

Supplemental Statement on Net Neutrality and Media Diversity
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This statement is intended to supplement the written and oral testimony provided by Professor Arturo J. Carrillo at the Public Oversight Roundtable on PR22-0691 on January 24, 2018.¹ It expands on Professor Carrillo’s response to Chairperson Brandon Todd’s question during the Roundtable regarding the impact of net neutrality on media diversity. This statement will take a closer look at the constituent elements of media diversity and its critical role in promoting First amendment values as well as freedom of expression. It will then consider how the FCC’s 2017 Restoring Internet Freedom (RIF) Order gutting net neutrality undermines media diversity, generally and in the District of Columbia. But first, it is helpful to recall what we mean by net neutrality in this context and which First Amendment values it promotes.

Net neutrality is first and foremost about “preserving the power of *individuals* to make choices about how they use the Internet – what information to seek, receive, and impart, from which sources, and through which services.”² By guaranteeing the free flow of information on the Internet – an integral component of freedom of expression – this principle functions as a cornerstone of modern democratic society, not least because of its critical role in safeguarding First Amendment values. Net neutrality enables the open marketplace of ideas while “fostering the public debate and deliberation essential for the task of democratic self-government; and, in the process, protecting speech that is unpopular, disfavored, and less well-funded.”³ It is against this backdrop that we turn to examine the importance of media diversity in relation to net neutrality.

I. Media Diversity, Freedom of Expression & First Amendment Values

Media rights are an integral component of freedom of expression, along with the rights to impart or express information and ideas; to seek and receive information and ideas; and to access information held by public bodies.⁴ In particular, a free press is “one of the cornerstones of

¹ Testimony of Prof. Arturo J Carrillo, Public Oversight Roundtable on PR22-0691 – Sense of the Council Opposing the Repeal of Net Neutrality Rules Resolution Committee of Government Operations, Council of The District of Columbia (Jan. 24, 2018) <http://dccouncil.us/videos/archive/>.

² CENTER FOR DEMOCRACY & TECHNOLOGY, THE IMPORTANCE OF INTERNET NEUTRALITY TO PROTECTING HUMAN RIGHTS ONLINE 5 (2013), <https://cdt.org/files/pdfs/internet-neutrality-human-rights.pdf> [https://perma.cc/597U-9M44] (emphasis added).

³ Dawn Carla Nunziato, *First Amendment Values for the Internet*, 13 *First Amendment Law Review* 282, 1 (2014) <https://poseidon01.ssrn.com/delivery.php?ID=894066006095122120077100084125098092118059041019064065110101085089025120007097072121110039062059057028033083019087006120100123108038036022041016100113105028113027009062024124082114024116015078092107114084028091028105028084019027123109090005100023004&EXT=pdf>. [hereinafter Nunziato].

⁴ UNITED NATIONS HUMAN RIGHTS COMMITTEE, GENERAL COMMENT NO. 34, CCPR/C/GC/34, para. 11, 18 (2011) <http://www2.ohchr.org/english/bodies/hrc/docs/gc34.pdf> [hereinafter HRC GENERAL COMMENT NO. 34].

democracy.”⁵ This is because a free press and other media are essential to the “free [flow of] information and ideas about public and political issues between citizens, candidates and elected representatives,” which requires that they be allowed to operate “without censorship or restraint.”⁶ Democratic governments are thus bound “to encourage an independent and diverse media,” and not undermine them, if they are to respect freedom of expression and promote First Amendment values.

Media diversity, sometimes called media pluralism, is “the degree to which opinions are represented in the media.”⁷ Governments need to promote it as a means “to protect the rights of media users [...] to receive a wide range of information and ideas”.⁸ Further, “[i]n recognition of the particular importance of media diversity to democracy, special measures...should be put in place to prevent undue concentration of media” and the resulting decrease in media diversity.⁹ There are three parts to media plurality, each of which must be promoted and respected:

- The first is the **diversity of outlets**. Opinions, ideas, and information receive representation in the media through media outlets.¹⁰ Thus, diversity of media outlets allows diversity of content in the media.¹¹ It requires “the establishment of a free environment for the creation and dissemination of [media] outlets[.]”¹²
- The second is the **diversity of sources**. This requires ensuring that all media have access to “the full benefits of digital platforms, in particular the Internet, to strengthen the right to freedom of opinion and expression[.]”¹³
- Finally, there is “**diversity of content**. This allows for different communities and vulnerable groups to have access to media outlets and find ways to effectively disseminate their voice.”¹⁴

Media plurality is threatened when there is “undue media dominance or concentration by privately [or State] controlled media groups in monopolistic situations that may be harmful to a diversity of sources and views.”¹⁵ This kind of “concentration of media ownership... [can result] in uniformity

⁵ *Id.* at para. 13.

