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Hearing on HB 141

(Oppose HB 141)

“Commercial Law – Internet Privacy and Net Neutrality”

before the

Committee on Economic Matters

Maryland General Assembly

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Mr. Chairman and Distinguished Members of the Committee,

Good afternoon. My name is Michael Horney, and I am a Research Fellow at The Free State Foundation, an independent, nonpartisan research and educational institution located in Rockville, Maryland. The Free State Foundation is a free market-oriented think tank focusing heavily on communications and Internet law and policy. Thank you for the opportunity to present this testimony on HB 141, which was prepared by me and Free State Foundation President Randolph May. We oppose adoption of HB 141.

HB 141 is unnecessary and its enactment would be harmful. The adoption of the FCC's *Restoring Internet Freedom Order*, which repealed heavy-handed public utility regulation of Internet services providers ("ISPs") in an order released in January 2018, has not resulted in any demonstrated net neutrality violations by broadband providers. And despite claims from some that repeal of the *Title II Order* would "end the Internet as we know it," the Internet remains free and open to all Americans. And pertinent to the nation's ability to continue to expand and improve high-speed networks, the United States Telecom Association has found that broadband investment increased from 2016 to 2017 after two years of sharp decline following the adoption of the *Title II Order*.

HB 141 purports to prevent state funds from being used to procure services from an Internet service provider that blocks, impairs, or degrades certain Internet traffic or that engages in certain forms of commercial traffic preferencing. HB 141 is legally problematic because it conflicts with federal policy that broadband Internet access services are largely unregulated "information services" and should not be regulated in a public utility-like fashion. And HB 141 is unwise as a matter of policy.

The FCC's *Restoring Internet Freedom Order* expressly preempts any state measure that, in effect, would impose prohibitions and restrictions on ISPs that are inconsistent with the prohibitions and restrictions the federal agency has repealed. HB 141's provisions regarding blocking, impairing or degrading, and traffic preferencing essentially mirror the regulations that were repealed by the FCC. Thus, HB 141, if adopted, would be contrary to what the FCC's order called the "preemptive federal policy of nonregulation for information services."

The FCC's order declares that state or local laws inconsistent with the federal policy of not regulating Internet traffic would "requir[e] each ISP to comply with a patchwork of separate and potentially conflicting requirements across all of the different jurisdictions in which it operates." HB 141 runs afoul of the federal policy by contributing to the patchwork regulatory problem.

Due to the dynamic nature of today's digital broadband networks in terms of operation and routing, it is difficult, if not impossible, to distinguish between intrastate and interstate Internet traffic in the way that, in an analog world, telephone companies more readily could distinguish between intrastate and interstate voice traffic. Therefore, by interfering with the ISPs' ability to carry interstate traffic, HB 141 necessarily would impose a burden on interstate commerce. As the FCC's *Restoring Internet Freedom Order* explains:

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 interstate communications. Thus, because any effort by states to regulate intrastate traffic would interfere with the Commission's treatment of interstate traffic, the first condition for conflict preemption is satisfied.

HB 141 purports to be limited by its terms to Internet providers that receive state funds. While the resulting impacts conceivably may be less than for a state law purporting to extend its reach beyond services procured with state funds, they nevertheless are sufficient to render the law inconsistent with federal policy. This inconsistency and the adverse effects on interstate commerce would put this Maryland law at substantial risk of preemption.

Legal questions aside, the FCC's order explains why state laws like HB 141 would be harmful to broadband consumers. The difficulties inherent in distinguishing between intrastate and interstate Internet traffic – and the resulting costs from attempting to separate such traffic – may have an adverse impact on investment, innovation, and the overall quality and price of broadband services in Maryland.

Assuming it is even possible for ISPs to distinguish between intrastate and interstate traffic, as a practical matter ISPs would need to install additional data processing capabilities to monitor data flows across the country. Any online activity can result in Internet traffic being transmitted all across the country – and, for that matter, the world. This means ISPs would need to implement different practices in efforts to accommodate Maryland's and other states' laws. These additional costs imposed on Internet providers offering services in Maryland likely would crowd out resources that otherwise would be used for additional investment and innovation.

