Position: Support
SB 287
State Funds - Procurement of Services From Internet Service Providers - Restriction
Senate Education, Health, and Environmental Affairs

Testimony of Harold Feld, Senior Vice President, Public Knowledge
March 2, 2018

Public Knowledge supports Senator Manno's legislation, Senate Bill 287*, State Funds - Procurement of Services From Internet Service Providers – Restriction*. Public Knowledge is a 501(c)(3) based in Washington D.C. that works to support freedom of expression, an open Internet, access to affordable communications tools and creative works.[1] I have worked on the issue now known as "net neutrality" since the question of whether to classify cable modem broadband service as a cable service, a telecommunications service or an information service first arose before the FCC in 1998.

Public Knowledge supports SB 287 as necessary and vital protection for Maryland consumers and small businesses – as well as ensuring that the State government of Maryland, and Maryland local governments, continue to enjoy access to all necessary online content and service necessary to perform their function. In the attached document, I will begin with a brief history of the common carriage rules and FCC proceedings that made the modern, open Internet possible. Contrary to what some have asserted, the FCC has always exercised jurisdiction over the Internet and protected it through either explicit common carriage obligations or a general duty against unreasonable discrimination. Next, I will briefly touch on the potential harms that businesses, consumers and local governments face in the absence of net neutrality.

[1]More information about Public Knowledge is available on our website: www.publicknowledge.org

Finally, I will address the question of whether federal law preempts either SB 287. As I explain below, because the FCC explicitly found in its *Network Neutrality Repeal Order*[2] that Congress withheld authority from the FCC to regulate broadband, it follows that the FCC also lacks authority to preempt state regulation of broadband. Indeed, the State of Maryland could go further than proposed, and impose net neutrality as a condition of offering broadband access service in the state. Given the enormous authority that states enjoy when acting as purchasers of goods and services, there can be no question that SB 287 is neither in violation of the Commerce Clause or preempted by federal law.

Respectfully submitted,

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Senior Vice President
Public Knowledge

[2] In re Restoring Internet Freedom, *Declaratory Ruling, Report and Order, and Order*, WC Docket No. 17-108 (rel. January 4, 2018) ("*Net Neutrality Repeal Order*")

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A Brief History of Network Neutrality From the 1960s Until Now.[3]

Beginning in the 1960s, companies and researchers began to explore the possibility of combining computing power with communications technology. AT&T then the monopoly provider, initially refused to allow development of digital communications technologies and refused to provide services for what it saw as potentially rival services.[4] In a series of proceedings known as the *Computer* proceedings, the FCC required that AT&T (and subsequently all telephone companies) to carry data without any interference or discrimination. This common carrier obligation prevented the telephone companies, through whose networks the Internet packets traveled, from deciding what services would or would not be offered on the network. Combined with the obligation to allow subscribers to attach any device that did not harm the network, this made possible the evolution of the dial up Internet.

This principle that the network does not interfere with any of the content or applications that operate on the network, was enshrined in the fundamental architecture of the Internet as the

[3] For general sources on the history of the Internet and the role of the FCC's regulations, *see generally National Cable and Telecommunications Association v. Brand X*, 545 U.S. 967 (2005)("*Brand X*"); *U.S. Telecom Assoc. v. FCC*, 825 F.3d 674 (D.C. Cir. 2016)("*USTA*"); *Verizon v. FCC*, 740 F.3d 623 (D.C. Cir. 2014) '('*Verizon*"); Jason Oxman, *The Commission and the Unregulation of the Internet*, Office of Plans and Policy Working Paper Series, No. 31 (1999), available at: https://transition.fcc.gov/Bureaus/OPP/working_papers/oppwp31.pdf.
[4] Paul Baran, one of the pioneers in packet-switched communication first proposed building a digital network that would operate over AT&T's telephone lines as early as 1964. AT&T refused to permit Baran to implement his ideas because "[i]t's not going to work. And furthermore, why should we're not going into competition with ourselves. *See* Stewart Brand, "Founding Father," Wired (March 1, 2001), available at: https://www.wired.com/2001/03/baran/ (last visited February 27, 2018); Interview of Paul Baran, Computer History Museum Oral History Project (1988) available at: http://archive.computerhistory.org/resources/access/text/2017/09/102740210-05-01-acc.pdf (last visited February 27, 2018).

