

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION EIGHT

IN RE COUNTY INMATE
TELEPHONE SERVICE CASES

Civil No. B291341

*On Appeal from the Superior Court of
Los Angeles County, Case No. JCCP
4897, Hon. Carolyn B. Kuhl, Judge
Presiding.*

**APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF
CIVIL AND HUMAN RIGHTS ORGANIZATIONS IN SUPPORT OF
PLAINTIFFS-APPELLANTS**

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To the Presiding Judge of the Second Appellate District, Division

Eight:

Pursuant to Rule 8.200 of the California Rules of Court, the Human Rights Defense Center, Public Counsel, the American Civil Liberties Union (ACLU) of Southern California, Worth Rises, the Prison Law Office and Impact Fund respectfully request leave to file the attached amicus curiae brief in support of Plaintiffs-Appellants.

Interest of Amici

This brief is submitted by six organizations that advocate for the fair and equal treatment of all people within the criminal justice system and for an end to the imposition of unduly punitive and harmful costs, fines and fees on those who cannot afford to pay them. Moreover, some of the organizations regularly communicate with incarcerated persons and thus have an interest in ensuring communication between incarcerated persons and advocacy groups is not unduly and punitively expensive.

The **Human Rights Defense Center** (HRDC) is a non-profit charitable corporation headquartered in Florida that advocates in furtherance of the human rights of people held in state and federal prisons, local jails, immigration detention centers, civil commitment facilities, Bureau of Indian Affairs jails, juvenile facilities, and military prisons. HRDC's advocacy efforts include publishing two monthly publications, Prison Legal

News, which covers national and international news and litigation concerning prisons and jails, as well as Criminal Legal News, which is focused on criminal law and procedure and policing issues. HRDC also publishes and distributes self-help reference books for prisoners, and engages in state and federal court litigation on prisoner rights issues, including wrongful death, public records, class actions, and Section 1983 civil rights litigation concerning the First Amendment rights of prisoners and their correspondents. HRDC regularly communicates with people who are incarcerated in prisons and jails throughout the country. Further, HRDC has spent decades advocating for reasonable prisoner phone rates that benefit both prisoners and society as a whole.

Public Counsel is the nation's largest public interest law firm specializing in delivering pro bono legal services to low-income communities. In 2018, Public Counsel staff and pro bono partners served more than 16,000 people and 300 nonprofit organizations. Of the 5,700 people to whom we provided full representation, 3,800, or two-thirds, achieved legal successes, resulting in \$11 million in revenue for our clients. These clients are served through the eight legal projects that Public Counsel operates: Children's Rights, Community Development, Consumer Rights & Economic Justice, Homelessness Prevention, Immigrants' Rights, Veterans' Rights, the Audrey Irmis Project for Women & Girls' Rights, and an impact litigation project,

Opportunity Under Law. The mission of the Consumer Rights & Economic Justice project, is to advance economic justice by providing legal counsel for low-income individuals and their families, addressing inequalities in bargaining power, opposing those who take advantage of the vulnerable, and holding wrongdoers accountable. In addition to assisting victims of predatory lenders and fraud in all of its forms, the Consumer Rights & Economic Justice Project litigates and advocates to end the criminalization of poverty, and to take down corporate profiteering from system-involved persons and their families. One of its class action impact cases challenges a bail bonds cartel that inflates the costs of pre-trial freedom. To litigate this case, and another case involving the unconstitutionality of gang injunctions, Public Counsel regularly communicates with incarcerated persons throughout California.

The **American Civil Liberties Union** is a nationwide nonprofit, nonpartisan organization with over 1.5 million members dedicated to the defense of the fundamental rights outlined in the United States Constitution and the Bill of Rights, including the right to freedom of association. The ACLU of Southern California (“ACLU SoCal”) is an affiliate of the American Civil Liberties Union. ACLU SoCal works in the areas of economic justice, immigrants’ rights, and criminal justice, among others, to dismantle racism and white supremacy and create equitable opportunities and outcomes for all.

ACLU SoCal works with community and organizational partners to end harsh policies that result in mass incarceration; achieve effective community-based solutions and opportunities; implement sensible and proportionate interventions; prioritize rehabilitation and transformative justice over punishment; and put a stop to the ways that the criminal legal system strips economic resources from low-income communities and communities of color. The ACLU Foundation of Southern California is the court ordered monitor of the conditions of confinement and medical services within all Los Angeles County jail facilities. The Jails Project also monitors conditions in the Santa Barbara Sheriff's Office jails.

Worth Rises is a non-profit advocacy organization dedicated to dismantling the prison industrial complex and ending the exploitation of those it touches. It works to expose the commercialization of the criminal legal system and advocate and organize to protect and return the economic value extracted from affected communities. Through its work, Worth Rises strives to pave the road toward a safe and just world free of police and prisons.

The **Prison Law Office** engages in class action impact litigation to improve conditions in prisons, jails, and juvenile halls for adults and children, represents individual prisoners, educates the public about prison conditions, and provides technical assistance to advocates across the country.

The Prison Law Office has litigated numerous large-scale prisoner and parolee class actions in the last 40 years. These include *Brown v. Plata*, 563 U.S. 493 (2011) (holding that court-mandated population limit for California prisons was necessary to remedy violations of prisoners’ constitutional rights to adequate medical and mental health care in two statewide class action lawsuits), and *Pennsylvania Dep’t of Corr. v. Yeskey*, 524 U.S. 206 (1998) (unanimously holding the Americans with Disabilities Act applies to state prisoners).

