

November 2022

Private Prison Telecom Corporations and State Action: How This One Trick Will Allow Plaintiffs to Disrupt an \$8 Billion Industry

Connor McCleskey

Follow this and additional works at: <https://digitalcommons.law.uidaho.edu/idaho-law-review>

Recommended Citation

Connor McCleskey, *Private Prison Telecom Corporations and State Action: How This One Trick Will Allow Plaintiffs to Disrupt an \$8 Billion Industry*, 57 IDAHO L. REV. (2022).

Available at: <https://digitalcommons.law.uidaho.edu/idaho-law-review/vol57/iss3/9>

This Article is brought to you for free and open access by Digital Commons @ UIdaho Law. It has been accepted for inclusion in Idaho Law Review by an authorized editor of Digital Commons @ UIdaho Law. For more information, please contact annablaine@uidaho.edu.

PRIVATE PRISON TELECOM CORPORATIONS AND STATE ACTION: HOW THIS ONE TRICK WILL ALLOW PLAINTIFFS TO DISRUPT AN \$8 BILLION INDUSTRY

CONNOR MCCLESKEY*

TABLE OF CONTENTS

I. INTRODUCTION	635
II. A PRIMER ON THE PRISON TELECOM INDUSTRY.....	639
A. History	639
B. The Impact of the Industry	640
III. THE LEGAL LANDSCAPE	642
A. Federal Regulations and State Laws	643
B. Prison Telecom Litigation.....	647
i. Litigation in Federal Courts and Why It Fails	648
ii. Constitutional Claims.....	649
IV. THE STATE ACTION DOCTRINE: WHY CONSTITUTIONAL CLAIMS FAIL	651
V. WHY PRISON TELECOM CORPORATIONS SHOULD BE CONSIDERED STATE ACTORS.....	654
A. Prison telecom corporations assist law enforcement agencies with prosecution and rights violations by recording phone calls, performing biometric surveillance, and phone tapping attorneys.	654
B. Prison telecom corporations shape corrections policies and regulations through bidding, lobbying, and influence.	657
C. Prison telecom corporations return money extracted from incarcerated people and their families to corrections agencies, funding vital government functions.	659
D. Corrections agencies write contracts and requests for proposals that often direct every action of providers.	660
VI. LOOKING FORWARD TO A CONSTITUTIONAL RIGHT TO PHONE CALLS	660
VII. CONCLUSION	661

I. INTRODUCTION

For incarcerated people, the telephone is a lifeline. Many people behind bars rely on it as the primary means of communication, especially for those who are incarcerated in out-of-state facilities, far away from their families. The COVID-19 pandemic has only increased the importance of phone access: many facilities suspended or ended visits in early 2020 to curb the spread of the virus and, as of January 2021, those visits have not resumed.¹

* B.A. Oberlin College, J.D. Georgetown University Law Center. This Article is built upon the work of the countless dedicated activists who have spent decades fighting for prison abolition and phone justice.

1. See, e.g., *The Most Significant Criminal Justice Policy Changes From the COVID-19 Pandemic*, PRISON POL'Y INITIATIVE, <https://www.prisonpolicy.org/virus/virusresponse.html> (last updated Apr. 6, 2021).

Over the past three decades, correctional facilities have almost entirely privatized the provision of telephone services.² Nearly every correctional agency in the country charges incarcerated individuals for phone calls, and most contract with just a handful of niche telecom corporations that cater to the correctional market.³ In exchange for exclusive contracts to provide telephone service to everyone incarcerated in a given facility, the prison telecom corporations offer correctional agencies kickbacks—known as “commissions”—on the cost of each phone call.⁴

As a result of this dynamic, the cost of a call for someone behind bars reached as high as \$25 for a 15-minute phone call.⁵ And, because incarcerated people are often paid just pennies an hour for work,⁶ their families and friends are usually responsible for paying for the cost of these calls. The burden of paying for communication falls hardest upon Black and Brown women that are already living with the experience of having a loved one in prison or jail.⁷ But, the industry’s harms stretch beyond just the cost of telephone calls: prison telecom corporations are notorious for employing deceptive billing practices,⁸ promoting ever-widening

2. See, e.g., Steven J. Jackson, *Ex-Communication: Competition and Collusion in the U.S. Prison Telephone Industry*, 22 CRIT. STUD. MEDIA COMM. 263 (2005), [https://sjackson.infosci.cornell.edu/Jackson_CompetitionandCollusioninPrisonPhoneIndustry\(CSMC2005\).pdf](https://sjackson.infosci.cornell.edu/Jackson_CompetitionandCollusioninPrisonPhoneIndustry(CSMC2005).pdf).

3. *Id.* at 269 (noting that, by 1995, 90% of all correctional agencies derived a profit from phone calls); Michael Sainato, ‘*They’re Profiting Off the Pain’: The Push to Reign in the \$1.2bn Prison Phone Industry*, GUARDIAN (Nov. 26, 2019, 5:02 PM), <https://www.theguardian.com/us-news/2019/nov/26/theyre-profiting-off-pain-the-push-to-rein-in-the-12bn-prison-phone-industry> (discussing the two corporations that control 70% of the market).

4. Peter Wagner & Alexi Jones, *On Kickbacks and Commissions in the Prison and Jail Phone Market*, PRISON POL’Y INITIATIVE (Feb. 11, 2019) [hereinafter Wagner & Jones, *On Kickbacks and Commissions*], <https://www.prisonpolicy.org/blog/2019/02/11/kickbacks-and-commissions/>; see also Sarah Betancourt, *Costly Connections*, COMMONWEALTH (July 28, 2020), <https://commonwealthmagazine.org/criminal-justice/costly-connections/>.

5. Kiran Misra, *The Biden FCC Needs to Tackle Exorbitant Jail and Prison Call Prices*, SLATE (Dec. 21, 2020, 11:02 AM), <https://slate.com/technology/2020/12/biden-fcc-prison-jail-phone-video-costs.html>; see also Peter Wagner & 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.

6. See 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/>.

7. Saneta de Vuono-Powell et al., *Who Pays? The True Cost of Incarceration on Families*, ELLA BAKER CTR., FORWARD TOGETHER, RESEARCH ACTION DESIGN (2015), <http://whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf>.

8. See, e.g., Steven Cohen, *\$25m Global Tel Link Settlement Reached for Inmates*, TOP CLASS ACTIONS (June 1, 2020), <https://topclassactions.com/lawsuit-settlements/lawsuit-news/civil-rights/25m-global-tel-link-settlement-reached-for-inmates/>.

surveillance of incarcerated people and their families,⁹ and spying on confidential attorney-client phone calls.¹⁰

The industry's harms have been recognized for decades. Activists, news outlets, and federal and state regulators have all attempted to expose and challenge the exploitative prison telecom model.¹¹ During the surge of Black Lives Matter uprisings and protests in the summer of 2020, demonstrators incorporated "Prison Phone Justice" into their broader calls for justice and abolition.¹² However, these efforts have frequently run into a business model that ensures widespread resistance to even the slightest measure intended to provide relief to families.

Through the cost of calls, the prison telecom industry siphons off countless resources from communities of color, compounding the damage caused by racist over-policing and systemic underinvestment. Corporations share about 50% of their telephone charges with correctional agencies through kickbacks called "site commissions."¹³ These payments have become huge sources of revenue for many small-town jails and sheriffs' departments.¹⁴ As a result, the industry and law enforcement march in lockstep against any legislative or regulatory reform.

Unsurprisingly, these forces have led to a legal landscape that is hostile to plaintiffs. People wronged by this industry often have no legal recourse, even if

9. Peter Wagner & 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; David Grossman, *Prisons Are Building Giant Biometric Databases of Prisoners' Voices*, POPULAR MECHANICS (Feb. 1, 2019), <https://www.popularmechanics.com/technology/security/a26112865/us-biometric-voice-archives-prisoners/> (discussing databases of "voice prints" of callers collected by private corporations).

10. Karl Bode, *Securus Quietly Settles Lawsuit Over Illegally Spying on Inmate Attorney Conversations*, TECHDIRT (June 1, 2020, 3:44 PM), <https://www.techdirt.com/articles/20200522/08004544553/securus-quietly-settles-lawsuit-over-illegally-spying-inmate-attorney-conversations.shtml>.

11. See, e.g., Rates for Interstate Inmate Calling Services, Second Report and Order and Third Further Notice of Proposed Rulemaking, 30 F.C.C. Rcd. 12763 (Nov. 5, 2015).

12. *Tell Congress: Pass the COVID-19 Compassion and Martha Wright Prison Phone Justice Act*, COLOR OF CHANGE OF CHANGE, https://act.colorofchange.org/sign/congress_martha_wright_reed?source=coc_main_website (last visited Feb. 10, 2021).

13. See Wagner, *supra* note 9; see also Brittany J. Finder, *Aligning Practice and Principles: A Call to Eliminate the Use of Site Commissions in Inmate Calling System Contracts*, PUBLIC CONTRACT L.J. (Dec. 11, 2020), https://www.americanbar.org/groups/public_contract_law/publications/public_contract_law_jrnl/46-2/eliminate-inmate-calling/.

14. Peter Wagner & Alexi Jones, *On Kickbacks and Commissions in the Prison and Jail Phone Market*, PRISON POL'Y INITIATIVE (Feb. 11, 2019), <https://www.prisonpolicy.org/blog/2019/02/11/kickbacks-and-commissions/>; Sarah Betancourt, *Costly Connections*, COMMONWEALTH MAG. (July 28, 2020), <https://commonwealthmagazine.org/criminal-justice/costly-connections/>.

they are subjected to corporate behavior that would be unimaginable for many in the free world.¹⁵ At the federal level, the industry has used legal challenges to water down attempts to lower the cost of calls nationwide.¹⁶ Recently, activists have begun to bring suits against prison telecom corporations under a variety of different causes of action.¹⁷ But, courts have rejected many of these challenges, often due to the providers' unique role as private vendors within a public system.¹⁸

One reason why prison telecom corporations are so rarely sued in court is because judges have largely refused to entertain constitutional claims against them.¹⁹ For the most part, constitutional claims have failed after judges conclude that plaintiffs cannot meet the "state actor" requirement.²⁰ But, while telecom providers may be private corporations, they are increasingly exercising an enormous amount of coercive power over incarcerated people and their families.²¹ In many facilities, prison telecom corporations operate massive surveillance systems, often without a warrant.²² And, with almost no oversight by courts or regulators, abuses are common.²³

Still, judges find that corporations are not state actors for a variety of reasons. Many suits are filed *pro se*, and judges are historically particularly hostile to incarcerated self-represented plaintiffs.²⁴ Moreover, given the litany of decisions denying that prison telecom corporations are state actors, many resource-strapped

15. *The Prison Industry: How it Started. How it Works. How it Harms.*, WORTH RISES, <https://static1.squarespace.com/static/58e127cb1b10e31ed45b20f4/t/5ff2bbe318d44937a922e754/1609743335995/The+Prison+Industry+-+How+It+Started%2C+How+It+Works%2C+and+How+It+Harms+%28December+2020%29.pdf> (p. 53 discussing how prison telecom corporations seize unused funds after 90 days, cap deposits at \$50 to maximize deposit fees, among other exploitative practices).

