

NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 18-1051 (and consolidated cases)

IN THE
**United States Court of Appeals
for the District of Columbia Circuit**

MOZILLA CORPORATION, ET AL.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION
and THE UNITED STATES OF AMERICA,

Respondents.

On Petition for Review of an Order
of the Federal Communications Commission

**PROOF BRIEF OF TWILIO INC. AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONERS**

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CERTIFICATE AS TO PARTIES, ORDERS, AND RELATED CASES

Pursuant to D.C. Circuit Rule 28(a)(1), Twilio Inc. certifies:

A. Parties and Amici

The list of parties is set forth in the Petitioners' opening briefs. Notices of intent to file briefs of amici curiae have been filed by: Scott Jordan and Jon Peha, Professors of Communications Law, Electronic Frontier Foundation, City of New York, Engine Advocacy, Consumers Union, eBay, Members of Congress, and American Council on Education and 18 Other Education and Library Associations.

B. Order under Review

Amicus curiae Twilio Inc. supports Petitioners' challenge to the FCC's decision to vacate its regulation banning broadband internet access providers from blocking or throttling lawful internet content, as set forth in *Restoring Internet Freedom*, 33 FCC Rcd. 311 (2018) (JA____) ("*Net Neutrality Repeal Order*"), *vacating Protecting & Promoting the Open Internet*, 30 FCC Rcd. 5601 (2015) (JA____) ("*2015 Net Neutrality Order*").

C. Related Cases

The list of related cases is set forth in the addenda to the brief filed by the Government Petitioners.

August 27, 2018

/s/ Adrienne E. Fowler

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Twilio Inc., certifies that it does not have a parent corporation and no publicly held corporation owns 10% or more of Twilio stock.

August 27, 2018

/s/ Adrienne E. Fowler

**CERTIFICATE OF COUNSEL REGARDING NECESSITY
OF SEPARATE AMICUS CURIAE BRIEF**

Pursuant to D.C. Cir. R. 29(d), Twilio Inc. hereby certifies that it is submitting a separate brief from other amici in this case due to the specialized nature of its business and its unique interests in this proceeding.

To the best of its knowledge, Twilio is the only amicus presenting information regarding the parallels between the FCC's regulation of text messaging and its regulation of broadband internet access, and how those parallels demonstrate that the order under review will cause widespread harm. Moreover, Twilio understands other amici intend to focus on other topics, such as the preemption of state laws, whether the net neutrality rules substantially burdened broadband providers before the Commission repealed them, and legislative history. Joining these divergent issues into a single brief would hinder rather than streamline the presentation of amici's arguments. Accordingly, Twilio certifies that filing a joint brief would not be practicable.

August 27, 2018

/s/ Adrienne E. Fowler

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* Authority upon which *amicus* principally relies.

GLOSSARY

API	Application program interface
FCC	Federal Communications Commission
<i>Net Neutrality Repeal Order</i>	<i>Restoring Internet Freedom</i> , 33 FCC Rcd. 311 (2018).
<i>2015 Net Neutrality Order</i>	<i>Protecting & Promoting the Open Internet</i> , 30 FCC Rcd. 5601 (2015).

STATUTES AND REGULATIONS

The text of relevant statutes and regulations is set forth in the addenda to the briefs filed by the Petitioners, with the exception of 15 U.S.C. § 45(a), which provides in relevant part:

§ 45. Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

STATEMENT OF INTEREST, IDENTITY, AND AUTHORITY TO FILE

Twilio Inc. is a cloud-based communications platform provider.¹ More than two million developers around the world have used Twilio’s platform to integrate voice, text messaging, fax, chat, and video communications channels into their software applications. Using Twilio, software developers can create call centers, office phone systems, call tracking systems, and customer communications systems. By making access to a wide variety of communications channels a part of every software developer’s toolkit, Twilio is enabling innovators across every industry—from emerging business leaders to the world’s largest organizations—to reinvent how companies engage with their customers.

Twilio makes integrating communications technology into software applications easy and effective in three ways relevant to this case. First, Twilio has designed a series of innovative and user-friendly application program interfaces (“APIs”), which developers can integrate into their software applications. These APIs use the same software programming language that developers already must know to build the rest of a mobile or web application; developers do not need to learn new, complex telecommunications integrations—even when powering the world’s most demanding applications. Once the API is integrated, an application can access communications networks.

Second, Twilio has built a sophisticated communications platform, capable of delivering communications through networks across the globe. It has also

¹ All parties have consented to the filing of this brief, and correspondence indicating such consent is available from counsel for *amicus*.

