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October 15, 2019

Joint Committee on Telecommunications, Utilities, and Energy  
Sen. Michael J. Barrett & Rep. Thomas A. Golden, Chairs

## **SUPPORT FOR S.1960**

### **PRESERVING INTERNET FREEDOM AND PROTECTING CONSUMERS IN THE DIGITAL ERA**

Dear Senator Barrett, Representative Golden, and members of the committee:

The ACLU of Massachusetts offers our strong support for S.1960, *An Act To Ensure A Free And Open Internet In The Commonwealth*. This legislation re-establishes net neutrality and internet freedom for Massachusetts residents<sup>1</sup>.

The internet began and flourished as a free and open network. This freedom allowed the internet to thrive, spreading art, music, and creativity across the globe, transforming political activism and civic engagement, and providing a wide variety of social and economic opportunities to all with a connection. Freedom of information and communication are the lifeblood of our democracy and our economy.

Massachusetts is the cradle of both liberty and our nation's high-tech sector. There are more technology workers per capita in our state than any other in the country, including California, home to Silicon Valley. The free and open internet long provided a level playing field for all companies, without regard to their size or customer base. Small tech startups were able to innovate and grow into large tech companies because the provision of internet services did not discriminate between different types of content or content producers.<sup>2</sup> Startups, of which there are thousands in Massachusetts, know this. It's why Massachusetts entrepreneurs are on the front lines when it comes to defending the freedom of the internet.<sup>3</sup>

Net neutrality is good for our technology industry, our economy, and our liberty. S.1960 imposes the necessary rules that will preserve and defend an open internet for future generations of internet users and businesses alike.

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<sup>1</sup> Internet freedom is a subject of significant concern, as evidenced by the number of related bills before this committee, including H.2921 and S.1936, and we applaud the varied efforts to address the issue. We focus our testimony on S.1960 because we believe it will most thoroughly and effectively advance net neutrality in the Commonwealth.

<sup>2</sup> Nathan White, Net Neutrality and the Future of the internet, The Huffington Post, Jul. 2014, available at [https://www.huffpost.com/entry/net-neutrality\\_b\\_5256423](https://www.huffpost.com/entry/net-neutrality_b_5256423)

<sup>3</sup> Kelly O'Brien, Net neutrality changes would 'kneecap' Mass. entrepreneurs, say tech execs, Boston Business Journal, Apr. 2017, available at <https://www.bizjournals.com/boston/news/2017/04/21/net-neutrality-changes-would-kneecap-mass.html>

## **The problem: the Trump FCC killed net neutrality**

Net neutrality is a simple concept based on the idea that content should move freely and equally across the internet without regard for its origin, content, or destination. Net neutrality regulations apply well-established “common carrier” rules to the companies that provide internet services, to preserve its freedom and openness.<sup>4</sup> These rules prohibit the owner of an internet network from discriminating against information by halting, slowing, or otherwise tampering with the transfer of data or content. (The only exception is for legitimate network management purposes such as easing congestion or blocking spam.)

In 2015, during President Barack Obama’s administration, the Federal Communications Commission (FCC) enacted regulations to prevent broadband internet access providers (commonly known as internet service providers, or ISPs) from engaging in this type of content discrimination. The Commission did so by classifying broadband internet access as a “telecommunications service,” making it subject to common carrier rules that have long applied to our telephone networks.

After President Donald Trump took office, the FCC embarked on a mission to dismantle these rules. In January 2018, after a period of notice and comment, the FCC reclassified broadband internet access service as an “information service,” abandoning common carrier rules, net neutrality, and the consumer protections they afforded consumers.

The Trump FCC not only killed net neutrality regulations, but also declared that states could not adopt their own net neutrality laws by barring states from imposing any rule or requirement that the FCC “repealed or decided to refrain from imposing” or that is “more stringent” than the deregulatory rule itself.

