internet Order because it was unnecessary and counterproductive. *See RIF Order* ¶¶ 246-47 ("We find that the vague Internet Conduct Standard is not in the public interest," in part because it "has created regulatory uncertainty in the marketplace hindering investment and innovation.").	H.B. 957 § 14-4203(B)(1) provides: "A fixed Internet Service provider, in the course of providing fixed broadband Internet access service, may not unreasonably interfere with or unreasonably disadvantage: (I) An end user's ability to select, access, and use broadband Internet access service or lawful Internet content, applications, services, or devices of the end user's choice; or (II) Subject to reasonable network management, an edge provider's ability to make lawful content, applications, services, or devices available to end users." *Because the D.C. Circuit upheld the FCC's decision to repeal a substantively identical conduct standard on the*

	basis that it was unnecessary and counterproductive, see Mozilla Corp.*, 940 F.3d at 55-56, H.B. 957's attempt to undermine that binding federal determination by reinstating the FCC's previously applicable conduct standard directly conflicts with the FCC's Order and is foreclosed by the conflict preemption doctrine.*
Zero Rating Is Permitted: The RIF Order imposes no restrictions on zero rating arrangements, finding them presumptively procompetitive. Notably, even the *Title II Order*, which imposed the above-referenced Internet conduct standard (along with other forms of common carrier regulation) on broadband Internet access service providers, did not flatly ban zero rating that involved third-party consideration or selective exemptions from data charges. *See RIF Order* ¶ 250.	H.B. 957 § 14-4203(A)(5)-(6) provides: "A fixed Internet service provider, in the course of providing fixed broadband Internet access service, may not: (5) Engage in zero-rating in exchange for consideration, monetary or otherwise, from a third party; [or] (6) Zero-rate only certain Internet content, applications, services, or devices in a category of Internet content, applications, services, or devices." *By imposing zero-rating limits that are even* ***more*** *restrictive than the 2015 approach that the FCC rejected as overly burdensome, H.B. 957 plainly conflicts with federal law and is foreclosed by the conflict preemption doctrine.*
Ensuring Market-Based Governance of Internet Traffic Exchange: The FCC determined that traffic-exchange arrangements should not be subject to economic regulation. *See RIF Order* ¶ 166 ("Today, we reverse the [*Title II Order*]'s extension of Title II authority to Internet traffic exchange agreements," which "was unnecessary and is likely to unduly inhibit competition and innovation."); *id.* ¶ 168 (finding that "freeing Internet traffic exchange arrangements from burdensome government regulation, and allowing market forces to discipline this emerging and competitive market is the better course").	H.B. 957 § 14-4203(A)(8) provides: "A fixed Internet service provider, in the course of providing fixed broadband Internet access service, may not: (8) Engage in practices, including agreements, with respect to, related to, or in connection with Internet service provider traffic exchange, that have the purpose or effect of evading the prohibitions established under this section and § 14-204 of this subtitle." *Because the D.C. Circuit upheld the FCC's decision to shield traffic-exchange arrangements from economic regulation, see* Mozilla Corp.*, 940 F.3d at 20, H.B. 957's attempt to undermine that federal determination by reinstating such regulation directly conflicts with the RIF Order and is foreclosed by the conflict preemption doctrine.*