16. *See generally* 30 F.C.C. Rcd. 12763.

17. NELSON ET AL., NATIONAL CONSUMER LAW CENTER, COMMERCIALIZED (IN)JUSTICE LITIGATION GUIDE 44 (2020), https://www.nclc.org/images/pdf/criminal-justice/WP_Litigation_Guide.pdf.

18. *Id.*

19. *See cases cited infra* note 120.

20. *See discussion infra* Section II.A.ii.

21. *See discussion infra* Section IV; *see also* George Joseph & Debbie Nathan, *Prisons Across the U.S. Are Quietly Building Databases of Incarcerated People's Voice Prints*, INTERCEPT (Jan. 30, 2019, 9:00 AM), <https://theintercept.com/2019/01/30/prison-voice-prints-databases-securus/>.

22. *See infra* pp. 632–33 nn. 172–175.

23. *See generally* *A Lawsuit Aims to End the Prison Telephone Racket*, BOSTON GLOBE (May 5, 2018, 1:05 AM), <https://www.bostonglobe.com/opinion/editorials/2018/05/05/lawsuit-aims-end-prison-telephone-racket/owb0PuEzRgs8BkJUwJXaP/story.html>.

24. *See, e.g.*, Debra Cassens Weiss, *Posner: Most Judges Regard Pro Se Litigants as 'Kind of Trash Not Worth the Time'*, ABA JOURNAL (Sept. 11, 2017, 22:57 AM), https://www.abajournal.com/news/article/posner_most_judges_regard_pro_se_litigants_as_kind_of_trash_nor_worth_the_t (quoting retired federal Judge Richard Posner as saying that "most judges regard [pro se litigants] as kind of trash not worth the time of a federal judge").

social justice lawyers and advocates may choose to devote their time and energy to litigation that is more likely to succeed.²⁵

However, even under the current law, prison telecom corporations are state actors.²⁶ They gather evidence for criminal trials, perform warrantless wiretaps—and even provide the majority of the funding for some corrections agencies.²⁷ Under any definition—legal or common sense—these corporations have become inexorably intertwined with corrections agencies.

And, the failure to recognize that they are state actors has implications that reach beyond just the telecom industry. It impacts the entire U.S. prison system. Nearly every service has been privatized and commodified.²⁸ In many facilities, corporations have entirely taken over the day-to-day operation of incarceration from government agencies.²⁹ And, as judges refuse to hold corporations responsible for constitutional violations, it means that meager constitutional rights are disappearing. It also means that, due to the Prison Litigation Reform Act's screening requirements,³⁰ corporations do not have to even lift a finger to defend against allegations of wrongdoing.³¹

In this Article, I will examine why the law currently fails to address the harms of the prison telecom industry. First, I will provide a brief history of the industry and its formation during the era of mass incarceration. Second, I will illustrate some of the industry's effects on individuals, communities and the law. Third, I will examine why courts have been so hostile to suits brought against the industry and propose several key reforms that could end this exploitation for good.

II. A PRIMER ON THE PRISON TELECOM INDUSTRY

A. History

Until the mid-1980s, phone calls in correctional facilities functioned like payphones in the free world.³² At that time, AT&T dominated local telephone service and payphones alike, and this control of the market included control over payphones in prisons and jails.³³ Then, after the Reagan administration broke up

25. See Stephen Raheer, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 *Hastings Race & Poverty L.J.* 3, 40, 46 (2020) (noting that, although “litigation and regulatory advocacy have produced victories, such efforts are unlikely to result in comprehensive protections” without legislative action).

26. See *infra* Section IV.

27. See discussion *infra* Section IV.

28. See WORTH RISES, *supra* note 15 (discussing the U.S. prison system as a “vast matrix of public-private partnerships,” comprised of thousands of companies).

29. See *generally id.* (discussing twelve different sectors that have been privatized in prisons and jails).

30. See *generally* 28 U.S.C. § 1915(a).

31. See *infra* note 130.

32. See Jackson, *supra* note 2, at 268.

33. See WORTH RISES, *supra* note 15, at 48.

the AT&T monopoly, the market was flooded with a proliferation of new regional providers.³⁴ This trend carried over to prisons and jails, which began to contract with a wider variety of prison telecom providers.³⁵

This diversification was accompanied by a shift in how prison telephone service was viewed. It ceased to be treated like a utility—like running water—that people deserved to access freely. Instead, it became a service that could be commodified and sold to incarcerated individuals and their families. Within a decade of the end of the AT&T monopoly, nearly every correctional facility in the country had switched to private telecom provider for phone service.³⁶ Unsurprisingly, these private corporations exploited their captive market. At the time, a 15-minute call in some facilities cost \$20, just for a local call.³⁷

The prison telecom industry did not grow in a vacuum. The same racist, hateful policies that created the modern prison state fostered the growth of privatized correctional services by creating the conditions for private telecom corporations to thrive.³⁸ More people incarcerated for longer terms, in more isolated facilities³⁹—separated from their communities and support networks. The lucrative market soon attracted outside investment from private equity firms, who acquired a foothold in the market, which then rapidly consolidated.⁴⁰

Today, the prison telecom industry is dominated by just two corporations, each owned by high-profile private equity firms. The largest, GTL (formerly known as Global Tel Link), controls contracts for telephone services in facilities with about a million incarcerated individuals.⁴¹ The second largest corporation, Securus, provides services for over 850,000 incarcerated people across hundreds of facilities.⁴² Together, the two corporations control at least 90% of the prison telecom market by most measures.⁴³

B. The Impact of the Industry

Prison telecom corporations like GTL and Securus have exploited their power over the market to charge exorbitant rates for phone calls. This business

34. See Jackson, *supra* note 2, at 268.

35. *Id.* at 268 (noting that, after the breakup of AT&T, new entrants to the market included “AT&T rivals MCI and Sprint, followed closely by a series of dedicated start-ups”).

36. See WORTH RISES, *supra* note 15, at 49.

37. See Jackson, *supra* note 2, at 264.

38. A.E. Raza, *Legacies of the Racialization of Incarceration: From Convict-lease to the Prison Industrial Complex*, 11 J. INST. JUST. INT’L STUD. 159 (discussing in general how racist attitudes drive attempts to monetize the carceral system).

39. Jacob Kang-Brown & Ram Subramanian, *Out of Sight: The Growth of Jails in Rural America*, VERA INST. OF JUST. (June 2017), <https://www.vera.org/downloads/publications/out-of-sight-growth-of-jails-rural-america.pdf> (concluding that, between 2007 and 2017, the carceral population has increase in rural areas).

40. See WORTH RISES, *supra* note 15, at 49.

41. See *id.* at 52.

42. *Id.*

43. *Id.*

model has broad, deleterious effects on incarcerated individuals and their entire networks. And, given the racist nature of the criminal-legal system, this impact also falls hardest on Black and Brown communities.⁴⁴

The cost of telephone calls places an enormous financial burden on incarcerated people, who already face a system of overlapping forces that effectively prevent them from ever obtaining financial stability. Due to decades of racist policies and systemic disinvestment in communities of color, people convicted of crimes have disproportionately less wealth than people without criminal-legal system contact.⁴⁵ Then, after being convicted, many incarcerated individuals are often saddled with mountains of fines and fees imposed by the criminal-legal system.⁴⁶ Finally, once they are actually in prison, incarcerated individuals can be forced to work for just cents a day.⁴⁷ For instance, states like North Carolina force people behind bars to work menial jobs producing furniture and supplies for state agencies,⁴⁸ but pay them as little as five cent per hour.⁴⁹ At that rate, someone in a North Carolina prison would have to work for *sixty* hours to pay for a single 15-minute in-state call, due to GTL's rates.⁵⁰

Since incarcerated people cannot afford the cost of calls, the burden overwhelmingly falls upon their families.⁵¹ Women—and Black and Brown women, in particular—make up the vast majority of people responsible for paying these costs.⁵² In a study conducted of people visiting San Quentin State Prison in California, researchers found that most women spent “as much as one-third of their

44. See generally Saneta de Vuono-Powell et al., *Who Pays? The True Cost of Incarceration on Families*, ELLA BAKER CTR., FORWARD TOGETHER, RESEARCH ACTION DESIGN (2015), <http://whopaysreport.org/wp-content/uploads/2015/09/Who-Pays-FINAL.pdf> (noting numerous ways in which the costs of incarceration disproportionately impact Black and Latino individuals).

45. In fact, nearly two-thirds of people in jail fall below the poverty line. de Vuono-Powell et al., *supra* note 7, at 9; see also Meredith Booker, *The Crippling Effect of Incarceration on Wealth*, PRISON POL'Y INITIATIVE (APR. 26, 2016), <https://www.prisonpolicy.org/blog/2016/04/26/wealth/>; see generally Bryan L. Sykes & Michelle Maroto, *A Wealth of Inequalities: Mass Incarceration, Employment, and Racial Disparities in U.S. Household Wealth*, 2 RUSSELL SAGE FOUND. J. SOC. SCI. 129–152 (2016), www.jstor.org/stable/10.7758/rsf.2016.2.6.07.

46. See, e.g., MATTHEW MENENDEZ ET AL., THE STEEP COSTS OF CRIMINAL JUSTICE FEES AND FINES 5 (2019), https://www.brennancenter.org/sites/default/files/2020-07/2019_10_Fees%26Fines_Final.pdf.

47. See 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/>.

48. *North Carolina Prison Inmates at Work*, N.C. DEPT. OF CORR., <https://www.doc.state.nc.us/work/workover.htm> (last visited Feb. 10, 2021).

49. Sawyer, *supra* note 6.

50. *NCDPS Call Rates*, PRISON PHONE JUSTICE (Sept. 24, 2019), https://www.prisonphonejustice.org/media/phonejustice/NC_DPS_Phone_Rates_September_2019.pdf.

