

**Testimony of Michael J. Santorelli
Director, Advanced Communications Law & Policy Institute
New York Law School**

Before the Connecticut Senate Committee on Energy and Technology

**Hearing on: SB-2 – An Act Concerning Internet Service Providers and
Net Neutrality Principles**

March 8, 2018

* * * * *

TABLE OF CONTENTS

	INTRODUCTION & SUMMARY.....	1
1.	CONTEXT: STATE NET NEUTRALITY LAWS SEEK TO REPLICATE A FAILED FCC REGULATORY FRAMEWORK.....	3
1.1	<i>Broadband Investment Lagged Under the FCC’s Misguided Common Carrier Framework, Offering a Cautionary Tale to States.....</i>	4
1.2	<i>Broadband Thrives Under a Deregulatory Framework, Offering States a Better Model That Should Be Replicated.....</i>	8
1.3	<i>State Net Neutrality Laws Are Vulnerable to Federal Preemption.....</i>	10
2.	STATE NET NEUTRALITY LAWS COULD UNDERMINE ALREADY ROBUST CONSUMER PROTECTIONS & WOULD DIVERT RESOURCES FROM POLICING AREAS WHERE HARM IS MUCH LIKELIER TO OCCUR.....	13
2.1	<i>Robust Consumer Protections Remain at Both the Federal & State Levels..</i>	14
2.2	<i>State Net Neutrality Laws Could Undermine Consumer Welfare.....</i>	15
2.3	<i>When Seeking to Police the Digital Ecosystem, States Should Focus More Resources on Firms Operating at the Network’s Edge.....</i>	18
3.	STATE POLICYMAKERS ARE BETTER SERVED SEIZING THE MANY OPPORTUNITIES TO BOLSTER BROADBAND CONNECTIVITY.....	22
3.1	<i>In Lieu of Net Neutrality Laws, States Should Develop Policies & Strategies to Promote Broadband Deployment.....</i>	22
3.2	<i>In Lieu of Net Neutrality Laws, States Should Develop Policies & Strategies to Improve Broadband Adoption and Bolster Digital Literacy Skills.....</i>	24
4.	CONCLUSION.....	25

INTRODUCTION & SUMMARY

Chairs Formica, Reed, and Winfield, and distinguished members of the Committee – thank you very much for the opportunity to testify today. I am the Director of the Advanced Communications Law & Policy Institute (ACLP) at New York Law School.¹

The ACLP studies the array of legal, regulatory, and public policy issues impacting the deployment and use of advanced communications services in the United States. A core mission of ours is to develop analyses that can assist in shaping impactful, rational policies that benefit and empower consumers throughout the digital ecosystem. We are regularly called upon by policymakers at every level of government and of every political stripe to offer counsel and insights regarding proposed policies, programs, and other initiatives aimed at bolstering broadband connectivity. In the recent past, I was appointed by FCC Chairman Pai to serve on the Removing State and Local Regulatory Barriers to Broadband Deployment Working Group, which works in support of the Commission’s Broadband Deployment Advisory Committee. I have also served on the New York State Broadband Task Force; have been involved with many similar initiatives in New York City; and have offered formal and informal input to policymakers at the state and local levels in places like Colorado, Massachusetts, and West Virginia, and via organizations like the National Conference of State Legislatures, the National Association of Regulatory Utility Commissioners, and the National League of Cities.

With Senate Bill 2, Connecticut has joined a growing number of states exploring how they might fill a perceived gap in broadband consumer protection. Although in many instances well intentioned, these efforts could very well do more harm than good if enacted. Indeed, putting aside

¹ For additional information about the ACLP, please visit <http://www.nyls.edu/advanced-communications-law-and-policy-institute/>.

the likelihood that such efforts will be preempted or otherwise nullified in court, *the rigidity of many of these laws could, ironically, result in consumer welfare losses in the form of lower investment levels by ISPs, less robust offerings, and an overall chill in the kind of business model and service offering experimentation that has delivered to consumers a range of ways to go online.* This is not mere conjecture: there is persuasive evidence that the FCC's two-year experiment with a framework very similar to the one being explored by Connecticut and other states negatively impacted the broadband sector.

This testimony focuses on the following three points:

1. **Context** – The history of FCC efforts in this space, coupled with their impacts on investment and innovation by ISPs and others in the ecosystem, suggests that bills like the one being examined by Connecticut will likely do little to improve the overall consumer experience, and could very well harm it. Moreover, these laws are extremely vulnerable to federal preemption, raising the specter of protracted litigation to protect a framework that has already proven to be incongruous with, and detrimental to, the modern communications space.
2. **Protecting Consumers** – The basic premise of state net neutrality bills is that, without state action, consumers will be left without sufficient protection vis-à-vis the whims of broadband ISPs. This is not true. After the repeal of the 2015 FCC Open Internet order, consumer protections against harmful activities by ISPs remain robust. Moreover, the threat posed by ISPs remains theoretical – there is no track record of harm by service providers. This is because ISPs lack any incentive to block or throttle data traffic willy-nilly. In the context of paid prioritization, experimentation should not be stifled lest it impede the development of consumer-friendly and social welfare-enhancing offerings.

To the extent a state wishes to allocate resources in support of policing bad behavior in the digital ecosystem, it should focus instead on content providers, which have very compelling incentives to engage in behavior that is far more nefarious than anything an ISP is capable of.

3. ***Bolstering Broadband Connectivity*** – A more productive and impactful use of state resources is to focus on bolstering broadband connectivity. Even though Connecticut already has among the best broadband connectivity rates in the nation, there is still room for improvement: some areas remain without sufficient access options, while many consumers with ready access remain offline. Modernizing regulatory frameworks could go a long way toward spurring the investment that will be needed to fill any gaps in availability (as previously noted, the net neutrality framework being considered in states like Connecticut has proven to undermine investment). Equally as important is the development and deployment of a comprehensive demand-side strategy for bringing more people online and empowering them with the digital literacy skills needed to use their connections in productive, meaningful ways.

1. CONTEXT: STATE NET NEUTRALITY LAWS SEEK TO REPLICATE A FAILED FCC REGULATORY FRAMEWORK

The radical two-year experiment spearheaded by the Wheeler-era FCC² – where the Commission in its 2015 Order reclassified broadband as a common carrier service and imposed a stifling regulatory regime, breaking with two decades of regulatory precedent³ – was a misguided

² *In the Matter of Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015) (“*2015 Order*”).

³ Even though the 2015 Order was upheld in court in *U.S. Telecom Assoc. v. FCC*, 825 F.3d 674 (D.C. Cir. 2016), the ruling hinged on the extension of deference to the FCC’s reclassification of broadband as a Title II common carrier service and a finding that its analysis in support of its change in treatment of the service was sufficiently robust. In short, the case is not dispositive with respect to the classification itself. Indeed, the Supreme Court in 2005 upheld

failure that negatively impacted broadband investment and created an environment that was likely to undermine innovation and harm consumer welfare.⁴ Seeking to resurrect elements of the order in state law could result in similar outcomes. Moreover, these state laws, if enacted, are likely to be nullified in federal court. This section addresses these points in turn.

