

# Behind Bars: The Urgency and Simplicity of Prison Phone Reform

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*It is well-established that the Federal Communications Commission is supposed to regulate telephone rates. Yet the agency is practically powerless to help prison inmates—perhaps the most vulnerable and desperate phone-users among us. In many states, inmates pay exorbitant rates to a handful of private-equity-backed telecom companies in order to maintain a connection with the outside world. The FCC finally attempted to regulate inmate calling toward the end of the Obama Administration, but the D.C. Circuit invalidated that order in *Global Tel\*Link v. FCC* (2017). With the Trump Administration unlikely to prioritize inmate calling, it is unclear what the best way forward is in the wake of the D.C. Circuit opinion. This Article hopes to answer that question. First, it summarizes the inmate calling issue as well as related topics like video visitation. Second, it provides a comprehensive round-up of the FCC's topsy-turvy regulatory history with respect to inmate calling. Third, it recommends that Congress update the Communications Act to ensure that inmates are treated fairly. This Article makes the case that high inmate calling rates are unnecessary and oppressive, and that Congress should act to correct this market and humanitarian failure.*

INTRODUCTION	205
I. MARKET FAILURE IN INMATE CALLING	208
A. <i>The Origins and Structure of the ICS Industry</i>	208
B. <i>How Excessive ICS Rates Impact Consumers</i>	211
C. <i>Other Prison-Related Issues in Telecommunications</i>	212
II. THE REGULATORY PENDULUM	213
A. <i>The FCC's Regulatory Authority</i>	213
B. <i>A Brief History of FCC Rulemaking</i>	214
1. <i>The 2013 Order</i>	216
2. <i>The 2015 Order</i>	217
3. <i>The 2016 Order</i>	218
C. <i>Justice Deferred in the D.C. Circuit</i>	219
III. LAW REFORM	223
A. <i>Why Congress Should Take Charge</i>	223
B. <i>Prison Phone Reform At The State Level</i>	226
C. <i>Potential Litigation Strategies</i>	227
CONCLUSION	228

## INTRODUCTION

When 20-year-old Ulandis Forte pled guilty to manslaughter in 1994 and was sentenced to spend years in prison, prison payphones became his

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best connection to the outside world.<sup>1</sup> Forte would collect call his grandmother, Martha Wright, several times per week; the calls never lasted more than 15 minutes, but they still cost Wright thousands of dollars per year.<sup>2</sup> Wright was an elderly, blind, retired nurse, so these exorbitant rates were more than inconvenient—they were oppressive.<sup>3</sup> Forte recounted that there were “times when she did have to choose over paying for her medication in order to talk to me.”<sup>4</sup> The Wright family’s story is not unique. Inmate calling services (“ICS”) is now a \$1.2 billion industry that is largely distinct from the regular telecommunications industry.<sup>5</sup> In 2014, one four-minute call from a Florida inmate cost \$56.00.<sup>6</sup> Rates vary by state, but they often run as high as \$15-20 per 15-minute phone call, even though the actual cost of service may be less than 5 cents per minute.<sup>7</sup> Perhaps it should not be surprising that ICS rates are through the roof, given that the market is dominated by a handful of powerful providers.<sup>8</sup> Nevertheless, anti-competitiveness is particularly troubling in the ICS context because it exploits the most marginalized people in our society and exacerbates the already broken institution of mass incarceration.<sup>9</sup>

Recognizing this problem, Martha Wright and others (the “Wright Petitioners”) teamed up with a coalition of lawyers in February 2000 to bring suit against Corrections Corporation of America (a private prison operator) and several telephone companies.<sup>10</sup> The class-action suit alleged that the exclusive contracts between prison facilities and providers resulted in “exorbi-

<sup>1</sup> See Justin Moyer, *After almost a decade, FCC has yet to rule on high cost of prison phone calls*, WASH. POST (Dec. 2, 2012), [https://www.washingtonpost.com/opinions/alter-almost-a-decade-fcc-has-yet-to-rule-on-high-cost-of-prison-phone-calls/2012/12/02/b11ea164-2daf-11e2-9ac2-1c61452669c3\\_print.html](https://www.washingtonpost.com/opinions/alter-almost-a-decade-fcc-has-yet-to-rule-on-high-cost-of-prison-phone-calls/2012/12/02/b11ea164-2daf-11e2-9ac2-1c61452669c3_print.html) [<https://perma.cc/6E9G-V96S>].

<sup>2</sup> See *id.*

<sup>3</sup> See *id.*

<sup>4</sup> Ulandis Forte on *Ridiculously High Prison Phone Rates*, YOUTUBE (Apr. 25, 2013), <https://www.youtube.com/watch?v=PKMVfZFz7CE> [<https://perma.cc/7RAF-KKHQ>].

<sup>5</sup> See 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?\\_r=0](https://www.nytimes.com/2015/03/31/us/steep-costs-of-inmate-phone-calls-are-under-scrutiny.html?_r=0) [<https://perma.cc/M3TQ-WMRE>].

<sup>6</sup> Komala Ramachandra, *Extortionate Phone Fees Cut Off US Prisoners*, HUMAN RIGHTS WATCH (Jun. 16, 2017, 11:27 AM), <https://www.hrw.org/news/2017/06/16/extortionate-phone-fees-cut-us-prisoners> [<https://perma.cc/NG9D-WTLY>].

<sup>7</sup> *The Staggering Price Prisoners’ Relatives Must Pay to Call Their Loved Ones*, WASH. POST (May 26, 2017), [https://www.washingtonpost.com/opinions/the-staggering-price-prisoners-relatives-must-pay-to-call-their-loved-ones/2017/05/26/16dff9f2-417f-11e7-8c25-44d09ff5a4a8\\_story.html?utm\\_term=.86e8c527e7cb](https://www.washingtonpost.com/opinions/the-staggering-price-prisoners-relatives-must-pay-to-call-their-loved-ones/2017/05/26/16dff9f2-417f-11e7-8c25-44d09ff5a4a8_story.html?utm_term=.86e8c527e7cb) [<https://perma.cc/A3EC-RYZT>].

<sup>8</sup> See Williams, *supra* note 5.

<sup>9</sup> See BRYAN STEVENSON, JUST MERCY: A STORY OF JUSTICE AND REDEMPTION 15 (2014) (“Today we have the highest rate of incarceration in the world. The prison population has increased from 300,000 people in the early 1970s to 2.3 million people today. There are nearly six million people on probation or on parole. One in every fifteen people born in the United States in 2001 is expected to go to jail or prison; one in every three black male babies born in this century is expected to be incarcerated.”).

<sup>10</sup> See *Martha Wright v. Corrections Corporation of America (FCC Petition)*, CTR. FOR CONST. RIGHTS (July 6, 2009), <https://ccrjustice.org/home/what-we-do/our-cases/martha-wright-v-corrections-corporation-america-fcc-petition> [<https://perma.cc/2YFR-E23T>]; see also Bill Miller, *Prison Firm Sued Over Phone Rates*, WASH. POST (Feb. 17, 2000), <https://www.washingtonpost.com/archive/local/2000/02/17/prison-firm-sued-over-phone-rates/cefe>

tant and unconscionable long distance rates[.]”<sup>11</sup> Judge Gladys Kessler dismissed the complaint, writing “that Plaintiffs’ claims are best resolved by initial consideration by the FCC[.]”<sup>12</sup> This kick-started a protracted battle among inmates and their families, the Federal Communications Commission (“FCC” or “Commission”), and the prison payphone industry. In 2003, Wright *et al.* petitioned the FCC to undertake formal rulemaking with respect to excessive inmate calling rates.<sup>13</sup> When nothing happened, the Wright Petitioners wrote again in 2007.<sup>14</sup> Finally, the FCC responded in 2012, promulgating a Report and Order that implemented interim rate caps for interstate ICS rates.<sup>15</sup> The Commission then followed up with a second Report and Order in 2015, which extended rate caps to intrastate inmate calling.<sup>16</sup> By that point, Ulandis Forte had been released from prison, Martha Wright had passed away, and nearly 15 years had lapsed since they first sought relief in the District Court. But even then, the battle was not over. Two years ago, the D.C. Circuit invalidated the 2015 ICS Order.<sup>17</sup> All that remains from this morass of regulation is interim rate caps that strictly apply to interstate calls.<sup>18</sup>

That is not enough to remediate the market failure that hurts so many inmates and their families. At the same time, it is unlikely that the FCC under Chairman Ajit Pai is going to further regulate the ICS industry. Accordingly, this Article argues that Congress should intervene by empowering the FCC to regulate intrastate calling and compelling the agency to do so. To support this argument, this Article is divided into three substantive sections: section I reviews the ICS market from both the carrier and consumer perspectives; section II traces the FCC’s serpentine history of regulating ICS up to the recent D.C. Circuit case; and section III looks at what comes next, weighing various policy and legal options. In short, this Article summarizes the regulatory landscape for ICS in the aftermath of the D.C. Circuit deci-

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b1b9-f47b-486a-a009-dd1f61eaad0d/?utm\_term=.935e65c3ad43 [https://perma.cc/S785-DJW3].