"end-to-end" principle.[5] Under this regulatory regime, the early internet flourished. The FCC continued to tariff new broadband technologies such as DSL.[6] Start ups that have now become household words such as Amazon and Google, were able to launch without needing to ask permission from Internet providers. Consumers everywhere in the country with a telephone line for dial up or DSL connection could reach any website or online service, creating a world of intense competition and innovation.

Following the election of George W. Bush and the appointment of Michael Powell as Chairman of the FCC,[7] the FCC began to change course. In 2002, the FCC classified cable modem service as an "Information Service" defined in Title I of the Communications Act, rather than a "Telecommunications Service" regulated under Title II of the Communications Act.[8] Critically, however, the FCC continued to insist that it had authority to regulate broadband, and used that power to prevent carriers from blocking content to Internet services.[9] It was not until June 2005, however, that the Supreme Court reversed the Ninth Circuit and affirmed the FCC's classification of cable modem service as an information service.[10] Almost immediately following *Brand X*, the FCC issued its "*Wireline Framework Order*"[11] and "Internet Policy Statement."[12] The *Wireline Framework Order* established a single, unified framework for wireline broadband access as an information service, subject to FCC authority under the theory of Title I "ancillary"

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[5] *See* J.H. Saltzer, D.P. Reed and D.D. Clark, End-to-End Arguments In System Design" (1981). Available at: http://web.mit.edu/Saltzer/www/publications/endtoend/endtoend.pdf (last visited February 27, 2018).
[6] *See In re GTE Telephone Operating Cos; GTOC Tariff No. 1* 13 FCC Rcd 22466 (1998).
[7] Michael Powell is now President of NCTA – The Internet & Television Association, the largest trade association for cable providers.
[8] *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities,* 17 FCC Rcd 4798 (2002).
[9] *See* Declan McCullagh, "Telco Agrees To Stop Blocking VOIP Calls," CNET (March 3, 2005). Available at: https://www.cnet.com/news/telco-agrees-to-stop-blocking-voip-calls/ (last visited February 27, 2018).
[10] *See Brand X*, note 3 *supra*.
[11] *In re Appropriate Framework for Broadband Access to The Internet Over Wireline Facilities*, 20 FCC Rcd 14853 (2005).
[12] *Appropriate Framework for Broadband Access to The Internet Over Wireline Facilities*, 20 FCC Rcd 14986 (2005).

jurisdiction. The Internet Policy Statement affirmed that all broadband subscribers has the right to access all legal content and services of their choice, and that the FCC would protect these rights (as well as other important consumer protections) through its "ongoing policymaking activities."

Beginning in 2007, Comcast began to interfere with the operation of peer-2-peer (P2P) services on its network. In particular, Comcast blocked access to a file sharing protocol called "BitTorrent." Public Knowledge and Free Press filed a complaint with the FCC to enforce the Internet Policy Statement. In 2008, the FCC sided with Public Knowledge and Free Press and ordered Comcast to stop interfering with subscriber content and services on its network.[13] Comcast appealed to the D.C. Circuit. While the appeal remained pending, the FCC opened a rulemaking to adopt formal net neutrality rules.[14]

In 2010, the D.C. Circuit found that the FCC had not articulated a basis of authority to enforce its policy statement under the theory of ancillary jurisdiction.[15] The FCC then adopted formal rules, preventing broadband Internet access service (BIAS) providers from engaging in blocking, throttling or "unreasonable discrimination." This time, the FCC based its authority on Section 706 of the Telecommunications Act of 1996, codified at 47 U.S.C. 1302.[16]

In 2014, the D.C. Circuit partially reversed the FCC's net neutrality rules. While agreeing that Section 706 provided the FCC (and the states) with an independent source of authority to regulate broadband, the D.C. Circuit also held that the FCC could not impose a categorical ban on blocking, throttling or otherwise discriminating against content or services unless the FCC