But less than two weeks ago a federal court ruled against that preemption claim in a case called *Mozilla Corp. vs. FCC*.<sup>5</sup> In that case, a panel of judges of the United States Court of Appeals of the District of Columbia Circuit held that Trump’s FCC went too far in dictating to states the limits of their regulatory powers in this area, finding that the FCC did not demonstrate it had legal authority to issue the preemption directive.

As a result, if the Commonwealth of Massachusetts wants to follow states like Washington, Maine, and California in adopting laws to restore a free and open internet, the FCC cannot stop us.

## **The proposal: Protect consumers from practices that harm net neutrality and promote internet openness and freedom**

To restore internet openness and freedom, S.1960 proposes that networks treat all data traffic indiscriminately. If this bill becomes law, ISPs will once more be prohibited from blocking, slowing down, or speeding up the delivery of online content at their discretion.

In other words, the legislation would take away from the ISPs the ability to decide what content is permitted to get to consumers quickly, what content should load slowly, and

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<sup>4</sup> ACLU, What Is Net Neutrality?, available at <https://www.aclu.org/issues/free-speech/internet-speech/what-net-neutrality> (updated December 2017).

<sup>5</sup> D.C. Cir., No. 18-1051 (Oct. 1, 2019)

what content shouldn't ever get to them. It prohibits censorship online, and ensures a fair playing field for businesses and consumers who rely on the internet.

First, the bill provides that broadband internet access companies that operate within or enter into any agreement with<sup>6</sup> the Commonwealth are prohibited<sup>7</sup> from (i) blocking lawful content, applications, or services, (ii) prohibiting the use of non-harmful devices, (iii) throttling<sup>8</sup> lawful traffic based on source, application or services, destination, content, ownership or type, (iv) engaging in paid prioritization; and (v) engaging in other practices that have the purpose or effect of circumventing or undermining the effectiveness of the bill.

Second, the bill mandates transparency. Under its terms, ISPs must publicly disclose accurate and relevant information in plain language regarding their network management practices, performance, and commercial terms.<sup>9</sup> This transparency empowers consumers and allows them to make informed choices.

Third, the bill prohibits companies from engaging in "zero-rating" practices. These practices are a means to indirectly prioritize content by allowing users to access certain content or apps without impacting their overall data usage. For example, AT&T's sponsored data<sup>10</sup> program allows users to "browse websites, stream video, and enjoy apps" without impacting their personal data plan. Zero-rating is anti-competitive, and privileges certain content over other information, endangering intellectual and economic freedom, and giving ISPs anti-democratic control over what internet users see, hear, watch, and do online.

Additionally, the bill institutes a process to ensure compliance by companies, gives the attorney general the power to enforce the law, and creates a fund with the money produced and recovered in those enforcement actions. The bill also provides for the use of broadband internet access services to address special needs during emergencies.

Finally, the bill regulates state contracts with ISPs and provides that their network management practices shall be a factor in the government body's decision about awarding a broadband internet service contract.

### **Conclusion: Massachusetts needs strong net neutrality rules**

Without net neutrality, our rights and the vitality of the internet economy are threatened. ISPs should not be allowed to create different lanes and use their gatekeeper position to speed up, slow down, or block communication and services on the internet, based on who can pay more or whom they disagree or agree with.

Freedom in this digital century requires internet access services to be net neutral. For this reason, the ACLU strongly supports this legislation. We urge the Committee to give S.1960 a swift favorable report. Thank you.

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<sup>6</sup> This provision also provides a strong argument against federal preemption because it directly regulates companies that enter into an agreement or contract with the state.

<sup>7</sup> These prohibitions are subject to reasonable and legitimate network management.

<sup>8</sup> Bandwidth throttling is a purposeful slowing of available bandwidth, i.e., an intentional lowering of the speed of an internet connection.

<sup>9</sup> The information does not include competitively sensitive information and information that compromises network security.

<sup>10</sup> Sponsored Data from AT&T, available at <https://www.att.com/att/sponsoreddata/en/index.html>