<sup>11</sup> See *Wright v. Corr. Corp. of Am.*, No. 1:00-CV-00293(GK), 2016 U.S. Dist. LEXIS 6855, (D.D.C. Jan. 21, 2016).

<sup>12</sup> *Id.* at 5.

<sup>13</sup> See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Petition of Martha Wright *et al.* for Rulemaking or, in the Alternative, Petition to Address Referral Issues in Pending Rulemaking, CC Docket No. 96-128 (filed Nov. 3, 2003) (hereinafter Wright Petition), at 3.

<sup>14</sup> See generally Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Petitioners’ Alternative Rulemaking Proposal, CC Docket No. 96-128, at 4-6 (filed Mar. 1, 2007) (hereinafter Alternative Wright Petition).

<sup>15</sup> See Rates for Interstate Inmate Calling Services, WC Docket No. 12-375, Report and Order and Further Notice of Proposed Rulemaking, 78 Fed. Reg. 67956 (Nov. 13, 2013) (hereinafter 2013 ICS Order).

<sup>16</sup> See Rates for Interstate Inmate Calling Services, WC Docket No. 12-375, Second Report and Order and Third Further Notice of Proposed Rulemaking, 80 Fed. Reg. 79135 (Dec. 18, 2015) (hereinafter 2015 ICS Order).

<sup>17</sup> See *Global Tel\*Link v. FCC*, 866 F.3d 397, 402 (D.C. Cir. 2017).

<sup>18</sup> *Inmate Telephone Service*, FCC, <https://www.fcc.gov/consumers/guides/inmate-telephone-service> [https://perma.cc/B5RD-C5MW] (last visited November 15, 2018).

sion and recommends a solution to the ICS problem that is specifically tailored for the Trump Administration. Federal regulation of excessive inmate calling rates has taken too long and accomplished too little. It is urgent that Congress act to change that.

## I. MARKET FAILURE IN INMATE CALLING

The ICS market in the United States is relatively young. It originated in the 1970s, when the Bureau of Prisons decided to expand inmate telephone access.<sup>19</sup> In those early years, AT&T was unsurprisingly the exclusive provider of prison phone calls,<sup>20</sup> but now most providers are prison-specific companies.<sup>21</sup> The modern ICS industry is characterized by market failure, or an inefficient allocation of resources that produces negative social costs.<sup>22</sup> Indeed, the relationship between ICS firms and prison facilities results in what former FCC Commissioner Mignon Clyburn called “the greatest and most distressing type of injustice I have ever seen in the communications sector.”<sup>23</sup> Before discussing how the FCC has attempted to rein in this regime, it is first necessary to understand how the U.S. prison complex transformed from hardly any prison phones to ICS injustice in less than a half-century. The rest of this section discusses how the ICS industry took shape and how it operates today; the implications of ICS injustice for inmates and their families; and the role of non-wireline technologies by which communications companies exploit inmates.

### A. *The Origins and Structure of the ICS Industry*

The prison payphone market has changed dramatically in a short period of time, transforming from a service offered by traditional phone companies to a wholly distinct industry. This story begins with the Bell divestiture. After Judge Harold Greene ordered the break-up of AT&T into a long-

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<sup>19</sup> See Steven J. Jackson, *Ex-Communication: Competition and Collusion in the U.S. Prison Telephone Industry*, 22 CRITICAL STUD. MEDIA COMM. 263, 267 (2005).

<sup>20</sup> See *id.* at 268.

<sup>21</sup> See Ben Walsh, *Prisoners Pay Millions To Call Loved Ones Every Year. Now This Company Wants Even More.*, HUFFINGTON POST (Dec. 6, 2017, 1:54 PM), [https://www.huffingpost.com/2015/06/10/prison-phone-profits\\_n\\_7552464.html](https://www.huffingpost.com/2015/06/10/prison-phone-profits_n_7552464.html) [https://perma.cc/7K9L-6U9J].

<sup>22</sup> See Will Kenton, *Market Failure*, INVESTOPEDIA (Apr. 12, 2018), <https://www.investopedia.com/terms/m/marketfailure.asp> [https://perma.cc/AN4B-2G4B]. Market failures are distinct from government/regulatory failures, which occur when prophylactic, interventionist government policy leads to inefficiency. See Joseph Stiglitz, *Regulation and Failure*, in NEW PERSPECTIVES ON REGULATION 17–19 (David A. Moss & John A. Cisternino eds., 2009). The ICS market reflects market failure rather than government failure because regulation has not made matters worse.

<sup>23</sup> Rates for Inmate Calling Services, WC Docket No. 12-375, Order on Reconsideration, 81 Fed. Reg. 62818 (Sept. 13, 2016) (hereinafter 2016 Order on Reconsideration), at 29.

distance carrier and regional Bell Operating Companies (“BOCs”),<sup>24</sup> there necessarily became more players in the ICS market. Early ICS operators included MCI, Verizon, and Pacific Bell.<sup>25</sup> But the Bell divestiture also opened the door for new entrants into the ICS market. Global Tel\*Link, which was founded in 1980,<sup>26</sup> began to take off in the late 1980s. Securus, another ICS giant, was born in 1986.<sup>27</sup> Today, Global Tel\*Link controls 50 percent of the ICS market and is worth over \$1 billion, while Securus controls 20 percent and recently sold for \$640 million;<sup>28</sup> both are owned by private equity firms.<sup>29</sup> All told, there are only five vendors with more than one percent market share in the entire prison phone industry,<sup>30</sup> and CenturyLink is the only traditional phone company remaining.<sup>31</sup> These are ideal conditions for market failure.

Service providers contract initially with prison facilities—not directly with inmates.<sup>32</sup> These contracts have three particular quirks that have profound implications for inmates and their families: 1) exclusive dealing; 2) site commissions; and 3) ancillary charges. First, an ICS contract generally “provides that the telecommunications provider will be the sole provider for a particular prison or prison system.”<sup>33</sup> In other words, the inmate does not have any choice of service provider. (The FCC has prohibited similar exclu-

<sup>24</sup> See generally *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982); see also STUART MINOR BENJAMIN & JAMES B. SPETA, *TELECOMMUNICATIONS LAW & POLICY* 203–16 (4th ed. 2015).

<sup>25</sup> See Madeleine Severin, Note, *Is There A Winning Argument Against Excessive Rates for Collect Calls From Prisoners?*, 25 *CARDOZO L. REV.* 1469, 1511 n.224 (2004); see also Celeste Fremon, *Crime Pays*, L.A. WEEKLY (June 22, 2001, 12:00 AM), <https://www.laweekly.com/news/crime-pays-2133484> [<https://perma.cc/Z685-KY36>] (noting that MCI, Verizon, and PacBell representatives often received customer complaints from mothers who could not afford to answer phone calls from their incarcerated children); Jackson, *supra* note 19, at 268.

<sup>26</sup> *Company Overview of Global Tel\*Link Corporation*, BLOOMBERG, <https://www.bloomberg.com/research/stocks/private/snapshot.asp?privcapId=4611589> [<https://perma.cc/GR9U-8K3J>] (last visited Nov. 5, 2018).

<sup>27</sup> 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/cell-phone-tracking-law-enforcement.html> [<https://perma.cc/3VYT-W8S6>].

<sup>28</sup> See Williams, *supra* note 5.

<sup>29</sup> *Id.* See also Walsh, *supra* note 21. Private equity has faced criticism for being too risky and too greedy. See *The trouble with private equity*, *ECONOMIST* (Jul. 5, 2007), <https://www.economist.com/leaders/2007/07/05/the-trouble-with-private-equity> [<https://perma.cc/3UNG-9NB4>]. Given these critiques, the notion that inmates depend on private equity-owned businesses to keep in touch with their families is alarming.

<sup>30</sup> See Peter Wagner, *Prison phone giant GTL gets bigger, again.*, PRISON POL'Y INITIATIVE (Aug. 28, 2017), <https://www.prisonpolicy.org/blog/2017/08/28/merger/> [<https://perma.cc/U3DL-B2DA>]. There were six such providers until Global Tel\*Link purchased its competitor Telmate in 2017. *Id.* The market was on the verge of shrinking even further until regulators recommended that Securus and Inmate Calling Solutions drop their bid to merge. See David Shepardson, *Inmate calling services companies drop merger bid after U.S. regulatory opposition*, REUTERS (Apr. 2, 2019, 6:46 P.M.), <https://www.reuters.com/article/us-fcc-inmate-merger/inmate-calling-services-companies-drop-merger-bid-after-us-regulatory-opposition-idUSKC N1RE2L7> [<https://perma.cc/8B2Y-PB67>].

<sup>31</sup> See *id.*

<sup>32</sup> See Justin Carver, *An Efficiency Analysis of Contracts for the Provision of Telephone Services to Prisons*, 54 *FED. COMM. L. J.* 391, 393 (2002).