HB 141 would not benefit Maryland's state and local agencies either. For example, under HB 141, any Internet provider that provides services for a state agency cannot engage in traffic prioritization. This restriction, even though cast in terms of "commercial" traffic, nevertheless may impede the delivery of emergency, public safety, and health services that state and local agencies provide because the line between what is "commercial" or not is unclear and likely to remain so. Or there may be government services clearly offered on a "commercial" basis that fall in those public safety and health-related categories that would be required by law to be treated just like popular video applications.

The impracticality of implementing different practices for provision of services procured with state funds and those offered to the public at large is problematic as well. An Internet provider would incur additional costs if it wanted to deviate from the state mandates applicable to state procurements while operating in accordance with federal law in its offerings to the public at large. As a practical matter, this might mean that all Maryland residents may be deprived of services that, in order to serve their intended purpose, depend on some form of traffic preferencing. For example, certain services like remote surgeries or physician consultations, various medical monitoring services, and emergency-type communications, may be adversely impacted because they cannot be prioritized over streaming of entertainment applications. Beyond identifiable health and safety services, HB 141's restrictions against any form of "commercial traffic" differentiation likely will discourage ISPs from offering other innovative services, including those which are still evolving in the fast-changing Internet environment.

In the two years following implementation of the FCC's *Title II Order*, which HB 141's restrictions mirror, Free State Foundation scholars estimated that broadband investment declined by \$5.6 billion on a nationwide basis. This corresponds to roughly \$116 million in foregone broadband investment in Maryland. Adoption of restrictions like those that would be imposed by HB 141 likely would have a Maryland-specific negative impact on investment and innovation, incentivizing broadband providers to invest in other states that do not adopt laws like the proposed bill.

Furthermore, the privacy regulations in HB 141 would require ISPs to obtain opt-in consent from consumers before they can use, disclose, sell, or provide access to a customer's personal information. Because these rules only apply to ISPs, and not to so-called edge providers like Google and Facebook, even though these dominant web entities collect and use far more personal information than the ISPs, consumers would be subjected to asymmetric privacy regulations, despite consumers' expectations for a consistent level of protection across the entire Internet ecosystem. HB 141 also would prohibit ISPs from refusing to serve consumers who do not provide opt-in consent and prohibit them from offering discounted services to consumers who do provide opt-in consent.

Even aside from the ill-effects created by the asymmetric regulation of ISPs and edge providers, the privacy restrictions could discourage ISPs from offering innovative, pro-consumer services facilitated by the use of consumer data. For example, consumer-friendly, discounted services, like free data programs, use consumer information to develop targeted offerings but may be prohibited if HB 141 is adopted. And businesses in Maryland, like coffee shops, in effect, might be restricted from offering public WiFi because consumers who do not provide opt-in consent are unable to access the network. As the FCC said in its January 2018 order: "[O]nly the FTC operates on a national level across industries, which is especially important when regulating providers that operate across state lines." The costs imposed on ISPs by having to comply with a patchwork of differing state privacy regulatory regimes – like the costs imposed by a patchwork of differing state net neutrality regimes – may deter investment in broadband facilities in Maryland and the provision of innovative services to Maryland consumers.

Governor Larry Hogan has made reducing unnecessary and costly regulatory mandates a hallmark of his administration. In his February 4, 2015, "State of the State" address, Governor Hogan declared: "Maryland's anti-business attitude, combined with our onerous tax and regulatory policies have rendered our state unable to compete with any of the states in our region. It's the reason that businesses, jobs and taxpayers have been fleeing our state at an alarming rate."

Significantly, after release of the FCC's January 2018 order, Maryland's consumers have remained protected from any allegedly abusive "net neutrality-type" or privacy practices by Internet service providers. Among other things, oversight by the Federal Trade Commission, the nation's expert agency with regard to consumer privacy disputes, and the Department of Justice, along with state consumer protection laws of general application, will protect consumers without imposing unnecessary burdens on ISPs.

In sum, HB 141 is unnecessary and problematical from a legal and policy perspective and should not be adopted. Thank you for considering this testimony.