⁶ *Id.* at para. 20.

⁷ REPORTERS WITHOUT BORDERS, 2017 World Press Freedom Index Detailed Methodology: Criteria Categories and Indicators, <https://rsf.org/en/detailed-methodology> (last visited Jan. 30, 2018).

⁸ HRC GENERAL COMMENT NO. 34, *supra* note 4 at para. 14.

⁹ HUMAN RIGHTS COUNCIL, REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION, Ambeyi Ligabo, A/HRC/7/14, 33 (2008) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G08/112/10/PDF/G0811210.pdf?OpenElement> [hereinafter A/HRC/7/14].

¹⁰ *See id.* at para. 21.

¹¹ *See id.*

¹² *Id.* at para. 25.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ HRC GENERAL COMMENT NO. 34, *supra* note 4 at para. 40.

of content and of informational agendas[.]”¹⁶ For this reason it can also lead to structural censorship, as discussed below. Consequently, “effective measures are necessary to prevent such [concentrated] control of the media.”¹⁷ In short, it is the responsibility of governments to “preserve the Internet’s ideal conditions for promoting and maintaining informational pluralism...[by] ensuring that changes are not made to the Internet that result in a reduction in the number of voices and amount of content available” to all.¹⁸

Ensuring media plurality is thus essential to realizing “the right of everyone to freedom of expression.”¹⁹ The benefits to democratic society in general, and to advancing first Amendment values in particular, are multiple, and include the following:

- Enabling individuals to exercise other fundamental human and civil rights, such as the rights to association and assembly; education; and participation in the political system.²⁰
- Fostering social mobilization for marginalized and vulnerable groups by enabling them to access relevant information, disseminate their opinions, and organize.²¹
- Ensuring the accountability of governments.²²
- Facilitating and ensuring pluralistic debates in the democratic process.²³
- Strengthening the quality of media content.²⁴
- Promoting innovation by fostering more and more diverse media outlets²⁵
- Expanding the range of public discourse by embracing underfunded, unpopular, or other disfavored speech and outlets²⁶

¹⁶ UNITED NATIONS EDUCATIONAL, SCIENTIFIC AND CULTURAL ORGANIZATION, WORLD TRENDS IN FREEDOM OF EXPRESSION AND MEDIA DEVELOPMENT: REGIONAL OVERVIEW OF LATIN AMERICA AND THE CARIBBEAN, 12 (2014) <http://unesdoc.unesco.org/images/0022/002277/227740e.pdf> [hereinafter UNESCO World Trends]

¹⁷ HRC GENERAL COMMENT NO. 34, *supra* note 4 at para. 40 (citation omitted) (internal quotation marks omitted).

¹⁸ INTER-AMERICAN COMMISSION ON HUMAN RIGHTS: OFFICE OF THE SPECIAL RAPPORTEUR FOR FREEDOM OF EXPRESSION, FREEDOM OF EXPRESSION AND THE INTERNET, Catalina Botero Marino, para. 19 (2013) http://www.oas.org/en/iachr/expression/docs/reports/2014_04_08_Internet_ENG%20_WEB.pdf [<https://perma.cc/6FSP-R583>] [hereinafter 2013 OAS SPECIAL RAPPORTEUR REPORT].

¹⁹ HRC GENERAL COMMENT NO. 34, *supra* note 4 at para. 40 (citation omitted) (internal quotation marks omitted).

²⁰ See HUMAN RIGHTS COUNCIL, REPORT OF THE SPECIAL RAPPORTEUR ON THE PROMOTION AND PROTECTION OF THE RIGHT TO FREEDOM OF OPINION AND EXPRESSION, Frank La Rue, A/HRC/17/27, para. 22 (2011) <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G11/132/01/PDF/G1113201.pdf?OpenElement> [hereinafter 2011 REPORT OF THE SPECIAL RAPPORTEUR].

²¹ See *id.* at para. 2.

²² ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE, THE REPRESENTATIVE ON FREEDOM OF THE MEDIA, MEDIA FREEDOM ON THE INTERNET: AN OSCE GUIDEBOOK, 16 (2016) (quoting Budapest Summit Declaration, 21 December 1994 <http://www.osce.org/mc/39554>) <http://www.osce.org/netfreedom-guidebook?download=true> [hereinafter OSCE GUIDEBOOK].

²³ See 2013 OAS SPECIAL RAPPORTEUR REPORT, *supra* note 18 at para. 18; see also, OSCE GUIDEBOOK, *supra* note 19 at 16.