[13] *See Comcast v. FCC*, 600 F.3d 642 (D.C. Cir. 2010).
[14] *See Verizon supra* note 3.
[15] *Comcast supra* note 13.
[16] *See Verizon supra* note 3.

reclassified broadband as a Title II telecommunications service.[17] The FCC therefore adopted the "road map" set down by the *Verizon* court, reclassified broadband as a Title II service, and adopted the bright line no blocking, no throttling, no paid prioritization rules in 2015. These rules were affirmed by the D.C. Circuit,[18] and remain in effect until the publication of the effective date of the *Net Neutrality Repeal Order* in the Federal Register.[19]

In short, contrary to what opponents of net neutrality claim, we have always had rules preventing ISPs from blocking or degrading content, with the exception of the period in 2014 when the DC Circuit struck down the rules under Title I and before the FCC reclassified broadband as a telecommunications service. Not surprisingly, it was during this brief period in 2014 that broadband provider engaged in the single, largest scale violation of net neutrality. The four largest broadband providers, Comcast, AT&T, Verizon and Time Warner Cable, congested their interconnection links to degrade Netflix traffic until Netflix agreed to pay a separate "interconnection fee" to deliver its streaming video to subscribers.[20] This was the incident which led to the first massive public outcry in support of net neutrality – including John Oliver's famous 2014 segment describing this as "mob shakedown."[21]

[17] *Id.*
[18] *See USTA supra* note 3.
[19] Although the *Net Neutrality Repeal Order* was published in the Federal Register, the notice explained that the reclassification of broadband as a Title I service and repeal of the net neutrality rules would not go into effect until 60 days after the Office of Management and Budget approved the rules. The 2015 rules therefore remain in effect, and continue to constrain ISP behavior.
[20] *See* Open Technology Institute, "Beyond Frustrated: The Sweeping Consumer Harms of ISP Disputes," New America Foundation (2014). Available at: https://www.newamerica.org/oti/policy-papers/beyond-frustrated-the-sweeping-consumer-harms-as-a-result-of-isp-disputes/
[21] *See* https://www.youtube.com/watch?v=fpbOEoRrHyU&t=4s

Expected Harms From The Loss Of Net Neutrality To Maryland As a Purchaser Of Broadband Access Services.

Because SB 287 addresses the state as a consumer of broadband services, I will focus the potential harms specifically on Maryland's concrete interest in ensuring unmediated access to the Internet for its state workers and low-income residents of public housing.

First, it is critical to recognize that, for the first time ever, the FCC has completely removed itself from oversight of broadband services. In its place, the FCC points to the Federal Trade Commission (FTC) and state consumer protection law as adequate to protect consumers. I have written elsewhere at considerable length why the FTC lacks authority to address net neutrality concerns under its existing authority.[22] Indeed, the single case that the FTC has attempted to bring against a broadband provider in the ***ten years*** that the FCC classified broadband as an "information service," demonstrates the limitations of the FTC's enforcement powers.[23]

As a consequence, absent action by the state of Maryland, there can be no general ban on blocking, throttling or prioritizing, or any other form of discrimination by a BIAS provider with regard to any content or service. Section 5 of the Federal Trade Commission Act limits FTC action to "unfair or deceptive acts or practices."[24] Section 5(n) further limits the ability of the FTC to find a particular act or practice "unfair." As a consequence, virtually all FTC

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[22] *See* "Can the FTC Really Handle Net Neutrality? Let's Check Against The 4 Most Famous Violations," Wetmachine Blog (December 2017). Available at: http://www.wetmachine.com/tales-of-the-sausage-factory/can-the-ftc-really-handle-net-neutrality-lets-check-against-the-4-most-famous-violations/ ; "No, the FTC CANNOT Have A Ban On All ISP Blocking," Wetmachine Blog (December 2017). Available at: http://www.wetmachine.com/tales-of-the-sausage-factory/no-the-ftc-cannot-have-a-ban-on-all-isp-blocking/ ; and, "No, the Draft Net Neutrality Repeal Does Not 'Restore Us to 2014'—And 2014 Wasn't Exactly Awesome Anyway," Wetmachine Blog (December 2017). Available at: http://www.wetmachine.com/tales-of-the-sausage-factory/no-the-draft-net-neutrality-repeal-does-not-restore-us-to-2014-and-2014-wasnt-exactly-awesome-anyway/