<sup>33</sup> *Id.* at 394.

sive contracts for cable in multi-dwelling units because of their anti-competitive effect,<sup>34</sup> but not for prison payphones.) Second, the procurement process for these “exclusive dealing” contracts almost always involves kickbacks. In short, ICS providers pay site commissions to prison facilities in the form of monetary payments or profit-sharing agreements.<sup>35</sup> During the public notice-and-comment phase of the FCC’s later rulemaking process, the Human Rights Defense Center described these payments as “legal bribes to induce correctional agencies to provide ICS providers with lucrative monopoly contracts.”<sup>36</sup> The upshot is that providers pay to win contracts, and then transfer those costs to users in the form of higher rates.<sup>37</sup> Third, ICS providers have imposed ancillary charges on consumers that are unrelated to calling in addition to ordinary rates. For example, some users with prepaid accounts have incurred a \$4.95 “inactivity fee” for not making phone calls over a 180-day period.<sup>38</sup> These factors are symptoms of monopoly,<sup>39</sup> which has until now proven lucrative for phone providers and prisons.

ICS providers aver that their rates merely reflect the costs associated with ensuring that inmate calls are secure.<sup>40</sup> Security is a legitimate concern, so it is desirable that providers have good call monitoring technology. Yet the suggestion that security justifies outrageous phone bills is untenable. In perhaps the most comprehensive law review article yet written about inmate calling, Madeline Severin emphatically discredits the security defense. She writes that the rates are disproportionate to the actual cost of the technology involved and that, even if inmate calling were appreciably more expensive to carry than regular phone calls, security costs should be borne by the prisons, not by families.<sup>41</sup> After all, Severin points out, the state covers all other costs

<sup>34</sup> *Nat’l Cable & Telecomm. Ass’n v. FCC*, 567 F.3d 659, 671 (D.C. Cir. 2009) (finding that the FCC’s order banning exclusivity agreements between cable companies and apartment building owners was authorized by § 628 of the Communications Act); *see also* 47 C.F.R. § 76.2000 (2008).

<sup>35</sup> *See* Brittany J. FINDER, Note, *Aligning Practice and Principles: A Call to Eliminate the Use of Site Commissions in Inmate Calling System Contracts*, 46 *PUB. CONT. L. J.* 363, 366 (2017).

<sup>36</sup> HUMAN RIGHTS DEFENSE CTR., *Comment in the Matter of Rates for Inmate Calling Services*, WC Docket No. 12-375 (*Further Notice of Proposed Rulemaking*) (Dec. 10, 2013), <https://www.humanrightsdefensecenter.org/media/publications/hrdc%20fcc%20comments%2012-20-13.pdf> [<https://perma.cc/L5TF-R3VG>].

<sup>37</sup> *See* Jackson, *supra* note 19, at 269 (“Whatever their merits in the larger telecom world, incentives to competition within the prison telephone industry have proven fundamentally perverse. Armed with a uniquely effective monopoly sourcing power, county, state, and federal officials have entered into what amount to profit-sharing agreements with telephone service providers, exchanging exclusive service rights for large commissions paid back into state funds.”).

<sup>38</sup> 2013 ICS Order, *supra* note 15, at 50.

<sup>39</sup> *See* BENJAMIN & SPETA, *supra* note 24, at 7 (“When a firm does not face pressure from competition, it can stay in business even when it does not use the most efficient production technology, and it can raise its profits by charging prices above marginal cost.”).

<sup>40</sup> *See* Williams, *supra* note 5.

<sup>41</sup> *See* Severin, *supra* note 25, at 1478. It is clear that added security does not justify ICS’s cost because actual security features—e.g. only permitting outgoing calls to pre-approved contacts—are cheap and straightforward.

of prison security.<sup>42</sup> Inmates do not foot the bill for watchtowers and barbed wire; they should not pay to secure their own phone calls.

### B. *How Excessive ICS Rates Impact Consumers*

While the current arrangement has enriched ICS providers, it has been extraordinarily damaging for inmates and their families. Inmates typically have three payment options when making phone calls from prisons: collect calls, debit, or pre-paid accounts.<sup>43</sup> That means that sometimes inmates bear the cost of payment, while other times it is family members paying. In any event, expensive phone calls are particularly onerous for these groups because studies show that incarcerated people and their families are more likely to be low-income relative to the general population.<sup>44</sup> This problem is compounded by a shameful prison labor system in which wages for inmates are typically less than one dollar per hour.<sup>45</sup> Thus, egregious phone rates necessarily trap low-income individuals between a rock and a hard place: family members either have to limit how much they talk to relatives, or else be stuck with sky-high phone bills.

The collateral consequences of expensive ICS are extraordinary. Inmates can be incarcerated long distances away from their loved ones.<sup>46</sup> And even when relatives are close by and able to visit, some prisons in the United States limit in-person visitation.<sup>47</sup> As a result, inmate calling is an essential technology for helping families communicate.<sup>48</sup> Outside communication, in turn, is uniquely important for prisoners. Studies show that “a powerful predictor of re-offending is the failure to maintain family and community con-

<sup>42</sup> *Id.* at 1476–77.

<sup>43</sup> 2013 ICS Order, *supra* note 15, at 13.

<sup>44</sup> See Catherine E. Akenhead, Note, *How States Can Take a Stand Against Prison Banking Profiteers*, 85 GEO. WASH. L. REV. 1224, 1226 (2017).

<sup>45</sup> Daniel Moritz-Rabson, ‘Prison Slavery’: *Inmates Are Paid Cents While Manufacturing Products Sold To Government*, NEWSWEEK (Aug. 8, 2018, 5:12 PM), <https://www.newsweek.com/prison-slavery-who-benefits-cheap-inmate-labor-1093729/> [<https://perma.cc/DR23-SCUX>]. See generally Alexia Fernández Campbell, *The federal government markets prison labor to businesses as the ‘best-kept secret’*, VOX (Aug. 24, 2018, 10:00 AM), <https://www.vox.com/2018/8/24/17768438/national-prison-strike-factory-labor> [<https://perma.cc/P2JS-T69M>].

<sup>46</sup> See Andrea M. Lindsey et al., *In Prison and Far From Home: Spatial Distance Effects on Inmate Misconduct*, 63 CRIME & DELINQ. 1043, 1046 (2017) (“[A]mong incarcerated parents of minor children, 62% in state prisons and 84% in federal prisons were housed more than 100 miles from home. A study of federal inmates found that 11% of them were placed more than 1,000 miles away from home.”).

<sup>47</sup> See Shannon Sims, *The end of American prison visits: jails end face-to-face contact – and families suffer*, GUARDIAN (Dec. 9, 2017, 8:17 AM), <https://www.theguardian.com/us-news/2017/dec/09/skype-for-jailed-video-calls-prisons-replace-in-person-visits> [<https://perma.cc/52KX-27KS>]. It is worth noting that courts have upheld restrictions on visitation. See *Overton v. Bazzetta*, 539 U.S. 126, 131–33 (2003). See also *Turner v. Safley*, 482 U.S. 78, 89 (1987).

<sup>48</sup> A 2015 survey by the Prison Policy Initiative found that only 31 percent of inmates had received a personal visit in the past month, whereas 70 percent of inmates had received a phone call in the past week. Bernadette Rabuy & Daniel Kopf, *Separation by Bars and Miles: Visitation in state prisons*, PRISON POLY INITIATIVE (Oct. 20, 2015), <https://www.prisonpolicy.org/reports/prisonvisits.html> [<https://perma.cc/R54D-NG9X>].

tact while incarcerated.”<sup>49</sup> For example, the Minnesota Department of Corrections found that visited inmates were thirteen percent less likely to be reconvicted for a felony than non-visited inmates.<sup>50</sup> In lieu of face-to-face visitation, phone calls are the next best option. Even the Bureau of Prisons acknowledges that telephone privileges “contribute to an inmate’s personal development.”<sup>51</sup> High ICS rates functionally limit those privileges and thereby may increase recidivism rates.<sup>52</sup>

### C. Other Prison-Related Issues in Telecommunications

It is worth highlighting that inmate calling is not the only means by which technology companies exploit prisoners. For example, video visitation also imposes exorbitant costs on inmates and their families.<sup>53</sup> In 43 states, inmates pay to video-chat family members.<sup>54</sup> (Unsurprisingly, Securus and GlobalTel are key players in the video visitation business.)<sup>55</sup> An even newer development is tablets for inmates.<sup>56</sup> In some prison systems, companies distribute free iPads, but then charge for basic services like sending e-mails and downloading music.<sup>57</sup> JPay, a prison contractor, typically charges 35¢ per e-mail, but has increased the price just before Mother’s Day.<sup>58</sup> JPay gave New York prisoners 52,000 tablets in February of this year and expects to generate \$9 million in profit from those tablets by 2022.<sup>59</sup> In Pennsylvania, meanwhile, inmates who want to read must pay \$147 for a tablet to access an e-book library.<sup>60</sup> Again, this Article is focused on inmate calling and not re-

<sup>49</sup> See Jackson, *supra* note 19, at 272; see also Severin, *supra* note 25, at 1536 n.373.