“virtualized” access to this infrastructure: because the Twilio platform is based in the cloud, organizations can access it any time, any place, as long as they have access to an open internet connection (*i.e.*, an internet connection where the service provider does not engage in throttling or blocking communications between Twilio and its customers). As a result, software developers can leverage Twilio’s cloud-based communications platform to develop intelligent communications applications that connect with users globally, without needing to implement complex telecom hardware and without needing to contract with each individual service provider.

Third, Twilio offers reliable cloud-based access to voice, text messaging, fax, chat, and video communications channels through a *single* platform; this, in turn, enables Twilio-powered software applications to use the best communication channels for their target audience. For example, 501(c)(3) social enterprise and Twilio client CareMessage offers a web platform, which healthcare companies use to make underserved patient populations healthier. The platform enables healthcare providers to engage in consistent communication, such as providing appointment reminders and follow-up communications after an appointment, with patients who have signed up to receive such communications. Members of these underserved populations typically have either a landline or a mobile device, but rarely both. Moreover, for patients who do have mobile phones, text messaging is frequently the most effective way to reach such individuals. Twilio, *CareMessage Keeps*

Communities Healthy with SMS (last visited Aug. 17, 2018).² Thus, Twilio’s ability to send communications via both text message and voice channels is of great value.

Twilio has a strong interest in the outcome of this case. As discussed above, Twilio’s customers may access their accounts and the platform over broadband connections.³ Similarly, the end users of Twilio-powered software may also rely on broadband connections. For example, Twilio helps companies live stream video experiences. The end users of Twilio-powered apps can access content ranging from video games to sports events, or hold one-to-one video conversations, but only if they have fast, reliable access to broadband networks. Similarly, a freelance web developer filed comments with the FCC indicating that, if she “can’t rely on [her] provider” to provide “fast, reliable” access to internet-based communications, including “cloud[] and tech platforms like Twilio,” then she will not be able “to make a living.” Comments of Nicole M. Arocho Hernandez, WC Docket No. 17-108 (filed July 13, 2017).⁴ Because the *Net Neutrality Repeal Order* harms internet openness, it will make broadband-powered communications less reliable and accessible, substantially harming Twilio and its customers.

Twilio also has distinct insight into the likelihood that the *Net Neutrality Repeal Order* will harm consumers and those who provide online content, services, and applications. The FCC has historically left text messaging channels unprotected

² Available at <https://customers.twilio.com/285/caremessage/>.

³ Throughout this brief, the term “broadband” includes fixed broadband, mobile broadband, and Wi-Fi access to a broadband network.

⁴ Available at <https://www.fcc.gov/ecfs/filing/10713106590510>.

from wireless carrier blocking and throttling, in a way that parallels the FCC's current lack of protection for broadband. Each month, wireless carriers block or throttle tens of millions of lawful, consented-to text messages that wireless subscribers expect to receive—all without obtaining permission from wireless subscribers. Twilio's experience shows that, when the Commission leaves a mode of communication unprotected, network providers will tend to block and throttle lawful content where they have the incentive and ability to do so.

STATEMENT OF AUTHORSHIP AND FINANCIAL CONTRIBUTIONS

Pursuant to Fed. R. App. P. 29(a)(4)(E), Twilio Inc. states that its counsel at Harris, Wiltshire & Grannis authored the following amicus brief. Attorneys at Harris, Wiltshire & Grannis also represent intervenors Internet Association and Entertainment Software Association. No party or their counsel contributed money with the intention of funding the preparation or submission of this brief. No person or entity other than Twilio Inc. contributed money that was intended to fund the brief's preparation or submission.

SUMMARY OF ARGUMENT

The Court must set aside the FCC's elimination of all of the net neutrality rules other than a limited transparency rule because the Commission's action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 41 (1983) (quoting 5 U.S.C. § 706(2)(A)). Where an agency either (1) fails to "examine the relevant data" and provide "a rational connection between

the facts found and the choice made” or (2) fails to provide a reasonable explanation for inconsistency between current and past agency policy, then its order is “itself unlawful.” *Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117, 2125-2126 (2016) (citations omitted). Put differently, the Commission’s decision to repeal its net neutrality rules must have been both “reasoned” and “reasonable” for this Court to uphold it. *ACA Int’l v. FCC*, 885 F.3d 687, 708 (D.C. Cir. 2018). As Petitioners explain, Jt. Br. for Non-Gov’t Pet’rs at 51–71; Jt. Br. for Gov’t Pet’rs at 15–38, the decision here was neither. Twilio’s experience illustrates this in two key ways.