1.1 *Broadband Investment Lagged Under the FCC’s Misguided Common Carrier Framework, Offering a Cautionary Tale to States*

There is real danger in state attempts to adopt net neutrality laws that seek to mimic the rules included in the FCC’s since-repealed 2015 Order. Treating broadband ISPs as common carriers – either directly, via formal FCC classification, or indirectly, via rules that have the effect of treating them as such – is contrary to history (common carrier rules were never meant for dynamic markets like broadband⁵) and regulatory precedent (bipartisan FCCs going back to the Clinton administration supported a deregulatory approach to broadband, rendering the 2015 Order an aberration⁶), and, of most relevance here, has proven to undermine much-needed investment in broadband infrastructure.

In general, common carrier-like rules undermine incentives to invest in new services because they create an artificial monopoly-like environment where the regulated firm seeks to maximize returns while investing as little as possible. This echoes the dynamic that tends to play out in the regulation of public utilities, which are treated as natural monopolies subject to exacting

classification of broadband as an information service. *National Cable and Telecommunications Association v. Brand X*, 545 U.S. 967 (2005).

⁴ *In the Matter of Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, WC Docket No. 17-108 (rel. January 4, 2018) (“2017 Order”).

⁵ For an extended discussion, see Charles M. Davidson & Michael J. Santorelli, *Federalism in Transition: Recalibrating the Federal-State Regulatory Balance for the All-IP Era*, 29 Berkeley Technology Law Journal 1131 (2014), http://btlj.org/data/articles2015/vol29/29_2/29-berkeley-tech-l-j-1131-1204.pdf (“Federalism in Transition”).

⁶ See *infra*, Section 1.2. See also *In the Matter of Restoring Internet Freedom*, Comments of the ACLP at New York Law School (July 17, 2017), WC Docket No. 17-108, <http://www.nyls.edu/advanced-communications-law-and-policy-institute/wp-content/uploads/sites/169/2013/08/ACLP-Comments-Restoring-Internet-Freedom-WC-Docket-No-17-108.pdf>.

scrutiny.⁷ Such frameworks encourage conservatism on the part of regulated entities because most actions they take are carefully examined by regulators in a “Mother-may-I” environment.⁸

This dynamic was evident in the broadband space after adoption of the 2015 Order. The introduction of common carrier regulation, even with extensive forbearance, resulted in a noticeable dip in network investment by ISPs.⁹ Some attempted to refute these findings by looking at a broader range of metrics – *i.e.*, those beyond investments in core network infrastructure in the U.S.¹⁰ – an approach that offered a highly skewed, and therefore less relevant, analysis.¹¹ Similarly, some pointed to statements by ISP executives about their continued commitment to investing in broadband regardless of the regulatory environment.¹² Such statements are to be expected from

⁷ Historically, public utility regulation and common carriage have been similar means of achieving similar ends for regulators: engaging in a *quid pro quo* with dominant firms wherein private entities cede certain rights and shoulder specific service obligations in exchange for a range of legal protections (*e.g.*, limited liability) and business model guarantees (*e.g.*, market dominance; a predetermined rate of return on investments). For further discussion, see *Federalism in Transition* at 1141.

⁸ This is a core element of both public utility and common carrier regulation. See, *e.g.*, JAMES C. BONBRIGHT ET AL., PRINCIPLES OF PUBLIC UTILITY RATES 8-11 (2d ed., 1988) (identifying the contours of traditional public utility regulation); ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS, VOL. II 127-129 (1988) (identifying the contours of utility-style common carrier regulation of basic telephone service). For further discussion of the similarities and differences between the two regimes, see *Federalism in Transition* at 1140-1142. See also Charles M. Davidson & Michael J. Santorelli, *Realizing the Smart Grid Imperative: A Framework for Enhancing Collaboration Between Energy Utilities & Broadband Service Providers*, Time Warner Cable Research Program on Digital Communications (2011), http://www.nyls.edu/advanced-communications-law-and-policy-institute/wp-content/uploads/sites/169/2013/08/TWC_Davidson.pdf (“*Realizing the Smart Grid Imperative*”).

⁹ 2017 Order at ¶¶ 86-98. See also George S. Ford, *Reclassification and Investment: A Statistical Look at the 2016 Data*, Phoenix Center Perspectives 17-08 (July 13, 2017), <http://phoenix-center.org/perspectives/Perspective17-08Final.pdf>; Hal Singer, *Bad Bet by FCC Sparks Capital Flight from Broadband*, March 2, 2017, Forbes.com Washington Bytes blog, <https://www.forbes.com/sites/washingtonbytes/2017/03/02/capital-flight-from-broadband-in-the-title-ii-era/#3fd1681735cf>; Hal Singer, *2016 Broadband Capex Survey: Tracking Investment in the Title II Era*, March 1, 2017, Hal Singer Blog, <https://haljsinger.wordpress.com/2017/03/01/2016-broadband-capex-survey-tracking-investment-in-the-title-ii-era/>; Patrick Brogan, *Broadband Investment Ticked Down in 2015*, U.S. Telecom (Dec. 2016), <https://www.ustelecom.org/sites/default/files/Broadband%20Investment%20Down%20in%202015.pdf>.

¹⁰ See, *e.g.*, S. Derek Turner, *It's Working: How the Internet Access and Online Video Markets are Thriving in the Title II Era*, Free Press (May 2017), <https://www.freepress.net/sites/default/files/resources/internet-access-and-online-video-markets-are-thriving-in-title-II-era.pdf> (“*It's Working*”).

¹¹ See, *e.g.*, Doug Brake, *Broadband Myth Series, Part 1: What Financial Data Shows About the Impact of Title II on ISP Investment*, ITIF Innovation Files Blog, <https://itif.org/publications/2017/06/02/broadband-myth-series-part-1-what-financial-data-shows-about-impact-title-ii>.

¹² See, *e.g.*, *It's Working* at 10-11.

those with a fiduciary responsibility to shareholders to successfully navigate any barriers or impediments to growth that might arise. Indeed, statements to the contrary – *e.g.*, that broadband company X was pulling back all of its investments or significantly slashing them because of a “bad” regulatory outcome – would likely be viewed as a breach of that responsibility.

The pursuit of a common carrier-like regulatory regime could have even more profound negative impacts on – and could prove devastating to – the provision of broadband services over the long term. It is difficult to accurately project how broadband capital expenditures might change over time, but the history of under-investment in network infrastructure by entities subject to heavy-handed regulation is illustrative of how the broader trend might shake out.

In the telecom space, the Telecommunications Act of 1996 (“the Act”) called for the implementation of a hybrid common carrier approach in an effort to “manufacture” competition in local telephone markets. Congress delegated to the FCC the authority to engage in detailed, prescriptive policymaking – that ultimately proved too rigid to be effective. The approximately 200 pages of statutory text generated thousands of pages of FCC rules, which in turn provoked dozens of lawsuits, court decisions, remands, and other such actions that left the telecommunications market in disarray for a decade.¹³ Ultimately, the attempt by federal policymakers to synthesize competition among firms failed because it was an unnatural fit for the marketplace.¹⁴ In particular, the Act created the perception that some business models were much more viable and lucrative than they were, which contributed to overinvestment, network

¹³ See, *e.g.*, ROBERT W. CRANDALL, COMPETITION AND CHAOS: U.S. TELECOMMUNICATIONS POLICY SINCE THE 1996 TELECOM ACT 9, 11 (2005).