<sup>50</sup> MINN. DEPT OF CORR., THE EFFECTS OF PRISON VISITATION ON OFFENDER RECIDIVISM 18 (2011).

<sup>51</sup> FED. BUREAU OF PRISONS, U.S. DEPT OF JUST., PROGRAM STATEMENT NO. 5264.07, TELEPHONE REGULATIONS FOR INMATES 1 (Feb. 2, 2002), [https://www.bop.gov/policy/progstat/5264\\_007.pdf](https://www.bop.gov/policy/progstat/5264_007.pdf) [<https://perma.cc/Z7ZF-Z4PZ>].

<sup>52</sup> See Ben Iddings, Comment, *The Big Disconnect: Will Anyone Answer the Call to Lower Excessive Prisoner Telephone Rates?*, 8 N.C. J. L. & TECH. 159, 169–70 (2006).

<sup>53</sup> See Bernadette Rabuy & Peter Wagner, *Screening Out Family Time: The For-Profit Video Visitation Industry in Prisons and Jails*, PRISON POL’Y INITIATIVE (Jan. 13, 2015), [https://www.prisonpolicy.org/visitation/exec\\_summary.html](https://www.prisonpolicy.org/visitation/exec_summary.html) [<https://perma.cc/MAG5-NZAE>].

<sup>54</sup> *Dropped Connections: The Barriers to Communication Created by Video Visitation*, HARV. C.R.-C.L. L. REV. AMICUS BLOG (Mar. 15, 2018), <http://harvardcrcl.org/dropped-connections-the-barriers-to-communication-created-by-video-visitation/> [<https://perma.cc/DS73-AEDW>].

<sup>55</sup> See, e.g., *Video Services*, SECURUS TECHNOLOGIES, <https://securustech.net/video-visitation> [<https://perma.cc/X2QR-QHNV>] (last visited Nov. 11, 2018).

<sup>56</sup> See Michael Waters, *The Outrageous Scam of “Free” Tablets for the Incarcerated*, THE OUTLINE (Aug. 10, 2018, 9:49 AM), <https://theoutline.com/post/5760/free-tablets-in-prison-nightmare?zi=62ffsexw&zd=5> [<https://perma.cc/T7X8-ZGUK>].

<sup>57</sup> See *id.*

<sup>58</sup> See Victoria Law, *Captive Audience: How Companies Make Millions Charging Prisoners to Send an Email*, WIRED (Aug. 3, 2018, 7:00 AM), <https://www.wired.com/story/jpay-securus-prison-email-charging-millions/> [<https://perma.cc/FK6J-9H8L>].

<sup>59</sup> Waters, *supra* note 56.

<sup>60</sup> Jodi Lincoln, *Incarcerated Pennsylvanians Now Have to Pay \$150 to Read. We Should All Be Outraged.*, WASH. POST (Oct. 11, 2018), <https://www.washingtonpost.com/opinions/incarcerated-pennsylvanians-now-have-to-pay-150-to-read-we-should-all-be-outraged/2018/10/>



lated communications technologies that affect inmates. Still, these examples are relevant here for two reasons: (1) they evince the invidious exploitation of inmates by the telecommunications industry that market failure makes possible; and (2) they reinforce the plight of inmates and stress the importance of at least making phone calls affordable.

## II. THE REGULATORY PENDULUM

Having established that inmate calling rates represent a market failure that negatively and needlessly impacts an already vulnerable group, the obvious next step is looking at government regulation. Indeed, market failure is one of the primary justifications for regulating telecommunications in the first place.<sup>61</sup> After much delay, the federal government finally began to address this market failure under the Obama Administration, but even then change was not linear or simple; in short, the “regulatory pendulum” has been in full swing.<sup>62</sup> This section follows that trajectory. It begins with an overview of the FCC’s statutory authority to regulate ICS; it then summarizes the tumultuous regulatory history, beginning with Martha Wright’s initial petition for rulemaking and including the three orders promulgated during the Obama years; and finally, it parses the critical D.C. Circuit opinion that undercut the FCC’s power to effectively regulate ICS. It is important to know where the FCC has already been to recommend how it should proceed.

### A. *The FCC’s Regulatory Authority*

Congress enacted the Communications Act and established the Federal Communications Commission with the goal of “regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide . . . communication service with adequate facilities at reasonable charges[.]”<sup>63</sup> The FCC’s jurisdiction extends “to all interstate and foreign communication[.]”<sup>64</sup> but, for the most part, “nothing in [the Act] shall be construed to apply or [to] give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regula-

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11/51f548b8-cbd9-11e8-a85c-0bbe30c19e8f\_story.html?utm\_term=.6a8ce4f867f5 [https://perma.cc/9ZCF-46CQ].

<sup>61</sup> See BENJAMIN & SPETA, *supra* note 24, at 6. See also Stephen Breyer, *Analyzing Regulatory Failure: Mismatches, Less Restrictive Alternatives, and Reform*, 92 HARV. L. REV. 547, 552 (1979) (acknowledging that market failure is usually the basis for government intervention).

<sup>62</sup> Cf. SUSAN CRAWFORD, *CAPTIVE AUDIENCE: THE TELECOM INDUSTRY AND MONOPOLY POWER IN THE NEW GILDED AGE* 63 (Yale Univ. Press 2013) (“The pendulum swings back and forth: cable deregulation in 1984 was followed by reregulation in 1992; the structural separation signaled by Al Gore and feared by John Malone was never carried out, and vertical integration has become common and unquestioned.”).

<sup>63</sup> 47 U.S.C. § 151 (2012).

<sup>64</sup> 47 U.S.C. § 152(a) (2012).

tions for or in connection with intrastate communication service[.]”<sup>65</sup> Thus, the FCC generally has the authority to regulate interstate wireline telephony, ensuring that charges are reasonable.

Title II of the Communications Act controls wireline telephone providers, which are classified as common carriers.<sup>66</sup> Common carrier status imposes several obligations on telecommunications providers, including the duty “to furnish such communication service upon reasonable request therefor”<sup>67</sup> and to guarantee that “[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful[.]”<sup>68</sup> While this statutory language broadly empowers the FCC to regulate telephone rates, section 276 speaks specifically about payphone service, which includes “the provision of inmate telephone service in correctional institutions[.]”<sup>69</sup> Congress’s goal in section 276 is to “promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public[.]”<sup>70</sup> To that end, Congress authorizes the FCC to “establish a per call compensation plan to ensure that all payphone service providers are *fairly compensated* for each and every completed *intrastate and* interstate call using their payphone[.]”<sup>71</sup> This language suggests that perhaps the FCC can regulate inmate payphones with respect to intrastate calling. At the very least, it is clear that the agency has authority to regulate ICS in some capacity.

### B. *A Brief History of FCC Rulemaking*

The long road to FCC regulation of ICS began in 2003 when Martha Wright petitioned the agency to undertake formal rulemaking. After the District Court stayed Wright’s class action suit,<sup>72</sup> Wright *et al.* petitioned the agency to “prohibit exclusive inmate calling service agreements and collect call-only restrictions at privately-administered prisons and require such facilities to permit multiple long distance carriers to interconnect with the prison telephone system[.]”<sup>73</sup> The Wright petition thus focused on exclusive dealing, suggesting that a freer, more competitive ICS market would necessarily lead to lower rates for inmates and their families. At the same time, the petition also called for rate caps akin to what the agency already imposes on

<sup>65</sup> 47 U.S.C. § 152(b) (2012).

<sup>66</sup> See BENJAMIN & SPETA, *supra* note 24, at 945 (defining common carrier as “[a] firm that sells its services to the general public and serves all comers for a set fee”).

<sup>67</sup> 47 U.S.C. § 201(a) (2012).

<sup>68</sup> 47 U.S.C. § 201(b) (2012).

<sup>69</sup> 47 U.S.C. § 276(d) (2012).

<sup>70</sup> 47 U.S.C. § 276(b)(1) (2012).

<sup>71</sup> 47 U.S.C. § 276(b)(1)(A) (2012) (emphasis added).

<sup>72</sup> See Wright v. Corr. Corp. of Am., No. 1:00-CV-00293(GK) 2016 WL 264907 (D.D.C. Jan. 21, 2016).

<sup>73</sup> See Wright Petition, *supra* note 13.

competitive local exchange carriers.<sup>74</sup> In retrospect, Wright and company were not asking the agency for much—they simply wanted to redress market failure at private prisons.