First, the record before the Commission and Twilio’s experience demonstrate that, in the past, the FCC fueled investment by online content, application, and platform providers by clearly indicating it would take action to address non-neutral broadband provider conduct that harmed internet openness. In adopting the *Net Neutrality Repeal Order*, the Commission did just the opposite. For the first time, it disclaimed any role in policing non-neutral broadband provider conduct as long as the provider disclosed it. In doing so, it ignored the evidence of how innovative companies, like Twilio, had relied on the Commission’s prior commitments to attract investment and thrived with the assurance that their content and services would reach end-user consumers without broadband provider interference.

Second, the *Net Neutrality Repeal Order* itself acknowledged that the negative “consequences of blocking or throttling lawful content on the Internet ecosystem [were] well-documented in the record and in Commission precedent.” *Net Neutrality Repeal Order* at 468 ¶ 265 (JA ____). The order expressly “emphasize[s] . . . that we do not support blocking lawful content.” *Id.* The Commission, however,

failed to provide a reasoned or reasonable explanation for how allowing providers to block and throttle legal online content (as long as they disclose it) will prevent these harms. In particular, it ignored the cautionary tale of the text messaging ecosystem: When communications senders and recipients are not protected against blocking and throttling by the underlying network providers, the free flow of communications suffers.

ARGUMENT

I. TWILIO AND OTHER SIMILARLY SITUATED COMPANIES INVESTED IN RELIANCE ON THE COMMISSION'S PRIOR COMMITMENT TO ENFORCE NET NEUTRALITY PROTECTIONS.

The Commission had embraced net neutrality protections—including the concept that blocking and throttling legal content is inconsistent with the Communications Act, regardless of whether providers disclose it—for well over a decade before adopting the *Net Neutrality Repeal Order*. During this era of protection, broadband providers' investments increased, and the companies and individuals who provide content, applications, and services via the internet engaged in vast innovation, including the invention of modern cloud computing. This innovation has greatly benefited consumers. New, non-traditional communications companies and their investors made business decisions in reliance on the Commission's consistent commitment that it would step in to protect core net neutrality safeguards. Because the Commission failed to meaningfully engage with record evidence of reliance and the relationship between strong net neutrality

protections and investment by anyone other than broadband providers, its decision to overturn those protections was arbitrary and capricious. *See* Jt. Br. for Non-Gov't Pet'rs at 68–71; Jt. Br. for Gov't Pet'rs at 29–32.

Twilio's experience illustrates this point. Until the *Net Neutrality Repeal Order* went into effect, Twilio had only operated in an environment where the Commission treated blocking and throttling lawful internet content as a prohibited practice. Twilio was founded in 2008, three years after the FCC announced its commitment to ensuring that consumers have “access [to] the lawful Internet content of their choice” and the ability to “run applications and use services of their choice.” *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities et al.*, 20 FCC Rcd. 14986, 14988 (2005). Two years after Twilio's founding, the Commission incorporated these principles into its regulations, *Preserving the Open Internet*, 25 FCC Rcd. 17905 (2010), and later reaffirmed its commitment by adopting bright-line rules banning blocking, throttling, and paid prioritization, among other open internet protections, *2015 Net Neutrality Order* at 5601 (JA ____).

Twilio successfully built its business, attracting both investors and customers, in this world of required internet openness. Ten years after its founding and two years after filing for an initial public offering, Twilio now has a market capitalization of over \$7.5 billion. Twilio, *Twilio Announces Second Quarter 2018 Results*, Business Wire (Aug. 6, 2018).⁵ Because Twilio needs open and reliable access to

⁵ Available at <https://www.businesswire.com/news/home/20180806005560/en/>.

broadband networks for its service to work properly, Twilio would not have been as successful in attracting the investors and customers it needed to launch and grow its company without a regulator that mandated internet openness. Letter from Twilio Inc. to the FCC, WC Docket No. 17-108, at 2 (filed Dec. 7, 2017) (putting on the record before the FCC that its “massive investment in technology” had been “fostered by a communications environment that has, for over a decade, operated under the assumption of established bright line rules”).⁶ As a result of this growth, Twilio now supports more than two million software developers, more than 50,000 businesses, and more than 1,000 nonprofits and social enterprises—a testament to the FCC’s earlier framework.

II. THE COMMISSION ARBITRARILY AND CAPRICIOUSLY DETERMINED THAT ABANDONING ITS BANS ON NON-NEUTRAL CONDUCT WOULD BENEFIT CONSUMERS AND THE INTERNET ECOSYSTEM.

