

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	WC Docket No. 23-320
Safeguarding and Securing the Open)	
Internet)	
)	

COMMENTS OF THE AMERICAN CIVIL LIBERTIES UNION

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I. INTRODUCTION

The American Civil Liberties Union (ACLU) has, for more than a century, served as one of the preeminent defenders of the First Amendment and the value of free speech. We are also strong defenders of equity – particularly for those who have traditionally been marginalized. We write today in response to the Federal Communications Commission's (FCC's) Notice of Proposed Rulemaking (NPRM) regarding Safeguarding and Securing the Open Internet. It is imperative that the FCC take every step possible to close the digital divide and protect a free and open internet.

Today, the internet is the primary forum for almost all speech, including political debate and organizing, artistic expression, and news gathering. Unfortunately, the prominence of the internet has enabled internet service providers (ISPs) to exercise unfettered power over what consumers can and cannot do, not just online, but in their lives. ISPs can censor political speech, prevent competitors from reaching their customers online, and ensure that paid commercial content crowds out education, research, and news. We therefore fully support the FCC's proposed rules to prohibit blocking, throttling and paid prioritization, as well as other unfair ISP conduct. These rules will protect users' ability to utilize the internet for the expression of our First Amendment rights.¹

Today's proposed rules will also promote equity – something that is simply non-existent in today's broadband marketplace. According to the Pew Research Center, just 71% of African-American households, and 65% of Latinx households subscribe to the internet.² Additionally, 18% of people on tribal lands can't access broadband³, and those with a disability are

¹ The D.C. Circuit court has held that "the First Amendment poses no bar to the [the Federal Communications Commission's 2015 Open Internet Rules]", from which this NPRM draws. *United States Telecom Assoc. v. FCC* at 106, No. 15-1063 (D.C. Cir. 2016).

² Sara Atske and Andrew Perrin, *Home broadband adoption, computer ownership vary by race, ethnicity in the U.S.*, Pew Research Center (July 16, 2021), <https://www.pewresearch.org/short-reads/2021/07/16/home-broadband-adoption-computer-ownership-vary-by-race-ethnicity-in-the-u-s/>.

³ *Tribal Broadband: National Strategy and Coordination Framework Needed to Increase Access*, Government Accountability Office (June 22, 2022), <https://www.gao.gov/products/gao-22-104421#:~:text=Despite%20federal%20efforts%2C%20broadband%20access,broadband%20access%20on%20triba%20lands.>

significantly less likely to be connected.⁴ Individuals living in rural communities are also less likely to be connected. More than 22% of Americans living in rural areas don't have broadband access.⁵ By reclassifying broadband as a Title II "telecommunications service," the FCC will have the opportunity to significantly narrow, or even close, the digital divide. This reclassification will once again enable the FCC to do what it was designed to do – regulate communications services and ensure that everyone, regardless of where they live or what they look like, has access to them.

II. THE FCC'S PROPOSED CONDUCT RULES WILL PROMOTE FREE EXPRESSION ONLINE

The FCC's NPRM proposes "rules to prohibit ISPs from blocking, throttling, or engaging in paid or affiliated prioritization arrangements," as well as a general conduct standard that would enable the FCC to prohibit other current or future practices "that unreasonably interfere with or disadvantage consumers or edge providers."⁶ The FCC justifies these rules on the grounds that they lead to a more open internet – which is "critical to its ability to serve as a platform for speech and civic engagement,' facilitate 'the development of diverse content, applications, and services,' and enable "a virtuous cycle of innovation."⁷ We wholeheartedly agree.

Although providers have long called conduct rules superfluous, noting that they would never violate the rules – violations of the rules have clearly occurred. Time and time again, with or without net neutrality rules in place, ISPs have sought to profit at the expense of consumers. They have blocked disfavored websites, throttled high bandwidth apps or competitive services, and charged websites and services for prioritization. By giving preferential treatment to certain websites and services, ISPs have severely jeopardized consumers' ability to roam the internet according to their own whims.

A. Rules Against Blocking, Throttling and Paid Prioritization are Necessary Because Providers Have Routinely Engaged in these Practices

The FCC's proposed rules to prevent blocking, throttling, and paid prioritization are necessary because the ISPs have routinely engaged in these practices. Throttling has been a particularly common occurrence. Researchers at Northeastern University and the University of Massachusetts Amherst found that wireless carriers routinely throttled streaming services, even

⁴ See *Internet Access by Age, Disability, and Race/Ethnicity in the US*, Disability Rights Education & Defense Fund, <https://dredf.org/internet-access-by-age-disability-and-race-ethnicity-in-the-us/>; Barbara A. Butrica and Jonathan Schwabish, *Technology and Disability: The Relationship Between Broadband Access and Disability Insurance Awards*, Center for Retirement Research at Boston College (October 2022), https://crr.bc.edu/wp-content/uploads/2022/10/wp_2022-13.pdf.

⁵ U.S. Department of Agriculture, *e-Connectivity for all rural Americans is a modern-day necessity*, <https://www.usda.gov/broadband>.

⁶ Safeguarding and Securing the Open Internet, 88 Fed. Reg. 76048, para. 70, 148, 164 (proposed Oct. 20, 2023).