51. See generally de Vuono-Powell et al., *supra* note 7.

52. *Id.* at 30.

annual income to maintain contact.”⁵³ This extends to entire families, leading nearly one in three families with an incarcerated loved one goes into debt just to pay for the cost of staying in touch.⁵⁴

By placing phone calls beyond the reach of many people behind bars, prison telecom corporations isolate people from their support networks. This isolation has an immeasurable negative impact on people’s wellbeing, especially individuals with mental illness.⁵⁵ Beyond the physical separation of prison walls, this communication gap predictably drives people to despair. This does not just lead to desperation in prisons, it prevents people from developing the bonds needed to succeed upon their release.⁵⁶ For instance, without easy access to phone calls, people cannot plan where they are going to live or work, and they cannot keep in touch with family members that are necessary for support. The cost of these severed bonds, multiplied by the millions of people that enter the U.S. prison system each year is unimaginable.

III. THE LEGAL LANDSCAPE

The prison telecom industry is governed by a patchwork of regulations and laws at both the federal and state level. Nationwide, corporations are predominantly regulated by the Federal Communications Commission (FCC).⁵⁷ Although there have been recent attempts by left-leaning legislators to pass laws to lower the cost of phone calls using federal legislation,⁵⁸ these have not yet been successful.⁵⁹ However, the COVID-19 pandemic has increased the urgency of these legislative campaigns,⁶⁰ and some long-standing phone justice legislation has made

53. *Id.*

54. *See id.* at 9.

55. *See generally* Craig Haney, *Madness and Penal Confinement: Some Observations on Mental Illness and Prison Pain*, 19 PUNISHMENT & Soc’y 310 (2017).

56. ITPI, *How Private Prison Companies Increase Recidivism*, IN THE PUBLIC INTEREST 7 (June 2016), <https://www.inthepublicinterest.org/wp-content/uploads/ITPI-Recidivism-ResearchBrief-June2016.pdf> (finding that high rates “reduc[es] contact between prisoners and their home communities, increasing recidivism”).

57. *See, e.g., The Communications Act of 1934*, 47 U.S.C. § 151 *et seq.*, OFF. FOR C.R. & C.L., <https://it.ojp.gov/privacyliberty/authorities/statutes/1288> (last visited June 23, 2021).

58. Press Release, Bobby L. Rush, Rep., House of Representatives, Rush Introduces Legislation to Protect Inmates and Their Families from Unjust Charges for Communications Services (Mar. 26, 2020), <https://rush.house.gov/media-center/press-releases/rush-introduces-legislation-to-protect-inmates-and-their-families-from>.

59. Martha Wright Prison Phone Justice Act, H.R. 6389 116th Cong., <https://www.govtrack.us/congress/bills/116/hr6389> (noting that this bill “died in a previous Congress” without a vote).

60. *See, e.g., Advocates Deliver Petition for Prison Phone Justice*, AMSTERDAM NEWS (Aug. 13, 2020), <http://amsterdamnews.com/news/2020/aug/13/advocates-deliver-petition-prison-phone-justice/>.

its way into relief legislation like, the HEROES Act.⁶¹ On the state level, regulation is inconsistent. In many states, the prison telecom industry is effectively unregulated,⁶² although some states with particularly active utility regulators have taken action to lower costs and increase transparency in the industry.⁶³

A. Federal Regulations and State Laws

At the federal level, the FCC is responsible for regulating any telecommunications provider, including prison telephone corporations.⁶⁴ The FCC's authority to regulate the cost of prison telephone calls, and telephone calls more broadly, stems from the Communications Act of 1934.⁶⁵ That Act requires the Commission to ensure that telephone calls are "just, reasonable, and fair" to the "general public."⁶⁶ In general, however, the FCC may only regulate interstate communication services, and must leave the regulation of purely intrastate communications to individual states.⁶⁷ But, a series of reforms included in the 1996 Telecommunications Act eroded the barrier against the FCC regulation of intrastate

61. See, e.g., Prison Policy Initiative, Inc., Comment Letter on Regulatory Requirements for Alternative Operator Services Companies (Sept. 19, 2019) (urging Iowa to adopt state regulations for the prison telephone industry), https://wcc.efs.iowa.gov/cs/idcplg?IdcService=GET_FILE&dDocName=1877108&allowInterrupt=1&noSaveAs=1&RevisionSelectionMethod=LatestReleased.

62. Omari Samkofa & Angie Jackson, *Detroit Pistons Owner Tom Gores Speaks About Controversy Over Securus* (Feb. 4, 2021), <https://www.freep.com/story/sports/nba/pistons/2021/02/04/tom-gores-detroit-pistons-securus-prison-phone-calls/4139871001/> (noting that the industry is unregulated in Michigan); see also Timothy Williams, *The High Cost of Calling the Imprisoned*, N.Y. TIMES (Mar. 30, 2015), <https://www.nytimes.com/2015/03/31/us/steep-costs-of-inmate-phone-calls-are-under-scrutiny.html> (discussing how prison telecom is "largely unregulated").

63. Lee Rood, *Why Are Calls from Iowa Jails the Most Costly in the US? State Utilities Board Wants to Know* (May 31, 2019), <https://www.desmoinesregister.com/story/news/2019/05/31/iowa-ia-investigates-phone-call-costs-charged-polk-county-jail-inmates-aclu-naacp/1290761001/>; David Reutter, *Alabama Public Service Commission Enacts Prison, Jail Phone Reforms*, PRISON LEGAL NEWS (Oct. 3, 2016), <https://www.prisonlegalnews.org/news/2016/oct/3/alabama-public-service-commission-enacts-prison-jail-phone-reforms/>.

64. See, e.g., *The Communications Act of 1934*, 47 U.S.C. § 151 et seq., OFFICE FOR C.R. & C.L., <https://it.ojp.gov/privacyliberty/authorities/statutes/1288> (last revised Nov. 17, 2013).

65. Rates for Interstate Inmate Calling Services, 78 Fed. Reg. 67,956, 67,958 (adopted Aug. 9, 2013) (to be codified at 47 C.F.R. Pt. 64). 47 U.S.C.A. § 151 (2021). *Id.* § 201(b).

66. Rates for Interstate Inmate Calling Services, 78 Fed. Reg. 67,956, 67,956. 47 U.S.C.A. § 151. *Id.* § 201(b).

67. See, e.g., *New England Pub. Comm'ns. Council v. FCC*, 334 F.3d 69, 75 (D.C. Cir. 2003) (citing 47 U.S.C. § 152(b)).

communication.⁶⁸ Specifically, Congress commanded the FCC to take action “to promote competition among payphone service providers” including “inmate telephone service in correctional institutions, and any ancillary services.”⁶⁹

Despite this legislative mandate, the Commission did not take any meaningful action on the cost of prison phone calls. In fact, the Commission only acted on the issue because of a nearly decade-long campaign by advocates and families of incarcerated people.⁷⁰ In 2000, a group of incarcerated people and their families filed a lawsuit against a private prison operator and a group of prison telecom corporations, alleging that the corporations signed exclusive contracts that led to unfair rates for telephone calls.⁷¹ The named plaintiff in that case, Martha Wright-Reed, was a 74-year-old Black woman who had spent nearly \$1,000 a year paying for phone calls with her incarcerated grandson.⁷² Although the federal judge hearing the case acknowledged that her case might have merit, she ultimately decided that the FCC had primary jurisdiction over the matter and referred the case to the Commission.⁷³ The FCC was silent on the issue for over a decade.⁷⁴

In 2012, the FCC issued its first significant rulemaking over the prison telephone industry.⁷⁵ After years of public pressure,⁷⁶ deliberation and rulemaking,⁷⁷ the FCC announced a set of sweeping reforms.⁷⁸ Most notably, the

68. Raheer, *supra* note 25 (discussing attempts by the industry to preempt state regulation using the newly passed Communications Act).

69. 47 U.S.C. § 276 (2018).

70. Statement of Acting Chairwoman Mignon Clyburn Re: Rates for Interstate Calling Services W.C. Docket No. 12-375 (on file at <https://docs.fcc.gov/public/attachments/DOC-322749A2.pdf>); see also Myaish Hayes, *Prison Phone Justice is a Gender Justice Issue: The Legacy of Mrs. Martha Wright-Reed* (Mar. 8, 2019), <https://mediajustice.org/news/prison-phone-justice-is-a-gender-justice-issue-the-legacy-of-mrs-martha-wright-reed/>.

71. *Wright v. Corrs. Corp. of America*, No. 00-293 (GK) (D.D.C. filed Oct. 8, 2003), <https://www.clearinghouse.net/chDocs/public/PC-DC-0019-0003.pdf>.

72. Justin Moyer, *After Almost a Decade, FCC Has Yet to Rule on High Cost of Prison Phone Calls*, WASHINGTON POST (Dec. 2, 2012), https://www.washingtonpost.com/opinions/after-almost-a-decade-fcc-has-yet-to-rule-on-high-cost-of-prison-phone-calls/2012/12/02/b11ea164-2daf-11e2-9ac2-1c61452669c3_story.html.

73. *Martha Wright v. Corrections Corporation of America (FCC Petition) Historic Case*, CTR. FOR CONST. HUMM. RTS., [hereinafter *Martha Wright*], <https://ccrjustice.org/home/what-we-do/our-cases/martha-wright-v-corrections-corporation-america-fcc-petition> (last updated July 6, 2009).

74. *Id.* See Case Timeline.

75. *FCC Takes Action Toward Fair Prison Phone Rates and Stronger Communities*, NATION INSIDE, <https://nationinside.org/campaign/campaign-for-prison-phone-justice/press/fcc-takes-action-toward-fair-prison-phone-rates-and-stronger-communities/>.

76. See, e.g., Case Timeline, *supra* note 74.

77. See, e.g., *id.* at 20; see also Raheer, *supra* note 25 (noting that the Commission waited nearly ten years to issue regulations).

78. Notice of Proposed Rule Making, Re: Rates for interstate rule making, (Dec. 24, 2012), <https://ecfsapi.fcc.gov/file/7022093344.pdf>; see also John Danneberg, *FF Order Heralds Hope for*

FCC announced a set of rate caps that would limit the cost of all local and long-distance calls from prisons at 11 cents per minute.⁷⁹ In addition, the FCC sought comment on a number of other planned reforms, like supplemental caps on hidden fees and secondary charges of calls.⁸⁰ These new rate caps would immediately ease the burden of paying for calls for countless incarcerated people and their networks.⁸¹ In some jurisdictions, the cost of a 15-minute call would drop from \$17 to just \$1.65.⁸²

Beyond the immediate savings to consumers, the FCC's regulations were a significant expansion of the agency's authority to regulate the industry. Interstate calls—calls from an incarcerated person in one state to a recipient in another state—constitute only a tiny fraction of the total number of calls from prisons and jails.⁸³ Local calls—those made and received within the same state—make up roughly 80% of calls.⁸⁴ So, beyond the dramatic cut in the cost of calls, these rate caps represented a significant change in the legal landscape of the prison telecom industry.