¹⁴ See Douglas H. Ginsburg, *Synthetic Competition*, 16 Media L. & Pol’y 1, 11-12, 15 (2006) (explaining that “synthetic competition” describes “a market subject to a regulatory regime designed to assure there are multiple sellers regardless whether fewer sellers, perhaps only one, would be more efficient” and arguing that, “in synthetic competition, the preferences of regulators – not consumers – are paramount”).

overbuilds, and, ultimately, to huge losses.¹⁵ In addition, the Act and the rigidity of the policies that flowed from it failed to account for the “rate of technological innovation in the industry.”¹⁶ In short, *by prescribing how a particular market should operate, regulators undermined the ability of the market to adapt, dooming many firms and diverting resources that might have been invested elsewhere.*

This dynamic is especially pertinent in the context of states seeking to replicate the 2015 Order given the several hundreds of *billions* of dollars that many agree will be needed over the next decade to support the deployment of new infrastructure, more fiber, 5G networks, and other expenditures aimed at hastening the spread of broadband to rural areas and further into key sectors (e.g., via the Internet of Things).¹⁷ As such, evidence of even the slightest decline in capital investment in broadband networks should not be written off, nor should it be rationalized as the price to be paid for assuring continued innovation at the network’s edge.¹⁸ The only way to unlock more investment in broadband, which is needed to continue upgrading and expanding this dynamic technology, is to avoid viewing and treating these services as common carriers.

¹⁵ See Thomas Hazlett et al., *Sending the Right Signals: Promoting Competition through Telecommunications Reform*, at p. 33, A Report to the U.S. Chamber of Commerce (Sept. 2004), http://www.uschamber.com/sites/default/files/reports/0410_telecommstudy.pdf (“The Telecommunications Act of 1996 created a new set of rules that artificially inflated the returns of some businesses and depressed the returns of others. Entrepreneurs, eager to take advantage of the new rules, formed a large number of new businesses. Optimistic business plans attracted massive amounts of capital and thus drove up stock price multiples and set the stage for the technology bubble”) (“*Sending the Right Signals*”).

¹⁶ See Richard A. Epstein, *Takings, Commons, and Associations: Why the Telecommunications Act of 1996 Misfired*, 22 Yale J. on Reg. 315, 320 (2005).

¹⁷ See, e.g., *Smart Cities: How 5G Can Help Municipalities Become Vibrant Smart Cities*, Accenture (2017), <https://www.ctia.org/docs/default-source/default-document-library/how-5g-can-help-municipalities-become-vibrant-smart-cities-accenture.pdf> (estimating that service providers will need to invest some \$275 billion in deploying 5G networks).

¹⁸ See *2015 Open Internet Order* at ¶ 410 (“Although we appreciate carriers’ concerns that our reclassification decision could create investment-chilling regulatory burdens and uncertainty, we believe that any effects are likely to be short term and will dissipate over time as the marketplace internalizes our Title II approach, as the record reflects and we discuss further, below. More significantly, to the extent that our decision might in some cases reduce providers’ investment incentives, we believe any such effects are far outweighed by positive effects on innovation and investment in other areas of the ecosystem that our core broadband policies will promote.” (citations omitted)).

1.2 *Broadband Thrives Under a Deregulatory Framework, Offering States a Better Model That Should Be Replicated*

A better approach for states – and one recently reinstated by the FCC in its repeal of the 2015 Order – is to embrace the light-touch framework under which broadband blossomed and thrived for two decades.

There is significant evidence underscoring the efficacy of the light-touch regulatory approach to broadband that prevailed for more than a decade prior to the imposition of common carrier regulation by the previous Commission. Network investment boomed, allowing for advanced infrastructure to be deployed across the country.¹⁹ Wider availability of more robust broadband connections encouraged and enabled innovation at the edge, allowing consumers to reap enormous benefits.²⁰ In short, without such sustained levels of investment by ISPs, innovation across the broadband space – at the core and around the edges – simply would never have occurred.²¹

This context is essential because the slowing of network investment (discussed above) makes clear that the attempted re-introduction of a common carrier-like regulatory approach by the states could shock the sector once again into pulling back some of its investments. This visceral reaction, which occurred in the wake of the 2015 Order, stemmed primarily from the loss of freedom for ISPs to innovate, invest, and deploy new services in response to a changing market and evolving consumer demand and preferences.

¹⁹ For further discussion, see Charles M. Davidson & Michael J. Santorelli, *Understanding the Debate over Government-Owned Broadband Networks: Context, Lessons Learned, and a Way Forward for Policy Makers*, at p. 19-28, A Report of the ACLP at New York Law School (June 2014), <http://www.nyls.edu/advanced-communications-law-and-policy-institute/wp-content/uploads/sites/169/2013/08/ACLP-Government-Owned-Broadband-Networks-FINAL-June-2014.pdf> (“*Understanding the Debate*”).

²⁰ *Id.*

²¹ See, e.g., See, e.g., Michael Santorelli, *Cutting Through the Noise: Net Neutrality is an Infrastructure Issue*, May 18, 2017, Forbes Washington Bytes, <https://www.forbes.com/sites/washingtonbytes/2017/05/18/cutting-through-the-noise-net-neutrality-is-an-infrastructure-issue/#451c662a3e60>.

There is a wealth of evidence indicating a causal relationship between the implementation of a deregulatory model in the broadband space and increases in investment, competition, and innovation.²² These gains coincided with and fed into a fundamental transformation of consumer expectations for their communications services and the primacy of the network vis-à-vis enabling innovation. Indeed, another important indicator of the success of a light-touch regulatory framework is the key role that it has played in fostering the creation of an ecosystem of firms that spans discrete but related segments (*i.e.*, ISPs, content providers, device manufacturers).²³ Unlike under common carriage, which for many years focused on preserving a narrow set of market conditions to the ultimate detriment of would-be competitors and collaborators, light-touch regulation created the conditions under which such cross-sector partnerships have thrived. In short, the bright lines that once separated discrete segments of the communications space – and that were once enforced by common carrier-like rules – began to disappear as a result of a shift to regulatory minimalism.

For these reasons, a deregulatory approach to broadband was embraced for many years on a bipartisan basis. Indeed, the foundation of this framework was forged by a Clinton-era FCC chairman, who recognized that “Government policy can have a profound impact on Internet development” and that “the Internet has flourished in large part due to the absence of regulation.

²² The literature on this point is vast. A small sampling from the era of light-touch regulation includes: James Speta, *Deregulating Telecommunications in Internet Time*, 61 Wash. & Lee L. Rev. 1063 (2004); *Sending the Right Signals* (comparing and contrasting the regulatory frameworks for telephone and broadband services and finding that the exacting regulatory approach for the former would hinder, rather than advance, competition and innovation in the market for the latter); Robert Crandall & Hal Singer, *The Economic Impact of Broadband Investment*, Broadband for America (Feb. 2010), available at http://www.broadbandforamerica.com/sites/default/themes/broadband/images/mail/broadbandforamerica_crandall_singer_final.docx (finding that “In a largely deregulatory climate, broadband penetration skyrocketed to nearly 65 percent penetration by the end of the decade as absolute and quality-adjusted prices fell, and first-generation technologies—cable modem, DSL, and 3G wireless—individually covered approximately 90 percent of all U.S. households and collectively covered even more.” *Id.* at 1).