[23] *See FTC v. AT&T Mobility, Inc.*, Decided February 26, 2018, (9th Cir. 2018) (*en banc*). Available at: http://cdn.ca9.uscourts.gov/datastore/opinions/2018/02/26/15-16585.pdf

[24] 15 U.S.C. 45(a).

enforcement actions rely at least to some degree on the "deceptive" prong. As long as an ISP provides the limited disclosure required by the new FCC rules (which substantially reduce the disclosure requirements imposed by the 2015 rules), the ISP is free to block, degrade, prioritize, throttle or charge additional fees to access any content or service it wishes. Even in those areas where subscribers may have a choice between 2 providers, or even 3 providers, ISPs can reserve the right to change their terms of service at will and to charge early termination fees to customers unhappy with new prioritization or throttling policies.

Even with FCC oversight in place, BIAS providers have tried to block services, require purchase of a more expensive tier to access particular applications, and degraded access to content until the content provider agreed to pay additional fees.[25] Going forward, we can expect BIAS providers to follow the practices they have developed in their cable services and begin developing a host of new fees for content, services or equipment that the FCC previously prohibited. While these concerns alone would be sufficient to prompt the State of Maryland to enact net neutrality rules of general applicability, they also present unique concerns for state and local governments.

States and Local Governments May Pay More to Use Preferred Vendors.

Today, state and local governments may choose any online service to meet its needs. If an agency requires cloud storage, or if a school district contracts with a particular online textbook provider, it does not worry if its ISP has an agreement with any particular vendor to prioritize certain content. Nor does the state risk losing access to services, or having services throttled, in the event of a commercial dispute between the ISP and the online vendor.

[25] *See* "Can The FTC Really Handle Net Neutrality," *supra* note 22.

Additionally, state and local governments are not locked into their ISP by fear that they will lose prioritized access to their vendor of choice by switching. Finally, state and local governments can rest assured that even if they employ different ISPs at different locations – or if their employees work from home or other remote locations – that reaching the government of Maryland's chosen online vendor depends solely on the speed and quality of connection purchased rather than on any third party arrangement between the ISP and a third party.

Consider the following examples. Suppose the Montgomery County School District decides to contract with an online vendor for access to e-textbooks, online lesson plans and other cloud based teacher support and services. Amazon now decides to enter the market, and agrees with the ISP contracted with the school to pay for prioritized delivery, whereas other vendors will be subject to congestion. The School District now faces a choice, whether to take the "free" prioritization of Amazon's service or continue to use its existing vendor. Assume that the School District decides to switch to Amazon to enjoy "free" prioritization (with all the associated disruption that comes from switching vendors), but Amazon and the ISP now have a pricing dispute. The ISP responds by degrading access to Amazon's services until Amazon agrees to pay the higher price. The School District would be caught in the middle, in exactly the same way that Comcast and Verizon subscribers were caught in the middle when those ISPs had their commercial dispute with Netflix, and ion exactly the same way that cable subscribers are caught in the middle whenever cable operators have a "retransmission dispute" with programing networks or local broadcasters.

Anyone who has managed a procurement contract knows that the School District in this hypothetical cannot possibly switch vendors to address such transient disputes any more than subscribers could switch vendors to get access to Netflix in 2014. Indeed, since both Verizon and

Comcast were congesting Netflix traffic to force Netflix to pay higher interconnection fees, switching would have done no good. The response from ISPs – or the FCC for that matter – that "customer backlash" will force ISPs and 3rd party vendors to avoid these disruptions is demonstrably false to fact.

Digital Redlining

Now let us contemplate a new hypothetical. A textbook company decides to pay for prioritization to schools in Montgomery County, but has no interest in paying for prioritization to a more rural county such as Washington or to a more "urban" county such as Baltimore. Or, alternatively, an ISP that offers prioritization of the state's chosen vendor is simply not available in another county or community. The quality of access to the content chosen by the state for its public schools would now depend entirely on the geographic location of the school. This kind of "digital redlining" would be completely permissible absent state action to prohibit it. After all, it is neither "unfair" nor "deceptive" under the FTC Act for a company to limit its paid prioritization exclusively to customers it deems "more desirable." Nor is it a violation for the ISP offering prioritized service in one district to refuse to serve another.