⁷ Safeguarding and Securing the Open Internet, 88 Fed. Reg. 76048, para. 118, (proposed Oct. 20, 2023).

when networks weren't congested.⁸ Worse still, the wireless carriers appeared to selectively throttle streaming services -- AT&T throttled Netflix 70% of the time, but never throttled Amazon Prime video.⁹ This selective throttling shows that ISPs can, and do, give preferential treatment to favored websites.

ISPs have also throttled entire neighborhoods in order to punish heavy broadband users. For example, when one user exceeded Cox's preferred data limit, it slowed upload speeds for that user's whole community.¹⁰ Throttling has also physically endangered Americans. During the California wildfires, Verizon throttled the Santa Clara fire department's internet to just 1/200th of its expected performance, too slow for even accessing email.¹¹ This throttling prevented first responders from coordinating with each other, and potentially, from connecting with endangered persons and places in time to save them.

ISPs have also engaged in a practice called paid prioritization, where they charge some apps and websites to be sped up, while slowing down others. This enables ISPs to prevent consumers from interacting with websites that can't afford to pay, by making that website comparatively difficult to access. In 2010, AT&T admitted to having "hundreds" of customers who paid for higher-priority service.¹² Additionally, in 2014, Netflix agreed to pay Comcast to ensure that its content streamed more quickly.¹³

Also troubling is the fact that ISPs could prevent their customers from accessing information that they don't agree with. In 2021, the Idaho-based ISP YourT1WiFi.com announced that it would block subscriber access to Twitter and Facebook, because those services had de-platformed Donald Trump.¹⁴ Although the initial message to customers indicated they would need to opt-out of this blocking, the company later clarified that customers actually had to opt-in.¹⁵ Additionally, in 2007, Verizon refused to allow NARAL Pro-Choice America – a

⁸ Fangfan Li, Arian Akhavan Niaki, David Choffnes, Phillipa Gill, and Alan Mislove, *A Large-Scale Analysis of Deployed Traffic Differentiation Practices*, ACM Special Interest Group on Data Communication (August 23, 2019), <https://wehe.meddle.mobi/papers/wehe.pdf>.

⁹ Fangfan Li et al., *A Large-Scale Analysis of Deployed Traffic Differentiation Practices*, ACM Special Interest Group on Data Communication (August 23, 2019), <https://wehe.meddle.mobi/papers/wehe.pdf>.

¹⁰ Jon Brodtkin, *Cox Slows Internet Speeds in Entire Neighborhoods to Punish Any Heavy Users*, Ars Technica (June 8, 2020), <https://arstechnica.com/tech-policy/2020/06/cox-slows-internet-speeds-in-entire-neighborhoods-to-punish-any-heavy-users/#:~:text=Cox%20warns%20customers%20to%20lower,limit%20on%20%E2%80%9Cgigabit%E2%80%9D%20plan.&text=Cox%20Communications%20is%20lowering%20Internet,Internet%20users%20and%20their%20neighbors.>

¹¹ Stacy Chen, *Verizon throttled Santa Clara County Fire's data while they battled wildfires, lawsuit claims*, ABC News (Aug. 22, 2018) <https://abcnews.go.com/US/verizon-throttled-santa-clara-county-fires-data-battled/story?id=57332361>.

¹² Declan McCullagh, *AT&T: Net rules must allow 'paid prioritization,'* CNET (Aug. 31, 2010) https://web.archive.org/web/20120407093906/http://news.cnet.com/8301-13578_3-20015231-38.html.

¹³ Roger Yu, *Netflix cuts deal with Comcast to speed service*, USA Today (Feb. 13, 2014) <https://www.usatoday.com/story/money/business/2014/02/23/netflix-comcast-deal-streaming/5757631/>.

¹⁴ WKRC, *Citing 'censorship' concerns, Idaho internet provider blocks Facebook, Twitter*, Local 12 (Jan. 13, 2021) <https://local12.com/news/nation-world/citing-censorship-concerns-idaho-internet-provider-blocks-facebook-twitter>.

¹⁵ Emily Czachor, *Internet Provider to Restrict Access to Facebook, Twitter to Customers Who Request It*, Newsweek (Jan. 11, 2021) <https://www.newsweek.com/internet-provider-restrict-access-facebook-twitter-customers-who-request-it-1560656>.

reproductive freedom advocacy organization, to send a text-based funding campaign.¹⁶ Even if this refusal was not predicated on the company's opposition to reproductive freedom, it shows that without Commission intervention, providers *could* censor disfavored viewpoints, and that is a risk that the Commission simply can't allow.

B. The General Conduct Rule Will Protect Americans from Other Current and Future Bad Conduct

The Commission's proposed general conduct rule is necessary to protect consumers against a slew of current and future ISP behaviors that are not otherwise covered by the rules against blocking, throttling, and paid prioritization. Most profit-motivated actors are particularly adept at finding loopholes to existing rules. For example, after the FCC prohibited ISPs from throttling or offering paid prioritization, they began offering zero-rating schemes. Zero rating is when ISPs exempt certain services from counting towards a customers' data caps. This enables ISPs to push consumers towards certain websites and away from others. A general conduct rule will enable the FCC to close newly found loopholes, and may discourage ISPs from seeking out those loopholes in the first place.