However, these rate caps were immediately challenged before they could go into effect.⁸⁵ The providers (along with several state and local corrections agencies) claimed that, by capping both local and long-distance calls, the FCC had overstepped its authority to regulate interstate communications.⁸⁶ While the

Reform of Prison Phone Industry (Dec. 14, 2013), <https://www.prisonlegalnews.org/news/2013/dec/15/fcc-order-heralds-hope-for-reform-of-prison-phone-industry/> (discussing reaction to the regulation).

79. Press Release, FCC, FCC Takes Next Big Steps in Reducing Inmate Calling Rates (Oct. 22, 2015), <https://www.fcc.gov/document/fcc-takes-next-big-steps-reducing-inmate-calling-rates>.

80. *Id.*

81. Beth Schwartzapfel, *The FCC Looks into the Prison Telephone Racket*, MARSHALL PROJECT (Oct. 22, 2015, 1:39 PM), <https://www.themarshallproject.org/2014/12/04/the-fcc-looks-into-the-prison-telephone-racket>.

82. *Id.*; FCC, Press Release, FCC Takes Next Big Steps In Reducing Inmate Calling Rates (Oct. 22, 2015), <https://www.fcc.gov/document/fcc-takes-next-big-steps-reducing-inmate-calling-rates>.

83. Federal Communications Commission Washington, Letter to President of NARUC (on file at <https://docs.fcc.gov/public/attachments/DOC-365619A1.pdf>) (discussing that 80% of calls are intrastate).

84. *Id.*

85. David Shepardson, *Court Blocks Immediate FCC Rate Cut for U.S. Prisoner Telephone Calls*, REUTERS (Mar. 7, 2016), <https://www.reuters.com/article/us-usa-telecoms-prison/court-blocks-immediate-fcc-rate-cut-for-u-s-prisoner-telephone-calls-idUSKCN0W92CK>.

86. See *Glob. Tel Link v. FCC*, 866 F.3d 397, 401–02 (D.C. Cir. 2017); see also Global Tel Link, *Global Tel Link Expresses Grave Concern with Proposed FCC Decision on Inmate Calling Services*, PR NEWSWIRE (Oct. 22, 2015), <https://www.prnewswire.com/news-releases/global-tellink-expresses-grave-concern-with-proposed-fcc-decision-on-inmate-calling-services-300164830.html> (condemning the regulations as “disastrously short-sighted”).

Commission initially aggressively defended the legality of these caps,⁸⁷ the agency's stance changed dramatically after the 2016 presidential election. Then President Donald J. Trump appointed Ajit Pai—a former lobbyist for the prison telecom industry⁸⁸ and vocal opponent of the FCC's previous regulations⁸⁹—as the Chairman of the FCC.⁹⁰ Within weeks of his appointment, the FCC announced that it would no longer defend the rate caps in court because “the current Commission does not believe that the agency has the authority” to implement them.⁹¹

Unsurprisingly, this move doomed the FCC's regulations. In 2017, the Court of Appeals for the D.C. Circuit struck down the caps on local phone calls and vacated many of the proposed reforms.⁹² The Court concluded that the FCC did not have the authority to impose rate caps on purely intrastate phone calls, even if they were unfairly priced.⁹³ After the *GTL* decision, Democrat legislators introduced several bills intended to explicitly grant the FCC authority over local phone calls.⁹⁴ These efforts gained renewed urgency in the movement due to both the pandemic and the surge of protests following the killings of George Floyd, Breonna Taylor, and other Black and Brown people in 2020.⁹⁵ To date, Congress has yet to pass any legislation specifically addressing the cost of calls for incarcerated people.⁹⁶

The *GTL* decision remains a significant hurdle for any FCC regulation today. Without the ability to regulate local calls, the FCC cannot touch the vast majority of

87. Shepardson, *supra* note 85 (quoting an FCC filing as saying that the regulations were a “firmly grounded exercise of the FCC's statutory authority”).

88. Carrie Wilkinson, *FCC Chairman Called Out on Conflict of Interest Concerning Prison Phone Company*, PRISON LEGAL NEWS (Aug. 30, 2017), <https://www.prisonlegalnews.org/news/2017/aug/30/fcc-chairman-called-out-conflict-interest-concerning-prison-phone-company/>.

89. *See, e.g.*, Rates for Interstate Inmate Calling Services, 30 FCC Rcd. 12,763, 12,960 (2015) (Comm'r Ajit Pai, dissenting); Rates for Interstate Inmate Calling Services, 28 FCC Rcd. 14,107, 14,218 (2013) (Comm'r Ajit Pai, dissenting).

90. Press Release, FCC, Statement of Ajit Pai on Being Designated FCC Chairman by President Trump (Jan. 23, 2017), <https://www.fcc.gov/document/statement-ajit-pai-being-designated-chairman-president-trump>.

91. *See Glob. Tel Link*, 866 F.3d at 406; *see also* Cecilia Kang, *Court Strikes Obama-Era Rule Capping Cost of Phone Calls from Prison*, N.Y. TIMES (June 13, 2017), <https://www.nytimes.com/2017/06/13/technology/fcc-prison-phone-calls-regulations.html> (noting that the agency switched positions after Pai became Chairman).

92. Cecilia Kang, *Court Strikes Obama-Era Rule Capping Cost of Phone Calls from Prison*, N.Y. TIMES (June 13, 2017), <https://www.nytimes.com/2017/06/13/technology/fcc-prison-phone-calls-regulations.html>; *see also Glob. Tel Link*, 866 F.3d at 403.

93. *Glob. Tel Link*, 866 F.3d at 410 (rejecting the “conclusion that § 276 authorizes the Commission to cap intrastate rates pursuant to ‘just, reasonable and fair’ ratemaking.”); NELSON ET AL., *supra* note 18, at 39.

94. S. 1764, 116th Cong. (2019).

95. Rachel M. Cohen, *Senators Push for Free Prison Calls in Next Coronavirus Relief Bill*, INTERCEPT (Aug. 7, 2020, 11:43 AM), <https://theintercept.com/2020/08/07/prison-phone-calls-coronavirus-relief-bill/> (noting that protests brought increased focus on conditions in jails and prisons).

96. *Id.* (discussing obstacles to the bill in congress).

the industry. In September 2020, the FCC announced that it was lowering the cost of long-distance calls, while reaffirming the Commission's belief in the validity of the *GTL* decision by calling on state regulators to take action on local calls.⁹⁷ However, after the 2020 election, it is possible that a new FCC Commissioner could renew the agency's efforts to extend its authority over all calls from correctional facilities.

Regulation at the state and local level remains inconsistent. Very few states have passed meaningful regulation of the industry.⁹⁸ A handful of states, like Illinois, have passed rate caps for calls from state prisons, while leaving the cost of calls from jails untouched.⁹⁹ In the past few years, some cities and counties have sought to lower the cost of calls as an issue of racial justice. For instance, New York City and San Francisco have all passed laws to provide free or low-cost calls to people in jail,¹⁰⁰ while Dallas renegotiated its contract to charge less than one cent per minute, after a campaign by activists.¹⁰¹

B. Prison Telecom Litigation

Like regulators and legislators, courts have also failed to exercise meaningful oversight over the prison telecom industry. A mix of statutes and common law ideas at the federal and state level create difficulties for plaintiffs attempting to hold the industry accountable in court. Judges have long declared that prison telecom corporations, unlike many other actors in correctional facilities, cannot be sued for constitutional violations, blocking the vast majority of claims.¹⁰² Federal law also

97. Rebecca Boone, *FCC Asks States to Lower the Cost of In-State Inmate Calls*, ASSOCIATED PRESS (Sept. 22, 2020), <https://apnews.com/article/ajit-pai-idaho-prisons-5dff229e977acc11c8926cb2f82fe713>.

98. Omari Sankofa II & Angie Jackson, *Detroit Pistons Owner Tom Gores Speaks About Controversy Over Securix*, DETROIT FREE PRESS (Feb. 6, 2021, 3:45 PM), <https://www.freep.com/story/sports/nba/pistons/2021/02/04/tom-gores-detroit-pistons-securix-prison-phone-calls/4139871001/> (noting that the industry is unregulated in Michigan); see also Timothy Williams, *The High Cost of Calling The Imprisoned*, N.Y. TIMES (Mar. 30, 2015), <https://www.nytimes.com/2015/03/31/us/steep-costs-of-inmate-phone-calls-are-under-scrutiny.html> (discussing how prison telecom is "largely unregulated").

99. See, e.g., Carrie Wilkinson, *Family Connections Bill Signed into Law in Illinois*, PRISON LEGAL NEWS (Sept. 2, 2016), <https://www.prisonlegalnews.org/news/2016/sep/2/family-connections-bill-signed-law-illinois/>.

100. Lauren Johnson, *New York is the First Major City to Allow Free Calls from Jail*, CNN (May 1, 2019), <https://www.cnn.com/2019/05/01/us/free-calls-from-jail-nyc-trnd/index.html>; Press Release, Office of the Mayor London N. Breed, San Francisco Announces All Phone Calls from County Jails Are Now Free (Aug. 10, 2020), <https://sfmayor.org/article/san-francisco-announces-all-phone-calls-county-jails-are-now-free>.

101. Steven Young, *Dallas County Drops Jail Phone Calls to \$.01 per Minute*, DALLAS OBSERVER (Feb. 19, 2020), <https://www.dallasobserver.com/news/dallas-countys-jail-phone-calls-now-among-cheapest-in-us-11873772>.

102. See discussion *supra* Section II.B.i.

does not create a viable cause of action, and FCC regulations do not create a cause of action either.¹⁰³ Although some plaintiffs have brought successful tort actions in state courts, these victories have been infrequent.¹⁰⁴ The result is that prison telecom corporations can act with impunity.

i. Litigation in Federal Courts and Why It Fails

Historically, advocates have not had much success using federal statutes to challenge the prison telecom industry.¹⁰⁵ There have been a few attempts to file suit under the Communications Act requirement that rates be “just and reasonable,” but judges have generally referred any challenge involving the cost of phone calls to the FCC, which has historically waited years before acting on the claims.¹⁰⁶ As a result, many suits brought under federal law are never even heard by a judge.

