Good morning. I’d like to begin by thanking Chairman Brandon Todd and the staff of the Committee on Government Operations for the opportunity to testify on this important topic. My interest in network neutrality arises from my role as a law professor at George Washington University specializing in the intersection of international law with Information, Communications, and Technology (ICT) policy and practice.¹

Along with my colleague, Professor Dawn Nunziato, I published an article not long ago entitled, “The Price of Paid Prioritization: The International and Domestic Consequences of the Failure to Protect Net Neutrality in the United States.”² In it, we argued that the United States, as a party to the International Covenant on Civil and Political Rights (ICCPR), a major human rights treaty, must take into account its international legal obligations regarding the rights to freedom of expression and non-discrimination when formulating and implementing policies to regulate network neutrality. I believe this perspective has numerous positive implications for the DC Council’s efforts to engage with this critical issue in 2018, as reflected in the proposed resolution.

Accordingly, this testimony will address three issues raised by the proposed resolution and the Federal Communications Commission (FCC)’s 2017 Restoring Internet Freedom (RIF) Order. The first is the definition of net neutrality. The second is the role of net neutrality in guaranteeing the enjoyment of basic human rights including, but not limited to, free speech and the principle of non-discrimination. Last but not least, I want to encourage the Council to consider examples from other jurisdictions of potential measures that could better protect net neutrality in accordance with First Amendment values.

Defining Net Neutrality in Line with Human Rights and First Amendment Values

The standard, technical definition of network neutrality is this: Internet service providers (ISPs)—including mobile operators—must treat all data and content online equally, without regard to its source or destination, to guarantee the free flow of information and unfettered access to it. When viewed through the lens of human rights, “preserving [net] neutrality means 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.”

Under this view, net neutrality supports freedom of expression and equality of opportunity by enabling people to seek, receive and impart information, and to interact as equals. It requires that the Internet be maintained as an open platform on which network providers treat all content, applications and services equally, without discrimination. An important aspect of net neutrality states that everyone should be able to innovate without permission from anyone or any entity.

This broader definition of net neutrality embodies what my colleague Professor Dawn Nunziato has termed “First Amendment values,” which should be applied to and respected by private actors like the ISPs. According to Professor Nunziato, these values include the facilitation of 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.” Without strong net neutrality protections like those in the 2015 Open Internet Order, broadband providers would be free to prioritize whatever content they choose and to discriminate against disfavored content. Given the freedom to do so in the past, 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. It should come as no surprise that they would do so. As unregulated market actors, these speech intermediaries have various incentives to favor some and to discriminate against other content—including content that is disfavored, poorly funded, unpopular or otherwise conflicts with their own political, economic, or other interests. Allowing broadband providers to discriminate in this manner is inconsistent with our First Amendment values.

In my opinion, then, the definition of net neutrality in the proposed resolution could better reflect the humanistic dimension at the heart of the principle and, in so doing, advance these key First Amendment values. Let me turn now to how this works in practice.

**Why Protecting Network Neutrality Means Protecting Basic Human Rights and First Amendment Values**

Protecting net neutrality is tantamount to ensuring respect for basic human rights such as freedom

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6 Id. at 10-11.
of expression, non-discrimination, and affordable access to the full Internet for everyone, among many others. Net neutrality is already a consolidated norm of international human rights law due to the seminal role it plays in the protection of freedom of expression and non-discrimination rights in society. Article 19 of the ICCPR, a human rights treaty to which the United States is a party, affirms the right “to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of [ ] choice.”7 Since the rise of electronic communications, this framework has evolved to expressly accommodate the expression and receipt of information via the Internet. It is now well settled that the constituent rights comprising freedom of expression will apply to all “internet-based modes of communication.”8 Network neutrality is also instrumental to preserving media diversity and pluralism on the Internet.

With respect to non-discrimination, the ICCPR establishes in Article 2 that State parties are obligated “to respect and to ensure to all individuals within [their] territory and subject to [their] jurisdiction the [human] rights recognized [in the treaty] without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.” It is the application of this core non-discrimination norm to freedom of expression rights on the Internet that gives rise to principle of net neutrality as defined above.