The **Impact Fund** is a non-profit legal foundation that provides strategic leadership and support for impact litigation to achieve economic, environmental, racial, and social justice. The Impact Fund provides funding, offers innovative training and support, and serves as counsel for impact litigation across the country. The Impact Fund has served as party or amicus counsel in a number of major civil rights cases before this Court, including cases challenging employment discrimination and limitations on access to justice. Through its work, the Impact Fund seeks to use and support impact litigation to achieve social justice for all communities.

Amici submit this brief to provide additional context and sociological data concerning the economic and non-economic harms imposed on Appellants - incarcerated persons and their family members - who are charged unreasonably high prices to communicate as a result of “site

commissions.” These harms include negative social and emotional outcomes that have concrete impacts on incarcerated persons and family members, particularly those who are low-income.

No party or attorney to this litigation authored the proposed amicus brief or any part thereof. No party made a monetary contribution to the preparation or submission of this brief.

Dated: October 21, 2019

Respectfully submitted,

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I. INTRODUCTION

The Superior Court's finding that incarcerated persons and their families -- who ultimately shoulder the taxes that phone providers in jails should be paying to municipalities -- were not taxpayers with standing, should be reversed. The decision relies on erroneous inferences about the role of site commissions, and ignores the fact that incarcerated individuals are a literally captive market with no option other than to use the Inmate Calling System (ICS). The Court's determination that ICS providers have a financial incentive to challenge site commissions because they would have "a greater opportunity for profit if they did not have to pay the commissions" (Tr. Order at 7) is unfounded and ignores the substantial body of empirical evidence and market analyses that show that site commissions are passed through to callers.

Because each ICS provider has a monopoly in the respective County jail over a captive and vulnerable population, ICS providers pass through the cost of the site commissions in the form of high rates without any concern that they will lose customers. Thus, they have no incentive to challenge the current arrangement. While in many other economic situations, such as landlord-tenant relationships or theater-goers, market forces and competition do not cause taxes to be passed wholly to the consumer, here, as discussed below, incarcerated persons have no viable alternative for communicating with their loved ones and thus end up paying exorbitant phone rates. Appellants,

incarcerated individuals and their loved ones, are harmed directly and materially by the site commissions and have an interest in the outcome of this litigation. In addition to the economic harms, these high phone rates lead to an array of negative physical, emotional, and psychosocial consequences for both incarcerated individuals and their loved ones.

Accordingly, Appellants suffer the bulk of the harms of site commissions, giving them standing under this specific and unique set of circumstances to bring their Proposition 26 claim.

II. STATEMENT OF FACTS

A. The ICS Market has Developed into an Oligopoly

Until the 1970s, incarcerated individuals in state and federal prison systems were limited to making one call every three months. Steven Jackson, *Ex-Communication: Competition and Collusion in the U.S. Prison Telephone Industry*, 22(4) CRITICAL STUD. IN MEDIA COMMUNICATION 263, 267 (2005). Recognizing that insufficient communication between incarcerated individuals and those in their personal networks is strongly correlated with recidivism and undesirable social outcomes, federal and state governments enacted more permissive telephone access programs aimed at increasing incarcerated individuals' community contact. *Id.* Following these legislative changes, AT&T retained an exclusive monopoly over inmate calling services (ICS) until 1984.

During this period, ICS price rates remained comparable with telephone prices in the broader telecommunications market. *Id.* at 268.

In 1984, AT&T's monopoly was broken up under the terms of a settlement agreement reached in an antitrust action brought by the United States Department of Justice. Subsequent legislation and FCC rule-making actions sought to make the ICS industry more competitive by reducing entry barriers that inhibited new entries into the market. *Id.*; *Global Tel*Link v. Federal Communications Commission*, 866 F.3d 397, 403-404 (D.C. Cir. 2017). These reforms, paired with a sharp and sustained rise in the national rate of incarceration, rendered the ICS market increasingly lucrative to service providers. Jackson, *supra*, at 267. Although these conditions were initially successful in attracting new providers such as MCI, GTE, and Sprint into the ICS market, they have failed to sustain robust market competition. *Id.*; John E. Dannenberg, *Nationwide PLN Survey Examines Prison Phone Contracts, Kickbacks* 22 (4) PRISON LEGAL NEWS 1, 4 (2011). Instead, through a series of consolidation processes including several high-profile mergers and acquisitions, the ICS market has become heavily dominated by a few firms. As of 2013, “three companies – GTL, Securus, and CenturyLink – control[led] 90% of the state DOC market, either directly or through their subsidiaries” with GTL being the biggest provider. John E. Dannenberg and Alex Friedmann, *FCC Order Heralds Hope for Reform of Prison Phone Industry*, 24 (12) PRISON

LEGAL NEWS 1, 7 (2013). These firms also dominate the county-jails ICS market, as demonstrated by the fact that all defendant counties currently contract with either Securus or GTL.

B. ICS Prices are Exorbitantly High.

It is a well-documented phenomenon that calling rates for individuals using ICS systems are grossly higher than the rates paid by non-users. *See, e.g., Global Tel*Link*, 866 F.3d at 404. Incarcerated persons, or those whom they call, may pay up to \$10.70 for a fifteen-minute intrastate call and \$17.30 for an inter-state call of the same length. Dannenberg and Friedman, *supra*, at 5; Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Rates for Interstate Inmate Calling Services*, 28 FCC Rcd. 14107 (2013) (“FCC 2013 Order”), p. 20. These prices are substantially more expensive in county-jail systems than in state prison systems. Erin Jordan, *Is the cost of county jail calls highway robbery?* THE GAZETTE (May 31, 2019), <https://bit.ly/2H5CBcJ>. In California, jail ICS rates are an average of 2.8 times higher than state prison ICS rates, and a fifteen-minute call can cost up to \$17.80. Peter Wagner and Alexi Jones, *State of Phone Justice: Local jails, state prisons, and private phone providers*, PRISON POL’Y INITIATIVE (Feb. 2019), https://www.prisonpolicy.org/phones/state_of_phone_justice.html.