Just as SB 287 is necessary to ensure that the state and local government of Maryland can select the third party vendors of their choice without regard to the preferences of its ISP, SB 287 is necessary to provide the same protection against digital redlining to public housing. Residents of public housing are most typically subject to stereotypes that drive the availability of services in their communities. Until today, residents of public housing could be confident that if they bought a 10 mbps connection, they could experience the Internet in exactly the same way as

anyone else in Maryland with a 10 mbps connection. Without net neutrality, that is no longer guaranteed.

Accordingly, SB 287 further valid state interests as purchasers of broadband access services. Only through state action can Maryland ensure that all government workers, all government facilities, and all public housing residents continue to enjoy the same unfettered access to online services and content they enjoy today.

Federal Law Does Not Preempt Action By Maryland.

In its *Net Neutrality Repeal Order*, the FCC purports to preempt the states from adopting any net neutrality rules (while also maintaining that state consumer protection laws make FCC regulation redundant and counter-productive). In doing so, the FCC relies on the classification of broadband as an interstate information service, the "general deregulatory purposes" of the Telecommunications Act of 1996, and its previous history of preempting certain other information services in the past.[26] Critically, however, unlike previous cases involving FCC preemption, the FCC has not retained any jurisdiction over broadband to impose net neutrality rules. In all other cases cited by the FCC, the FCC retained authority over the relevant service but determined that it would instead rely on "market forces" to provide adequate regulation. In the *Net Neutrality Repeal Order*, the FCC goes out of its way to affirmatively find that the FCC retains virtually ***no*** authority over broadband – and certainly no authority to impose net neutrality regulation. This is therefore not a case where the FCC has chosen to regulate through market forces, making state regulation inconsistent. This is a case where the FCC has no authority to

[26] *Net Neutrality Repeal Order, supra* note 2 at ¶¶194-204.

act.[27] The FCC can no more preempt Maryland from regulating net neutrality than it can preempt Maryland from regulating local operations of Uber, AirB-N-B, or any other "interstate information service."

Why the FCC Has Eliminated Its Own Preemption Authority.

Federal preemption analysis by the FCC looks to the following factors. First, has Congress generally preempted the field, either by directly preempting the states or by so comprehensively regulating the field as to leave no room for state action.[28] Even the FCC concedes that there is no direct federal preemption of state regulation of either information services generally or broadband access service in particular. Were it otherwise, the FCC could not also claim to rely on general state consumer protection laws to protect consumers from abusive conduct from broadband providers. Indeed, the Communications Act explicitly references state regulation of communications services, and permits the states broad latitude in regulating how communications services – which are far more comprehensively regulated than "information services" – are provided within the confines of their state. By contrast, where Congress has preempted the states, it has done so with specificity.[29] The State of Maryland regulates the sale of cell phones through its retail laws. It regulates the placement of towers and fiber for broadband through zoning and franchising. It regulates the sale of cable services through its state franchising authorities. Only where Congress has specifically preempted the

[27] *See Comcast supra* note 22. *See also American Library Association v. FCC,* 406 F.3d 689 (D.C. Cir. 2005); *MPAA v. FCC*, 309 F.3d 796 (D.C. Cir. 2002).
[28] *MN PUC v. FCC*, 483 F.3rd 570 (8th Cir. 2007).
[29] *See, e.g.,* 47 U.S.C. §160 (expressly preempting states from adopting regulations removed through FCC forbearance process); 47 U.S.C. §253 (expressly preempting any state law prohibiting any entity from offering telecommunications services).

states, or delegated to the FCC the specific authority to preempt the states, is the State of Maryland preempted from acting.[30]