²⁴ See HRC GENERAL COMMENT NO. 34, *supra* note 4 at para. 28.

²⁵ See 2011 REPORT OF THE SPECIAL RAPPORTEUR, *supra* note 20 at Summary.

²⁶ See Nunziato, *supra* note 3 at 1.

- Helping to reverse the perpetuation of inequality due to disparities in resources.²⁷

In the next section, we explain why repealing net neutrality protections will contribute to a systematic undermining of media pluralism, freedom of expression, and the critical First Amendment values that diversity enables.

II. Protecting Net Neutrality is Essential to Safeguarding Media Competition, Diversity, and Innovation in the District of Columbia

Net neutrality is a necessary safeguard for ensuring media plurality in practice. Strong net neutrality principles guarantee equal access to the Internet for all users and the free flow of information online. To this end, the FCC's 2015 Open Internet Order established a set of rules to promote and protect an open Internet.²⁸ In addition to defining other key measures, the FCC defined the scope of its new Rules to apply to "both fixed and mobile broadband Internet access service."²⁹ It further enacted three bright-line rules that go to the heart of net neutrality protections: no blocking;³⁰ no throttling;³¹ and no paid prioritization.³² Finally, the FCC devised a way to reach other types of conduct that may not come under the bright-line rules by establishing its "no unreasonable interference/disadvantage standard."³³ Under this rule, Internet Service Providers (ISPs) could not unreasonably interfere with or disadvantage either end users' ability to use and access broadband service or Internet content or edge providers' ability to make such content available to end users.³⁴

Without robust net neutrality protections, ISPs may legally engage in the blocking or throttling of certain underfunded, unpopular, or disfavored content. They can also favor certain types of sources

²⁷ See 2011 REPORT OF THE SPECIAL RAPPORTEUR, *supra* note 17 at para. 61-62.

²⁸ See Rules Protecting and Promoting the Open Internet, 80 Fed. Reg. 19,738 (Apr. 13, 2015) (to be codified at 47 C.F.R. pts. 1, 8, 20), available at <http://www.gpo.gov/fdsys/pkg/FR-2015-04-13/pdf/2015-07841.pdf> [hereinafter 2015 Open Internet Order].

²⁹ *Id.*, at para. 25.

³⁰ *Id.*, at para. 112. "A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not block lawful content, applications, services, or nonharmful devices, subject to reasonable network management."

³¹ *Id.*, at para. 119. "A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not impair or degrade unlawful Internet traffic on the basis of Internet content, application, or service, or use of a non-harmful device, subject to reasonable network management."

³² *Id.*, at para. 125. "A person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not engage in paid prioritization. [...] Paid prioritization refers to the management of a broadband network provider's network to directly or indirectly favor some traffic over other traffic, including through use of techniques such as traffic shaping, prioritization, resource reservation, or other forms of preferential traffic management, either (a) in exchange for consideration (monetary or otherwise from a third party), or (b) to benefit an affiliated entity."

³³ *Id.*, at para. 136. "Any person engaged in the provision of broadband Internet access service, insofar as such person is so engaged, shall not unreasonably interfere with or unreasonably disadvantage (i) end users' ability to select, access, and use broadband Internet access service or the lawful Internet content, applications, services, or devices of their choice, or (ii) edge providers' ability to make lawful content, applications, services, or devices available to end users. Reasonable network management shall not be considered a violation of this rule."

³⁴ *Id.*

of online content over others. Without the bright line rules and oversight procedures for net neutrality contained in the 2015 Open Internet Order, the risk that ISPs may act to undermine media diversity increases significantly. As noted previously, “[g]iven the freedom to do so in the past, [ISPs that serve as] intermediaries for expression have indeed discriminated against content in a variety of ways—including against social and political expression and other content that is highly valued within our constitutional scheme.”³⁵

What follows is an overview of the potential consequences of unfettered control over Internet services that the 2017 RIF Order enables. These include decreased competition, concentration of media sources, structural censorship, and harm to innovation in the media. As we shall see, this has direct consequences for the residents of the District of Columbia.

a. Decreased competition shrinks the number of media outlets and sources and reduces content diversity

Strong net neutrality principles are necessary to preserve competition among media entities in the United States. In particular, paid prioritization – the creation of Internet “fast-lanes” – skews the playing field in favor of established incumbents and other well-resourced players at the expense of small, underfunded or unpopular sources.³⁶ In the digital realm, where mere “[m]illiseonds of difference” in the time to transmit or access services or content “can leave you at a disadvantage[.]”³⁷ net neutrality guarantees a level playing field, thereby enhancing competition. A level playing field among media outlets (i.e., companies that distribute news and/or create media) and sources means these entities can compete on equal footing (at least as far as access to the Internet and the free flow of information are concerned) to gain and keep readership, as well as to attract advertising revenues.³⁸ Without it, larger outlets with greater resources are much more likely to prevail.