The disparity between prices paid by ICS users and non-users cannot be solely attributed to additional market-entry or operational costs. Justin

Carver, *An efficiency analysis of contracts for the provision of telephone services to prisons*, 54 FED. COMM. L. J. 391, 398-99 (2002). Rather, the “prohibitive per-minute charges and ancillary fees for payphone calls” in the ICS system are caused by “variety of market failures in the prison and jail payphone industry.” *Global Tel*Link*, 866 F.3d at 401.

C. ICS Markets That Do Not Use Site Commissions Produce Substantially Lower Prices and Higher Usage Rates.

Comparing rates in markets that do not use site commissions with those that do also demonstrates the cost-inflating effect of site commissions on ICS prices. At present, eight states, including California, have eliminated commission-based prison telephone monopolies in state prisons. Editorial, *Costly Phone Calls for Inmates*, N.Y. TIMES (Sept. 23, 2012), available at <https://nyti.ms/2P4cGZI>. In each instance, ICS prices dropped significantly after site commissions were removed. *Id.* Several “federal agencies, such as the Department of Homeland Security’s Immigration Customs and Enforcement (ICE), have taken similar measures to provide lower rates, resulting in nationwide calling rates of \$0.12 a minute without additional fees or commissions at ICE facilities. FCC 2013 Order at p. 4. According to the FCC, these examples show “that rates can be reduced to reasonable, affordable levels without jeopardizing the security needs of correctional facilities and law enforcement or the quality of service.” *Id.*

Moreover, removing site commissions results in greater utilization—*i.e.*, more communication between incarcerated individuals and their families and friends—because of lower price rates. *Id.* As noted by the FCC, “following such reforms, there is significant evidence that call volumes increased, which shows the direct correlation of how these reforms promote the ability of inmates to stay connected with friends and family.” *Id.* In some instances ICS price reductions have resulted in increases in call volume of up to 300%. *Id.* n. 15.

III. ARGUMENT

I. ICS Providers Have No Incentive to Challenge Site Commissions Because Plaintiffs Pay the Costs of the Commissions Through Higher Price Rates.

The Superior Court erred in dismissing the plaintiffs for lack of standing on their Proposition 26 tax claim. Contrary to the Court’s speculation (Tr. Order. at 7), ICS Providers have no incentive to challenge site commissions because they recuperate the costs of commissions by charging higher rates to end users. Carver, 54 FED. COMM. L. J. at 419; *see also Global Tel*Link*, 866 F.3d at 404 (noting that ICS providers recoup site commissions through setting “correspondingly high end-user rates.”).

The providers benefit from a monopolistic arrangement that allows them to charge exorbitant rates from which both they and the government entity profit. This common interest in high commission rates explains the joint ICS provider/governmental challenge to the FCC’s limitation on ICS rates;

both considered the current commission arrangement to be in their economic interest. *Glob. Tel*Link*, 866 F.3d at 401 (brought by “[f]ive inmate payphone providers, joined by state and local authorities”).

The overwhelming research and literature demonstrates that it is the incarcerated callers and the loved ones who they communicate with that suffer most from site commissions, which result in high pricing. *Id.* The incarcerated persons, not the ICS service providers, have an incentive to challenge the validity of site commissions.

A. Site Commissions Result in Higher Prices for Incarcerated Persons and their Family Members, and Thus Cause Serious Harm to the Plaintiffs.

The vast majority of states and counties, including the defendant counties in this case, use site commissions as part of their contracts with ICS providers. Paul Zimmerman and Susan Flaherty, *Location monopolies and prison phone rates*, 47 (2) Q. REV. ECON. AND FIN. 261, 262 (2007). These commissions are profit sharing mechanisms whereby a provider agrees to share a percentage of the revenue earned from providing ICS services with the state or county that runs the facility in exchange for having exclusive ICS rights for the duration of the contract. *Id.*; Carver, 54 FED. COMM. L. J. at 392. Given that “ICS bids are predicated on the winning provider’s willingness to share part of its ICS revenues with the correctional facility,” companies competing for these exclusive contracts attempt to outbid one another by

offering the largest site commission to the relevant government. *Id.* This auctioning system has resulted in state commission rates as high as 76% of total revenue and California county commission rates as high as 83.3% in San Mateo, one of the defendants in this case. Dannenberg and Friedman, *supra*, at 6; Civic Letter RE: Inmate Calling Services – Public Comment for WC Docket No. 12-375, at 4.

Unsurprisingly, the literature overwhelmingly demonstrates that site commissions contribute to higher ICS rates for users. In a 2013 order, the FCC found that a “significant factor driving these excessive rates is the widespread use of site commission payments – fees paid by ICS providers to correctional facilities or departments of corrections in order to win the exclusive right to provide inmate phone service.” FCC 2013 Order at 4. See also Carver, 54 FED. COMM. L. J. at 396-397; Zimmerman and Flaherty, *supra*, at 262; *Global Tel*Link*, 866 F.3d at 404.

Economic analyses of the ICS market also demonstrate that the use of site commissions results in high prices for end-users and little harm to providers. In a site commission system, “the state and the company enter[] into a third-party beneficiary contract...[where] both actors focus[] only on their own welfare and neglect[] the so-called “beneficiary” of the contract.” Carver, 54 FED. COMM. L. J. at 419. The rational self-interest of both contracting parties results in high site commissions, and by extension high end-user prices.