A general conduct rule could also ensure that ISPs advertise their products truthfully. Today, many ISPs offer "unlimited" plans that are not actually unlimited. Verizon offers at least three different tiers of unlimited plans, with the "unlimited welcome" plan throttling speeds after consumers exceed 60gb of data in a billing cycle.¹⁷ Once consumers learn that their unlimited plan is not truly unlimited, it could deter them from more bandwidth intensive internet use – even if that use is streaming a political debate, taking online classes, or attending a telehealth appointment.

C. The Commission Should Explicitly Prohibit Viewpoint and Content Based Zero-Rating Schemes

The FCC asked whether there are "any specific practices that would or would not violate" its proposed general conduct rule," and whether zero rating raises particular concerns.¹⁸ We urge the Commission to explicitly block zero-rating schemes that are not viewpoint or content neutral. We believe that these types of zero-rating will enable ISPs to steer customers towards particular websites, in violation of their right to access the information of their choice. In addition, zero-rating will disproportionately impact low-income consumers.

Many zero-rating schemes enable an ISP to promote their other products and stifle competition. For example, because AT&T owned HBO Max, AT&T allowed its customers to watch HBO Max without that streaming counting towards their data caps.¹⁹ However, if other

¹⁶ Aaron Sankin, *The 6 worst net neutrality violations in history*, Daily Dot (May 21, 2014) <https://www.dailydot.com/debug/net-neutrality-violations-history/>.

¹⁷ Important Plan Information, Verizon (last accessed Dec. 13, 2023) <https://www.verizon.com/plans/unlimited/>.

¹⁸ Safeguarding and Securing the Open Internet, 88 Fed. Reg. 76048, para. 167 (proposed Oct. 20, 2023).

¹⁹ Steve Dent, *AT&T blames net neutrality law for HBO Max counting against data caps*, Engadget (March 18, 2021) <https://www.engadget.com/att-blames-net-neutrality-for-hbo-max-hit-on-its-data-caps-095555622.html>.

streaming services also wanted their content to be zero-rated, AT&T would make them pay.²⁰ As Stanford Professor Barbara van Schewick has noted, “choosing which apps get zero-rated has a powerful effect on user behavior,” because “people prefer zero-rated content over content that eats up their data.”²¹

Zero-rating schemes also disproportionately impact low-income and marginalized consumers, because they are more likely to be subject to data caps in the first place. Low-income individuals more often must rely solely upon mobile internet, which in turn is more likely than fixed internet to have data caps.²² More affluent consumers, on the other hand, will be less likely to have plans that subject them to data caps. More affluent consumers are also better able to pay for data overages if they do have data caps, and so would be less deterred from visiting sites that count towards their cap.

At the same time, banning harmful zero-rating is good for consumers. In particular, in countries such as India, Canada, and the European Union that have banned harmful zero-rating, ISPs have increased data caps and lowered the price of data, giving consumers more data that they can use in the way that’s best for them.²³

III. RECLASSIFICATION OF BROADBAND AS A TITLE II SERVICE WILL PROTECT CONSUMERS AND PROMOTE UNIVERSAL SERVICE

The Commission proposes to “return BIAS to its classification as a telecommunications service under Title II of the [Communications] Act,”²⁴ noting that reclassification “is necessary to unlock tools the Commission needs to fulfill its objectives and responsibilities to safeguard this vital service.”²⁵ Once more, we wholeheartedly agree. For too long, the Commission’s ability to close the digital divide and protect consumers against bad ISP behavior has been hamstrung. We hope that the FCC will reclassify broadband as a Title II service, and exercise appropriate oversight over this vital communications tool.

²⁰ Jon Brodtkin, *AT&T lies about Calif. net neutrality law, claiming it bans “free data,”* *Ars Technica* (March 18, 2021)

<https://arstechnica.com/tech-policy/2021/03/att-lies-about-calif-net-neutrality-law-claiming-it-bans-free-data/>.

²¹ Barbara van Schewick, *Facebook, Google & Big Telecoms want to keep violating net neutrality in Europe. Regulars should stop them.*, Stanford Law School Center for Internet and Society (May 30, 2022)

<https://cyberlaw.stanford.edu/blog/2022/05/facebook-google-big-telecoms-want-keep-violating-net-neutrality-europe-regulators#:~:text=Choosing%20which%20apps%20get%20zero,that%20eats%20up%20their%20data>.

²² Andrew Perrin, *Mobile Technology and Home Broadband 2021*, Pew Research Center (June 3, 2021)

<https://www.pewresearch.org/internet/2021/06/03/mobile-technology-and-home-broadband-2021/>.