For these reasons international experts from the United Nations and other human rights systems have reiterated that “[t]here should be no discrimination in the treatment of Internet data and traffic, based on the device, content, author, origin and/or destination of the content, service or application.”9 Among other things, this requires that “[a]ny restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with [the strict exceptions regime set out in] paragraph 3 [of Article 19].”10 What this means in practice is that leaving Internet service providers full discretion to regulate online data traffic, as the 2017 RIF Order does, is likely to lead to discriminatory business practices such as throttling and paid prioritization that undermine net neutrality and thus freedom of expression.

Let me give you an example. Harvard Law professor Susan Crawford analogizes the open Internet to a public “sidewalk for communication.”11 Imagine if private contractors who built the sidewalks

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10. HRC General Comment 34, para. 43.
were allowed for any reason to confine some pedestrians to walk in slow lanes (throttling), or to grant extra-speedy passage to others who could pay for it, thus obtaining a right-of-way over their less affluent or well-connected fellow pedestrians (paid prioritization). This is what happens when, say, Comcast charges Netflix a premium to ensure that its video streams at optimal levels to the detriment of smaller rivals, or AT&T blocks or slows customers’ access to Apple’s Facetime application. Net neutrality essentially keeps the ISP owners of the Internet’s “sidewalks” from deciding unilaterally who gets to use them and how in an unfair manner.

Rounding out the panoply of relevant elements is the right to access information online. Put simply, “[g]iving effect to the right to freedom of expression imposes an obligation on States to promote universal access to the Internet.”\textsuperscript{12} As we have seen, human rights law requires that such access be provided without discrimination of any kind. Accordingly, the UN’s top human rights technical body has called upon governments “to take all necessary steps to foster the independence of […] new media […] such as internet and mobile based electronic information dissemination systems […] and to ensure [equal] access of all individuals thereto.”\textsuperscript{13}

In sum, net neutrality is best understood as the principle of non-discrimination applied to all people’s right to request, receive or impart data or information online without undue restriction. As such, it meshes organically with citizens’ capacity to exercise their freedom of expression, as well as many other basic human rights that free speech enables. It is for this reason that protecting net neutrality also advances the First Amendment values that encompass such rights. Among these are the rights to hold opinions and religious beliefs without interference; the right to education; the rights to freedom of association and assembly; the right to full participation in the social, cultural and political life of the state; media rights; and the right to social and economic development.\textsuperscript{14}

\textit{Protecting Net Neutrality and First Amendment Values in the District of Columbia}

In addition to the proposed resolution, DC has taken important actions to push back against the FCC’s repeal of the 2015 Open Internet Order and its net neutrality protections. These include joining a lawsuit of state attorney generals requesting judicial review of the 2017 RIF Order. The proposed resolution itself affirms in categorical terms its rejection of that Order. But what more, if anything, can the DC Council do to protect net neutrality and advance First Amendment values in the aftermath of the FCC’s Repeal Order? Although subordination to Congressional review limits the District’s legislative autonomy, it may be worth considering other alternatives, such as regulatory action.

By way of example, some jurisdictions have sought, through executive or legislative actions, to impose net neutrality obligations on Internet service companies that do business with those states.

\textsuperscript{12} 2011 Joint Experts Declaration, para. 6(a).
\textsuperscript{13} HRC General Comment 34, para. 15.
Just this past Monday the governor of Montana signed an executive order doing just that.\textsuperscript{15} His order prohibits ISPs like Charter, Verizon and AT&T, that enter into new contracts with the state, from blocking content and charging more for faster service from websites to customers in Montana. Legislators in four other states – California, New York, North Carolina, and Rhode Island – are proposing to do the same through bills that would forbid internet providers with state government contracts from blocking or slowing down sites or online services.\textsuperscript{16} These state leaders believe their approach stands the best chance of withstanding federal preemption challenges in court and better protecting their resident consumers.

In any event, the DC Council in the proposed resolution should seize the opportunity to reaffirm in the strongest terms possible the Districts commitment to protecting free speech rights and First Amendment values of its residents in line with the human rights norms that underpin the principle of net neutrality.

Respectfully submitted,

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