For the counties, the rational behavior is to provide the contract to the company that offers the highest site commissions without concern for end-user prices. *Id.* at 397. For the company, the rational behavior is to offer high commissions because “this strategy strictly dominates offering a low site commission” and increases their likelihood of acquiring the contract. Zimmerman and Flaherty, *supra*, at 262. Once a provider acquires the contract, the rational behavior is to inflate end-user prices to compensate for the cost of ‘purchasing’ the contract. *Id.*; Carver, *supra*, at 396.

Critically, rational providers inflate end-user prices without typical market ramifications such as the loss of customers because prison calling is a captive market and because demand is highly inelastic. Kukorowski, *supra*. Incarcerated individuals and their loved ones are captive consumers because state-enforced exclusive ICS contracts render it impossible for them to call each other through other channels. *Id.* Moreover, the “paucity of close substitutes” for prison calling and the lack of feasible alternative forms of communication such as in-person visitation and traditional writing renders the demand curve highly inelastic. Zimmerman and Flaherty, *supra*, at 262. Consequently, prisoners and their loved ones are forced to choose between communicating with their loved ones and paying inflated rates or not communicating at all. *Global Tel*Link*, 866 F.3d at 397. The dysfunctional state of the ICS market is perhaps best summarized by the FCC finding that:

Inmates and their families cannot choose for themselves the inmate calling provider on whose services they rely to communicate. Instead, correctional facilities each have a single provider of inmate calling services. And very often, correctional authorities award that monopoly franchise based principally on what portion of inmate calling revenues a provider will share with the facility—*i.e.*, on the payment of “site commissions.” Accordingly, inmate calling providers compete to offer the highest site commission payments, which they recover through correspondingly higher end-user rates. *See Order, 30 FCC Rcd. at 12818–21.* If inmates and their families wish to speak by telephone, they have no choice but to pay the resulting rates.

Id.

In sum, the ability of ICS Providers to capitalize on this dysfunctional market to avoid bearing the “costs” of site commissions makes it evident that they have little incentive to challenge them and that the primary victims of commissions are prisoners and those who they communicate with.

B. Telephone Calls Are Often the Only Means for Incarcerated Individuals to Maintain Contact with Loved Ones.

In their brief, Respondents argue that the ICS providers are charging a “fair market value” as the term is defined in the California Code of Civil Procedure § 1263.320(a). However, this definition conceals the fact that the buyers in this situation — incarcerated individuals attempting to maintain contact with their loved ones — do not fit into the definition of “buyer” in § 1263.320(a), which requires an individual with “no particular necessity” for entering the market. In reality, telephone calls are frequently the only way for

incarcerated individuals to stay in touch with family members on the outside, which is essential for successful rehabilitation during imprisonment.

First, many families have neither the financial capacity nor the time to be able to visit incarcerated loved ones in person. Even when families do have the means to do so, the jail itself often restricts their visits. Prisons and jails around the country are increasingly ending the practice of in-person visitation, often only allowing incarcerated individuals to speak with family and friends via telephone or video call. Shannon Sims, *The end of American prison visits: jails end face-to-face contact – and families suffer*, THE GUARDIAN (Dec. 9, 2017), <https://bit.ly/2C0y5Io>.

Second, while letter writing is often touted as an inexpensive way for incarcerated individuals to maintain contact with loved ones, in reality the majority of incarcerated persons are functionally illiterate. Kim Moody *et. al*, *Prevalence of dyslexia among Texas prison inmates*, 96(6) TEX. MEDICINE 69 (2000). Letter writing is also not an appropriate way for young children with rudimentary reading and writing skills to maintain contact with incarcerated parents. In addition, younger incarcerated persons (i.e., those under age 30, who make up roughly 20 percent of the federal prison population) rely nearly exclusively on phone and e-mail as methods of communication. Many within this segment of the population remain highly unaccustomed to writing letters and do not comprehend how this system could be a feasible method of

maintaining contact. Jim Elliott, *Postal workers say millennials perplexed by “snail mail”*, Coast Mountain News (Feb. 14, 2019). Finally, many prisons restrict written mail to postcards, a practice which costs more than sending mail using a traditional envelope and engenders significant privacy concerns, as anyone who comes across a postcard can easily read its contents. Leah Sakala, Return to Sender: Postcard-Only Mail Policies in Jail, PRISON POL’Y INITIATIVE (Feb. 7, 2013), <https://www.prisonpolicy.org/postcards/report.html>.

Respondents make allusions to other “captive markets” wherein sellers are legally able to charge exorbitant prices because buyers have no alternative. Reply Brief at 40-41. However, the desire of incarcerated individuals to stay in contact with their children is a much more compelling and powerful interest than someone’s desire to eat popcorn while watching a movie or drink coffee at the airport. *Id.* at 41. The two are simply incomparable. The unincarcerated person has easily available alternatives, such as buying dinner after watching the movie, or drinking coffee at home before leaving for the airport. On the other hand, incarcerated individuals have no other affordable option to maintain contact with their families. California courts have recognized that simply charging what the market will allow is untenable when such charges will have an outsize financial effect on the lives of those within the captive market. *See, e.g., Besaro Mobile Home Park, LLC v. City of Fremont*, 204 Cal.

App. 4th 345, 359 (2012) (allowing city to impose controls that protected mobile home residents from exorbitant rent increases). Charging exorbitant user fees to incarcerated individuals is similarly indefensible here, where users have no other options and do not have the financial ability to regularly pay the required fees.