²³ See *Connecting America: The National Broadband Plan*, at p. 15-16, FCC (2010) (providing a more detailed conceptual definition of the ecosystem) (“*National Broadband Plan*”).

A "hands-off" approach allows the Internet to develop free from the burdens of traditional regulatory mechanisms.”²⁴ This Clinton-era approach was formalized by Bush-era Commissions²⁵ and echoed early on by the Obama-era FCC.²⁶ *Viewed in this context, the 2015 Order is a true anomaly that was rightly rolled back in 2017.* Choosing to adopt legislation that would enshrine core elements of the 2015 Order would align a state with that anomalous – and dangerous – approach.

1.3 State Net Neutrality Laws Are Vulnerable to Federal Preemption

There are at least three ways in which courts might preempt or otherwise overturn state net neutrality laws.

First, the impetus for the spate of state net neutrality laws like the one being considered in Connecticut was the repeal of the Wheeler-era 2015 Order by the Pai-led FCC in 2017. The laws seek to reinstate that which was recently repealed,²⁷ making them inconsistent with and contrary to the prevailing framework for broadband, as set forth in the 2017 Order. As such, these laws are vulnerable to federal preemption. Ironically, the 2015 Order, the jumping off point for many state

²⁴ See William Kennard, Chairman, FCC, *Connecting the Globe: A Regulator's Guide to Building a Global Information Community*, at IX-2 (1999), <http://www.fcc.gov/connectglobe/regguide.pdf>.

²⁵ Between 2002 and 2007, the FCC formally classified every means of broadband internet access as an information service. See *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 FCC Rcd. 4798 (2002), *aff'd Nat'l Cable & Telecomm. Ass'n v. Brand X Internet Serv.*, 545 U.S. 967 (2005); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 20 FCC Rcd. 14,853 (2005); *Classification of Broadband Over Power Line Internet Access Service as an Information Service*, 21 FCC Rcd. 13281 (2006); *In the Matter of Appropriate Regulatory Treatment for Broadband Access to the Internet Over Wireless Networks*, 22 FCC Rcd. 5901 (2007).

²⁶ See, e.g., *National Broadband Plan at 5* (“While we must build on our strengths in innovation and inclusion, we need to recognize that government cannot predict the future. Many uncertainties will shape the evolution of broadband, including the behavior of private companies and consumers, the economic environment and technological advances. As a result, the role of government is and should remain limited.”).

²⁷ See Press Release, *After Trump Administration Rollback, Senate Majority Leader Duff, Legislators and Telecommunications Experts Propose Connecticut Net Neutrality Law*, Feb. 28, 2018, Connecticut Senate Democrats, <http://www.senatedems.ct.gov/duff-news/1421-duff-180228#sthash.bM1MQwbp.dpbs>.

net neutrality laws, was explicit in its conclusions regarding the lack of a state role in the regulation of broadband services:

“...we reaffirm the Commission’s longstanding conclusion that broadband Internet access service is jurisdictionally interstate for regulatory purposes. As a general matter, mixed jurisdiction services are typically subject to dual federal/state jurisdiction, except where it is impossible or impractical to separate the service’s intrastate from interstate components and the state regulation of the intrastate component interferes with valid federal rules or policies. With respect to broadband Internet access services, the Commission has previously found that, “[a]lthough... broadband Internet access service traffic may include an intrastate component...broadband Internet access service is properly considered jurisdictionally interstate for regulatory purposes.” The Commission thus has evaluated possible state regulations of broadband Internet access service to guard against any conflict with federal law. Though we adopt some changes to the legal framework regulating broadband, the Commission has consistently applied this jurisdictional conclusion to broadband Internet access services, and we see no basis in the record to deviate from this established precedent.”²⁸

In its 2017 Order, the FCC underscored that broadband remains an interstate service and documented at length its legal authority to operationalize its preemptive authority in response to “any state or local measures that would effectively impose rules or requirements that we have repealed or decided to refrain from imposing in this order or that would impose more stringent requirements for any aspect of broadband service that we address in this order.”²⁹ This authority hinges on a characteristic fundamental to the Internet: its lack of an identifiable intrastate element.³⁰ As the FCC has noted, summarizing significant case law on the topic:

Because both interstate and intrastate communications can travel over the same Internet connection (and indeed may do so in response to a single query from a consumer), it is impossible or impracticable for ISPs to distinguish between intrastate and interstate communications over the Internet or to apply different rules in each circumstance. Accordingly, an ISP generally could not comply with state or local rules for intrastate communications without applying the same rules to

²⁸ 2015 Order at ¶ 431 (citations omitted).

²⁹ 2017 Order at ¶ 195.

³⁰ See, e.g., *Minn. Pub. Utils. Comm’n v FCC*, 483 F.3d 570 (8th Cir. 2007) (upholding FCC preemption of the PUC’s attempt to levy traditional telecommunications regulation on a VoIP provider, finding that it is impossible to separate interstate and intrastate elements of the service for regulatory purposes).

interstate communications. Thus, because any effort by states to regulate intrastate traffic would interfere with the Commission’s treatment of interstate traffic...”³¹

Second, Congress never contemplated a patchwork state-by-state regulatory approach to broadband, which, as noted, is fundamentally interstate in nature. On a bipartisan basis, Congress in the 1996 Act explicitly stated its intent for the Internet to remain “unfettered by” regulation at the state and federal levels.³² In furtherance of this directive, Congress include an alternative regulatory category – “information services” – which was meant for dynamic, competitive services like broadband. And even though there are clauses in the federal communications laws that might signal otherwise, the FCC’s primacy with respect to advanced communications services is clear and incontrovertible.³³ Indeed, even in the regulation of basic telephone service, which was long governed by a dual federal-state framework, owing to that service’s clearly identifiable intrastate and interstate components,³⁴ courts routinely upheld FCC preemption of state actions that conflicted with its preferred approach.³⁵ As the marketplace for communications services has continued to evolve, courts have been increasingly deferential to FCC efforts to implement more national regulatory schemes, even for services that were once governed in concert with the states.³⁶

Third, assuming that state net neutrality laws were somehow insulated from preemption (which, as noted at length above, they are not), they would still likely fail on the merits. This is

³¹ 2017 Order at ¶ 200 (citations omitted).

³² 47 U.S.C. § 230(b)(2).

³³ For an extended discussion, see Charles M. Davidson & Michael J. Santorelli, *Broadband, The States & Section 706: Regulatory Federalism in the Open Internet Era*, 8 Hastings Science & Technology Law Journal 211 (2016), <http://www.nyls.edu/advanced-communications-law-and-policy-institute/wp-content/uploads/sites/169/2013/08/Davidson-Santorelli-Broadband-Section-706-The-States-Hastings-STLJ-Summer-2016.pdf>.

³⁴ *Federalism in Transition*.