Federal law does technically allow people to file claims against prison telecom corporations, but other doctrines effectively limit their use. In theory, the Communications Act of 1934 provides consumers with a private right of action to sue telecom providers that do not provide “just and reasonable” telephone rates.¹⁰⁷ Indeed, the *Wright* plaintiffs brought claims under the Communications Act, in addition to other constitutional and anti-trust claims.¹⁰⁸

However, a set of common law doctrines prevents most of these suits from being heard in court, instead transferring them to the FCC. The first concept is the doctrine of primary jurisdiction, which allows a court to refer claims to an administrative agency if a claim falls within their area of expertise.¹⁰⁹ For instance, in the *Wright* case, the judge refused to hear the claims under the Communications Act because the FCC had primary jurisdiction over the review of the cost of

103. See discussion *supra* Section II.B.i.

104. See, e.g., Jon Reid, *Securus Won't Record California Prisoner Calls, Under Settlement*, BLOOMBERG LAW (June 17, 2020), <https://news.bloomberglaw.com/tech-and-telecom-law/securus-wont-record-california-prisoner-calls-under-settlement>.

105. See, e.g., *McNeil v. Glob. Tel-Link*, No. 3:15-cv-01243 2017 WL 5248377 (M.D. Pa. Nov. 13, 2017) (dismissing claim brought under Federal Communications Act); *Smith v. Securus Techs., Inc.*, 120 F. Supp. 3d 976, 88 (D. Minn. 2015) (dismissing claims brought under the Telephone Consumer Protection Act).

106. ARIEL NELSON, BRIAN HIGHSMITH, ALEX KORNYA, & STEPHEN RAHER, NATIONAL CONSUMER LAW CENTER COMMERCIALIZED (IN)JUSTICE LITIGATION GUIDE: APPLYING CONSUMER LAWS TO COMMERCIAL BAIL, PRISON RETAIL, AND PRIVATE DEBT COLLECTION 38–39 (2020), https://www.nclc.org/images/pdf/criminal-justice/WP_Litigation_Guide.pdf, (noting that the FCC waited ten years to act on the *Wright* Petition and has been “slow to issue new rules” afterwards).

107. 47 U.S.C. § 206 (stating that providers that violate the Act “shall be liable to the person or persons injured” for money damages); 47 U.S.C. § 207 (allowing individuals harmed by violations of the Act to bring suit in federal district court).

108. *Martha Wright v. Corrections Corporation of America*, CTR. FOR CONST. RIGHTS (Oct. 22, 2007), <https://ccrjustice.org/home/what-we-do/our-cases/martha-wright-v-corrections-corporation-america>.

109. Bryson Santaguida, *The Primary Jurisdiction Two-Step*, 74 U. CHI. L. REV. 1517 (2007).

interstate phone calls.¹¹⁰ The plaintiffs then had to navigate a years-long FCC mediation process that concluded without a settlement, before proceeding to file a petition for the FCC to issue new regulations.¹¹¹

A second common law idea, the filed rate doctrine, performs a similar function. Utility providers, including telephone companies, are required to submit their rates to government regulators, who are then responsible for ensuring that consumers actually pay the posted rate.¹¹² The filed rate doctrine prevents consumers from claiming that a rate is unreasonable if that rate is on file with a regulator.¹¹³ Although advocates have argued that the filed rate doctrine should not apply to prison telecom industry, courts continue to dismiss claims that challenge the reasonableness of telephone rates.¹¹⁴

ii. Constitutional Claims

Similarly, constitutional claims against prison telecom corporations at the federal level are usually unsuccessful. Although constitutional litigation is responsible for some dramatic reforms of the U.S. prison system, courts have largely rejected constitutional claims against prison telecom corporations.¹¹⁵ Most of these suits, brought under Section 1983, die at the hands of the “state actor” doctrine.¹¹⁶ Further, many judges have simply concluded that there is no constitutional right to telephone calls.¹¹⁷ As a result, successful constitutional litigation against prison telecom corporations is basically non-existent.

110. Ben Iddings, *Big Disconnect: Will Anyone Answer the Call to Lower Excessive Prisoner Telephone Rates*, 8 N.C. J.L. & TECH. 159, 191 (2006).

111. *Martha Wright*, *supra* note 73.

112. *See* *Am. Tel. & Tel. Co. v. Cent. Office Tel.*, 524 U.S. 214, 22 (1998) (internal citations omitted).

113. NELSON ET AL., *supra* note 17, at 66 (citing *Carlin v. DairyAmerica, Inc.*, 705 F.3d 856, 867 (9th Cir. 2013)) (“At its most basic, the filed-rate doctrine provides that state law, and some federal law (e.g. antitrust law), may not be used to invalidate a filed-rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question.”).

114. *See, e.g.*, *Alexander v. Glob. Tel Link Corp.*, No. 3:17cv560-LG-RHW, 2019 U.S. Dist. LEXIS 147303, at *16 (S.D. Miss. Mar. 29, 2019).

115. *See, e.g.*, Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 662 (1993), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3602&context=penn_law_review (concluding that litigation has led to “standards of minimally adequate treatment” of incarcerated people).

116. *See, e.g.*, *Montgomery v. Securus Techs.*, No. 3:19-CV-00433-GNS-RSE, 2020 WL 3343000, at *7 (W.D. Ky. June 18, 2020) (concluding that prison telecom providers are not state actors under Section 1983); *Pierce v. Kalamazoo Cty. Jail*, No. 1:14-CV-684, 2014 WL 5599693, at *2 (W.D. Mich. Nov. 3, 2014 (same)); *Breland v. Evercom Sys.*, No. 7:09-CV-60-HL, 2009 WL 1490488, at *1 (M.D. Ga. May 27, 2009) (same).

117. *See, e.g.*, *Combs v. Stevens*, No. 1:16CV9 RLW, at *4 (E.D. Mo. Jan. 27, 2016) (“Plaintiff’s claim that he was denied free phone calls does not state a plausible claim under § 1983 because inmates

Constitutional litigation is particularly important for people behind bars. By turning to federal courts, incarcerated people and advocates have won court orders that lead to significant changes in the legal landscape for incarcerated people.¹¹⁸ Some victories have led to significant tools for incarcerated people to expose the inhumane conditions, like *Bivens*, which opened the door to federal claims for money damages against certain types of officials.¹¹⁹ Other lawsuits have led to symbolic statements of the human rights of incarcerated people, like the Supreme Court's decision in *Estelle v. Gamble*, now a fundamental piece of the Supreme Court's 8th Amendment jurisprudence and the prisoners' rights movement alike.¹²⁰

Unsurprisingly, the vast majority of lawsuits filed by incarcerated people are based on constitutional claims.¹²¹ Constitutional claims have historically been one of the most common— if still immensely difficult and time consuming— avenues to receive money damages for rights violations.¹²² In addition, legal advocates often produce materials that focus on constitutional claims above statutory or state-level remedies.¹²³ Presumably, these materials are easier to standardize to a broader audience and simpler to explain than complex state statutes and causes of action.

Perhaps because of these materials, many incarcerated people have attempted to file constitutional claims against prison telecom corporations or against correctional agencies that work with them.¹²⁴ These have almost been uniformly unsuccessful.¹²⁵ In fact, the vast majority of them are dismissed at the screening stage that every incarcerated plaintiff must overcome before they can even make it into federal court.¹²⁶

do not have a constitutional right to free phone calls.”); *Sensabaugh v. Poff*, No. 7:10-cv-00482, at *2 (W.D. Va. Nov. 1, 2010) (“Plaintiff’s complaint must be dismissed as frivolous because he does not have a constitutional right to make free calls.”).

118. See, e.g., Susan P. Sturm, *The Legacy and Future of Corrections Litigation*, 142 U. PA. L. REV. 639, 662 (1993) (concluding that litigation has led to “standards of minimally adequate treatment” of incarcerated people).

119. See, e.g., James E. Pfander, *The Story of Bivens v. Six Unknown-Named Agents of the Federal Bureau of Narcotics* (Nw. Univ. Sch. of L., Faculty Working Paper No. 189, 2009), <https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1188&context=facultyworkingpapers>.

120. See, e.g., Jonathan Rosenfeld, *The Origin of Prisoner’s Rights: Estelle v. Gamble* 429 U.S. 97; 75-929 (1976), NAT’L L. REV. (Sept. 16, 2016).

121. See Margo Schlanger, *Inmate Litigation*, 116 HARV. L. REV. 1555, 1575 (2003) (explaining that incarcerated people file federal civil suits thirty-five times more frequently than the general population).

122. *Id.* at 1573 n. 52.

123. See, e.g., CTR. FOR CONSTITUTIONAL RIGHTS & NAT’L LAWYERS GUILD, *THE JAILHOUSE LAWYER’S HANDBOOK: HOW TO BRING A FEDERAL LAWSUIT TO CHALLENGE VIOLATIONS OF YOUR RIGHTS IN PRISON* (5th Ed. 2010), https://ccrjustice.org/files/Report_JailHouseLawyersHandbook.pdf.

124. See, e.g., *Henneberg v. Securus Corr. Servs.*, No. 20-cv-00223-JPG, 2020 WL 4365472, at *1 (S.D. Ill. Jul. 30, 2020).

125. See Rosenfeld, *supra* note 120.

126. See, e.g., *McNeil v. Glob. Tel-Link*, No. 3:15-cv-01243, 2017 WL 5248377, at *1 (M.D. Pa. Nov. 9, 2018).

IV. THE STATE ACTION DOCTRINE: WHY CONSTITUTIONAL CLAIMS FAIL

Federal judges have dismissed these claims for two key reasons. First, many have concluded that private telecom corporations cannot be sued in constitutional suits because they are not state actors. Second, even when suits are allowed to proceed, judges have quickly concluded that there is no constitutional right to cheap telephone calls.

Most incarcerated people that file lawsuits do so bring suits in federal court.¹²⁷ Many of these claims are “Section 1983” claims,¹²⁸ which allow people to win money damages for claims of federal rights violations perpetuated by state actors.¹²⁹ These claims are usually said to have two elements: first, there must be a deprivation of a right created by the Constitution or another federal law, and second, the deprivation must be made under color of state law.¹³⁰ This second element usually poses the problem for people trying to sue prison telecom corporations.

To date, the Supreme Court has repeatedly interpreted the Fourteenth Amendment’s Due Process Clause to protect against constitutional infringements by state actors.¹³¹ On the other hand, the Court has generally refused to extend this protection against so-called “private conduct, no matter how discriminatory or wrongful.”¹³² However, private parties can find themselves liable for constitutional violations if the rights violations are “fairly attributable to the State” because the private party is acting while “clothed with the authority of state law.”¹³³

Even by Supreme Court standards, the Court’s decisions on this issue have been particularly vague and, at times, contradictory.¹³⁴ As a result, circuit courts have relied on a number of different tests to determine what constitutes state action. In general, however, courts apply four tests: the state compulsion test, the public function test, the nexus test, and the joint action test.¹³⁵

127. See Schlanger, *supra* note 121, at 1573 n.52 (estimating that about 25% of lawsuits filed by incarcerated people are in state court).