C. The High Rates Particularly Harm Low-Income Individuals.

Exacerbating the problem, incarcerated individuals are ill-equipped to afford the high price of prison phone calls. The average annual personal income for an incarcerated man prior to incarceration is 52% lower than that of a man who has never been incarcerated. Bernadette Rabuy and Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), available at <https://www.prisonpolicy.org/reports/income.html>. It is highly unlikely that incarcerated individuals will have any savings to draw upon to facilitate their expenses while in prison. Coupled with the fact that the average national prison wage is approximately 60 cents an hour, it is a near certainty that the average incarcerated individual will be unable to pay for regular communication costs while in prison. Daniel Moritz-Rabson, *'Prison Slavery': Inmates are Paid Cents While Manufacturing Products Sold to Government*, NEWSWEEK (Aug. 28, 2018), available at <https://bit.ly/2KJMKgj>.

High ICS rates create significant obstacles to communication between incarcerated persons and their loved ones. Generally speaking, incarcerated individuals and their families have substantially lower incomes than non-incarcerated individuals and are thus ill-equipped capable to pay high ICS rates.¹ In a recent survey, nearly 80 percent of formerly incarcerated people said they did not have the opportunity to talk with family and friends as much as they wanted while they had been in prison, with the primary reason being that the cost of phone calls was too much of a financial burden for both them and their friends and family members. Artika Tyner et al., *Phone Calls Creating Lifelines for Prisoners and Their Families: A Retrospective Case Study on the Campaign for Prison Phone Justice in Minnesota*, 30(2) TRINITY L. REV. 83, 89, 96 (2015). Some families have been forced to undertake additional work to pay for communication with prisoners or have suffered financial consequences and gone into debt. Katy Reckdahl, *State PSC considers lowering 'sinful' prison phone rates*, THE LENS (Nov. 15, 2012), <https://bit.ly/2N23G4D>.

¹ Bernadette Rabuy and Daniel Kopf, *Prisons of Poverty: Uncovering the Pre-incarceration Incomes of the Imprisoned*, PRISON POL'Y INITIATIVE (July 9, 2015), <https://www.prisonpolicy.org/reports/income.html>; *Medicaid Expansion & Criminal Justice-Involved Populations: Opportunities for Health Care for the Homeless Community*, NAT'L HEALTH CARE FOR THE HOMELESS COUNCIL (Jan. 2013), <https://www.soa.org/globalassets/assets/Files/Sections/health-MedicaidExpansion-Justice-Final.pdf>.

Such costs are passed on to their friends and family through collect calling systems. Wendy Sawyer, *How much do incarcerated people earn in each state?*, PRISON POL'Y INITIATIVE (Apr. 10, 2017), <https://www.prisonpolicy.org/blog/2017/04/10/wages/>. However, incarcerated individuals tend to come from low-income families, who face severe financial burdens due to the expense of maintaining contact. More than one-third of families charged with paying these costs have gone into debt. deVuono-Powell, *supra*, at 9. Some families have had to take second jobs to afford the cost of calling incarcerated family members. Reckdahl, *supra*. Others have been evicted from their homes or have had their electricity disconnected. *Id.* Some have wondered how even middle-class families can afford current rates. Leticia Miranda, *The Criminal Cost of Talking to a Loved One Behind Bars*, COLORLINES (May 14, 2012), <https://www.colorlines.com/articles/criminal-cost-talking-loved-one-behind-bars>. In a recent survey, nearly 80 percent of formerly incarcerated people said they did not have the opportunity to talk with family and friends as much as they wanted while they had been in prison, primarily because the cost of phone calls was too much of a financial burden for both them and their friends and family members. Tyner, *Phone Calls Creating Lifelines*, at 86.

Moreover, these burdens fall disproportionately on families of color, who are less likely to have the wealth to support the extra costs imposed by

the site commissions. Courtney E. Martin, *Closing the Racial Wealth Gap*, N.Y. Times, April 23, 2019, available at <https://www.nytimes.com/2019/04/23/opinion/closing-the-racial-wealth-gap.html>. The San Francisco Financial Justice Project found that around “80% of phone calls are paid for by incarcerated individuals’ support networks, primarily low-income women of color.” See *Mayor London Breed and Sheriff Vicki Hennessy Announce Plan for San Francisco to Make All Jail Phone Calls Free and End County Markups in the Jail Commissary*, <https://sfmayor.org/article/mayor-london-breed-and-sheriff-vicki-hennessy-announce-plan-san-francisco-make-all-jail>.

Given the significant harm Plaintiffs suffer from site commissions being passed through in the form of higher calling costs, this Court should reverse the Superior Court’s ruling that Plaintiffs did not have standing under Proposition 26 to challenge the site commissions as an illegal tax.

II. Eliminating Site Commissions Will Result in Lower ICS Rates for Appellants.

Eliminating the commission-based prison telephone system in California jails, as has already been done in California state and federal prisons, will decrease the costs of telephone calls placed by those in county jail. The system as it currently exists in California county jails is unsustainable,

unfair, and entirely unnecessary.² Eight states – California, Michigan, Missouri, Nebraska, New Mexico, New York, Rhode Island, and South Carolina – have eliminated commission-based prison telephone monopolies in state prisons. Clarissa Ramon, *Truth About Prison Phones*, HUFFINGTON POST (Nov. 5, 2012), https://www.huffpost.com/entry/truth-about-prison-phones_b_1856657. These states have seen the cost of prisoner-to-family calls drop precipitously. Dannenberg and Friedman, *supra*, at 7; Todd Shields, *Prison Phones Prove Captive Market for Private Equity*, BLOOMBERG (Oct. 3, 2012), <https://bloom.bg/2YP03G3>. As the eight states that have done away with the practice illustrate, there is absolutely no reason for California to continue to permit Defendants to use a commission-based system that results in unnecessary exploitation of incarcerated Americans merely seeking to stay in contact with their loved ones. The available evidence indicates both that eliminating the commission system would reap significant pecuniary benefits for affected prisoners and their loved ones and that the decreased calling costs would not render the ICS market unprofitable.