³⁵ *Id.*

³⁶ See, e.g., *Direct Commc’ns Cedar Valley, LLC v. FCC*, 753 F.3d 1015 (10th Cir. 2014) (upholding a sweeping FCC order that, among other things, preempted many state telecom regulations as the Commission sought to modernize the federal universal service program).

because the laws, including the one being considered in Connecticut, seek to force ISPs to act as common carriers despite the fact that broadband has been reclassified as an “information service.” The FCC in 2010 attempted to follow this path, but its proposals were eventually struck down by the D.C. Circuit Court of Appeals.³⁷ In its ruling, the Court noted that, when broadband is classified as an information service, the Commission “may not impose requirements that contravene express statutory mandates,” which for information service providers (*i.e.*, ISPs) include exemptions from rules that are tantamount to those long imposed on common carriers, like prohibitions on blocking and paid priority.³⁸ If a state chose to follow this path, it would likely fall prey to the same legal outcome.

2. STATE NET NEUTRALITY LAWS COULD UNDERMINE ALREADY ROBUST CONSUMER PROTECTIONS & WOULD DIVERT RESOURCES FROM POLICING AREAS WHERE HARM IS MUCH LIKELIER TO OCCUR

Many state net neutrality laws seek to bolster consumer protection, reasoning that the 2017 rollback of the 2015 Order created a regulatory gap that could be exploited by ISPs. This is not the case. As discussed below, *robust consumer protections – at both the federal and state levels – remain in place*. Moving forward with separate state laws is thus unnecessary and could prove counterproductive as some of these proposed rules, particularly the ban on paid prioritization, might very well undermine consumer welfare gains by chilling innovation and experimentation (as discussed below in section 2.2). To the extent a state wishes to bolster its oversight of consumer harms in the digital ecosystem, it would be well served to focus on entities operating at the edge of the broadband network (*e.g.*, content providers like Google and Facebook), which have

³⁷ *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014).

³⁸ *Id.*

compelling incentives and far-reaching power to engage in behavior that society can agree is harmful.

2.1 *Robust Consumer Protections Remain at Both the Federal & State Levels*

The 2017 Order was unequivocal with regard to the ability of states to police broadband ISPs going forward:

“Although we preempt state and local laws that interfere with the federal deregulatory policy restored in this order, we do not disturb or displace the states’ traditional role in generally policing such matters as fraud, taxation, and general commercial dealings, so long as the administration of such general state laws does not interfere with federal regulatory objectives. Indeed, the continued applicability of these general state laws is one of the considerations that persuade us that ISP conduct regulation is unnecessary here...We appreciate the many important functions served by our state and local partners, and we fully expect that the states will “continue to play their vital role in protecting consumers from fraud, enforcing fair business practices, for example, in advertising and billing, and generally responding to consumer inquiries and complaints” within the framework of this order.”³⁹

In short, states can continue to apply and enforce laws of general applicability vis-à-vis ISPs so long as those actions do not interfere with or undermine the FCC’s overall regulatory framework for broadband.

These protections are further amplified by the restoration of Federal Trade Commission (FTC) authority to police broadband ISPs.⁴⁰ The 2015 Order removed this authority from the FTC when it reclassified broadband as a common carrier.⁴¹ Reclassification of broadband as an information service, coupled with a recent court ruling clarifying the scope of FTC authority vis-

³⁹ *2017 Order* at ¶ 196 (citations omitted).

⁴⁰ *Id.* at ¶ 141.

⁴¹ The FTC is prohibited by statute from regulating common carriers. 15 U.S.C. § 45(a)(2).

à-vis ISPs,⁴² reinstates an important cop on the broadband beat.⁴³ With most ISPs committing to voluntarily preserve core net neutrality principles (*e.g.*, no blocking), the FTC is once again able to hold these companies to their promises. Moreover, as former FTC Chairman Jon Leibowitz recently noted in testimony before the Connecticut Senate, echoing the 2017 Order, the ability to ensure that ISPs “honor their commitments” is also shared by state Attorneys General by “using their existing consumer protection authority.”⁴⁴

2.2 State Net Neutrality Laws Could Undermine Consumer Welfare

Among its many failings, the 2015 Open Internet Order included a range of prohibitions on the kind of business model and service delivery experimentation that has long benefited broadband consumers in the United States. Foreclosing opportunities to experiment with paid priority, for example, undermines the development of services that might appeal to consumers. It also constrains the ability of consumers to dictate whether a new offering is viable or not. Ideally, popular services will be able to thrive; unpopular ones will be shelved. For these reasons, a state’s attempt to ban paid priority would chill innovation and stifle business model experimentation, which in turn would make consumers worse off (and because it conflicts with the 2017 Order, a state ban will in all likelihood be preempted).

⁴² See *FTC v. AT&T Mobility*, No. 15-16585 (9th Cir. 2018), <http://cdn.ca9.uscourts.gov/datastore/opinions/2018/02/26/15-16585.pdf>.

⁴³ See, *e.g.*, Michael Santorelli, *After Net Neutrality: The FTC is the Sheriff of Tech Again. Is it Up to the Task?*, Dec. 15, 2017, Forbes Washington Bytes, <https://www.forbes.com/sites/washingtonbytes/2017/12/15/the-game-is-on-the-ftc-tech-regulation-post-net-neutrality/#2e92c105575a> (noting that the FTC “has a robust record vis-à-vis ISPs, holding them accountable to promises made to their customers. That is a very good thing, setting a strong precedent for future action if and when an ISP acts in a truly harmful or anticompetitive manner.”) (“*After Net Neutrality*”).

⁴⁴ See *Statement of Jon Leibowitz on How the FTC Can Protect Consumers in the Broadband Marketplace through its Competition and Consumer Protection Authority before the Connecticut Energy & Technology Committee*, at p. 2, Feb. 13, 2018, https://www.cga.ct.gov/et/related/20180213_Informational%20Froum%20Net%20Neutrality/Jon%20Liebowitz%20Testimony.pdf.

There are many compelling business, security, and consumer-focused reasons for allowing active network management and reasonable prioritization.⁴⁵ As the ACLP noted in a joint filing to the FCC in 2010 – a filing that was endorsed by two dozen stakeholders, including state legislators and regulators; healthcare innovators; nonprofit professionals working with seniors and people with disabilities; and other policy experts – prioritization of data traffic can deliver important benefits to consumers. The following observations about the need for and benefits of prioritization were identified:

- “Increased utilization of broadband by larger numbers of Americans and by additional sectors of the economy will increase the amount of traffic flowing through broadband infrastructure. This will spur further investment in bolstering networks, but will also invite more intensive utilization of broadband by individual and institutional consumers. Thus, regardless of how much bandwidth is available, network congestion and other issues will continue to challenge service providers.
- “Consistent with the FCC’s vision for broadband in America, certain types of socially-valuable tools and services will require priority when networks are congested in order to assure reliable delivery. Failure to allow for these types of arrangements could impede further development and deployment of life-enhancing services...
- “Consumers should have the ability to work with service providers to ensure that the content they demand is delivered without delay. For example, a senior household should have the ability to assign priority to its telemedicine services, while college students living in off-campus housing should have the ability to assign priority to movie downloads. Similarly, service providers should have the ability to subject these agreements to reasonable network management needs in order to assure a reliable and consistent user experience in furtherance of the FCC’s vision of broadband in America.”⁴⁶

The ACLP made similar points in a 2014 filing to the FCC as part of a previous net neutrality proceeding. These remain relevant in the context of state attempts to ban paid prioritization:

⁴⁵ See, e.g., *In the Matter of Preserving the Open Internet*, Joint Filing of Ad Hoc Coalition of Interested Stakeholders, GN Docket No. 09-191 (April 10, 2010), <https://ecfsapi.fcc.gov/file/7020437182.pdf> (“*Joint Filing*”); *In the Matter of Protecting and Promoting the Open Internet*, Reply Comments of the ACLP, GN Docket, No. 14-28 (Sept. 15, 2014), <https://ecfsapi.fcc.gov/file/7522699123.pdf> (“*ACLP 2014 Filing*”).