The FCC did not regulate in response to the initial Wright petition, so in 2007 Wright *et al.* submitted an alternative rulemaking proposal.<sup>75</sup> This second request asserted that inmate collect calling rates remained egregiously high such that “one hour of conversation per week can result in a monthly telephone bill of \$300[.]”<sup>76</sup> Rather than address this with “structural” relief, the petitioners this time sought to establish “benchmark” rates for all ICS calls.<sup>77</sup> The petition recommended \$0.20 per minute for debit calls and \$0.25 for collect.<sup>78</sup> In theory, this approach “would raise fewer legal, technical and engineering cost issues” and “be far simpler and less regulatory[.]”<sup>79</sup> It would not attempt to eliminate exclusive dealing; instead, it would stop ICS providers from shifting the cost of kickbacks to vulnerable consumers. Moreover, the petitioners argued that simple rate regulation is clearly within the ambit of FCC authority, pursuant to section 201(b) of the Communications Act.<sup>80</sup>

The FCC granted the Wright petitions and issued a notice of proposed rulemaking (“NPRM”) in December 2012<sup>81</sup>—nearly a decade after Wright *et al.* first filed for relief. Pursuant to the Administrative Procedure Act (“APA”),<sup>82</sup> the NPRM sought public comment to flesh out the agency’s administrative record regarding ICS. In general, the FCC wanted “to balance the goal of ensuring reasonable ICS rates for end users with the security concerns and expense inherent to ICS within the statutory guidelines of sections 201(b) and 276 of the Act.”<sup>83</sup> Accordingly, the Commission asked several specific questions, pertaining to rate caps,<sup>84</sup> collect calling versus debit calling,<sup>85</sup> and exclusive dealing,<sup>86</sup> among other topics. The Commission also sought comment on its legal authority to act in the first place.<sup>87</sup> In her statement accompanying the NPRM, Commissioner Mignon Clyburn wrote that “[t]he telephone is a crucial instrument for the incarcerated . . . because voice calling is often the only communications option available” and that “[t]here are well over two million children with at least one parent behind bars and

<sup>74</sup> *Id.* at 18–19 (“[T]he Commission should treat prison telephone system providers as common carriers and place some requirements on their charges in order to ensure reasonable telephone system rates.”).

<sup>75</sup> See Alternative Wright Petition, *supra* note 14.

<sup>76</sup> *Id.* at 2.

<sup>77</sup> *Id.* at 4.

<sup>78</sup> *Id.* at 6.

<sup>79</sup> *Id.* at 4.

<sup>80</sup> *Id.* at 11–12.

<sup>81</sup> See Rates for Interstate Inmate Calling Services, 78 Fed. Reg. 4369 (proposed Jan. 22, 2013) (to be codified at 47 C.F.R. § 64).

<sup>82</sup> 5 U.S.C. § 553(b)–(c) (2012).

<sup>83</sup> Rates for Interstate Inmate Calling Services, 78 Fed. Reg. 4369, 4371 (proposed Jan. 22, 2013) (to be codified at 47 C.F.R. § 64).

<sup>84</sup> *Id.* at 8–13.

<sup>85</sup> *Id.* at 12.

<sup>86</sup> *Id.* at 14.

<sup>87</sup> *Id.* at 19.

regardless of their circumstances, both children and parents gain from regular contact with one another.”<sup>88</sup> Then-Commissioner Ajit Pai endorsed the FCC’s decision to undertake rulemaking: “I believe that prices should be set by the free market rather than by government fiat. At the same time, however, we must recognize that choice and competition are not hallmarks of life behind bars.”<sup>89</sup> It seemed that the entire agency was finally ready to move ahead with ICS regulation. For inmates and their families, it was better late than never.

### 1. *The 2013 Order*

The FCC adopted a Report and Order and Further Notice of Proposed Rulemaking on August 9, 2013.<sup>90</sup> The Order began by acknowledging Martha Wright and noting that “[t]ens of thousands of others have since urged the Commission to act[.]”<sup>91</sup> From there, the agency explained that sections 201(b) and 276 authorize the Commission to ensure that ICS rates are just, fair, and reasonable.<sup>92</sup> Particularly important was the phrase “fairly reasonable” in section 276, which the agency understood to require “that the interests of both the payphone service providers and the parties paying the compensation must be taken into account.”<sup>93</sup> Next, the FCC found that the ICS market was not sufficiently competitive,<sup>94</sup> which in turn led to exorbitant rates for end users.<sup>95</sup> To solve this problem, the agency asserted that rates must be cost-based.<sup>96</sup> The agency noted that site commission payments are not compensable<sup>97</sup> before establishing interim safe harbors for interstate ICS rates<sup>98</sup> as well as hard rate caps.<sup>99</sup> These upper limits were \$0.21 per minute for debit and \$0.25 for collect,<sup>100</sup> which were almost exactly what the Wright Petitioners recommended in their Alternative Petition.

In her accompanying statement, then-Acting Chairwoman Clyburn invoked Sam Cooke, writing “that it’s been a long, long time in coming, but change has finally come.”<sup>101</sup> She also provided perhaps the most succinct and reasonable justification for rate regulation imaginable: “Tying rates to actual costs is fair, is guided by the law, and will provide significant financial relief

<sup>88</sup> *Id.* at 22–23.

<sup>89</sup> *Id.* at 24.

<sup>90</sup> See generally 2013 ICS Order, *supra* note 15.

<sup>91</sup> *Id.* at 2.

<sup>92</sup> *Id.* at 8–9.

<sup>93</sup> *Id.* at 9.

<sup>94</sup> See *id.* at 22–24.

<sup>95</sup> See *id.* at 24–25.

<sup>96</sup> *Id.* at 27.

<sup>97</sup> *Id.* at 29.

<sup>98</sup> See *id.* at 34, 37. Interim safe harbor rates were \$0.12 per minute for interstate prepaid calls and \$0.14 per minute for interstate collect calls.

<sup>99</sup> *Id.* at 41–42. After capping rates, the Order addressed several more discrete topics, including disability accommodations in ICS, constitutional law, and enforcement.

<sup>100</sup> *Id.* at 34.

<sup>101</sup> *Id.* at 90.

for families, without sacrificing the requisite security protocols.”<sup>102</sup> Despite this powerful argument in favor of ICS regulation and even after endorsing the earlier NPRM, Commissioner Pai dissented.<sup>103</sup> He bemoaned that the order imposed “full-scale rate-of-return regulation on ICS providers” rather than simple rate caps because he did not “believe that it is within the Commission’s competence to micromanage the prices of inmate calling services.”<sup>104</sup> He also asserted that the 2013 Order violated the APA.<sup>105</sup> These criticisms foreshadowed future challenges to FCC regulation, as well as Pai’s approach when he would later become Chairman.

In addition to establishing interim rates, the 2013 Order also included a further notice of proposed rulemaking.<sup>106</sup> Most notably, the top priority for future rulemaking would be reforming intrastate rates because “the record indicates that a significant number of ICS calls are intrastate, highlighting the need for reform of intrastate rates.”<sup>107</sup> Of course, the FCC’s authority to regulate strictly intrastate telecommunications is suspect under the plain language of section 152 of the Communications Act. But the agency suggested that section 276 carved out an exception.<sup>108</sup> Tabled for later rulemaking were ICS for the deaf community<sup>109</sup> and further rate reform,<sup>110</sup> among other issues. Thus, while the 2013 Order set interim rate caps for interstate calling, there was still a long road ahead in the battle for ICS rate reform.

## 2. *The 2015 Order*

In 2015, the FCC issued its follow-up Report and Order, as well as a third further notice of proposed rulemaking.<sup>111</sup> The 2015 Order was the high-water mark for prison phone justice. It crucially noted that the earlier “interim interstate rate caps increased call volumes, without compromising correctional facility security requirements.”<sup>112</sup> This confirmed that extraordinarily high rates were actively keeping families from communicating and that rate caps remediated that issue by lowering costs. The 2015 Order then adopted new rate caps, superseding the earlier interim rates.<sup>113</sup> Unlike the prior rates, these new rates applied to both inter- and intrastate ICS.<sup>114</sup> The FCC had first raised the possibility that it had authority to regulate intra-

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<sup>102</sup> *Id.* at 91.

<sup>103</sup> *See id.* at 93–114.

<sup>104</sup> *Id.* at 94. Rate-of-return regulation is “[a] form of regulation under which firms are permitted to charge prices that both cover their total costs of providing a service and, in addition, pay a ‘reasonable’ rate of return on their capital investments in providing the service.” BENJAMIN & SPETA, *supra* note 24, at 953.

<sup>105</sup> 2013 ICS Order, *supra* note 15, at 112.

<sup>106</sup> *See id.* at 67–86.

<sup>107</sup> *See id.* at 68.

<sup>108</sup> *See id.* at 69–70.

<sup>109</sup> *Id.* at 72.

<sup>110</sup> *Id.* at 75–80.

<sup>111</sup> *See generally* 2015 ICS Order, *supra* note 16.

<sup>112</sup> *Id.* at 6.

<sup>113</sup> *Id.* at 8, 13–14.

<sup>114</sup> *Id.* at 13.

state rates in the 2013 NPRM; two years later, after hearing from commenters, the Commission affirmed that section 276 places intrastate rates clearly within the FCC's jurisdiction.<sup>115</sup> As the Commission noted, section 276 makes repeated references to intrastate service<sup>116</sup> and requires rates for that service to involve "fair compensation."<sup>117</sup> Ensuring fairness in intrastate calling was essential in the 2015 Order because the vast majority of ICS usage is intrastate.<sup>118</sup> Additionally, the 2015 Order limited or prohibited most ancillary charges, which may make up as much as 38 percent of ICS costs for consumers,<sup>119</sup> but it stopped short of banning site commission payments outright.