The Commission failed to consider key evidence and many key aspects of internet policy when it adopted the *Net Neutrality Repeal Order*. Here, Twilio highlights one particular thing the Commission failed to consider, to the detriment of consumers and competition: that its new regulatory treatment of broadband is substantially the same as its regulatory treatment of text messaging, where providers block and discriminate against lawful traffic with abandon. Twilio’s experience demonstrates that the Commission unreasonably determined that the repeal of bans on non-neutral conduct would not increase the incidence of blocking and throttling

⁶ Available at <https://ecfsapi.fcc.gov/file/1207136662560/Twilio%20Comment%20on%20WC%20Docket%20No.%2017108%20RIFA%20and%20Messaging%20Ex%20Parte.pdf>.

online. See *Net Neutrality Repeal Order* at 467 ¶ 264 (JA ____) (“[T]he transparency rule we adopt, combined with antitrust and consumer protection laws, obviate the need for conduct rules by achieving comparable benefits at lower cost.”).

A. The Commission ignored key evidence of harm.

Twilio provided the Commission with real-world evidence that abandoning rules on blocking and throttling would harm internet openness. Twilio observed that, in the event the FCC rescinded its bans on non-neutral conduct by broadband providers, such providers would have virtually the same legal duties with respect to lawful internet content as wireless carriers have with respect to lawful text messaging content. Comments of Twilio Inc. at 3, WC Docket No. 17-108 (filed Aug. 30, 2017).⁷ Twilio explained that wireless carriers had thwarted openness in the text messaging context by “arbitrarily block[ing] consumer access to content of their choosing, artificially limiting throughput, or otherwise refus[ing] to route lawful content to and from the consumer’s desired destination.” *Id.* It explained that “in the first six months of 2017, more than 50 million consented messages ha[d] been filtered on Twilio’s mobile platform by mobile operators.” *Id.* at 4.⁸ This demonstrated that, if subject to the same (or similar) regulatory treatment as text messaging providers, broadband providers were likely to do the same. *Id.* at 3–4.

The Commission dismissed Twilio’s argument in a footnote, contending that Twilio had failed to demonstrate “harms to Internet openness” because it “alleg[ed]

⁷ Available at <https://www.fcc.gov/ecfs/filing/108311463017675>.

⁸ Internal Twilio figures later demonstrated that wireless carriers blocked over 75 million such messages for the full 2017 calendar year.

[mis]conduct in the provision of text messaging service, rather than broadband Internet access service.” *Net Neutrality Repeal Order* at 377 ¶ 115 & n.426 (JA____). But that response entirely missed the point. Twilio did not argue that the Commission needed to keep the *2015 Net Neutrality Order* intact in order to prevent the blocking of text messages.⁹ Rather, it raised a question with which the Commission entirely failed to engage: how is broadband service different from text messaging service, such that a lack of regulatory protection will yield openness in the internet realm when it has led to blocking and throttling in the text messaging realm? By “entirely fail[ing] to consider an important aspect” of the costs and benefits of retaining the no-blocking and no-throttling rules for broadband, the FCC engaged in an arbitrary and capricious decision-making process. *State Farm*, 463 U.S. at 43.

B. In abandoning its net neutrality conduct rules, the Commission harmed internet openness.

The evidence Twilio provided to the Commission established that abandoning strong net neutrality protections would harm internet openness. Today, there are no clear prohibitions on blocking or throttling text messages, and no requirements that carriers treat lawful text messages in a neutral manner. As a result, text message channels are far from open. The rules the Commission has now applied to the

⁹ Twilio does support regulatory protections, including a ban on blocking, throttling, and discriminatory treatment, in the text messaging context. However, its comments fully recognized that the *2015 Net Neutrality Order* granted no such protection, and that repeal of that order would not directly affect the regulatory treatment of text messaging.

broadband context mirror the rules that apply to text messaging—and will lead to the same result.

1. Wireless providers block and discriminate against legal text messages.

By way of background, the FCC bans voice service providers from engaging in call blocking, except in “specific, well-defined circumstances” where the call is almost certainly illegal and fraudulent. *Advanced Methods to Target and Eliminate Unlawful Robocalls*, 32 FCC Rcd. 9706, 9709 ¶ 9 (2017).¹⁰ In contrast, the FCC has not directly addressed whether wireless carriers can refuse to deliver lawful text messages. In the *2015 Net Neutrality Order*, the Commission stated it would address the “status of [text] messaging within our regulatory framework”—including whether providers could block, throttle, or otherwise discriminate against such messages—in a separate proceeding. *2015 Net Neutrality Order* at 5746 ¶ 336 n.881 (JA ____). The Commission never followed through on that statement.