²³ See, e.g., Barbara van Schewick, *Facebook, Google & Big Telecoms want to keep violating net neutrality in Europe. Regulars should stop them.*, Stanford Law School Center for Internet and Society (May 30, 2022)

<https://cyberlaw.stanford.edu/blog/2022/05/facebook-google-big-telecoms-want-keep-violating-net-neutrality-europe-regulators#:~:text=Choosing%20which%20apps%20get%20zero,that%20eats%20up%20their%20data>;

Barbara van Schewick, *European regulators just stopped Facebook, Google and Big Telecoms’ Net Neutrality Violations*, Stanford Law School Center for Internet and Society (June 15, 2022)

<https://cyberlaw.stanford.edu/blog/2022/06/european-regulators-just-stopped-facebook-google-and-big-telecoms-net-neutrality>.

²⁴ Safeguarding and Securing the Open Internet, 88 Fed. Reg. 76048, para. 16 (proposed Oct. 20, 2023).

²⁵ Safeguarding and Securing the Open Internet, 88 Fed. Reg. 76048, para. 21 (proposed Oct. 20, 2023).

A. Title II Authority Will Enable the Commission to Protect Consumer Privacy

Extending the privacy protections of Title II to ISPs will close dangerous privacy loopholes. Because broadband is such a critical component of our daily lives, ISPs are able to monitor consumers as they go about their daily lives. This has enabled them to amass, use, disclose and sometimes sell a wealth of data about consumers, including demographic information (like race, ethnicity, sexual orientation, economic status, political affiliations, or religious beliefs), browsing history, live and historical location data, and contacts. Maintaining such large troves of information puts consumers at risk – with more than 234 million victims of data breaches from January to September of this year alone.²⁶ Moreover, ISPs have found multiple ways to profit off their data collection. For example, for five years, the now defunct CerCareOne sold real-time location data from large telecom companies like AT&T, T-Mobile and Sprint, to bounty hunters and bail bondsmen, who used it to find the locations of people they were tracking.²⁷ In addition, the Federal Trade Commission found that several ISPs targeted ads to customers on behalf of third parties.²⁸ To do so, they combined their own data with information purchased from data brokers to put consumers into targeted ad categories like “pro-choice,” “African American,” “Jewish,” “Asian Achievers,” “Gospel and Grits,” “Hispanic Harmony,” “working class,” “unlikely voter,” “last income decile,” “tough times,” “investor high-value,” and “seeking medical care.”²⁹

Reclassification is necessary for the FCC to enforce rules that let consumers have control over their own information and prevent ISP abuses. Section 222 of the Communications Act requires telecommunications carriers to protect customer proprietary network information (CPNI) – data collected by telecom companies on their customers.³⁰ However, that provision doesn’t apply to broadband only providers, and won’t until broadband is reclassified as a Title II service.

B. Title II Authority Will Enable the Commission to Bridge the Digital Divide

One of the Commission’s primary goals is to ensure universal service.³¹ Universal service was also a key goal of Congress when they created the FCC.³² While the Commission

²⁶ Lynn Hulsey, *2023 is already a record year for data breaches and exposures*, Dayton Daily News (Oct. 16, 2023) <https://www.daytondailynews.com/business/2023-is-already-a-record-year-for-data-breaches-and-exposures/U7OU25VFJBHWHPT4AL2WT3LWVQ/#:~:text=The%202023%20data%20compromises%20impacted,said%20had%203.18%20million%20victims.>

²⁷ Linda Hardesty, *Cellphone location data from T-Mobile, AT&T and Sprint was sold to bail bondsmen*, Fierce Wireless (Feb. 7, 2019) <https://www.fiercewireless.com/wireless/cell-phone-location-data-from-t-mobile-at-t-and-sprint-was-sold-to-bail-bondsmen>.

²⁸ *A Look At What ISPs Know About You: Examining the Privacy Practices of Six Major Internet Service Providers*, Federal Trade Commission, iii (Oct. 21, 2021) https://www.ftc.gov/system/files/documents/reports/look-what-isps-know-about-you-examining-privacy-practices-six-major-internet-service-providers/p195402_isp_6b_staff_report.pdf. Missing

²⁹ *A Look At What ISPs Know About You: Examining the Privacy Practices of Six Major Internet Service Providers*, Federal Trade Commission, 22 (Oct. 21, 2021) https://www.ftc.gov/system/files/documents/reports/look-what-isps-know-about-you-examining-privacy-practices-six-major-internet-service-providers/p195402_isp_6b_staff_report.pdf.

³⁰ 47 U.S. Code § 222 (1934) (last amended 2008).

³¹ *Universal Service*, Federal Communications Commission (last updated Dec. 1, 2023), <https://www.fcc.gov/general/universal-service>.

and Congress have done their best to promote universal service without Title II authority – full authority will better enable the FCC to close the digital divide by protecting existing broadband adoption programs and better enabling the commission to create new ones. Title II authority will also enable the FCC to prevent landlords from colluding with more types of ISPs to stifle competition, and require ISPs to ensure that their networks work well, and bounce back quickly after disasters.