The FCC points to no specific provision of the Communications Act that either preempts states from imposing net neutrality obligations on a broadband information service, or which delegates to the FCC such authority. To the contrary, the FCC goes out of its way in its analysis to strip any authority it may have over broadband (except preemption authority). Rather, the FCC points to what it perceives as the "generally deregulatory purpose" of the Telecommunications Act in general and Section 230[31] in particular. Even assuming the FCC's new interpretation of Section 230 were upheld (and it is worth noting that the D.C. Circuit has explicitly rejected this interpretation on several occasions[32]), court have held that a mere expression of broad Congressional policy is not a source of authority for state preemption.[33]

The FCC therefore relies on the next step of the analysis, the "impossibility" doctrine. Courts have held that where the FCC imposes a set of regulations within its authority on a regulated service, and a state imposes regulations that make compliance with these regulations "impossible," the state regulations must fall. It is here that the FCC's decision to divest itself of any possible authority over broadband vitiates the FCC's preemption argument.

There Is No Express Delegation of Authority To The FCC To Regulate "Information Services."

[30] *ALA supra* note 27 (rejecting assertion of "plenary authority"); *MPAA* (exercise of authority requires a specific delegation).
[31] 47 U.S.C. §230.
[32] *See, e.g., USTA supra* note 2. *Verizon supra* note 2.
[33] *See, e.g., Comcast supra* note 22; *MPAA supra* note 27.

The Communications Act is divided into six "titles," with different types of communications services regulated pursuant to a different title. Title II covers regulation of telecommunications services. Title III covers regulation of wireless services and broadcasting. Title VI covers regulation of cable services.

Title I is the introductory title of the Communications Act. In addition to providing the general purpose of the FCC, describing the organization of the Commission, and providing it contains two provisions relevant here. Section 153(24) defines an "information service" as various capabilities "delivered via telecommunications." It is for this reason that information services are referred to as Title I services. Critically, however, the courts have been explicit that this definition provides ***no*** independent grant of authority to regulate information services. Unless the FCC can point to some other source of authority for a regulation of an information service, the FCC has no power to impose the regulation.[34] If the FCC has no power to regulate, it has no power to preempt state law, since it is only where it is impossible to comply with an FCC regulation does the "impossibility" doctrine create preemption of the contrary state law.[35] Certainly where the Congress has actively prohibited the FCC from regulating, as the *Net Neutrality Repeal Order* finds, the FCC is prohibited from either regulating or preempting the states.[36]

In the cases relied upon by the FCC, the FCC has explicitly retained regulatory authority through the doctrine of "ancillary authority." Under this doctrine, the FCC may regulate an interstate communication over which it has no express authority provided that doing so is "reasonably ancillary to the effective performance of the Commission's responsibilities."[37]

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[34] *Echostar Satellite LLC v. FCC*, 704 F.3d 992 (2013); *ALA supra* note 27.
[35] *See MN PUC, supra* note28 (explaining impossibility doctrine).
[36] *See National Assoc. of Regulatory Utility Commissioners v. FCC*, 553 F.2d 601 (D.C. Cir. 1976)("*NARUC II*").
[37] *Comcast, supra* note 22.

Courts have severely limited this doctrine, requiring that the Commission tie exercise of its ancillary jurisdiction to a specific exercise of regulatory authority and rejecting the argument that ancillary jurisdiction conveys "plenary authority" to regulate anything related to communications.[38]

In those cases where the courts have upheld preemption of state authority over an information service, the FCC both explicitly identified its direct source of authority ***and*** identified the alternative regulatory scheme under which it would regulate the Title I service. For example, in the *CCIA* case relied upon by the FCC, the D.C. Circuit upheld preemption as a reasonable exercise of ancillary authority over Title II communications services and because the FCC had adopted an "alternative regulatory scheme" that relied on market mechanisms rather than tariffing.[39] Similarly, in *MN PUC*, the court found that the FCC continued to exercise jurisdiction over voice-over-IP (VOIP) services and that therefore the determination to rely on market forces was an exercise of the Commission's regulatory authority.