In Twilio’s experience, voice providers typically heed the Commission’s express ban on blocking voice calls, with relatively isolated exceptions. Carriers

¹⁰ Available at <https://www.fcc.gov/document/fcc-adopts-rules-help-block-illegal-robocalls-0>. These exceptions are designed to apply where a fraudster has almost certainly illegally “spoofed” a call—that is, makes the call appear to be coming from a phone number that is wholly uninvolved, with the intent to deceive. For example, fraudsters used to pretend to be from the IRS for the purpose of stealing consumers’ money or information, and spoof the call such that the caller ID indicated the call was coming from the IRS’s main line. *Id.* at 9707 ¶ 2. The FCC’s rules permit voice providers to block calls that appear to be coming from the IRS’s number because the IRS has told carriers that it never places outgoing calls from that number and asked them not to complete such calls, in order to head off such scams. *See id.* at 9710 ¶ 10.

could have adopted similar, narrowly tailored procedures to block only text messages that are virtually certain to be fraudulent, including illegally spoofed texts; however, they have chosen not to take this approach. Instead, providers have taken the FCC's silence on the permissibility of blocking or discriminating against lawful text message traffic as a license to block and discriminate against text messages sent from a Twilio customer's ten-digit phone number with true abandon.

It is perfectly lawful for Twilio's customers to send text messages from a standard phone number, using the Twilio platform, as long as the recipient has sufficiently consented to the texts. *See Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, 18 FCC Rcd. 14014, 14115 ¶ 165 & n.603 (2003) (prohibitions against sending text messages using certain forms of automated technologies do not apply where the recipient has provided consent).¹¹ Rather than permitting all lawful traffic to be transmitted over standard text messaging channels—the same channels members of the public use every day to text with one another—carriers discriminate against text messages originating from cloud-based communications platforms like Twilio, blocking tens of millions of such messages every month. Letter from Emily Denadel Emery, Government Relations Manager, Twilio Inc. to Marlene H. Dortch, Secretary, FCC, WT Docket No. 08-7 (filed Feb. 22, 2018).¹² Carriers do not inform senders how they choose

¹¹ Available at <https://www.fcc.gov/document/rules-and-regulations-implementing-telephone-consumer-protection-act-1991-9>.

¹² Available at <https://ecfsapi.fcc.gov/file/10222205175912/Twilio%20Ex%20Parte%2002.22.2018.pdf>.

which text messages they will deliver and which they will not. Letter from Emily Denadel Emery, Government Relations Manager, Twilio Inc. to Marlene H. Dortch, Secretary, FCC, WT Docket No. 08-7 (filed Sept. 16, 2016).¹³ Nor do carriers warn senders about blocking, either in real time or after the fact; frequently, senders have no way of knowing at all which messages have been blocked. *Id.* The FCC has not banned or otherwise meaningfully policed this blocking and left these matters up to each carrier's discretion.

This leaves companies that use new and innovative texting technologies with four options:

(1) sending messages from a “short code”—a five-digit number issued from a private registry administered by an industry association for wireless carriers—after paying a steep fee and providing carriers with information about what the messages will say and obtaining their approval, U.S. Short Code Registry, *How to Get Started* (last visited Aug. 19, 2018);¹⁴

(2) abandoning use of Twilio or any other non-carrier-run text messaging service and instead signing up with a prioritized enterprise messaging service offered by a wireless carrier, *see, e.g.,* Verizon Business, *Mobility* (last visited Aug. 19, 2018);¹⁵ AT&T Business, *AT&T Business Mobility Services* (last visited Aug. 19,

¹³ Available at <https://ecfsapi.fcc.gov/file/10915216075469/Twilio%20Meeting%20Ex%20Parte%209.15.2016.pdf>.

¹⁴ Available at <https://usshortcodes.com/how-to-get-started>.

¹⁵ Available at <http://www.verizonenterprise.com/products/mobility/workforce-productivity/business-messaging/>.

2018);¹⁶ Sprint Business, *Enterprise Messaging Gateway* (last visited Aug. 19, 2018);¹⁷

(3) continue using standard text messaging channels at the risk of having messages blocked; or

(4) abandoning the text messaging channel entirely.

Wireless carriers have economic incentives to drive demand to the first two options. For customers, the short code option is far costlier than sending a traditional text message using Twilio or another non-traditional text message sender. Obtaining a short code for sending text messages is 500 times more expensive than obtaining a ten-digit phone number for text messages; this short code fee goes to the industry association for wireless carriers.¹⁸ Carriers also charge per-text-message fees that are typically one-third higher for short code messages than for messages sent from a traditional ten-digit number, Twilio, *SMS Pricing* (last visited Aug. 19, 2018),¹⁹ an increase that can be quite costly for high-volume text campaigns. Carriers and the wireless carrier industry association that runs the short code program justify increased charges for text message campaigns sent through the short code system by offering the ability to send large numbers of messages more quickly and other

¹⁶ Available at <https://www.business.att.com/solutions/Service/mobility-services/mobile-messaging/global-smart-messaging-suite/>.