1. Title II Authority Will Promote Digital Equity

The digital divide exists because many Americans cannot afford broadband³³ (or cannot consistently afford broadband)³⁴, don't have a device with which to connect³⁵, or don't have adequate digital literacy skills³⁶. Reclassifying broadband as a Title II service will enable the Commission to promote digital equity by improving and expanding current programs intended to make broadband more affordable, and by creating new programs that can promote device access and digital literacy.

i. Reclassification Will Expand the Pool of Lifeline Providers

Notably, Title II authority will allow the FCC to expand the number of providers able to offer Lifeline subsidies. The Lifeline program provides a \$9.25 a month subsidy for low-income households to purchase phone or broadband service, but only “eligible telecommunications carriers” are able to offer this subsidy to their customers. In *Mozilla v. FCC*³⁷, the case centering on the FCC's rollback of its 2015 open internet order, the D.C. court explained that “the statute expressly defines an “eligible telecommunications carrier” (ETC) as a “common carrier” under Title II. *Id.* § 214(e)(1).³⁸ Thus, “as a matter of plain statutory text...the decision to strip it of Title II common-carrier status—facially disqualifies broadband [providers] from inclusion in the Lifeline Program.”³⁹

When reconsidering the issue in light of the D.C. Circuit's decision, the FCC determined that Lifeline support could apply to broadband only when its provider offered both broadband and telephone service, on the rationale that telephone providers are common carriers.⁴⁰

³² Cite to communications act ;universal service provision

³³ Unplugged: NTIA Survey Finds Some Americans Still Avoid Home Internet Use, National Telecommunications and Information Administration, <https://www.ntia.gov/blog/2019/unplugged-ntia-survey-finds-some-americans-still-avoid-home-internet-use>.

³⁴ John B. Horrigan, *Philadelphia's Digital Divide by the Numbers*, City of Philadelphia, 20 (October 2021), <https://www.phila.gov/media/20211019110414/Connecting-Philadelphia-2021-Household-Internet-Assessment-Survey.pdf>.

³⁵ Digitunity, *The Issue*, <https://digitunity.org/the-issue/>.

³⁶ Amanda Bergson-Shilcock, The new landscape of digital literacy, National Skills Coalition at 4 (May 2020), <https://nationalskillscoalition.org/wp-content/uploads/2020/12/05-20-2020-NSC-New-Landscape-of-Digital-Literacy.pdf>.

³⁷ 940 F.3d 1 (D.C. Cir., 2019).

³⁸ *Mozilla*, 940 F.3d at 112.

³⁹ *Id.* at 111.

⁴⁰ F.C.C., Order on Remand, In the Matter of Restoring Internet Freedom, WC Docket No. 17-108, at ¶¶91-92, 95 (rel. Oct. 29, 2020).

Accordingly, customers seeking to use their Lifeline benefit on broadband are severely limited in their choice of provider. Those who live in an area that isn't served by an eligible provider are unable to use the benefit at all.

ii. Reclassification will enable Universal Service Fund Contributions Reform, Which in Turn Will Enable More Digital Inclusion Programs

Reclassification of broadband as a Title II service would enable the FCC to sustain and expand the Universal Service Fund (USF). The USF is a vital program that pays for four programs that aim to make universal service a reality, including the Lifeline program. To fund the USF, the FCC assesses telecommunications revenues. However, this funding mechanism is unsustainable because, as customers shift from traditional telecommunications services to broadband, the revenues of assessable services have significantly decreased.⁴¹ By reclassifying broadband as a Title II service, broadband revenues would be assessable by default. Since broadband revenues are significantly higher than phone service revenues, assessing broadband revenues would give the FCC enough money to expand existing programs and fund new ones.⁴²

With a larger USF, the Commission could maintain the Affordable Connectivity Program – a critical \$30 a month broadband subsidy for low-income consumers. The ACP is currently funded through a congressional appropriation, but that initial appropriation is slated to run out of funds in early 2024.⁴³ If the FCC added ACP as one of its USF programs, the program's beneficiaries wouldn't be reliant upon a mercurial Congress to pay for their internet.

In addition, a bigger USF would enable the FCC to improve the Lifeline program. The Lifeline program's \$9.25 subsidy hasn't even come close to keeping up with the cost of broadband service, which now hovers between \$50-90/month.⁴⁴ With more funding, the FCC could expand the Lifeline subsidy to better reflect the actual cost of broadband. The Commission could also remove the one subsidy per household limit that prevents multiple family members from connecting simultaneously.

Furthermore, the Commission would have the funding to create a device voucher program. As mentioned above, the inability to afford a device is one of the key drivers of the digital divide. 1 in 10 households across the country don't have even a single computer,⁴⁵ and the households without a computer are disproportionately Black, Latinx, or low-income.⁴⁶ In

⁴¹ <https://www.shlb.org/policy/research/USForward> at p. ?

⁴² See generally, Carol Matthey, *USForward*, NTCA (The Rural Broadband Association) (September 2021), <https://www.ntca.org/sites/default/files/documents/2021-09/FINAL%20USForward%20Report%202021%20for%20Release.pdf>.

⁴³ Joe Supan, *The ACP Helps Millions Afford Internet. It Could be Gone by Next Year*, CNET (Dec. 4, 2023), <https://www.cnet.com/home/internet/the-acp-helps-millions-afford-internet-it-could-be-gone-by-next-year/>.

⁴⁴ Jonathan Schwantes, *Broadband Pricing: What Consumer Reports Learned from 22,000 Internet Bills* (November 17, 2022), <https://advocacy.consumerreports.org/wp-content/uploads/2022/11/FINAL.report-broadband.november-17-2022-2.pdf>.