In the absence of net neutrality, the ability of small and local news media entities to stay afloat will be diminished by their inability to compete meaningfully with larger outlets:

In a world without net neutrality [...] [t]he cost of online news reporting will go up, and local providers’ ability to offer quality content will go down. There will be fewer legacy outlets, and many of the ones that do survive will do so by consolidating, diminishing their

³⁵ Nunziato, *supra* note 3 at 10.

³⁶ See 2015 Open Internet Order, *supra* note 28.

³⁷ Martin Giles, *The Demise of Net Neutrality Will Harm Innovation in America*, MIT Technology Review (Dec. 7, 2017) (quoting Tom Lee, head of policy at Mapbox), <https://www.technologyreview.com/s/609594/the-demise-of-net-neutrality-will-harm-innovation-in-america/>.

³⁸ See Timothy B. Lee, *Print newspapers are dying faster than you think*, Vox (Nov. 2, 2016), <https://www.vox.com/new-money/2016/11/2/13499004/print-newspapers-dying>.

independence and the diversity of the local news ecosystem as a whole.³⁹

Diminished competition among media entities does not just decrease the diversity of media outlets and sources. It also impacts the diversity of *content* available to online outlets and users, for at least two reasons. First, lack of competition will lead to a concentration of dominant outlets that can curtail the dissemination and visibility of marginal, unpopular or underfunded expression online. Second, media actors in competition often seek to transmit or produce diverse content to appeal to a larger readership or attract attention. Decreased competition thus negatively affects media plurality because it reduces the incentive such media entities have to generate diverse media content that would attract readership and advertising revenues.⁴⁰

Harold Feld of the D.C.-based think tank Public Knowledge sees a growing parallel between the history of cable news and the concentration of cable news sources in the absence of strong regulations, on the one hand, and the repeal of the FCC’s 2015 Open Order in December of 2017, on the other. Feld contends that “the net neutrality repeal order does for broadband exactly what the 1984 Cable Act did for cable—create an environment with virtually no effective restraint on the ability of providers to favor their own content and discriminate against rivals.”⁴¹ His fear is that the lifting of net neutrality regulations will lead to “rapid horizontal and vertical consolidation” in Internet services just as similar measures did with respect to cable outlets.⁴² This is of deep concern because experience not just in the United States but elsewhere has shown that:

[m]edia concentration [can] be a structural obstacle to free and pluralistic media. Horizontal concentration of many titles in the hand of one company [can] limit the variety of opinions. Vertical concentration of media outlets, printing houses and distribution channels [can] hinder competitors from accessing the market. Cross-ownership of non-media related companies in media houses [can] hamper the watchdog function of the press towards the private sector.⁴³

Moreover, research on the effect of media concentration in Europe suggests that the consolidation of outlets and sources can lead to a kind of censorship within the media sector. Certain kinds of information are less likely to be covered by the media if the diversity of voices in that sector is decreased.⁴⁴ The OSCE Office of the Representative on Freedom of the Media terms this

³⁹ Adam Hersh, *Slowing Down the Presses: The Relationship Between Net Neutrality and Local News*, The Center for Internet and Society, Stanford Law School (Dec. 2017), https://cyberlaw.stanford.edu/files/publication/files/20171208-NetNeutralityandLocalNews_0.pdf.

⁴⁰ Armando J. Garcia Pires, Working Paper No 04/15, *Media Diversity, Advertising and Net Neutrality*, Center for Applied Research at NHH (Mar. 11, 2015), https://brage.bibsys.no/xmlui/bitstream/handle/11250/295761/A04_15.pdf?sequence=1.

⁴¹ Harold Feld, *Will Repeal of Net Neutrality Accelerate the Trend in Media Consolidation? The History of Cable Suggests “Yes”*, Promarket.org (Dec. 6, 2017), <https://promarket.org/will-repeal-net-neutrality-accelerate-trend-media-consolidation-history-cable-suggests-yes/> [hereinafter Feld].

⁴² *Id.*

⁴³ OSCE OFFICE OF THE REPRESENTATIVE ON FREEDOM OF THE MEDIA, *THE IMPACT OF MEDIA CONCENTRATION ON PROFESSIONAL JOURNALISM*, 9 (2003) <http://www.osce.org/fom/13870?download=true> [hereinafter OSCE IMPACT OF MEDIA CONCENTRATION].