The FCC has commended states that have reformed their ICS procedures, like New Mexico and New York, which demonstrate “that rates can

² Brandi Collins, *Groups urge Congresswoman Lee to push back against federal prison phone kickbacks*, SAN FRANCISCO BAY VIEW (Sept. 7, 2012), <https://bit.ly/2N2Jy28/>; *Costly Phone Calls for Inmates*, *supra*.

be reduced to reasonable affordable levels without jeopardizing the security needs of correctional facilities and law enforcement or the quality of service.” FCC 2013 Order at 4. In 2014, the FCC noted that “[e]liminating the competition-distorting role site commissions play in the marketplace should enable correctional institutions to prioritize lower rates and higher service quality as decisional criteria in their RFPs.”¹ In the Matter of Rates for Interstate Inmate Calling Services, Second Further Notice of Proposed Rulemaking, 29 FCC Rcd. 13170 (2014) at p. 14. Federal agencies, such as the Department of Homeland Security (DHS) and Immigration Customs and Enforcement (ICE), have taken similar laudable measures to ensure that, as of 2013, there were “nationwide calling rates of \$0.12 a minute without additional fees or commissions at ICE facilities.” FCC 2013 Order at 4. The Federal Bureau of Prisons has also eliminated site commissions. *Federal Bureau of Prisons phone rates and kickbacks*, PRISON PHONE JUSTICE, <https://www.prisonphonejustice.org/state/BOP/>.

These measures taken by several states and federal agencies stand in stark contrast to the system used in California county jails. In the California jails, ICS providers are forced to drive up costs on the ICS consumers to cover costs incurred through site commission payments. By eliminating commissions, the eight states and certain federal agencies have decreased overhead by eliminating the high financial bar that ICS providers needed to

meet to secure monopolies in state prisons and ICE detention facilities. Or, in the FCC's words, by eliminating site commissions, these states and agencies have gotten rid of a "significant factor driving ... excessive rates." FCC 2013 Order at 4.

Unsurprisingly, lower ICS prices resulting from the removal of site commissions also result in higher call volume between incarcerated individuals and their loved ones. According to the FCC, "there is significant evidence that call volumes increased" in the eight states that removed site commission, "which shows the direct correlation of how these reforms promote the ability of inmates to stay connected with friends and family." FCC 2013 at p. 4. Moreover, call volume has increased significantly where ICS prices have been reduced by government enforced rate caps. *Id.* For example, ICS call volume went up 36% after New York ICS rates dropped in 2007, and continued to increase as rates were further reduced. *Id.* at 38. By 2013, call volume was up approximately 160% from 2006 levels. *Id.* In another instance, ICS provider Telmate reported that it saw "an increase of up to 300 percent in call volume when it lowered its rates." *Id.* Reduced prices and increased call volume create enormous benefits for incarcerated persons – who, as is discussed below, are far less likely to recidivate when they are able to talk to their families and friends outside the confines of prison – and their loved ones, who need not pay exorbitant collect calling fees that they cannot afford.

This Court need not look far to see the potential for a successful system that does not use ICS site commissions. In California prior to August 2007, when commissions began to be phased out, the cost of interstate calls was a \$3.95 connection fee and \$0.89 per minute. Dannenberg, *supra*, at 10. As of 2017, with ICS commissions prohibited, the cost for interstate calls are \$0.25 per minute with no connection fee. *California Rates July 2017*, PRISON PHONE JUSTICE, <https://www.prisonphonejustice.org/CA/california-rates-july-2017>. Similarly, Ohio, New Jersey, and Pennsylvania each saw their ICS rates fall below \$0.06 after eliminating site commissions. Second Report and Order and Third Further Notice of Proposed Rulemaking, *In the Matter of Rates for Interstate Inmate Calling Services*, 30 FCC Rcd. 12763 (2015) at p. 25. In Ohio, this was a reduction of 75%. *Id.* This data makes clear both that commissions are not necessary for ICS contracts to function and that, without commissions, ICS rates would drop to less extreme levels. Consequently, the Superior Court erred in inferring that ICS prices would not decrease if site commissions were deemed invalid.

By eliminating commissions, California county jails can enjoy the same decreased costs experienced by California state prisons. This standardization will also ensure continuity for the families of incarcerated individuals who are transferred from jail facilities to prison facilities.

III. Removing Site Commissions from Appellee's ICS Systems Will Produce Desirable Social Outcomes for Appellants and Their Communities.

The extremely high cost of jail phone calls means that keeping in regular contact with friends and family is a nearly unobtainable luxury for many incarcerated individuals. As noted above, many families have run into debt simply to keep in touch with incarcerated loved ones. Even the FCC has noted that maintaining contact with incarcerated family members can amount to an “impossible strain on the household budget.” *Statement of Commissioner Jessica Rosenworcel Re: Rates for Interstate Inmate Calling Services* (WC Docket No. 12-375). Despite these nearly insurmountable financial burdens, incarcerated individuals’ ability to maintain regular communication with loved ones outside of jail is vital for the well-being of incarcerated persons, their families, and society at large.