⁴⁶ *Joint Filing* at 8-9 (footnotes omitted).

“Consumers also tolerate and benefit from many business practices that some in this proceeding argue are anti-consumer. A leading example here is the idea of prioritization, a notion that rankles many because it seems inherently contradictory to the ethos of the Internet. Much like in the real world, the online experience has long been a managed one. Content is curated and filtered by algorithms carefully developed by firms seeking to provide end-users with better services (e.g., more relevant search results) and to support business models built around such highly targeted content (e.g., ads for products that reflect a user’s online habits and preferences). Customers generally appreciate these kinds of services (privacy concerns aside) because it echoes long-standing practices that support a range of services at different prices. For example, those who wish to skip airport security lines can do so for a fee via TSA Pre. Those who wish to receive a package faster from a retailer can pay more for overnight shipping. Online, freemium models have thrived. These provide free access for all consumers, while also allowing more active users to purchase premium add-on services. Similarly, tiered pricing packages for broadband service are also popular, allowing users of all kinds to purchase plans that meet their distinct needs (e.g., high bandwidth plans for gamers).

“From a social policy perspective, support for prioritized services of both the analog and digital variety makes practical sense. Consumers have a high tolerance for these kinds of outcomes, reflecting an acknowledgement of a simple fact: certain things are more important than others. In other words, not every good or service is equal. For example, drivers who are snarled in gridlock nevertheless tolerate giving ambulances prioritized access through traffic during emergencies. Similarly, in the aftermath of major natural disasters, residents of impacted areas tend to support emergency response efforts that prioritize critical institutions over other needs (e.g., prioritizing efforts to restore electricity to hospitals over households). As such, there is no reason why firms should be prevented from engaging in this type of behavior online. *Although some might be loath to admit it, not all Internet content has the same social value.* The brief history of the Internet teaches that, regardless of how much capacity might be available, there will always be some level of congestion. Accordingly, there is significant evidence to support allowing firms to prioritize certain kinds of socially important content (e.g., a telemedicine application) over others (e.g., streaming a movie) if the conditions warrant such an outcome.”⁴⁷

Accordingly, states should not seek to ban a means of experimenting in the delivery of broadband services, especially when those means would likely yield more individualized, consumer-friendly services.

⁴⁷ ACLP 2014 Filing at p. 4-5.

2.3 *When Seeking to Police the Digital Ecosystem, States Should Focus More Resources on Firms Operating at the Network’s Edge*

At a very basic level, the net neutrality debate has always been about power – which entities possess it; what are the incentives to wield it; and what is best way to ensure that it is not used in an anticompetitive manner. Of most relevance to states considering whether to adopt net neutrality laws is that, contrary to the assumptions of many, including the FCC that adopted the 2015 Order, the power dynamic in the broadband ecosystem has profoundly shifted.

This shift is important because the power dynamic described in the 2015 Order – a dynamic that is reflected in many proposed state net neutrality laws – is woefully out of date.⁴⁸ Indeed, the 2015 Order espoused a view of ISP power that never really existed. Net neutrality rules have always been framed as prophylactic protection against “threats” rather than actual harms.⁴⁹ To that end, the 2015 Order’s view reflected the realities of the marketplace in the late 1990s and early 2000s, when broadband providers arguably had some measure of power and opportunity to squash innovation at the network’s edge.⁵⁰ But instead of exercising the power to, say, undermine the development of rival email, search, or video services like YouTube, ISPs opted not to meddle, even though these nascent offerings, which were vying for the attention of customers, were technically “free-riding” on their networks.⁵¹ And even when some of those edge companies, led

⁴⁸ See 2015 Order at ¶¶ 78-101.

⁴⁹ See, e.g., *id.* at ¶ 8.

⁵⁰ For a leading early description of this power dynamic, see Mark A. Lemley and Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. Rev. 925 (2001) (“*End of End-to-End*”).

⁵¹ See, e.g., Arshad Mohammed, *SBC Head Ignites Access Debate*, Nov. 4, 2005, Wash. Post, <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/03/AR2005110302211.html> (reporting on comments by then-CEO of SBC Ed Whitacre regarding the possibility of charging edge companies for using their “pipes”). The notion of “free-riding” still resonates in the net neutrality context. See, e.g., Richard John, *The Next Net Neutrality Debate*, July 10, 2017, Bloomberg, <https://www.bloomberg.com/view/articles/2017-07-10/the-next-net-neutrality-debate> (“Now that it looks as if the Title II designation for ISPs is history, it is time to explore other options. What do to? To begin with, acknowledge that the current legal regime is anything but neutral and stop demonizing the ISPs. Amazon, Netflix and Alphabet, the parent of Google, have benefited hugely from the status quo without

by Google, expressed interest in paying for a “fast lane,” the ISPs turned them down.⁵² Why? For one, they feared a public relations and consumer backlash.⁵³ But more importantly, the ISPs recognized that working constructively with a range of innovators, including possible competitors at the edge, offered consumers the most value.⁵⁴

Now, the power dynamic has changed completely. Content companies and others at the network’s edge possess enormous power to shape the online experience – for both good and ill. This stems from their having established themselves as essential to user enjoyment of the Internet.⁵⁵ And increasingly, their power extends offline as well. Indeed, a true measure of any digital entity’s power is the extent to which it can shape outcomes in both the online world and the real world. To that end, the likes of Google, Facebook, and Amazon have the power to undermine rivals by prioritizing their own products in search results.⁵⁶ They can impact elections and shape

having channeled more than a trickle of their enormous profits into the maintenance and improvement of the existing information infrastructure. They are free-riding on a network that the ISPs built.”).

⁵² See Vishesh Kumar and Christopher Rhoads, *Google Wants its Own Fast Track on the Web*, Dec. 15, 2008, Wall St. Journal, <https://www.wsj.com/articles/SB122929270127905065>.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ Some have gone so far as to label entities like Google and Facebook as public utilities. See, e.g., danah boyd, *Facebook is a Utility; Utilities Get Regulated*, May 15, 2010, Zephoria.org, <http://www.zephoria.org/thoughts/archives/2010/05/15/facebook-is-a-utility-utilities-get-regulated.html> (“Your gut reaction might be to tell me that Facebook is not a utility. You’re wrong. People’s language reflects that people are depending on Facebook just like they depended on the Internet a decade ago. Facebook may not be at the scale of the Internet (or the Internet at the scale of electricity), but that doesn’t mean that it’s not angling to be a utility or quickly becoming one.”); Harry McCracken, *Of Course Facebook is a Utility!*, Nov. 17, 2013, Time.com, <http://techland.time.com/2013/11/17/of-course-facebook-is-a-utility/> (“On the web, the single biggest reason why giants collapse is because they don’t react quickly enough to indirect, emerging threats of this sort. If Facebook blithely dismissed them, it would be cause for alarm. But if the company is looking like a utility for the masses rather than a hot property for young people, it’s not a sign that the game has changed – it’s Facebook being what it’s been trying to be all along. And have you noticed? Utilities can be solid businesses. Maybe even better businesses than ones beloved by trendy teens.”); Jonathan Taplin, *Is it Time to Break up Google?*, April 22, 2017, N.Y. Times, <https://www.nytimes.com/2017/04/22/opinion/sunday/is-it-time-to-break-up-google.html> (arguing that Google “has all of the characteristics of a public utility” and observing that “We are going to have to decide fairly soon whether Google, Facebook, and Amazon are the kinds of natural monopolies that need to be regulated...”).