By contrast, the FCC does not even pretend to find a source of authority for its preemption. Rather, the FCC finds (contrary to the finding it made a mere two years earlier) that Congress intended to deprive not only the FCC, but the states, of authority to impose net neutrality regulations. But the FCC cannot have its cake and eat it too. It cannot on the one hand find that Congress explicitly withheld authority to impose net neutrality over broadband to the FCC, then in the next breath claim that Congress would nevertheless want the FCC to preempt the states anyway. To the contrary, where Congress intended for the FCC to preempt the states, it said so explicitly and not through the vagaries of a "policy statement."[40]

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[38] *ALA*.
[39] *Computer and Communications Industry Assoc. v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).
[40] *Comcast* (explicitly rejecting reliance on policy statements generally and Section 230 in particular)*; MPAA*.

Congress Delegated Power To The States To Promote Broadband Deployment.

Indeed, to the extent Congress can be said to have acted with regard to the states and broadband, it appears that Congress has affirmatively *delegated* power to the states. Section 706(a)[41] expressly delegates to both the FCC and the states the responsibility to ensure timely deployment of broadband to all Americans. In 2010, the FCC used the authority of Section 706 to create the 2010 broadband regulations, finding that net neutrality created a "virtuous cycle" that encouraged development of new content and services, which in turn drove adoption and investment in infrastructure. The D.C. Circuit explicitly affirmed this interpretation of the statute. When Verizon objected that this reading would confer similar power to the states, the Court agreed. Rather than view this as reason to reject Section 706 as a source of authority, the *Verizon* Court noted that Congress has previously delegated power to the states, "and we see no reason to think that Congress could not have done so here."[42] While the FCC has now disavowed this interpretation of Section 706(a) and the "virtuous cycle" generally, that conclusion is not binding on the State of Maryland.

In short, nothing about the "interstate" nature of broadband service or the FCC's claim to preempt the states prevents Maryland from adopting SB 287. The State of Maryland routinely regulates the offering of goods and services, even if many of the goods or services offered originate in interstate commerce. Automobiles are shipped in interstate commerce, but nothing prevents Maryland from passing its own "Lemon Laws" and regulating car dealerships. Since the FCC's *Net Neutrality Repeal Order* explicitly finds that the FCC has no authority to impose net neutrality regulation, it follows that a regulation imposed by the State of Maryland cannot

[41] 47 U.S.C. 1302(a).
[42] *Verizon*, 740 F.3rd at 638.

conflict with a regulation of the FCC. While those opposed to net neutrality would no doubt find it convenient if preemption authority were somehow different from and superior to all other authority – it is not, and no court has found otherwise. If the FCC lacks authority to regulate, it lacks authority to preempt.

States Have Unique Powers When Acting As Purchasers of Goods And Services.

Finally, even if one were to accept that the FCC has preempted the states from imposing net neutrality regulations generally, nothing prevents the State of Maryland from determining from whom it will purchase services in the market. If broadband providers – contrary to their current protestations – prefer to engage in discriminatory conduct, they are free to avoid contracting with Maryland. Courts have consistently found that when the state acts in its capacity as a consumer in the marketplace, it is entitled to broad discretion over what conditions it will impose. Thus, for example, the State of Maryland requires that any state contractor must pay a living wage. Nothing prevents the State of Maryland from pursuing a similar strategy here.

CONCLUSION

From its initial conception until today, the FCC has provided regulatory oversight to ensure that providers do not block or degrade access to online services on a non-discriminatory basis. Now that the FCC has abandoned this responsibility, the State of Maryland must rise to the occasion. Even when acting simply as a consumer of services in the marketplace, the State of Maryland has a strong interest in ensuring that the broadband access services it purchases provide access to the open Internet, and ensure that Maryland will continue to enjoy unlimited choice of online services and content. Nor is the FCC's claim to have preempted the states

sustainable. The FCC's own findings that it lacks authority to impose net neutrality regulation likewise deprive it of the authority to preempt the states from imposing net neutrality regulations.

This past week, the State of Washington passed a net neutrality law of general applicability.[43] In response to a question as to whether he had concerns over the FCC's assertion of preemption, State Representative Drew Hansen replied: "Just because the FCC claims it has the power to preempt state law doesn't mean it does. I can claim that I have the power to manifest unicorns on the Washington State Capitol Lawn. But if you look outside right now, there are no unicorns."

Thank you.

Respectfully submitted,

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[43] *See* Fast Company, "Washington Just Passed the Country's Toughest Net Neutrality Legislation," (February 27, 2018).