128. See Taylor Van Hove, *Fraud, Mistake and, Section 1983 Prison Claims: Why the Federal Rules of Civil Procedure and Section Should Be Amended to Require Heightened Pleading for Section 1983 Inmate Litigation*, 65 DEPAUL L. REV. 213, 228 n.149 (2016).

129. 42 U.S.C. § 1983.

130. See generally Jack M. Beermann, *Common Law Elements of the Section 1983 Action*, 72 CHI.-KENT L. REV. 695 (1997).

131. See, e.g., *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 49–50 (1999).

132. *Id.* at 50.

133. See *Polk County v. Dodson*, 454 U.S. 312, 317–18 (1981) (citations omitted).

134. See Martin A. Schwartz & Erwin Chemerinsky, *Dialogue on State Action*, 16 *TOURO C. L. REV.* 775, 80 (2016) (identifying “inconsistencies in the decisions that the Supreme Court has never resolved”); see also *Lebron v. Nat’l R.R. Passenger Corp.*, 513 US 374, 378 (1995).

135. Schwartz & Chemerinsky, *supra* note 134, at 798; David M. Howard, *Rethinking State Inaction: An In-Depth Look at the State Action Doctrine in State and Lower Federal Courts*, 16 *CONN. PUB. INT. L.J.* 221, 227 (2017).

The state compulsion test finds state action if a state law or policy requires a private party to undertake a certain action.¹³⁶ Significantly, courts have concluded that compulsion requires an “significant encouragement,” beyond a private party complying with a state regulatory scheme, no matter how detailed.¹³⁷ Rather, the state must compel the private party to take a certain action, not just react to their actions.¹³⁸ For instance, in *Blum v. Yaretsky*, the Supreme Court held that there was no state action when New York lowered Medicaid benefits for nursing home residents that were transferred to lower levels of care.¹³⁹ In the Court’s view, there was no compulsion because the state merely adjusted the benefits in response to the decision of the residents’ physicians—who were private parties.¹⁴⁰

Another potential test is the public function test, which asks whether a private party performing a function that is “traditionally and exclusively” reserved to the state.¹⁴¹ Although this test would appear to encompass a wide range of government functions that, under a common sense view, are traditional and exclusive, the Supreme Court has repeatedly sought to limit this category.¹⁴² In the prison context, this narrow focus has led to head-scratching decisions by circuit courts that rely on strained dives into historical records. For instance, in *Holly v. Scott*, the Fourth Circuit declared that “the operation of prisons is not a ‘public function,’” citing examples of private individuals operating prisons in the 19th century.¹⁴³

The third option, the nexus test, seeks to determine whether there is a “sufficiently close nexus” between a private party and the state, such that the private party’s actions can be considered state actions.¹⁴⁴ Some circuit courts consider a fourth test, the joint participant test, that asks whether state and the private parties are so interdependent that they should be recognized as “joint participant[s]” in the alleged rights violation.¹⁴⁵ Like the state compulsion test, this test requires courts to embark on a highly fact-specific “totality of the

136. *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982); Howard, *supra* note 135, at 232; Julie K. Brown, *Less Is More: Decluttering the State Action Doctrine*, 73 MO. L. REV. 561, 565 (2008).

137. *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (concluding that the “mere fact that a business is subject to state regulation does not by itself convert its action into that of the State,” even if the regulation is “extensive and detailed”).

138. Barba Rook Snyder, *Private Motivation, State Action, and the Allocation of Responsibility for Fourteenth Amendment Violations*, 75 CORNELL L. REV. 1053, 1065 (1990).

139. *Blum*, 457 U.S. at 1011.

140. Megan M. Cooper, Note, *Dusting Off the Old Play Book: How the Supreme Court Disregarded the Blum Trilogy, Returned to Theories of the Past, and Found State Action through Entwinement in Brentwood Academy v. Tennessee Secondary School Athletic Ass’n*, 35 CREIGHTON L. REV. 913, 945 (2001).

141. See Brown, *supra* note 136, at 565; see also *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522 (1987).

142. See Brown, *supra* note 136, at 565.

143. *Holly v. Scott*, 434 F.3d 287, 293 (4th Cir. 2006); see also *Richardson v. McKnight*, 521 U.S. 399, 405 (1997).

144. Howard, *supra* note 135, at 230.

145. See, e.g., *Gorenc v. Salt River Project Agric. Improvement & Power Dist.*, 869 F.2d 503, 507 (9th Cir. 1989) (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)).

circumstances” analysis.¹⁴⁶ For instance, in *West v. Atkins*, the Supreme Court held that a contract physician working in a state prison was a state actor because the state had authorized him to be the exclusive provider of medical care to incarcerated people.¹⁴⁷ The *West* court noted that the physician’s contract or nature of his employment was irrelevant—it is the function that is key.¹⁴⁸

Many Section 1983 suits brought against prison telecom corporations have been dismissed under the “state actor” doctrine.¹⁴⁹ Many of these lawsuits are filed pro se by incarcerated people without the help of an attorney.¹⁵⁰ Although judges ostensibly provide more leeway to pro se plaintiffs,¹⁵¹ they have repeatedly dismissed cases against prison telecom corporations at the earliest stage for a failure to provide a detailed analysis of the state actor doctrine.¹⁵² These dismissals show why this doctrine, above all else, is the fundamental obstacle to constitutional litigation against the prison telecom industry.

These claims have been dismissed, even when they have alleged seemingly clear-cut instances of unfair or illegal behavior on the part of the corporations. In *Brooks v. Securustech.net*, an incarcerated person attempted to sue corrections officials in Suffolk County, New York, as well as Securus, the jail’s telecom vendor.¹⁵³ According to the complaint, Securus charged rates as high as \$5.00 for a 15 minute phone call, frequently disconnected callers before their time was up, and charged “outrageous” fees.¹⁵⁴ The plaintiff alleged a number of different constitutional claims.¹⁵⁵ First, the complaint claimed that, as a result of the costs, people had no contact with the outside world, in violation of the Eighth Amendment.¹⁵⁶ The complaint also alleged that the dropped calls and flawed system violated the due process rights of pre-trial detainees by preventing them from preparing an adequate defense with their attorneys.¹⁵⁷

Applying the “nexus” test for state action, a federal judge dismissed the case with prejudice.¹⁵⁸ The judge simply noted that Securus was a privately-held

146. Howard, *supra* note 135, at 229.

147. *West v. Atkins*, 487 U.S. 42, 55 (1988).

148. *Id.* at 56.

149. *See Montgomery*, 2020 WL 3343000, at *7 (collecting cases) (citations omitted).

150. *See, e.g., Lockridge v. Sumner Cnty. Jail*, No. 3:18-cv-01364, 2019 WL 1028002, at *4 (M.D. Tenn. Mar. 4, 2019) (dismissing case filed pro se); *Breland v. Evercom System, Inc.*, No. 7:09-cv-60, 2009 WL 1490488, at *1 (M.D. Ga. May 27, 2009) (dismissing case filed pro se).

151. *See generally Haines v. Kerner*, 404 U.S. 519, 520 (1972).

152. *See, e.g., Montgomery*, 2020 WL 3343000, at *4 (listing cases).

153. *Brooks v. Securustech.net*, No. 13-CV-4646(JS)(AKT), 2014 WL 737683, at *1 (E.D.N.Y. Feb. 24, 2014).

154. *Id.* at *2–3.

155. *Id.*

156. *Id.* at *2.

157. *Id.* at *2–3.

158. *Id.* at 15, 19.

corporation, citing business information on the company's website.¹⁵⁹ The court then concluded that, as a private corporation, Securus was not a state actor, even if it had a contract with Suffolk County or was regulated by the state.¹⁶⁰ This decision, with its bare reasoning and failure to actually explore the facts of the case, is emblematic of the caselaw in this area.

V. WHY PRISON TELECOM CORPORATIONS SHOULD BE CONSIDERED STATE ACTORS

However, these decisions are legally flawed and rely on many different faulty assumptions about how the prison telecom industry works. Even under the Supreme Court's existing murky definition of the term, prison telecom corporations qualify as state actors. The decisions in these cases demonstrate that federal judges are just as susceptible to being fooled by corporate talking points as anyone else. In reality, the prison telecom industry is deeply enmeshed with correctional agencies.

A. Prison telecom corporations assist law enforcement agencies with prosecution and rights violations by recording phone calls, performing biometric surveillance, and phone tapping attorneys.

Prison telecom corporations are not neutral vendors that merely provide a utility to the state. In reality, they wield an enormously powerful set of surveillance technology that law enforcement officials have frequently used to support the prosecution of criminal defendants and punish incarcerated people. And—unsurprisingly, given the complete lack of industry oversight—prison telecom corporations have repeatedly used these tools to violate the constitutional rights of incarcerated people and their families. In effect, they have become an arm of law enforcement.

Prison telecom corporations have recently begun to offer recording and monitoring as part of their telephone services. For instance, Securus' "Secure Call Platform" claims to monitor every single call made from a correctional agency to outside parties.¹⁶¹ These recordings are then stored on a server, where law enforcement officials can access them.¹⁶² Police officers and detectives can use these recordings as vital pieces of evidence in criminal investigations and prosecutions of both the caller and recipient of these calls.¹⁶³ Through these tools,

159. *Brooks*, 2014 WL 737683, at *15 n.5.

160. *Id.* at *16.

161. Jordan Smith & Micah Lee, *Not So Securus*, INTERCEPT (Nov. 11, 2015, 10:43 AM), <https://theintercept.com/2015/11/11/securus-hack-prison-phone-company-exposes-thousands-of-calls-lawyers-and-clients/>.

162. See Jennifer Valentino-DeVries, *Service Meant to Monitor Inmates' Calls Could Track You, Too*, N.Y. TIMES (May 10, 2018), <https://www.nytimes.com/2018/05/10/technology/cellphone-tracking-law-enforcement.html>.

163. See, e.g., *People v. Anderson*, 2020 Ill. App Ct. 3d 180458-U, ¶¶ 30–32, 44 (Ill. App. Ct. Sept. 10, 2020) (upholding conviction based on introduction of recorded jail phone calls).

prison telecom corporations have enmeshed themselves into one of the quintessential government functions: prosecuting and incarcerating people accused of crimes.¹⁶⁴

Prison telecom corporations like Securus have also repeatedly recorded privileged and confidential conversations between incarcerated individuals and their attorneys—and have also provided this ostensibly confidential material to prosecutors.¹⁶⁵ Securus alone has paid millions of dollars in settlements and fines to settle these allegations,¹⁶⁶ which the corporation claims occurred as a result of a software glitch. But the frequency with which these recordings occurred — thousands of calls across many different states¹⁶⁷— belies any claim that this an innocent mistake. When viewed as a whole, it suggests that the industry plays a crucial role in systemic rights violations that may have impacted countless criminal cases.