⁵⁶ See, e.g., Mark Scott, *Google Fined Record \$2.7 Billion in E.U. Antitrust Ruling*, June 27, 2017, N.Y. Times, <https://www.nytimes.com/2017/06/27/technology/eu-google-fine.html> (reporting on a ruling by regulators in Europe that found that Google “unfairly favor[ed] some of its own services over those of rivals.”).

public opinion by how they present the news.⁵⁷ They can decimate the workforce by pursuing automation as a growth strategy.⁵⁸

Deciding whether or not to wield this power to meddle in the user experience – and in the lives of users generally – boils down to incentives. The difference in business models – *i.e.*, how these companies make money – makes this clear. ISPs derive the lion’s share of their revenues from residential and business subscriptions to voice, video, and/or data products. This means that any effort to degrade or limit a person’s enjoyment of their user experience – by, for example, blocking a popular website or unnecessarily throttling a popular service – would harm their bottom lines, both from subscriber loss and public pressure that would likely harm their stock price.⁵⁹

Edge entities, on the other hand, are fueled by economic incentives that drive them to mine consumer data stemming from their use of a range of online and offline-but-still-connected services.⁶⁰ Accordingly, content companies like Facebook and Google have every incentive to dominate – nay, monopolize – our online experience because their bottom lines hinge on their ability to monetize personal data.⁶¹ As such, they seek to entice us to use more of their services –

⁵⁷ See, e.g., Olivia Solon, *Facebook’s Failure: Did Fake News and Polarized Politics Get Trump Elected?*, Nov. 10, 2016, The Guardian, <https://www.theguardian.com/technology/2016/nov/10/facebook-fake-news-election-conspiracy-theories> (reporting on the prominence of Facebook in the delivery and consumption of news by users and noting that “pressure is growing on Facebook to not only tackle the problem [of fake news] but also to find ways to encourage healthier discourse between people with different political views.”).

⁵⁸ See, e.g., Danielle Paquette, *People are Worried Amazon will Replace Whole Foods Workers with Robots*, June 16, 2017, Wash. Post Wonkblog, https://www.washingtonpost.com/news/wonk/wp/2017/06/16/people-are-worried-amazon-will-replace-whole-foods-workers-with-robots/?utm_term=.461d0c7b2c0e.

⁵⁹ See, e.g., Michael Santorelli, *Cutting Through the Noise: Net Neutrality is an Infrastructure Issue*, May 18, 2017, Forbes Washington Bytes, <https://www.forbes.com/sites/washingtonbytes/2017/05/18/cutting-through-the-noise-net-neutrality-is-an-infrastructure-issue/#451c662a3e60> (“Cutting Through the Noise”).

⁶⁰ See, e.g., *Protecting the Privacy of Customers of Broadband and Other Telecommunications Services*, Comments of the ACLP, WC Docket No. 16-106 (May 27, 2016), <http://www.nyls.edu/advanced-communications-law-and-policy-institute/wp-content/uploads/sites/169/2013/08/ACLP-Privacy-Comments-WC-Docket-No-16-106-052716.pdf> (discussing these incentives at length) (“ACLP Privacy Comments”).

⁶¹ For example, the vast majority – about 86% – of the revenues for Alphabet, Google’s parent company, stem from ad revenues, while just about all of Facebook’s revenues come from ads. These and other companies of their ilk sell and place ads based on their ability to more precisely target them, which stems from their intimate knowledge of consumers’ online behavior. See John Shinal, *Google is Grabbing More and More Ad Revenue from Partners*, April

by, for example, giving them away for “free” – while surreptitiously hoovering up more and more of our data.⁶² This also drives their efforts to blunt any meaningful enforcement of privacy and antitrust laws and to shift the focus – and blame – for any online harms, real or theoretical, to others, most prominently the ISPs.⁶³

This new power dynamic provides a powerful check on ISPs because bad behavior vis-à-vis consumers would be relatively easy to detect and remedy. But such is not the case for edge entities:

“An arbitrarily blocked website is explicit, as are broken promises around the delivery of content. But when it comes to understanding the tools and techniques employed by content companies to track us all, to collect and commoditize users’ data, to place ads, and, increasingly, to make decisions impacting the offline lives of consumers, it is nearly impossible to detect harm. This gap between how the tech giants are actually conducting themselves and what regulators perceive to be happening is dangerous. It allows bad behavior to proliferate exponentially. Exhibit A is the black box nature of the algorithms and other tools used by content companies to harvest data on a vast scale. Such big data techniques are ultimately the creation of humans, so bias is possible and increasingly evident. Examples [can be] horrifying. As such data-driven approaches become more prominent in automated processes impacting things like parole decisions and loan approvals, failure to understand how these tools work, let alone actively police their use and abuse, risks stealth harms to consumers on a wide scale.”⁶⁴

As such, state policymakers interested in bolstering consumer welfare online should ensure they are equipped with the knowledge and the resources to effectively police the part of the digital ecosystem where harms are likely occurring beneath a veil of secrecy cannily maintained by edge companies.

27, 2017, CNBC, <http://www.cnbc.com/2017/04/27/alphabets-google-unit-grabbing-ever-more-ad-revenue-from-partners.html> (reporting Google’s recent revenues); Josh Constine, *Facebook Beats in Q1 with \$8.03B Revenue, Faster Growth to 1.94B Users*, May 3, 2017, TechCrunch, <https://techcrunch.com/2017/05/03/facebook-q1-2017-earnings/> (reporting Facebook’s recent revenues).

⁶² See generally *ACLP Privacy Comments*

⁶³ *Id.*

⁶⁴ *After Net Neutrality* (citations omitted).

3. STATE POLICYMAKERS ARE BETTER SERVED SEIZING THE MANY OPPORTUNITIES TO BOLSTER BROADBAND CONNECTIVITY

In addition to enhancing efforts to police potential bad behavior at the network's edge, state policymakers might also explore – and hopefully embrace – the range of impactful ways in which they can act to improve broadband connectivity. As previously noted, adopting net neutrality laws will ultimately detract from better connectivity by, among other things, blunting investment, chilling innovation, and reducing overall consumer welfare. A more productive path forward would be to focus on modernizing regulatory frameworks in an effort to unlock additional investment and bolstering support for critical demand-side activities like digital literacy training. These imperatives are described in turn below.