A. High Prices Take a Psychological Toll on Incarcerated People That Lasts Past the Time of Incarceration

The Federal Bureau of Prisons has noted that maintaining family ties while incarcerated is important for personal development. 28 CFR § 540.100(a) (1996). At least one state has a statute requiring prison officials to promote communication between incarcerated individuals and their family and friends, which “fosters reintegration...motivat[ing] the inmate and thus contribut[ing] to morale and to security.” Wis. Admin. Code DOC § 309.39(1) (1998).

The realities of incarceration lead to a myriad of negative psychosocial effects. Incarcerated people often easily become demoralized and alienated due to the extremely strenuous living conditions inherent in most prisons. Fabrice Guilbaud, *Working in Prison: Time as Experienced by Inmate-Workers*, 51(5) REVUE FRANÇAISE DE SOCIOLOGIE 41, 51, 64 (2010). Incarcerated individuals typically suffer from a myriad of negative psychosocial impacts such as depression, anxiety and stress. Allison Hollihan & Michelle Portlock, *Osborne Ass'n, Video Visiting in Corrections: Benefits, Limitations, and Implementation Considerations*, OSBORNE ASS'N 6 (2014), <https://bit.ly/31yII28>. This is especially true for younger prisoners, who often face a more drastic adjustment to life in prison and may find it especially difficult to adjust. Tyner, *Phone Calls Creating Lifelines*, at 90.

The opportunity to speak with loved ones outside of prison affords incarcerated individuals the ability to maintain a semblance of normalcy and retain a measure of hope. Many in prison see the telephone as a lifeline to the quotidian life they wish to return to. *Id.* at 89. It has been demonstrated time and again that those who maintain regular contact with loved ones while in prison exhibit lower rates of depression, anxiety, and stress. Allison Hollihan & Michelle Portlock, *supra*, at 6. Conversely, prisoners who do not maintain contact with the outside world often demonstrate increased levels of desperation and anger, which can result in more resistance to prison rules and

increased injurious or violent behavior toward fellow inmates. Tyner, *Phone Calls Creating Lifelines*, at 89-90; Songul Duran *et al.*, *Anger and Tolerance Levels of the Inmates in Prison*, 32(1) ARCHIVES OF PSYCHIATRIC NURSING 66, 68 (2018). Therefore, it should seem nearly axiomatic that maintaining contact with loved ones outside of prison is vital for incarcerated individuals' emotional and mental temperament and development.

B. High Prices Decrease the Ability of an Incarcerated Person to Maintain Relationships Both Inside and Outside the Jail

The ability to stay in touch with one's spouse while imprisoned also has extremely beneficial effects on incarcerated individuals and their spouses. For spouses, maintaining contact with their incarcerated spouse increases the likelihood that the relationship survives the incarcerated period and persists after their spouse's release. Saneta deVuono-Powell *et al.*, *Who Pays? The True Cost of Incarceration on Families*, ELLA BAKER CTR. FOR HUM RTS. 32 (2015), <https://bit.ly/1M9n7ja>; Bales and Mears, *supra* note 4, at 300.

The high price of prison phone calls also has detrimental effects on relationships between incarcerated individuals. Prisoners often trade essentials, including meals, as currency in prison, which affords them more time to speak to friends and relatives on the phone when they are unable to afford these calls solely using funds from their commissary budget. Artika Tyner *et al.*, *Phone Calls Creating Lifelines for Prisoners and Their Families:*

A Retrospective Case Study on the Campaign for Prison Phone Justice in Minnesota, 30(2) TRINITY L. REV. 83, 96 (2015).

Incarcerated individuals who maintain regular interaction with family members while imprisoned are more likely to have their sentences reduced and are less likely to be involved in negative incidents while incarcerated. Second Chance Act of 2007: Community Safety Through Recidivism Prevention, PL 110-199, § 3(b)(6), 122 Stat. 657 (2008) (codified at 42 U.S.C. § 17501 (2008)).

C. The High Prices Have a Lasting Impact on Psychological and Social Well-being After Incarceration, Including Lower Rates of Recidivism.

Communication with loved ones also produces better outcomes for prisoners after their incarceration. Prisoners who maintain such contact are less likely to reoffend than those who are unable to keep in touch.³ Moreover, prisoners who maintain contact with loved ones are more likely to develop strong support systems outside of the criminal justice system, which enable them to have assistance with housing, employment, and to more successfully complete parole than their counterparts.⁴ Even those who do eventually

³ Joshua Cochran, *The Ties that Bind or the Ties that Break: Examining the Relationship between Visitation and Prisoner Misconduct*, 40 J. CRIM. JUST. 433, 439 (2012); William Bales and Daniel Mears, *Inmate Social Ties and the Transition to Society: Does Visitation Reduce Recidivism?*, 45(3) J. RESEARCH CRIME AND DELINQUENCY 287 (2008).

⁴ Bruce Western *et al.*, *Stress and Hardship After Prison* 120(5) AMER. J. SOCIOLOGY 1512, 1533 (2015); Creasie Finne Hairston, *Family Ties During*

reoffend take a longer time to do so if they have more frequent contact with loved ones outside of prison while they are incarcerated. Tyner, *Phone Calls Creating Lifelines*, at 91. Having this support network has also been shown to help formerly incarcerated people successfully complete parole. Hairston, *supra* note 55, at 49-50.

On the other hand, those who do not retain regular contact with friends and family while in prison find it much more difficult to re-integrate and are less likely to secure employment post-release. Christy Visher *et al.*, *Returning Home: Understanding the Challenges of Prisoner Reentry*, URB. INST. 116-9 (2004). They are more likely to rely upon public benefits and resources and their higher rate of recidivism further increases the emotional and financial costs associated with maintaining this country's prison system.⁵ Any potential profits lost as a result of lowering ICS rates are far outweighed by the costs produced by incarcerating repeat offenders. Drew Kukorowski, *The price to call home: state-sanctioned monopolization in the prison phone industry*, PRISON POL'Y INITIATIVE (Sept. 11, 2012), <https://bit.ly/2yUaV6p>.