⁴⁵ Digitunity, *The Issue*, <https://digitunity.org/the-issue/>.

⁴⁶ David DiMolfetta, *Another Digital Divide: Americans Without Access to Devices*, S&P Global (June 15, 2022), <https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/another-digital-divide-americans-without-access-to-devices-69125302>; Emily A. Vogels, *Digital divide persists even as Americans with lower incomes make gains in tech adoption*, Pew Research Center (June 22, 2021),

addition, many more households don't have enough computers for everyone in the household to connect simultaneously. Absent a device, low-income and marginalized consumers are beholden to public spaces, like libraries, to connect to the internet. But, relying upon public computers for access is difficult for individuals who need to connect after-hours, or who don't have a mode of transportation to get to the public space.

Any FCC device voucher program should be modeled off of the Device Access for Every American Act, with some modifications. That legislation would provide low-income families with multiple vouchers that they can use to purchase a computer or tablet directly from a retailer or device refurbisher.⁴⁷ Vouchers could be used to pay for an eligible device, taxes, shipping and warranties. To ensure that beneficiaries have the same opportunity as others for a quality connection, the Commission should set evolving minimum standards for devices and adjust the voucher amount to keep pace with the average price of a device. Unlike the legislation, however, the voucher should be given to each eligible individual, instead of each eligible household. This will enable each member of a household to connect simultaneously. Additionally, it is critical that the FCC offer customers new vouchers when their old device breaks or becomes too outdated.

Finally, a larger USF would enable the Commission to create a digital literacy grant program to bridge the digital divide. A startling 1/3 of working adults lack digital skills.⁴⁸ Older Americans, those with limited English proficiency, and lower income households are more likely to lack digital skills.⁴⁹ Through the Digital Equity Act, Congress has invested nearly \$3 billion in improving digital skills, and securing access to devices.⁵⁰ Nevertheless, achieving universal digital literacy will require sustained effort. One option is a Digital Equity Foundation, which would be an independent body that promotes digital literacy, digital inclusion, and digital equity by awarding grants to community organizations, leveraging private sector resources, and collecting data.

2. Reclassification Will Protect Tenants in Multi-Tenant Environments

Reclassification will enable the Commission to better enforce its rules prohibiting exclusive contracts between landlords of “multi-tenant environments” (MTEs) – like apartments,

<https://www.pewresearch.org/short-reads/2021/06/22/digital-divide-persists-even-as-americans-with-lower-incomes-make-gains-in-tech-adoption/>.

⁴⁷ See generally, Device Access for Every American Act, S. 2729, 117th Cong. (2021).

⁴⁸ Amanda Bergson-Shilcock, The new landscape of digital literacy, National Skills Coalition at 4 (May 2020), <https://nationalskillscoalition.org/wp-content/uploads/2020/12/05-20-2020-NSC-New-Landscape-of-Digital-Literacy.pdf>.

⁴⁹ Ian Hecker, Shayne Spaulding and Daniel Kuehn, *Digital skills and older workers, supporting success in training and employment in a digital world*, Urban Institute at 2 (September 2021), https://www.urban.org/sites/default/files/publication/104771/digital-skills-and-older-workers_0.pdf.

⁵⁰ Yvette Scorse, *NDIA Celebrates the Senate Passage of the Infrastructure Bill*, National Digital Inclusion Alliance (August 10, 2021), <https://www.digitalinclusion.org/blog/2021/08/10/infrastructure-bill/>.

condos, and office buildings – and internet providers.⁵¹ As with the Lifeline program, these rules don't currently apply to broadband only providers.⁵²

The FCC's MTE rules came about because landlords and ISPs regularly colluded to profit at the expense of tenants. Since landlords must grant ISPs access to the building in order to offer service, some ISPs offer landlords a kickback to physically keep competitive providers out.⁵³ The resulting monopoly keeps prices for tenants artificially high and reduces service quality. With Title II authority over broadband, the Commission could enforce these rules against broadband-only providers as well as providers that offer both phone and internet service.

3. Reclassification Will Promote Network Reliability and Network Resiliency

In order to truly engage online, broadband service must be fast enough, and reliable enough to meet consumer needs. When networks slow to a crawl, or stop working altogether, for however brief a period, it can significantly impact day-to-day activities. Title II authority will enable the Commission to impose regulations that will ensure networks work well on regular days, and during disasters.

Reclassification would enable the FCC to promote network reliability and resiliency by requiring ISPs to invest in routine maintenance on their networks. Currently, some ISPs only invest in building and maintaining networks in wealthy, and white communities.⁵⁴ The FCC could also require networks to maintain on-site backup power, so that networks can continue to function during power outages. This is particularly important as wildfires continue to rage, year after year, and electric companies are forced to shut off power to slow the spread.⁵⁵ Moreover, reclassification would enable the Commission to require ISPs to harden networks and apply existing network resilience regulations to broadband only providers.