3.1 *In Lieu of Net Neutrality Laws, States Should Develop Policies & Strategies to Promote Broadband Deployment*

Broadband in Connecticut appears to be very robust. According to the FCC, less than 1 percent of the population has access to only one fixed broadband provider capable of delivering speeds meeting the current FCC benchmark of 25Mbps/3Mbps; the vast majority have a choice of at least two.⁶⁵ BroadbandNow ranks Connecticut as the second most connected state in the country.⁶⁶ Even so, there is always room for improvement vis-à-vis network availability, especially as the next generation of wired and wireline networks looms on the horizon.

Continued forward progress on the supply-side will hinge on the willingness and ability of states to tinker with their existing rules and regulations in an effort to unlock additional private investment in broadband networks. For example, state legislators could spearhead efforts to reform

⁶⁵ See FCC, Fixed Broadband Deployment, Area Summary: Connecticut, https://broadbandmap.fcc.gov/#/area-summary?type=state&geoid=09&bbox_arr=%7B-73.7277750,40.9801440,-71.7869940,42.0505870%7D&tech=acfosw&speed=25_3&vlat=41.51757849685481&vlon=-72.75738450000006&vzoom=6.964885880167202.

⁶⁶ See BroadbandNow.com, Connecticut, <https://broadbandnow.com/Connecticut>.

the myriad of regulations and processes governing local administration of public rights-of-way, including siting approvals, taxes, fees, and other rules impacting broadband infrastructure construction. Maintaining the status quo will act as a barrier to the timely and cost-effective deployment of the next generation of networks, the designs of which vary in important ways from previous iterations.⁶⁷ As such, efforts should begin now to rationalize and update these rules so that they accurately reflect the technical characteristics of new networks. There are also opportunities to harmonize regulatory requirements for and expectations of ISPs offering service over different platforms, an issue that is of increasing importance in an era when wireline and wireless broadband are substitutable services.

In addition, states are well positioned to serve as a convener of stakeholders interested in and capable of bolstering broadband availability. Indeed, state government has the unique ability to coordinate truly public-private projects aimed at bringing broadband to heretofore unserved areas by using public money to help make such deployments economic for expert private firms.⁶⁸ State programs in places like New York that have succeeded in deploying such approaches should be studied and adapted as appropriate.⁶⁹

⁶⁷ See, e.g., *Report of the Removing State and Local Regulatory Barriers to Broadband Deployment*, Jan. 10, 2018, FCC, <https://www.fcc.gov/sites/default/files/bdac-regulatorybarriers-report-012018.pdf>.

⁶⁸ See, e.g., Charles M. Davidson & Michael J. Santorelli, *Broadband and the Empire State: Toward Universal Connectivity in New York*, ACLP at New York Law School (Sept. 2012), <http://www.nyls.edu/advanced-communications-law-and-policy-institute/wp-content/uploads/sites/169/2013/08/ACLP-Report-Broadband-and-the-Empire-State-September-2012.pdf>.

⁶⁹ See New York State Broadband Program Office, About New NY, <https://nysbroadband.ny.gov/about>.

3.2 *In Lieu of Net Neutrality Laws, States Should Develop Policies & Strategies to Improve Broadband Adoption and Bolster Digital Literacy Skills*

Broadband adoption rates in the United States have plateaued in recent years, inching up to 73 percent in 2016.⁷⁰ FCC data indicates that, in general, Connecticut's broadband adoption rate tends to be above the national average.⁷¹ Even so, approximately a quarter of the state's population remains unconnected to broadband despite connections of at least 25Mbps/3Mbps being available to over 99 percent of the population.⁷² Consequently, the state might be better served focusing a substantial share of resources on helping to bring these residents to available connections and empowering them with digital literacy skills.

A critical first step will be determining the contours of the state's digital divide. In all likelihood, the demographic profile of the unconnected likely reflects, to a great degree, the profile of those without broadband nationwide, a group that is largely comprised of senior citizens, low-income residents, and people of color.⁷³ However, knowing more about who remains offline and why is essential. To that end, there are opportunities for states to encourage their cities to collaborate with those working in the community – nonprofits, senior centers, libraries, etc. – to gather and evaluate that information.

Relying on assumptions about why certain residents remain offline should not be tolerated. Indeed, some baselessly attribute non-adoption to the cost of broadband, despite significant

⁷⁰ See *Internet/Broadband Fact Sheet*, Feb. 5, 2018, Pew Research Center, <http://www.pewinternet.org/fact-sheet/internet-broadband/> (“*Internet/Broadband Fact Sheet*”).

⁷¹ See *In the Matter of Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, 2018 Broadband Deployment Report, at Appendix H, GN Docket No. 17-199 (rel. Feb. 2, 2018), https://apps.fcc.gov/edocs_public/attachmatch/FCC-18-10A1.pdf.

⁷² *Id.* at Appendix D.

⁷³ *Internet/Broadband Fact Sheet*.

evidence demonstrating that adoption decisions tend to be much more nuanced.⁷⁴ Many barriers have long held back more robust adoption in key demographic groups.⁷⁵ Fortunately, there is growing evidence that these barriers are surmountable if outreach and training efforts are designed to address a group's particular needs and deployed at the hyper-local level.⁷⁶ Working within local social networks to build trust and demonstrate the life-enhancing value of subscribing to broadband has proven to yield impressive results.⁷⁷

4. CONCLUSION

State net neutrality laws like the one being considered in Connecticut suffer from many flaws. As discussed at length here, such laws, if enacted, would likely be nullified in court. And even if they did survive, they would likely have a net negative impact on consumers. States are better served focusing their attention and resources on areas that are ripe for action: policing content companies to protect consumer online privacy; bolstering broadband availability; and empowering consumers via demand-side activities like comprehensive digital literacy training.

⁷⁴ See Maureen Lewis, *Digitally Unconnected in the U.S.: Who's Not Online and Why?*, Sept. 28, 2016, NTIA, <https://www.ntia.doc.gov/blog/2016/digitally-unconnected-us-who-s-not-online-and-why> (finding that the cost of broadband is not the primary factor impeding adoption among the unconnected); Octavia Carare et al., *The Willingness to Pay for Broadband of Non-Adopters in the U.S.: Estimates from a Multi-State Survey*, Info. Economics & Policy, Vol. 30 (March 2015), <https://www.sciencedirect.com/science/article/pii/S0167624514000523> (finding that, in many cases, non-adopters will not subscribe to broadband at any price).

⁷⁵ See, e.g., Charles M. Davidson & Michael J. Santorelli, *Barriers to Broadband Adoption*, A Report to the Federal Communications Commission (Oct. 2009), <http://www.nyls.edu/advanced-communications-law-and-policy-institute/wp-content/uploads/sites/169/2013/08/ACLP-Report-to-the-FCC-Barriers-to-BB-Adoption.pdf>.

⁷⁶ See, e.g., *Understanding the Debate* at p. 110-137.

⁷⁷ See, e.g., Charles M. Davidson, Michael J. Santorelli & Thomas Kamber, *Toward an Inclusive Measure of Broadband Adoption*, 6 International Journal of Communication 2555 (2012), <http://www.nyls.edu/advanced-communications-law-and-policy-institute/wp-content/uploads/sites/169/2013/08/Davidson-Santorelli-Kamber-Toward-an-Inclusive-Measure-of-Broadband-Adoption-IJOC-2012.pdf>.