Again, Commissioner Clyburn issued a statement praising the Commission's action. Clyburn, by this point a full-fledged hero for prison phone justice, commended the agency for finally capping rates for all ICS calls 14 years after the initial Wright lawsuit.<sup>120</sup> Future Chairman Pai, however, dissented on the basis that "the Commission does not have the legal authority to regulate the intrastate rates charged by payphone service providers[,]"<sup>121</sup> arguing that section 276 has an explicitly narrow purpose that plainly excludes rate regulation for intrastate ICS.<sup>122</sup> Specifically, Pai argued that the "fair compensation" language "is a one-way ratchet" insofar as the Commission only pre-empts state regulations "when intrastate payphone service rates are *too low* to ensure fair compensation."<sup>123</sup>

The 2015 Order also contained a third further notice of proposed rulemaking.<sup>124</sup> This NPRM called for public comments about the possibility of promoting competition in the ICS market, similar to what the Wright Petitioners called for all the way back in 2003.<sup>125</sup> It also sought comments regarding video visitation and other technological services with increasingly high rates,<sup>126</sup> among other issues.

### 3. *The 2016 Order*

The FCC issued a third order in 2016. This order on reconsideration responded to a petition by Michael Hamden, which argued that facilities-based costs should be built in to ICS rate caps.<sup>127</sup> The Commission agreed,

<sup>115</sup> *Id.* at 51.

<sup>116</sup> *Id.* at 52.

<sup>117</sup> *Id.* at 55.

<sup>118</sup> See *FCC Decides To Cap Prices Of In-State Phone Calls By Prison Inmates*, NPR (June 18, 2017, 5:01 PM), <https://www.npr.org/2017/06/18/533438857/fcc-decides-to-cap-prices-of-in-state-phone-calls-by-prison-inmates> [<https://perma.cc/B63M-YEU2>].

<sup>119</sup> See 2015 ICS Order, *supra* note 16, at 74–100. Such ancillary fees included account set-up payments and charges for electronic bills/statements.

<sup>120</sup> *Id.* at 194.

<sup>121</sup> *Id.* at 198.

<sup>122</sup> *Id.* at 199.

<sup>123</sup> *Id.* at 200.

<sup>124</sup> See *id.* at 138.

<sup>125</sup> *Id.* at 138.

<sup>126</sup> See *id.* at 140–46.

<sup>127</sup> See 2016 Order on Reconsideration, *supra* note 23, at 4–5.

amending rate caps to be more favorable to ICS providers.<sup>128</sup> In his statement, Chairman Tom Wheeler wrote, “Although the rate caps we adopt today are higher than those adopted in the *2015 ICS Order*, they still represent a significant constraint on ICS rates and will result in rates that are, on average, below the interim rate caps that are currently in effect for interstate ICS calls.”<sup>129</sup> Commissioner Clyburn wrote that she was “somber because after all this time, and all this attention, too few people really care.”<sup>130</sup> She continued that “[i]t does not seem to matter that many of these inmates hail from impoverished communities. It does not seem to matter that only 38% of them stay in touch with loved ones on a regular basis because of these exorbitant rates.”<sup>131</sup> Commissioner Pai dissented. He wrote, “We cannot set rate caps that are below the costs of providing inmate calling services. We cannot ignore record evidence regarding those costs. And we cannot exceed the bounds of our jurisdiction. It’s really that simple. Yet—here we go again.”<sup>132</sup> What Commissioner Pai was describing was indeed the regulatory pendulum in action.

### C. *Justice Deferred in the D.C. Circuit*

Three rounds of FCC rulemaking had finally answered Martha Wright’s plea for help, but ICS providers would not go down without a fight. The litigation surrounding prison phone justice is almost as complicated as the agency’s rulemaking in the first place. In short, there were several challenges to the FCC’s earlier rate caps, but the court held them in abeyance while the Commission considered further reforms.<sup>133</sup> More recently, ICS carriers challenged the 2015 Order and the D.C. Circuit stayed the agency’s rules.<sup>134</sup> The stage was set for the court to answer a crucial question for prison phone justice: “Whether the reforms promulgated in the [2015] *Order* reflect a lawful exercise of the Commission’s statutory authority to ensure that interstate and intrastate rates for inmate calling services are just, reasonable, and fair.”<sup>135</sup>

The major ICS players (Global Tel\*Link, Securus, CenturyLink, Telmate, and Pay Tel) filed a joint brief.<sup>136</sup> They argued that the FCC’s rate

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<sup>128</sup> *See id.* at 12, 24.

<sup>129</sup> *Id.* at 28.

<sup>130</sup> *Id.* at 29.

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at 32.

<sup>133</sup> *See, e.g.,* Securus Tech. v. FCC, No. 13-1280, 2014 U.S. App. LEXIS 13669 (D.C. Cir. Jan. 13, 2014).

<sup>134</sup> *See* Global Tel\*Link v. FCC, No. 15-1461, 2016 U.S. App. LEXIS 4934 (D.C. Cir. Mar. 7, 2016).

<sup>135</sup> Brief for Respondent at 11, Global Tel\*Link v. FCC, No. 15-1461 (D.C. Cir. Sept. 12, 2016). The 2016 Reconsideration Order was not under review in the 2017 D.C. Circuit case because it had not yet been published in the Federal Register. *Id.* at 15–18.

<sup>136</sup> *See generally* Joint Brief for the ICS Carrier Petitioners, Global Tel\*Link v. FCC, No. 15-1461 (D.C. Cir. June 6, 2016).

caps violated the Communications Act and the APA,<sup>137</sup> that the FCC lacked the authority to regulate intrastate rates,<sup>138</sup> and that the FCC's limitations on ancillary fees also violated the Communications Act and APA.<sup>139</sup> Specifically, the providers claimed that "[t]he FCC's caps are below average costs documented by numerous ICS providers and would deny cost recovery for a substantial percentage of all inmate calls."<sup>140</sup> In other words, the providers argued that the agency's actual rates were arbitrary and capricious insofar as they ignored key evidence in the administrative record. Also at issue was the agency's interpretation of section 276—the provision of the Communications Act that governs payphone service. The petitioners argued that section 276 does not authorize the FCC to regulate intrastate ICS, but rather is meant to ensure that providers are fairly compensated.<sup>141</sup> These arguments echoed—and at times quoted from—Pai's dissent from the 2015 Order.<sup>142</sup>

In response, the FCC maintained that it does in fact have authority to set intrastate rate caps and restrict ancillary charges under sections 201(b) and 276 of the Communications Act.<sup>143</sup> As it had in both the 2013 and 2015 Orders, the FCC contended that "fair compensation" in section 276 was both with respect to providers *and* end users.<sup>144</sup> At minimum, the Commission argued that "fair compensation" was ambiguous and that the agency's interpretation was therefore entitled to *Chevron* deference.<sup>145</sup> With respect to specific rate caps, the agency argued that the Reconsideration Order made the Petitioners' complaints moot or premature.<sup>146</sup> Going into oral argument, the agency seemed to be in a good position.

Shortly before oral argument, Donald Trump became President of the United States and appointed former Commissioner Ajit Pai to the position of FCC Chairman.<sup>147</sup> The following week, the agency sent a letter to the Court about changes in leadership at the Commission.<sup>148</sup> The letter disavowed large chunks of the FCC's brief on the basis that "a majority of the current Commission does not believe that the agency has the authority to cap intrastate rates under section 276 of the Act."<sup>149</sup> Although counsel for

<sup>137</sup> See *id.* at 19–26.

<sup>138</sup> See *id.* at 40–47.

<sup>139</sup> See *id.* at 47–54.

<sup>140</sup> *Id.* at 16.

<sup>141</sup> See *id.* at 17–18.

<sup>142</sup> See *id.* at 36, 42, 61, 62.

<sup>143</sup> Brief for the Respondent, *supra* note 135, at 3.

<sup>144</sup> *Id.* at 30–38.

<sup>145</sup> *Id.* at 31 (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984)). The *Chevron* 2-step test is still operative even when the agency is interpreting the organic statute to determine its own jurisdiction. See *City of Arlington v. FCC*, 569 US 290, 296–97 (2013).

<sup>146</sup> Brief for the Respondent, *supra* note 135, at 41.

<sup>147</sup> David Shepardson, *Trump taps net neutrality opponent Ajit Pai to head FCC*, REUTERS (Jan. 23, 2017), <https://www.reuters.com/article/us-usa-trump-fcc-idUSKBN1572RK?feedType=RSS&feedName=politicsNews> [<https://perma.cc/H5G5-9V6K>].

<sup>148</sup> See Letter to Mark J. Langer from David M. Gossett, *Global Tel\*Link v. FCC*, No. 15-0461 (D.C. Cir. Jan. 31, 2017).