Imprisonment: Do They Influence Future Criminal Activity? 52 FED. PROBATION 48, 49-50 (1988).

⁵ David Harding *et al.*, *Making Ends Meet after Prison: How Former Prisoners Use Employment, Social Support, Public Benefits, and Crime to Meet their Basic Material Needs*, U. MICH. POPULATION STUD. CTR. (2011); Bates and Mears, *supra*, at 311-2.

D. The High Prices Harm Children of Incarcerated People

The inability to afford phone calls has outsized emotional and psychological effects on loved ones outside of prison, particularly children, who often perceive loss of contact as a sign that the incarcerated individual no longer cares about them. Tyner, *Phone Calls Creating Lifelines*, at 91. Children of incarcerated people often have particular difficulty understanding why such phone calls amount to a hefty financial burden and why their parents are unable to call them regularly. Victoria Law, *\$15 for 15 Minutes: How Courts are Letting Prison Phone Companies Gouge Incarcerated People*, THE INTERCEPT (June 16, 2017), <https://bit.ly/2ZYxBhL>. This can lead to strained relations and a tenuous support system once the incarcerated individual is released from prison.⁶

Granting incarcerated parents the ability to maintain regular contact with their children has beneficial, long-lasting effects.⁷ Almost three million children in the United States - nearly 4 percent of the country's population

⁶ Jennifer Cobbina, *Fron Prison to Home: Women's Pathways in and out of Crime*, (May 2009) (unpublished Ph.D. dissertation, University of Missouri - St. Louis); *Coming Home: A Family's Guide to Reunification*, N.Y. STATE DEPT. OF CORRECTIONAL SERV., <http://www.doccs.ny.gov/FamilyGuide/ComingHomeBrochure.pdf>.

⁷ Zoann Snyder-Joy and Teresa Carlo, *Parenting Through Prison Walls: Incarcerated Mothers and Children's Visitation Programs*, in CRIME CONTROL AND WOMEN: FEMINIST IMPLICATIONS OF CRIMINAL JUSTICE POLICY 144 (Susan Miller, ed.) (1998)

under the age of 18 - have at least one parent in prison. *Collateral Costs: Incarceration's Effect on Economic Mobility*, PEW CHARITABLE TRUSTS 4 (2010). Over half of inmates in state prison and over 60 percent of inmates in federal prison have at least one child under the age of 18. Lauren E. Glaze and Laura M. Maruschak, *Parents in Prison and Their Minor Children*, BUREAU OF JUST. STATISTICS 2 (Aug. 2008), <https://bit.ly/2kkCUTf>.

Parents, and fathers in particular, who stay in contact with their children while in prison are more likely to be highly involved in their children's lives after they are released. Nancy La Vigne *et al.*, *Examining the Effect of Incarceration and In-Prison Family Contact on Prisoners' Family Relationships*, 21(4) J. CONTEMPORARY CRIM. JUST. 314 (2005). Parents that maintain contact with their children while in prison also exhibit decreased rates of recidivism. Cochran, *supra* note 33, at 439. Conversely, parents that lose contact with their children while incarcerated are far more likely to experience intense emotional distress and elevated levels of depression. Julie Poehlmann, *Incarcerated Mothers' Contact With Children, Perceived Family Relationships, and Depressive Symptoms*, 19(3) J. FAM. PSYCHOL. 350, 353 (2005).

A child's ability to maintain contact with incarcerated parents is incredibly important for their emotional and educational development. Studies show that children who lose contact with incarcerated parents have poor

performance in school and higher rates of truancy, the latter of which has been linked to increased criminal activity in adulthood. 2013 FCC Order at 68; *id.* n. 441. For children of incarcerated individuals, maintaining contact with their parents produces positive psychosocial outcomes and increases the likelihood of their parents remaining involved in the children's lives. Conversely, children who lose contact with their parents are likely to have poorer performance in school, be involved in criminal activity in adulthood, and exhibit negative emotional symptoms such as an increased risk of suicide and post-traumatic stress disorder. Laurel Davis and Rebecca J. Shlafer, *Mental health of adolescents with currently and formerly incarcerated parents*, 54 J. ADOLESC. 120, 124 (2017). Children who lose contact with incarcerated parents also exhibit negative emotional symptoms, are more likely to show signs of depression both during childhood and adulthood, and develop an increased risk of suicide and post-traumatic stress disorder. A lack of regular contact with incarcerated parents has also been linked to increased rates of homelessness among children. Letter from Margaret diZerega, Director, Family Justice Program, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 2.

IV. CONCLUSION

For the foregoing reasons, this Court should reverse the demurrer of Plaintiffs' lawsuit by the Superior Court and find that the Plaintiffs have standing.

Dated: October 21, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I am over the age of eighteen and not a party to the within action. I am a resident of or employed in the county where the service described below occurred. My business address is 11543 West Olympic Boulevard, Los Angeles, California 90064. On this date, I served the following document described as **APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF CIVIL AND HUMAN RIGHTS ORGANIZATIONS IN SUPPORT OF PLAINTIFFS-APPELLANTS** in said action by TrueFiling. The document was filed and served via the Court's electronic filing system, TrueFiling (excluding those not registered, who were served by mail, if applicable) to the parties listed below.

(SEE ATTACHED SERVICE LIST)

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 21, 2019, in Los Angeles, California.



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