IV. THE COMMISSION SHOULD NARROWLY PREEMPT STATE LAWS

In its NPRM, the Commission asks how it should “define the scope of preemption to ensure that [broadband] is principally governed by a federal framework.”⁵⁶ According to the

⁵¹ *Consumer FAQ: Rules for Service Providers in Multiple Tenant Environments*, Federal Communications Commission, available at <https://www.fcc.gov/consumers/guides/consumer-faq-rules-service-providers-multiple-tenant-environments>.

⁵² Report and Order and Declaratory Ruling in the Matter of Improving Competitive Broadband Access to Multiple Tenant Environments at para. 13-15, GN Docket No. 17-142 (Feb. 15, 2022), <https://docs.fcc.gov/public/attachments/FCC-22-12A1.pdf>.

⁵³ Jenna Leventoff, *Your Landlord Might be Making Deals With Broadband Providers. We Want Them to Stop*, Public Knowledge (Sept. 10, 2019), <https://publicknowledge.org/your-landlord-might-be-making-deals-with-broadband-providers-we-want-them-to-stop/>.

⁵⁴ *One Pager Explainer on Digital Redlining*, Public Knowledge, available at <https://publicknowledge.org/policy/one-pager-on-digital-redlining/>.

⁵⁵ Jenna Leventoff, *The California Wildfires Show Why We Need a National Backup Power Mandate to Keep Americans Connected During Disasters*, Public Knowledge (Oct. 1, 2020), <https://publicknowledge.org/the-california-wildfires-show-why-we-need-a-national-backup-power-mandate-to-keep-americans-connected-during-disasters/>.

⁵⁶ Safeguarding and Securing the Open Internet, 88 Fed. Reg. 76048, para. 97 (proposed Oct. 20, 2023).

constitution, federal laws and regulations superseded conflicting state laws.⁵⁷ However, states provided important consumer protections when the FCC repealed its 2015 open internet order, and states should be allowed to continue to protect their residents, both once the upcoming federal protections are in place and if a future Commission once again weakened or repealed these rules. Therefore, the FCC must not move beyond standard preemption, and should use its rules as a floor, and not a ceiling.

A. State Net Neutrality Laws and State Litigation Have Protected Consumers

The 2017 Restoring Internet Freedom Order, which repealed the Commission's Title II authority and net neutrality rules, also sought to preempt states from filling the void. However, the D.C. Circuit, in *Mozilla*, was clear that "in any area where the Commission lacks the authority to regulate, it equally lacks the power to preempt state law."⁵⁸

Thus, the many state initiatives to protect consumers withstood legal challenges. States including California, Colorado, New Jersey, Maine, Oregon, Washington and Vermont all passed laws or executive orders to protect consumers seeking to utilize the internet freely.⁵⁹ These state laws are harmonized with the net neutrality protections proposed in the NPRM. While most of these laws do not cover everything on every topic, the protections they include mirror the protections in the 2015 Open Internet Order.

California's net neutrality laws, however, comprehensively restored all of the 2015 net neutrality protections.⁶⁰ In addition, California's net neutrality laws moved beyond what the FCC has proposed in its NPRM with respect to zero-rating. Under the 2015 Open Internet Order, zero-rating would have been evaluated case-by-case under the general conduct rule. Building on the FCC's subsequent work on zero-rating under the 2015 Order, California's net neutrality law affirmatively blocks some harmful forms of zero rating.⁶¹

Even states without net neutrality laws can use litigation to stop ISPs from exploiting consumers. New York was able to secure refunds for hundreds of thousands of residents who didn't get the broadband speeds that they paid for by suing Charter Communications.⁶² In addition to repaying consumers who were cheated out of their hard earned dollars, New York

⁵⁷ U.S. Const. art. VI., § 2.

⁵⁸ *Mozilla v. FCC*, 940 F.3d 1, 74-87 (D.C. Cir. 2019).

⁵⁹ See Emily Washburn, What is Net Neutrality - and Why is it so Controversial? (Apr. 13, 2023), <https://www.forbes.com/sites/emilywashburn/2023/04/13/what-is-net-neutrality-and-why-is-it-so-controversial/?sh=1d62f35153a9>.

⁶⁰ That's because California's law is the only state-level net neutrality law that codified both the net neutrality protections in the Open Internet Rules and the important protections that were codified in the text of the 2015 Open Internet Order. See, e.g., Barbara van Schewick, *Gov. Jerry Brown Signs SB 822, Restoring Net Neutrality to California*, Center for Internet and Society at Stanford Law School (Sept. 20, 2018), <https://cyberlaw.stanford.edu/blog/2018/09/gov-jerry-brown-signs-sb-822-restoring-net-neutrality-california>.

⁶¹ SB 822, §3101(a)(5),(6) & (7)(B) & §3101(b); Press Release, *Attorney General Bonta: California's Net Neutrality Law is Here to Stay*, State of California Department of Justice (May 4, 2022) <https://oag.ca.gov/news/press-releases/attorney-general-bonta-california%E2%80%99s-net-neutrality-law-here-stay>.