The industry also provides surveillance tools that provide warrantless surveillance of anyone who receives a call from an incarcerated person. Securus, through a deal with major cellphone carriers, allowed law enforcement officials to track the locations of any cellphone that received a call from a correctional agency.¹⁶⁸ Securus provided this information to any officer that claimed to have a warrant and did not actually verify the legality of these searches.¹⁶⁹ In early 2020, the Federal Communications Commission proposed \$200 million in fines for

164. See Daniel Rudofsky, *Modern State Action Doctrine in The Age of Big Data*, 71 N.Y.U. ANN. SURV. AM. L. 741, 754 (2017), https://annualsurveyofamericanlaw.org/wp-content/uploads/2017/04/71-4_rudofsky.pdf; *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1140 (9th Cir. 2012) (finding state action where police delegated authority to private security to detain individuals, issue citations, and access police records); see also *Lusby v. T.G. & Y. Stores*, 749 F.2d 1423, 1430 (10th Cir. 1984) (finding state action where private security was given authority to make arrests and “substitute his judgment for that of the police”).

165. Tonya Riley, *A Private Prison Company Gave 1,300 Recordings of Confidential Inmate Phone Calls to Prosecutors*, MOTHER JONES (June 8, 2018), <https://www.motherjones.com/crime-justice/2018/06/securus-corecivic-kansas-prison-phone-calls/>.

166. See, e.g., Maeve Allsup, *Inmates, Attorneys Settle California Prison Call Recording Suit*, BLOOMBERG L. (June 17, 2020), <https://news.bloomberglaw.com/us-law-week/inmates-attorneys-settle-california-prison-call-recording-suit>.

167. Riley, *supra* note 165; Tim Cushing, *Another Prison Phone Service Caught Recording Privileged Conversations and Passing Them on to Law Enforcement*, TECHDIRT (Aug. 24, 2018), <https://www.techdirt.com/articles/20180822/08151040483/another-prison-phone-service-caught-recording-privileged-conversations-passing-them-to-law-enforcement.shtml>; Jordan Smith, *Securus Settles Lawsuit Alleging Improper Recording of Privileged Prisoner Calls*, PRISON LEGAL NEWS (Sept. 2, 2016), <https://www.prisonlegalnews.org/news/2016/sep/2/securus-settles-lawsuit-alleging-improper-recording-privileged-prisoner-calls/>.

168. Valentino-DeVries, *supra* note 162.

169. Valentino-DeVries, *supra* note 162 (quoting a letter written by Senator Ron Wyden as saying that “Securus confirmed that it did not ‘conduct any review of surveillance requests’”).

cellphone carriers' role in the scheme, but Securus escaped without a scratch.¹⁷⁰ And what's more, there has been no accounting of how many people had their rights casually violated by the industry.¹⁷¹

Finally, the industry also expanded into Orwellian surveillance of people's voices. Using technology developed using Department of Defense funds, the industry has developed tools to create a "voice print" of anyone using a correctional telephone system.¹⁷² In states like New York, nearly every incarcerated person is forced to submit to this biometric surveillance in order to access the phones.¹⁷³ Telecom corporations provide this data to law enforcement officials, who retain voice prints even after people are released from incarceration.¹⁷⁴ Even worse, this biometric surveillance is also turned against people who simply receive calls from an incarcerated loved one, without a warrant or even a suspicion that they are involved in criminal activity.¹⁷⁵

This mass surveillance alone puts telecom providers into the realm of a state action. By flagging "suspicious" calls, collecting evidence of supported wrongdoing, and organizing it for detectives, prison telecom corporations are engaging in much of the day-to-day work of law enforcement. In some respects, it even appears that correctional officials are simply outsourcing law enforcement to private vendors. By acting as law enforcement—a quintessential public function—prison telecom corporations have become state actors. Further the joint nature of the information sharing, where corrections officers can freely access information surreptitiously gathered by private corporations, suggests a further degree of state action.

170. Jon Brodtkin, *FCC Issues Wrist-Slap Fines to Carriers that Sold your Phone-Location Data*, ARSTECHNICA (Feb. 28, 2020, 3:06 PM), <https://arstechnica.com/tech-policy/2020/02/fcc-issues-wrist-slap-fines-to-carriers-that-sold-your-phone-location-data/>.

171. Statement of Commissioner Geoffrey Starks Approving in Part and Dissenting in Part, *AT&T Inc.*, FCC 20-26, No. EB-TCD-18-00027704 (Feb. 28, 2020), <https://docs.fcc.gov/public/attachments/FCC-20-26A5.pdf> (noting that, even after the investigation "the Commission still has no idea how many consumers' data was mishandled by each of the carriers").

172. David Grossman, *Prisons Are Building Giant Biometric Databases of Prisoners' Voices*, POPULAR MECHANICS (Feb. 1, 2019), <https://www.popularmechanics.com/technology/security/a26112865/us-biometric-voice-archives-prisoners/>.

173. George Joseph & Debbie Nathan, *Prisons Across the U.S. Are Quietly Building Databases of Incarcerated People's Voice Prints*, INTERCEPT (Jan. 30, 2019, 9:00 AM), <https://theintercept.com/2019/01/30/prison-voice-prints-databases-securus/>.

174. George Joseph & Debbie Nathan, *Prison Tech Company Is Questioned for Retaining 'Voice Prints' of People Presumed Innocent*, APPEAL (Feb. 12, 2019) <https://theappeal.org/jails-across-the-u-s-are-extracting-the-voice-prints-of-people-presumed-innocent/> (finding recordings can be stored of individuals "even if charges are dropped or they are found not guilty"); Worth Rises *supra* note 15, at 46 (discussing how a "person's voice print lives long beyond their incarceration").

175. Joseph & Nathan, *supra* note 174.

B. Prison telecom corporations shape corrections policies and regulations through bidding, lobbying, and influence.

While corrections agencies set contract terms through request for proposals (RFPs),¹⁷⁶ the prison telecom industry is not a passive vendor of services that simply acquiesces to government requests.¹⁷⁷ Rather, corporations have taken an increasingly influential role in dictating correctional policy. The industry exercises its power throughout the bidding process and contractual negotiations,¹⁷⁸ as well as through direct lobbying,¹⁷⁹ and informal influence.¹⁸⁰ In the past few years alone, the industry has succeeded in persuading corrections officials in adopting policies that drive more revenue to corporations, at an immense cost to the people forced to use their products: incarcerated people and their families.¹⁸¹

Prison telecom corporations have used contract negotiations to demand that corrections agencies implement sweeping changes to their policies. The most dramatic example of this can be seen in video calls, an increasingly important source of revenue for prison telecom corporations.¹⁸² The industry first rebranded video calls as “video visitation,” seeking to push the service—comparable to a stripped down version of Skype or Zoom—as a replacement for in person visits at

176. See generally Peter Wagner & Alexi Jones, *Best Practices for Phone RFPs*, PRISON POL’Y INITIATIVE (Jan. 14, 2021), https://www.prisonpolicy.org/phones/rfp_guidance.html.

177. Peter Wagner & Alexi Jones, *State of Phone Justice*, PRISON POL’Y INITIATIVE (Feb. 2019), https://www.prisonpolicy.org/phones/state_of_phone_justice.html (discussing “bundled contracts,” where providers offer phone service combined with other tools to “hid[e] the real costs of each service” and “make[] it more difficult for the facility to change vendors in the future”).

178. See, e.g., Bianca Tylek & Connor McCleskey, *This Call May be Monopolized and Recorded*, MARSHALL PROJECT (July 11, 2018) <https://www.themarshallproject.org/2018/07/11/this-call-may-be-monopolized-and-recorded>.

179. See *Private Prison Phone Companies Lobbied for Criminalization of Cell Phones in Prisons*, EQUAL JUST. INITIATIVE (Feb. 8, 2016), <https://eji.org/news/private-companies-lobbied-to-criminalize-cell-phones-in-prisons/>.

180. For instance, LEO Technologies, a telecom corporation that creates call-monitoring technology, appointed the former head of the California Department of Corrections and Rehabilitation (CDCR) as President and CEO just weeks after he retired from his position at CDCR. See Press Release, LEO Technologies Names Former California Department of Corrections Secretary as President and CEO, LEO Techs (Sept. 10, 2019), <https://leotechnologies.com/leo-technologies-names-ceo/>; Press Release, CDCR Secretary Scott Kernan Retiring, New Leadership Team Announced, Cal. Dept. of Corrs. and Rehab. (Aug. 14, 2018), <https://www.cdcr.ca.gov/news/2018/08/14/cdcr-secretary-scott-kernan-retiring-new-leadership-team-announced/>.

181. See, e.g., Worth Rises, *supra* note 15, at 49 (describing “burgeoning products” with “exorbitant price tags” that prison telecom corporations have marketed in the past decade).

182. Nicole Lewis & Beatrix Lockwood, *Can You Hear Me Now?*, MARSHALL PROJECT (Dec. 19, 2019), <https://www.themarshallproject.org/2019/12/19/can-you-hear-me-now>

facilities.¹⁸³ Then, for years, corporations like Securus actually required facilities to end in person visits altogether as part of their contracts.¹⁸⁴

By inserting these clauses into its contracts, Securus used its market power to dramatically curtail incarcerated individuals access to their loved ones. Although Securus never accepted responsibility for the practice, advocates found that as many as 70% of Securus contracts, covering hundreds of facilities, had contained clauses like “Customer will eliminate all face to face visitation.”¹⁸⁵ And corrections agencies agreed, in exchange for a cut of the revenue generated by these new “video visits.”¹⁸⁶ The practice only ended in 2015, after widespread outrage forced the corporation to backtrack.¹⁸⁷ Even when corporations do not force facilities to end in-person visits, nearly three-quarters of facilities with video calling decrease in person visitation.¹⁸⁸

Through these restrictions, the industry is able to influence the day-to-day operation of prisons and jails, affecting something as essential as human contact for incarcerated individuals. And, while there is no constitutional right to in-person visits, courts have repeatedly found that state regulations around visitation can create a liberty interest for people affected by them.¹⁸⁹ Thus, the industry’s practices during contract negotiations could have potentially led corrections agencies to violate the due process rights of incarcerated people. Beyond the industry’s power in contractual negotiations, corporations also benefit from a revolving door between corrections agencies and the private sector. Most notably, Ajit Pai, the former chairman of the FCC, represented Securus as a lobbyist in 2011.¹⁹⁰ Then, just a year later, he was appointed as a Commissioner of the FCC.¹⁹¹ Throughout his tenure, Pai’s FCC repeatedly implemented policies that benefitted

183. See generally Patrice A. Fulcher, *The Double-Edged Sword of Prison Video Visitation: Claiming to Keep Families Together While Furthering the Aims of the Prison Industrial Complex*, 9 Fl. A&M U.L. REV. 83, 92 (2013).

