

## *Why Isn't Montana's Executive Order Preempted?*

### **Through the order, the State of Montana acts as a consumer—not a regulator.**

- Because there's no mandate, and no new regulations, there's certainly no federal preemption. Companies that don't like Montana's proposed contract terms don't have to do business with the State.

### **There's no “patchwork of regulations” problem.**

- ISPs have always faced 50 sets of tort laws, consumer protection laws, property laws, tax laws. This is nothing new, and it's not onerous to implement.
- The Communications Act says that the Commission doesn't get to regulate state affairs. States do.
- The FCC's net neutrality repeal order said that the practices Montana's executive order focuses on—*e.g.*, throttling, blocking—are fundamentally consumer protection problems. These have always been state concerns.
- The “patchwork” argument isn't a preemption argument, anyway. The Communications Act has long envisioned both federal and state roles in telecommunications regulation.
- Certainly, there's no express statutory preemption on the purchasing issues here. And the idea that ISPs are totally immune from state law is just false.

### **Even if Montana did compel ISPs through a state law, the FCC's claims to preemption are a stretch.**

- Preemption is a question of congressional intent. There's no statutory basis for preemption under Title I.
- Remember: the FCC felt it needed to reclassify broadband under Title II to protect net neutrality principles. So when the FCC retreated back to Title I in December, it's unclear how the FCC can simultaneously claim that it doesn't have the power to impose net neutrality principles under Title I yet preempt states from doing the same.
- The ISPs are trying to have it both ways, too. During the previous administration, ISPs argued that the FCC lacked the power under Title II to preempt certain state laws that ISPs favored. Now, under Title I, ISPs are claiming broad, preemptive authority by the FCC. Both can't be true.

### **Bottom line: Montana is a consumer like you or me. It can drive a hard bargain if it wants.**

- Montana has accepted Chairman Pai's invitation for consumers to state their preferences.
- Companies that don't like it don't have to do business with the State—nothing stops ISPs from selling dumpy internet plans in Montana if they insist.
- The ISPs read the FCC's repeal order as effectively placing states at a competitive disadvantage when it comes to bargaining for services.