<sup>149</sup> *Id.*



the Wright Petitioners would still defend the 2015 Order in full as intervenors,<sup>150</sup> the Commission's change-up at the eleventh hour was nonetheless a significant development.<sup>151</sup>

The D.C. Circuit issued its opinion on June 13, 2017, siding with the petitioners and invalidating most of the 2015 Order.<sup>152</sup> The Court held (2-1) that the Order's intrastate rate caps exceeded the agency's statutory authority, that the Commission's use of cost data to establish rate caps was arbitrary and capricious, and that totally excluding site commissions from rate calculations was also arbitrary and capricious.<sup>153</sup> However, the Court remanded the ICS providers' challenge regarding ancillary fees to the agency to determine whether it could segregate interstate caps from intrastate caps.<sup>154</sup> Writing for the majority, Senior Judge Edwards was at least sympathetic to the plight of inmates and their families. He wrote that prior to FCC regulation, "[d]ue to a variety of market failures in the prison and jail payphone industry . . . inmates in correctional facilities, or those to whom they placed calls, incurred prohibitive per-minute charges and ancillary fees for payphone calls."<sup>155</sup> Nevertheless, Senior Judge Edwards did not defer to the FCC's proposed solution. Interestingly, his rejection of the agency's rationale for regulating apparently turned on the agency's last-minute letter:

The oddity here . . . is that the agency no longer seeks deference for the parts of the Order purporting to cap intrastate rates for ICS providers . . . [I]t would make no sense for this court to determine whether the disputed agency positions advanced in the Order warrant Chevron deference when the agency has abandoned those positions.<sup>156</sup>

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<sup>150</sup> See *id.*

<sup>151</sup> See Ann E. Marimow, *FCC made a case for limiting cost of prison phone calls. Not anymore.*, WASH. POST (Feb. 5, 2017), [https://www.washingtonpost.com/local/public-safety/fcc-made-a-case-for-limiting-cost-of-prison-phone-calls-not-anymore/2017/02/04/9306fbf8-e97c-11e6-b82f-687d6e6a3e7c\\_story.html?utm\\_term=.e27e21db4bc6](https://www.washingtonpost.com/local/public-safety/fcc-made-a-case-for-limiting-cost-of-prison-phone-calls-not-anymore/2017/02/04/9306fbf8-e97c-11e6-b82f-687d6e6a3e7c_story.html?utm_term=.e27e21db4bc6) [<https://perma.cc/AR7P-VK4N>].

<sup>152</sup> See generally *Global Tel\*Link v. FCC*, 866 F.3d 397 (D.C. Cir. 2017). 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> [<https://perma.cc/G7FL-VGKQ>]; Ann E. Marimow, *There's no cheap talk when it comes to prison calls. And that's not changing soon.*, WASH. POST (June 13, 2017), [https://www.washingtonpost.com/local/public-safety/drive-to-cut-costs-of-prison-calls-dealt-set-back-in-court/2017/06/13/e3d1b9ea-5049-11e7-be25-3a519335381c\\_story.html?utm\\_term=.a948b6f9e7b9](https://www.washingtonpost.com/local/public-safety/drive-to-cut-costs-of-prison-calls-dealt-set-back-in-court/2017/06/13/e3d1b9ea-5049-11e7-be25-3a519335381c_story.html?utm_term=.a948b6f9e7b9) [<https://perma.cc/2GDV-WZ6F>].

<sup>153</sup> *Global Tel\*Link*, 866 F.3d at 402.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 401.

<sup>156</sup> *Id.* at 407–08 (emphasis omitted). It is difficult to overstate the legal and political importance of the FCC's last-minute letter to the Court. Waiving *Chevron* deference effectively allows agencies to undermine actions by previous administrations without going through the formalities of notice-and-comment rulemaking. See Note, *Waiving Chevron Deference*, 132 HARV. L. REV. 1520, 1526–34 (2019). In the *Global Tel\*Link* case, the procedural requirements of the APA “were successfully sidestepped by the FCC when it took a litigating position consistent with its deregulatory agenda.” *Id.* at 1534.

For this reason, the Court eschewed the FCC's capacious understanding of section 276 and argued that the Commission's jurisdiction was strictly limited to regulating interstate ICS.<sup>157</sup>

Senior Judge Silberman authored a brief concurrence in which he delved deeper into *Chevron* analysis. Essentially, he explained how *Chevron's* two-step test would have applied if the agency had not sent its last-minute letter. First, he found section 276 to be ambiguous.<sup>158</sup> Yet he then argued that "the agency's interpretation would fail" at Step Two because "it is an unreasonable (impermissible) interpretation of section 276."<sup>159</sup> In the end, Senior Judge Silberman was dubious about the FCC's authority over intrastate rates, which is significant because it points toward problems with the statute itself.

The lone dissenter on the three-judge panel was Judge Pillard. She wrote, "I cannot agree that a company is 'fairly compensated' under [section 276] when it charges inmates exorbitant prices to use payphones inside prisons and jails, shielded from competition by a contract granting it a facility-wide payphone monopoly."<sup>160</sup> Unlike the majority, Judge Pillard would have applied the *Chevron* framework despite the agency abandoning its earlier view.<sup>161</sup> She walked through that analysis, arguing that the FCC's interpretation of section 276 was wholly reasonable, based both on language within that section and the larger goals of the Communications Act.<sup>162</sup> Next, in response to the majority's holding with respect to site commissions, Judge Pillard wrote, "[i]t is unclear why the majority finds it necessary to address how the caps were calculated, given its rejection of the FCC's power to cap at all. In any event, the majority's analysis is misguided."<sup>163</sup> Judge Pillard closed by noting that "[t]he majority appears to leave an opening for the FCC—on some other record and by some other reasoning—to rein in excessive inmate-calling rates, both interstate and intrastate."<sup>164</sup> In that sense, perhaps the D.C. Circuit's opinion was merely a setback and not a permanent denial of prison phone reform.

<sup>157</sup> *Global Tel\*Link*, 866 F.3d at 408–12.

<sup>158</sup> *Id.* at 418 (Silberman, J., concurring).

<sup>159</sup> *Id.* Senior Judge Silberman's analysis is conceptually interesting because it runs against the common presumption in Administrative Law that surviving Step One almost always leads to deference at Step Two. See Matthew C. Stephenson & Adrian Vermeule, *Chevron Has Only One Step*, 95 VA. L. REV. 597, 600–01 (2009).

<sup>160</sup> *Global Tel\*Link*, 866 F.3d at 419 (Pillard, J., dissenting).

<sup>161</sup> *Id.* at 420 ("If the FCC under new management wishes by notice and comment to change its rule, the statute gives it latitude to do so. We should uphold the rule that is on the books and leave to the agency to decide whether and how to change it."); see also *id.* at 426.

<sup>162</sup> *Id.* at 422–23.

<sup>163</sup> *Id.* at 423–24.

<sup>164</sup> *Id.* at 425.

### III. LAW REFORM

Despite the sliver of optimism at the end of Judge Pillard's dissent, the outlook for ICS reform in the wake of the D.C. Circuit opinion is not bright—especially with Chairman Pai at the helm of the FCC.<sup>165</sup> As it stands now, the Commission's 2013 interim rates for interstate calling are still in place.<sup>166</sup> Additionally, the D.C. Circuit opinion did not vitiate the Commission's limitations on ancillary charges with respect to interstate calls.<sup>167</sup> But intrastate calls—which, again, make up the vast majority of inmate calls—remain unchecked. If the FCC lacks the authority to remedy this market failure, then what is the next step?

There are two realistic options for further ICS reform: Congressional legislation and regulation at the state/local level. These options are not mutually exclusive and either would be a step in the right direction for inmates and their families. But a federal solution is easily the best option because it would help all inmates regardless of where they are incarcerated. Even Commissioner Michael O'Rielly has recognized that Congress is the best avenue for further ICS reform.<sup>168</sup> For this reason, Congress should pass legislation amending the Communications Act to authorize the FCC to regulate intrastate ICS rates. Such legislation would provide a solid legal foundation for the agency to re-issue its 2015 Order.

#### A. *Why Congress Should Take Charge*

Congress could easily correct the defects of the Communications Act to make ICS reform not only feasible, but also mandatory. In fact, there has even been legislation in the U.S. Senate with this very goal in mind. Last year, Senator Tammy Duckworth introduced the Inmate Calling Technical Corrections Act of 2018.<sup>169</sup> The Act aimed to “ensure just and reasonable

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<sup>165</sup> See Marimow, *supra* note 152. Recall that in the 2012 NPRM, Commissioner Pai expressed interest in regulating ICS. See Rates for Interstate Inmate Calling Services, 78 Fed. Reg. 4369, 4370 (proposed Jan. 22, 2013) (to be codified at 47 C.F.R. § 64). However, Chairman Pai's proposed plan was not cost-based and would have only capped rates for interstate calling, so that is not an adequate solution.

<sup>166</sup> *Inmate Telephone Service*, *supra* note 18.