184. Bernadette Rabuy, *Securus Ends its Ban on In-Person Visits, Shifts Responsibility to Sheriffs*, PRISON POL’Y INITIATIVE (May 6, 2015), <https://www.prisonpolicy.org/blog/2015/05/06/securus-ends-ban/>.

185. *Id.*

186. See Bernadette Rabuy & Peter Wagner, *Screening Out Family Time*, PRISON POL’Y INITIATIVE 14 (Jan. 2015), https://static.prisonpolicy.org/visitation/ScreeningOutFamilyTime_January2015.pdf (listing different commission rates for major providers).

187. *Securus Ends its Ban on In-Person Visits, Shifts Responsibility to Sheriffs*, PRISON POL’Y INITIATIVE (May 6, 2015) <https://www.prisonpolicy.org/blog/2015/05/06/securus-ends-ban/>.

188. Debra Cassens Weiss, *Another Jail Eliminates In-Person Visits and Adopts 50-Cent-a-Minute Video Visitation*, ABA J. (July 24, 2018), https://www.abajournal.com/news/article/another_jail_elimimates_free_in_person_visits_and_adopts_video_visitation.

189. See, e.g., *Patchette v. Nix*, 952 F.2d 158 (8th Cir. 1991).

190. Jon Brodtkin, *Ajit Pai Accused of Conflict for Helping Former Client, a Prison Phone Company*, ARSTECHNICA (Aug. 10, 2017, 2:35 PM), <https://arstechnica.com/information-technology/2017/08/ajit-pai-accused-of-conflict-for-helping-former-client-a-prison-phone-company/>.

191. *Id.*

the industry. In fact, one of his first actions as Commissioner was to refuse to defend the agency's prison telephone rate caps in court—effectively dooming a landmark piece of regulation that advocates had pushed for over decades.¹⁹² Although Pai would later issue a number of decisions that protected consumers against monopolization within the industry,¹⁹³ the appearance of influence had already been done.

Through contract negotiations and a revolving door of lobbyists, the industry exerts a significant degree of influence over corrections agencies. Under any test, a private corporation should qualify as a state actor if it were effectively setting policies and regulations, like Securus did for years.¹⁹⁴ Further, this saga gives the appearance that both corporations and government agencies worked hand in hand to decrease visitation for incarcerated people in order to drive up revenue from commissions. Either way, the line between state and corporation has become further blurred.

C. Prison telecom corporations return money extracted from incarcerated people and their families to corrections agencies, funding vital government functions.

Prison telecom corporations most directly support correctional agencies by providing them with revenue generated from telephone calls through a contractual kickbacks called “commissions.”¹⁹⁵ These commissions are often the single deciding factor for agencies during the bidding process, and, in some facilities, corporations have offered corrections agencies up to 96% of the revenues generated from phone calls.¹⁹⁶ At such high rates, commission payments can add up to millions of dollars a year for many jurisdictions.¹⁹⁷ And, many smaller counties have come to rely on the money generated by prison phone calls to balance their budgets.¹⁹⁸ For instance, officials in Worcester, Massachusetts pushed back against proposed legislation to lower the cost of calls, claiming that, if the county could no longer

192. Jon Brodtkin, *Republican-Led FCC Drops Court Defense of Inmate Calling Rate Cap*, ARSTECHNICA (Feb. 1, 2017, 2:40 PM), <https://arstechnica.com/tech-policy/2017/02/republican-led-fcc-drops-court-defense-of-inmate-calling-rate-cap/>.

193. See David Shepardson, *Inmate Calling Services Companies Drop Merger Bid After U.S. Regulatory Opposition*, REUTERS (Apr. 2, 2019, 4:46 PM), <https://www.reuters.com/article/us-fcc-inmate-merger/inmate-calling-services-companies-drop-merger-bid-after-u-s-regulatory-opposition-idUSKCN1RE2L7>.

194. See *supra* discussion note 189.

195. Peter Wagner & Alexi Jones, *On Kickbacks and Commissions in the Prison and Jail Phone Market*, PRISON POL'Y INITIATIVE (Feb. 11, 2019), <https://www.prisonpolicy.org/blog/2019/02/11/kickbacks-and-commissions/>.

196. Letter from Lee G. Petro, Drinker Biddle & Reath LLP, to Marlene H. Dortch, Secretary, Federal Communications Commission (Aug. 16, 2014), <https://ecfsapi.fcc.gov/file/7521772298.pdf>.

197. Wagner, *On Kickbacks and Commissions*, *supra* note 4.

198. Sarah Betancourt, *Costly Connections*, COMMONWEALTH MAG. (July 28, 2020), <https://commonwealthmagazine.org/criminal-justice/costly-connections/>.

generate money from prison phone calls, they would have to cut funding for public mental health programs.¹⁹⁹

The prison telecom industry does not just dictate policy—it actually raises revenue for government agencies through commissions.²⁰⁰ These commissions, then, shift the burden of paying for essential state services onto incarcerated people and their families who have already been preyed upon by the state. It also adds an additional harm, as it makes other core government functions, like mental health services, dependent on the continued exploitation of the prison telephone market. This level of funding stretches far beyond just corrections agencies, turning the prison telecom industry into a reliable source of revenue for many jurisdictions.

D. Corrections agencies write contracts and requests for proposals that often direct every action of providers.

Although prison telecom corporations exercise enormous influence over the industry as a whole, corrections agencies control many aspects of the bidding process itself.²⁰¹ Like other correctional industries, agencies issue “requests for proposals” (commonly known as RFPs) that describe a set of services that a facility requires from a potential telecom vendor.²⁰² Then, the different prison telecom corporations bid against each other, often by competing to see who will offer the most commissions to the agency.²⁰³

But, in many jurisdictions, these RFPs lay out the exact terms of the services that the prison telecom corporations will provide to the facility, removing any discretion that the corporation may have.²⁰⁴ In these instances, corrections agencies are not so much as delegating the authority to a private party, they are simply outsourcing the actual operation of the system to a contractor. With such rigid requirements, the provision of prison telecom services is not just a purely private affair. It is a joint action between a state actor and a corporation such that both are state actors.

VI. LOOKING FORWARD TO A CONSTITUTIONAL RIGHT TO PHONE CALLS

Of course, the state actor requirement is just one requirement for constitutional suits.²⁰⁵ Even if courts properly recognized the immense power that

199. *Id.*

200. See Wagner, *On Kickbacks and Commissions*, *supra* note 4.

201. See, e.g., *Financing a Jail Supplies and Equipment Company*, COMMERCIAL CAPITAL, <https://www.comcapfactoring.com/blog/financing-a-jail-supplies-and-equipment-company/> (last visited July 13, 2021) (advising prospective contractors how to navigate the bidding process for different states).

202. *Id.*

203. See Stephen Rahe, *The Company Store and the Literally Captive Market: Consumer Law in Prisons and Jails*, 17 HASTINGS RACE & POVERTY L.J. 3, 13 (2020).

204. Peter Wagner & Alexi Jones, *Best Practices for Phones RFPs*, Prison Policy Initiative (Jan. 14, 2021), https://www.prisonpolicy.org/phones/rfp_guidance.html.

205. See Brooks, 2014 WL 737683, at *15, 19.

prison telecom corporations have within correctional facilities, incarcerated plaintiffs would still have to demonstrate some constitutional right to phone access. But, by refusing to hear most constitutional suits about the industry, courts have made it unlikely that plaintiffs can ever establish such a right.

Courts have so far declined to find a sweeping constitutional right to telephone access.²⁰⁶ The core issue for many of these decisions comes down to the Supreme Court's conclusion in *Turner v. Safley*, which held that correctional officials can infringe upon the constitutional rights of incarcerated people if they can show that it is "reasonably related to legitimate penological interests."²⁰⁷ This incredibly low bar means that many judges simply defer to any correctional policy.²⁰⁸ Several federal appellate courts, like the Ninth Circuit, have held that incarcerated people have at least some right to use the telephone, stemming from the First Amendment right to communicate with others.²⁰⁹ But, even where judges have accepted the right to communicate, no circuit court has gone so far as to say that there is a right to communicate at affordable rates.²¹⁰ And, to date, many courts have been consistently hostile—derisive, even—to the notion of a constitutional right to affordable phone calls.²¹¹

Like with the state actor doctrine, judges may be making these decisions without a full understanding of how important the telephone is for many incarcerated people and their families. But, in any event, the concept of a constitutional right to communicate with others has broad implications that stretches beyond just the fight for prison phone justice. The movement to end solitary confinement, for instance, bears a number of similarities to the fight for affordable phone calls in the courts. They both depend on a recognition of the right to human contact—a right that judges have so far declined to recognize.²¹²

VII. CONCLUSION

Prison telecom corporations' business is exploitation. And, unless there is drastic legislative reform of the entire industry, families will continue to be forced to choose between paying exorbitant rates for calls or being isolated from their incarcerated loved ones. In the absence of this reform, however, courts can step in to help end this exploitation. However, many judges fail to recognize the symbiotic

206. *See, e.g.,* *Arsberry v. Illinois*, 244 F.3d 558, 564–65 (7th Cir. 2001).

207. *Turner v. Safley*, 482 U.S. 78, 89 (1987).

208. *See id.*

209. *See, e.g.,* *Johnson v. California*, 207 F.3d 650, 656 (9th Cir. 2000).

210. *See, e.g.,* *Pope v. Hightower*, 101 F.3d 1382 (11th Cir. 1996) (reversing a lower court decision that phone call regulations violated the First Amendment).

211. Peter R. Schults, *Calling the Supreme Court: Prisoners' Constitutional Right To Telephone Use*, 92 B.U. L. REV. 369, 380–90 (2012).

212. Andrew Leon Hanna, *The Present Constitutional Status of Solitary Confinement*, 21 J. CONST. L. ONLINE 1, 6 (2019) (quoting Alexander A. Reinert, *Solitary Troubles*, 93 NOTRE DAME L. REV. 927, 957 (2018)) (noting that "the Constitution has played almost no role in substantively limiting [solitary confinement's] use").

nature of the industry and correctional agencies. As a result, plaintiffs do not have access to constitutional suits—a powerful tool of reform for incarcerated people over the past few decades. Recognizing that prison telecom corporations are state actors is just a small step—but it is a step towards ending this exploitation for good.