¹⁷ Available at <https://business.sprint.com/solutions/enterprise-messaging-gateway/>.

¹⁸ Leasing a short code costs \$500 to \$1,000 per month. U.S. Short Code Registry, *Pricing*, <https://usshortcodes.com/pricing> (last visited Aug. 19, 2018). Twilio's standard charge to lease a ten-digit phone number is \$1 per month. Twilio, *SMS Pricing*, <https://www.twilio.com/sms/pricing/us> (last visited Aug. 19, 2018).

¹⁹ Available at <https://www.twilio.com/sms/pricing/us>.

enhanced features. *See, e.g.*, U.S. Short Code Registry, *Short Codes: What, Why, and How* (last visited Aug. 19, 2018).²⁰ Many of Twilio’s customers have no need for such “enhancements” but are forced to pay for them if they wish to ensure delivery while still using Twilio’s platform. In some cases, these enhancements are a detriment, particularly for organizations seeking to communicate with low-income populations. A number of low-cost, pre-paid plans do not allow customers to receive text messages from a short code or default to having the ability to receive short codes turned off. *See, e.g.*, Sire Mobile, *Why Can’t I Receive Texts from Short Codes?* (Jan. 4, 2018).²¹ Short codes are also less functional than Twilio and some other non-traditional text message platforms. For example, short codes do not support voice communications, while Twilio’s standard ten-digit phone numbers support both text messaging and voice.

Carriers are also incentivized to drive traffic to carrier-run enterprise messaging service. These services directly compete with the services that Twilio and other non-traditional text messaging platforms offer. Companies that sign up for carrier-run enterprise messaging service pay their carrier what they would otherwise pay Twilio for a similar service—and then some, as carrier-run services are more expensive than Twilio’s offerings. Moreover, carriers have an incentive to work together in an attempt to drive lower-cost, non-traditional text message providers out of the market. Likely as a result, carriers deliver text messages sent

²⁰ Available at <https://usshortcodes.com/about/short-codes-101>.

²¹ Available at <https://www.siremobile.com/blog/support/cant-receive-texts-short-codes/>.

through a prioritized enterprise messaging service run by another carrier, without engaging in the type of blocking or throttling they commonly apply to messages sent from the Twilio platform or other non-traditional text message platforms.

Because wireless carriers aim their blocking only at customers who pay the lower rate for standard text messages, wireless carrier blocking of text messaging disproportionately impacts traffic from non-profits, social enterprises, and new market entrants who have yet to obtain significant levels of investment. In some cases, it drives such organizations away from sending text messages altogether.

The problem has only increased since the adoption of the *Net Neutrality Repeal Order*. In contrast to the 75 million consented text messages blocked on Twilio's platform in 2017, Twilio estimates more than 175 text messages will be blocked by wireless carriers in 2018. By removing its earlier ban on throttling and blocking lawful internet traffic, the Commission undercut the notion that the Communications Act might require providers to deliver all lawful communications traffic, even in the context of non-Title-II services. The *Net Neutrality Repeal Order* suggests the opposite baseline: that providers of non-Title II communications services are not banned from blocking or throttling legal content, unless the FCC specifically says otherwise after determining such rules are “[...]necessary to prevent . . . harm[.]” *Net Neutrality Repeal Order* at 466 ¶ 263 (JA____). Wireless carriers have responded as one would reasonably expect: by increasingly blocking standard text messages in an attempt to funnel senders toward more expensive, prioritized offerings.

2. Broadband providers now face substantially the same regulatory treatment as text message providers.

The Commission concluded that “the state of broadband Internet access service competition and the antitrust and consumer protection laws,” when combined with a requirement that broadband providers disclose the nature of their blocking and throttling practices online, “obviates the need for [net neutrality] conduct rules by achieving comparable benefits” as the bans. *Net Neutrality Repeal Order* at 450 ¶ 239 (JA____). This conclusion does not square with reality or the lessons from the text messaging context.

As the Commission’s data shows, broadband providers face very little competition in most areas of the country. This is particularly true for residential fixed broadband service. *See Net Neutrality Repeal Order* at 383 ¶ 125 (JA____).

To be sure, more competition exists among mobile wireless carriers:

As of January 2017, at least four service providers covered approximately 92 percent of the U.S. population with 3G technology or better as compared to 82 percent at the beginning of 2014. Further, as of December 2016, at least four service providers covered approximately 89 percent of American consumers with LTE. While more limited than in non-rural areas, LTE coverage in rural areas has also increased: As of January 2017, at least four service providers covered approximately 55 percent of the population in rural areas, an increase from approximately 41 percent as of July 2015.

Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, 32 FCC Rcd. 8968, 8973 ¶ 7 (2017).²² Yet even that level of competition in the wireless carrier market has proven insufficient to deter carriers from blocking text messages. Consumers can do little when they know their provider engages in

²² Available at <https://docs.fcc.gov/public/attachments/FCC-17-126A1.pdf>.

traffic blocking if they do not have an alternative. But even where there is more competition, there is little they can do if all of the available alternatives are engaging in similar conduct.

Nor is the fear of “backlash” or a vague corporate commitment to internet openness enough to prevent blocking and throttling, as the Commission contended. *See Net Neutrality Repeal Order* 470 ¶ 264 (JA ____). There is no reason to think that, in the broadband context, providers would abandon the potential profits associated with blocking and throttling lawful content in order to foster positive community relations or promote the public good, when fear of public backlash has done little to prevent carriers from blocking text messages. Indeed, evidence before the Court demonstrates Verizon’s willingness to limit firefighters’ access to mobile broadband resources in the midst of an epic firefight, for economic gain. *Jt. Br. for Gov’t Pet’rs, Addendum 3-4 (Decl. of Anthony Bowden ¶¶ 9-11)*. Regardless of whether this conduct would have violated the rules set forth in the *2015 Net Neutrality Order*, this situation certainly demonstrates that broadband providers are no more sensitive than wireless providers to fears of public backlash against network practices that impede the public interest.

The threat of antitrust or consumer protection enforcement action also has not been enough to deter blocking and throttling of text messages. Wireless carriers have no accountability for the anti-consumer and anti-competitive effects of the system they have implemented because they are not subject to any meaningful oversight, even though the same antitrust and consumer protection statutes apply to both wireless carriers’ provision of text messaging and to broadband providers. *See,*

e.g., 15 U.S.C. § 1 (section of the Sherman Act banning “[e]very person” from entering to contracts and trusts made “in restraint of trade or commerce”); *id.* § 2 (section of the Sherman act banning “[e]very person” from engaging in monopoly behavior); *id.* § 45(a) (section of the Federal Trade Commission Act barring unfair and deceptive practices in the provision of non-common-carrier services). Yet these statutes have done nothing to prevent blocking and throttling in the text messaging context.

Enforcement bodies, including the Federal Trade Commission and the Antitrust Division of the Department of Justice, have to date failed to take any enforcement action in the text message blocking context. This demonstrates either that (1) enforcers view the blocking and throttling of lawful communications traffic as consistent with consumer protection and antitrust statutes (in the absence of any law or regulation that specifically bans such activity)—and so such laws also do not ban the blocking and throttling of lawful internet traffic, or (2) blocking may violate these statutes under certain circumstances but, as a practical matter, enforcers face great difficulty in bringing such cases under general antitrust and consumer protection statutes, such that the threat of such an enforcement action is insufficient to deter communications providers from blocking or throttling lawful traffic.

Similarly, private lawsuits and regulatory complaints have not had a meaningful effect in reducing text message blocking, because no rules clearly bar such activity. Individual consumers and businesses are not well equipped to gather evidence of unlawful behavior, attempt to negotiate a solution with the carrier, document all conduct, and ultimately petition for redress—particularly where a

consumer or business has no way of knowing why (and sometimes does not know whether) a carrier has blocked any one particular text message.

Nor will the Commission's limp transparency rule be enough to prevent broadband providers from blocking and throttling. Broadband providers face liability through this mechanism *only* when companies lie to customers about their practices. If the broadband provider is "transparent" about its blocking and throttling practices, it has acted consistently with the law. *See Net Neutrality Repeal Order* at 434 ¶ 208 (JA____). Moreover, providers merely have to provide a general description of the type of content they block somewhere on a "publicly available, easily accessible website" or in a notice to the FCC, which will then publish the disclosure online. *Id.* at 438, 440 ¶¶ 215, 220 (JA____). This is unlikely to provide consumers with the information they need, at the time they need it, to be sufficiently responsive to broadband provider blocking and throttling.

Wireless providers are not required to similarly disclose blocking and throttling of text messages. Nonetheless, some do—and their disclosures show how the Commission acted unreasonably in concluding that individual consumers will "understand the source of any blocking or throttling" of lawful online content due to online disclosures. *Id.* at 467 ¶ 264 (JA____). For example, AT&T's mobile terms of service are available through the AT&T website. Buried three-quarters of the way through a long document, AT&T provides notice that it "does not guarantee delivery of messages" and that "[m]essages are intended for direct communication between phones," *i.e.*, not for communications originating from a cloud-based communications platform. AT&T, *Wireless Customer Agreement* (last visited Aug.