⁴⁴ OSCE IMPACT OF MEDIA CONCENTRATION, *supra* note 43 at 27-33.

phenomenon “structural censorship.”⁴⁵ When the number of media actors is reduced through consolidation, newsworthy content will not receive the same degree of coverage as it would if a broader range of media entities existed. In other words, the lack of media plurality results in structural censorship, which in turn limits people’s ability to fully exercise their rights to seek, receive, and impart information and opinions in a democratic society.

b. Impact in the District of Columbia

As concerns news and other media actors operating in the District of Columbia, the potential for negative impact from the repeal of net neutrality protections is substantial. The extensive written and oral testimony presented to the Committee on Government Operations and the D.C. Council on this issue amply substantiates this reality. We want to highlight a few of these possible negative impacts as they relate to media diversity and First Amendment values.

First, access to and dissemination of diverse, local, and community-driven content in the District may suffer as a result of the FCC’s 2017 RIF Order. Local publications with a strong digital presence such as *Metro Weekly*, *Hill Rag*, and *El Tiempo Latino* may find it difficult to compete with other local and national publications that are better-resourced and/or favored by the ISPs’ anti-net neutrality practices.⁴⁶ Second, the lack of a level playing field for local media in D.C. may hamstring the editorial independence of local digital publications for the reasons noted above, as well as limit the diversity of online sources and content in other ways. As a result, content that is unpopular, from marginal or vulnerable sources in society, or otherwise under-resourced, may not receive the same degree of coverage or reach the same audience as before. For example, online activism to spread awareness and promote public debate on controversial or unpopular issues could be impaired if advocates are unable to get their message out because of blocking or throttling by ISPs that feel threatened by such activity.⁴⁷ Similarly, locally sourced online education courses may struggle if they cannot access appropriate Internet speeds due to prohibitive prioritization costs; and even if they do, they would have to pass those costs on to the students, making the courses less accessible.⁴⁸

Local innovation will also be affected. Without net neutrality protections, “it will be harder than ever for local news startups to [launch], because the costs of starting an online business will be higher, and the ability to innovate technologically will be constrained.”⁴⁹ Local entrepreneurs are especially concerned that “large companies will spend heavily to dominate fast-lane access, making it harder for some startups, such as bandwidth-hungry mobile video companies, to

⁴⁵ OSCE IMPACT OF MEDIA CONCENTRATION, *supra* note 43 at 10, 29.

⁴⁶ Adam Hersh, *Slowing Down the Presses: The Relationship Between Net Neutrality and Local News*, *The Center for Internet and Society*, Stanford Law School (Dec. 2017), https://cyberlaw.stanford.edu/files/publication/files/20171208-NetNeutralityandLocalNews_0.pdf.

⁴⁷ See oral testimony of Ingrid Sturgis, Public Oversight Roundtable on PR22-0691—Sense of the Council Opposing the Repeal of Net Neutrality Rules Resolution, Committee of Government Operations, Council of The District of Columbia (Jan. 24, 2018), <http://dccouncil.us/videos/archive/>.

⁴⁸ *See id.*

⁴⁹ *See* Feld, *supra* note 41.

challenge them.”⁵⁰ Even if a startup could afford to pay for paid prioritization, it would “have to pass those costs on to consumers, making it harder to compete with bigger players.”⁵¹ Further, if ISPs are favoring content that they own (by either throttling, blocking of competition content, or zero-rating deals), as AT&T currently does (through zero-rating) by not charging its customers for data used by its Internet application DirecTV, startups may find it impossible to innovate.⁵²

So, for example, a new video channel created by a startup company at Howard University’s Inclusive Innovation Incubator—a startup technology community space in DC dedicated to fostering inclusion and diversity—may struggle to survive because it cannot afford to pay its ISP for “prioritization” in streaming, which would prevent its videos from delays caused by buffering.⁵³

III. Conclusion

This supplementary statement unpacked the constituent elements of media diversity and described its critical role in promoting First Amendment values as well as freedom of expression, both in the District of Columbia and generally. In so doing, it deepens the understanding of how the FCC’s 2017 RIF Order gutting net neutrality undermines media diversity to the detriment of D.C. residents.

⁵⁰ Martin Giles, *The Demise of Net Neutrality Will Harm Innovation in America*, MIT Technology Review (Dec. 7, 2017) (quoting Tom Lee, head of policy at Mapbox), <https://www.technologyreview.com/s/609594/the-demise-of-net-neutrality-will-harm-innovation-in-america/>.

⁵¹ *Id.*

⁵² *Id.*

⁵³ See OSCE IMPACT OF MEDIA CONCENTRATION, *supra* note 43.