⁶² Chaim Gartenberg, *Charter-Spectrum reaches \$174.2 million settlement in New York AG's speed fraud lawsuit*, The Verge (Dec. 18, 2018), <https://www.theverge.com/2018/12/18/18146210/charter-spectrum-174-million-settlement-new-york-state-attorney-general-internet-speeds>.

was also able to require that Charter more truthfully advertise its speeds, and provide customers with hardware capable of reaching advertised speeds.⁶³

B. Federal Protections Should Be the Floor, Not the Ceiling

While many states stepped in to fill the void created by the repeal of the 2015 Open Internet Order—federal rules are nevertheless necessary to ensure *all* Americans are protected against all harmful ISP misconduct and to promote digital inclusion across the country. However, it’s also important that states who want to go further can do so. In other words, federal rules should be the floor, not the ceiling.

First, in areas where federal and state protections align, enabling states to maintain and enforce their own rules helps conserve limited federal and state resources and improves protections for consumers by enabling different entities to enforce their overlapping rules.⁶⁴ The FCC has limited resources to enforce its rules and cannot always investigate and enforce all potential violations. Allowing states to enforce their own, identical protections in parallel with the FCC allows states to step in even if the FCC cannot. In addition, parallel enforcement allows the FCC and the states to pool resources and coordinate efforts, letting scarce resources go further. As explained above, almost all state net neutrality protections aligned with the 2015 Open Internet Order.

Second, states and localities tend to have the best sense of the issues impacting their own communities, and the ways to solve those problems. For the times that a federal regulation is not sensitive to local context, it’s important that states be able to take additional actions to protect their constituents. Similarly, technology and ISP practices are evolving rapidly, and states are often able to respond more quickly as new threats emerge.

Third, preempting state laws that go further than the Commission’s net neutrality protections would reduce the protections in states with strong net neutrality laws. Consumers should not be worse off as a result of FCC action.

Moreover, narrow preemption is particularly important because the Commission has expressed a desire to forbear on much of its authority.⁶⁵ As we’ve noted in the privacy context: “if federal standards are strong and adapt to new threats, states may see no need to pass their own laws to supplement these standards. But preserving their ability to act if this is not the case can be good for the public.”⁶⁶ Ultimately, broad preemption “would be a win for business interests at

⁶³ Chaim Gartenberg, *Charter-Spectrum reaches \$174.2 million settlement in New York AG’s speed fraud lawsuit*, The Verge (Dec. 18, 2018), <https://www.theverge.com/2018/12/18/18146210/charter-spectrum-174-million-settlement-new-york-state-attorney-general-internet-speeds>.

⁶⁴ See *Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020) (“Indeed, in the vast majority of cases where federal and state laws overlap, allowing the States to prosecute is entirely consistent with federal interests.”)

⁶⁵ Safeguarding and Securing the Open Internet, 88 Fed. Reg. 76048, para. 98 (proposed Oct. 20, 2023).

⁶⁶ Neema Singh Guiliana, *Don’t be Fooled by the Tech Industry’s Push for Federal Privacy Legislation*, American Civil Liberties Union (Oct. 5, 2018), <https://www.aclu.org/news/privacy-technology/dont-be-fooled-tech-industrys-push-federal-privacy>.

the expense of the public.”⁶⁷ Thus, the Commission must clarify that its rules will serve as a floor, but not a ceiling.

V. THE COMMISSION SHOULD NOT FORBEAR FROM SECTION 254(D)

The Commission seeks comment on when to forbear from specific provisions, and notes that it proposes to “forbear from Title II provisions insofar as they would support the adoption of ex ante rate regulations for broadband Internet access service.”⁶⁸ By forbearing, the Commission would decline to enforce certain laws if doing so is in the public interest, thereby making them discretionary. However, the Commission has never before reversed its decision to forbear. Thus, the Commission must be particularly careful, and only forbear when doing so is truly necessary.

If the Commission forbears with respect to Section 254(d), it could jeopardize the Commission’s work to bridge the digital divide. Section 254(d) governs the USF contributions mechanism.⁶⁹ As noted above, the USF is a necessary program for closing the digital divide. To both ensure the stability of existing USF programs and have the funding available to create new programs that promote digital equity, the Commission should reform the USF contributions mechanism. Accordingly, we urge the Commission not to prematurely remove the potential assessment of broadband revenues from the options for contributions reform by forbearing during this proceeding.

VI. CONCLUSION

The rules proposed in today’s NPRM are a victory for Americans who want to be able to connect to the internet and exercise their free speech rights. The proposed conduct rules would renew the Commission’s authority to police ISP misconduct that keeps consumers from freely accessing the internet. Additionally, the NPRM’s proposal to reclassify broadband as a Title II telecommunications service would enable the Commission to bridge the digital divide by better enforcing existing rules and protecting existing programs, as well as creating new rules and programs to make universal access to affordable, reliable internet a reality.

⁶⁷ Neema Singh Guiliana, *Don't be Fooled by the Tech Industry's Push for Federal Privacy Legislation*, American Civil Liberties Union (Oct. 5, 2018), <https://www.aclu.org/news/privacy-technology/dont-be-fooled-tech-industrys-push-federal-privacy>.

⁶⁸ Safeguarding and Securing the Open Internet, 88 Fed. Reg. 76048, para. 98 (proposed Oct. 20, 2023).

⁶⁹ 47 U.S.C. §254(d)