17, 2018).²³ Few consumers would notice such language. Even fewer would know that this means that, if they fail to receive a key text, it may very well be the carrier's fault, not the sender's.

For example, schools commonly use Twilio to enable communications among parents, teachers, and students. A parent who fails to receive an early dismissal text from a teacher will likely blame the school, not the wireless carrier that throttled the messaging application or blocked the text message. A disclosure on a wireless carrier's website, which arguably puts consumers on notice that it blocks communications delivered through cloud-based communications platforms, is unlikely to lead the parent to blame his or her carrier. Even assuming the parent saw the disclosure, parents do not typically know that their school uses a cloud-based communications platform to send text messages. Moreover, because sometimes schools *do* make a mistake when sending text messages, the disclosure does not help the parent to ascertain what happened in this particular case. As a practical reality, parents who received no notice or delayed notice of an early dismissal will be scrambling to deal with ensuring their child gets home safely, particularly in an emergency. They are even less likely to have the time to deal with a technical investigation into the source of the problem than to have the technical ability to do so. Thus, the likelihood of parents knowing about their carrier's blocking—much less being sure enough about it to vote with their feet and choose a different carrier—is slim to none. Parents want their wireless carriers to deliver consented-to text

²³ Available at <https://www.att.com/legal/terms.wirelessCustomerAgreement.html>.

messages in the first instance, not to have the hollow promise of an opportunity to change providers after finding out about an early dismissal too late to make appropriate pick-up arrangements.

The same is true in the online context. For example, a broadband provider may notify its customers that it reserves the right to block content with certain technical characteristics. A customer of such a provider would be hard pressed to discover whether content he or she *cannot access* possesses those banned technical characteristics. Even if the customer could discover the technical characteristics of the content he or she tried to reach, few customers would be able to ascertain whether, in this particular instance, their inability to access content was the broadband provider's fault, the fault of the customer's computer or device, or the fault of the company whose information or service the customer could not access.

It may well be that some other form of transparency, such as real-time customer notification or a spam-filter-like mechanism, would be sufficient to put consumers on notice when their broadband providers (or their wireless carriers) block or throttle lawful content. However, the transparency rule now in place is not the panacea that the Commission wants and needs it to be for the *2015 Net Neutrality Order* to survive minimal scrutiny.

C. Broadband providers' blocking and throttling will greatly harm consumers and the internet.

The *Net Neutrality Repeal Order* correctly concluded that, when broadband providers block or throttle lawful internet traffic, they harm consumers and those who provide online content, applications, and services. The order does not,

however, appropriately consider the scope of harm that widespread blocking and throttling of internet traffic would cause—particularly in light of widespread blocking and throttling in the text messaging context. This, in turn, skewed the Commission’s cost-benefit analysis, in which it concluded “that maintaining the bans on blocking and throttling” would have “a small net negative benefit” to consumers. *See Net Neutrality Repeal Order* at 495 ¶ 323 (JA____).

While access to traditional phone networks remains important in the digital economy, members of the public and the companies and organizations serving them increasingly rely on online services (such as video and chat) and text messaging for most of their communications needs. *See* Stephen J. Blumberg & Julian V. Luke, *Wireless Substitution: Early Release of Estimates from the National Health Interview Survey, July–December 2017*, National Center for Health Statistics 1 (June, 2018) (“More than one-half of American homes (53.9%) had only wireless telephones (also known as cellular telephones, cell phones, or mobile phones) during the second half of 2017—an increase of 3.1 percentage points since the second half of 2016. More than 70% of adults aged 25-34 and adults renting their homes were living in wireless-only households.”);²⁴ Corilyn Shropshire, *Americans Prefer Texting to Talking, Report Says*, Chicago Tribune (Mar. 26, 2015) (noting that Americans with a cell phone send and receive five times as many text messages as

²⁴ Available at <https://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201806.pdf>.

voice calls).²⁵ The cumulative impact of restricted broadband access *and* restricted access to text messaging networks would have devastating effects on consumers and online content, application, and service providers.

CONCLUSION

For the foregoing reasons, Twilio supports Petitioners' challenge to the *Net Neutrality Repeal Order*.

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²⁵ Available at <http://www.chicagotribune.com/business/ct-americans-texting-00327-biz-20150326-story.html>.

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August 27, 2018

/s/ Adrienne E. Fowler

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I certify that on August 27, 2018, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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