<sup>167</sup> *Id.*

<sup>168</sup> In his dissent from the 2015 Order, Commissioner Michael O'Rielly wrote, “While there is no dispute that the prison payphone market as a whole does not seem to be functioning properly, we must respect the limits of our authority. The proper place to deal with any issues would be the Congress, where I suspect there may be receptivity to address specific problems. But it is not our role to create imaginary authority to serve a social agenda.” See 2015 ICS Order, *supra* note 16, at 210.

<sup>169</sup> Inmate Calling Technical Corrections Act of 2018, S. 2520, 115th Cong. (2018). Senator Duckworth has long been an advocate for communications reform in prisons, having previously introduced legislation about video visitation. See Press Release, Tammy Duckworth, Duckworth Reintroduces Bill to Reduce Recidivism Rates in Criminal Justice System (July 21, 2017), <https://www.duckworth.senate.gov/news/press-releases/duckworth-reintroduces-bill-to-reduce-recidivism-rates-in-criminal-justice-system> [<https://perma.cc/YV4H-86NL>].

charges for inmate telephone and advanced communications services.”<sup>170</sup> It would have amended the language of section 276, which currently prescribes that “all payphone service providers are fairly compensated,”<sup>171</sup> most noticeably by inserting the additional requirement that “all charges are just and reasonable.”<sup>172</sup> Thus, the Act considered the inmate calling market not only from the providers’ standpoint, but also from the users’ perspective. Additionally, the Act inserted crucial language that crystallizes the Commission’s authority to regulate all “advanced communications services” in addition to wireline payphones.<sup>173</sup> Finally, the Act commanded the agency to undertake rulemaking within eighteen months.<sup>174</sup> During the 115th Congress, Senator Duckworth’s legislation languished for months in the Committee on Commerce, Science, and Transportation and showed no sign of advancing outside of committee.<sup>175</sup>

Senator Duckworth should re-introduce the legislation, but with one critical amendment: the Inmate Calling Technical Corrections Act should more explicitly authorize the FCC to regulate intrastate ICS. In its current iteration, the Act finds that “[u]njust and reasonable charges extend to telephone and advanced communications services and to both intrastate and interstate communications.”<sup>176</sup> Although the Act recognized this problem, it did not explicitly fix it. To do that, a revised version of the Act should amend section 152 of the Communications Act. Subsection (a) generally limits the FCC’s jurisdiction to regulation of interstate communication,<sup>177</sup> but then subsection (b) creates an exception for “charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier.”<sup>178</sup> This exception only covers sections 223 through 227;<sup>179</sup> the Inmate Calling Technical Corrections Act should add section 276 to that list. Altogether, empowering the FCC to regulate intrastate calling and emphasizing reasonableness and fairness for inmates would address most issues raised by the D.C. Circuit.

Admittedly, amending the Communications Act is a difficult task.<sup>180</sup> There are myriad reasons that could explain why it is so hard to make changes to the Act. For example, the telecom industry features several behav-

<sup>170</sup> Inmate Calling Technical Corrections Act of 2018, *supra* note 169, at 1.

<sup>171</sup> 47 U.S.C. § 276(d) (2012).

<sup>172</sup> Inmate Calling Technical Corrections Act of 2018, *supra* note 169, at 3.

<sup>173</sup> *Id.* at 2–3.

<sup>174</sup> *Id.* at 4.

<sup>175</sup> *See id.* at 1.

<sup>176</sup> *Id.* at 2–3.

<sup>177</sup> *See* 47 U.S.C. § 152(a) (2012).

<sup>178</sup> 47 U.S.C. § 152(b) (2012).

<sup>179</sup> *Id.*

<sup>180</sup> Since it was enacted in 1934, the Act has only undergone three significant changes. First, the Cable Communications Policy Act of 1984 added Title VI, which deregulated cable. *See* Cable Communications Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779. Second, the Cable Television Consumer Protection and Competition Act of 1992 amended Title VI, adding “must carry” and “retransmission consent” rules. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1419. And third, the Telecommunications Act of 1996 overhauled existing telecommunications law, taking the re-

moths that dominate their markets and potentially capture regulators.<sup>181</sup> Another issue may be that telecommunications issues have become increasingly partisan.<sup>182</sup> However, amending the Communications Act to create intrastate rate caps for inmate calling is a discrete change that would only affect a small handful of firms, none of which have the lobbying power of the major telecom firms. And although policymakers frequently disagree along party lines, ICS is not a hyper-partisan issue. In fact, the Inmate Calling Technical Corrections Act was co-sponsored by Republican Senator Rob Portman.<sup>183</sup> And more generally, criminal justice reform is one of the few remaining bipartisan issues.<sup>184</sup> By re-framing prison phones as a criminal justice issue rather than a telecommunications issue, Senator Duckworth can hopefully persuade her colleagues to adopt ICS reform legislation.

It is worth mentioning briefly that Congressional delegation of intrastate regulatory authority is almost certainly constitutional. First, Congress can delegate rulemaking power to administrative agencies as long as it provides an “intelligible principle” with which to act.<sup>185</sup> The Inmate Calling Technical Corrections Act would absolutely satisfy that requirement. Second, Congress (and thereby any agency with delegated authority) can regulate purely intrastate commerce when that commerce has a substantial effect on national markets.<sup>186</sup> Given that intrastate inmate calls are part of a larger payphone industry, which in turn is part of a massive landline telephony market, it is fair to assume that intrastate calling has a large enough aggregate economic impact to merit federal regulation.

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cently-invented Internet into consideration, while opening up markets to increased competition. See BENJAMIN & SPETA, *supra* note 24, at 222–23.

<sup>181</sup> See Tom Wheeler, *A goal realized: Network lobbyists’ sweeping capture of their regulator*, BROOKINGS INST. (Dec. 14, 2017), <https://www.brookings.edu/blog/techtank/2017/12/14/a-goal-realized-network-lobbyists-sweeping-capture-of-their-regulator/> [<https://perma.cc/V2MD-Y2XA>].

<sup>182</sup> See, e.g., Haley Sweetland Edwards, *Why 2016 Republicans Oppose Net Neutrality*, TIME (Mar. 13, 2015), <http://time.com/3741085/net-neutrality-republicans-president/> [<https://perma.cc/LZB4-W35Y>] (explaining how Net Neutrality is highly technical and ostensibly should not have a political valence, but has become a partisan issue).

<sup>183</sup> See Inmate Calling Technical Corrections Act of 2018, *supra* note 169.

<sup>184</sup> See Alex Altman, *Will Congress Reform the Criminal Justice System?*, TIME (Mar. 26, 2015), <http://time.com/3760310/criminal-justice-reform/> [<https://perma.cc/Y8BB-E92L>]; Zoë Carpenter, *Does it Matter Why the Right Wants Criminal-Justice Reform?*, THE NATION (Mar. 27, 2015), <https://www.thenation.com/article/does-it-matter-why-right-wants-criminal-justice-reform/> [<https://perma.cc/J584-353Z>]; Van Jones, *Kushner’s effort to sway Trump on prison reform is smart*, CNN (Jan. 11, 2018, 6:12 PM), <https://www.cnn.com/2018/01/11/opinions/criminal-justice-reform-trump-sessions-van-jones-opinion/index.html> [<https://perma.cc/3J3H-RBLC>].

<sup>185</sup> See *Whitman v. Am. Trucking Assoc.*, 531 U.S. 457, 472 (2001).

<sup>186</sup> See, e.g., *Gonzales v. Raich*, 545 U.S. 1, 17 (2005) (“Our case law firmly establishes Congress’ power to regulate purely local activities that are part of an economic ‘class of activities’ that have a substantial effect on interstate commerce.”); see also *Wickard v. Filburn*, 317 U.S. 111, 124 (1942) (holding that “the reach of [the commerce] power extends to those intrastate activities which in a substantial way interfere with or obstruct the exercise of the granted power”).

### B. Prison Phone Reform At The State Level

Until Congress acts, the best hope for lower inmate calling rates is state and local regulation. This has already started. For example, the Texas Department of Criminal Justice slashed rates from 26 cents per minute to 6 cents per minute for both local and interstate inmate calls.<sup>187</sup> New York City has made all calls from jails free for inmates.<sup>188</sup> As Commissioner Clyburn highlighted in her 2015 statement, other states like New Jersey and West Virginia have limited calling rates to less than five cents per minute.<sup>189</sup> Moreover, thirteen states have completely eliminated “site commissions”—the kickbacks that ICS providers pay to facilities, which in turn get passed to consumers.<sup>190</sup> All of these efforts—both legislative and agency action—at the state level are significant for inmates and their families. Moreover, this progress is especially encouraging because it does not map onto red and blue states; there is hope yet that the prison phone problem may find a bipartisan solution.

At the same time, there are still many states where rates are not so inmate-friendly. Another concern is that while state-run prisons have gradually addressed exorbitant calling rates, county and city jails feature high rates and fees that get much less attention.<sup>191</sup> The success of ICS regulation at the state level emphasizes the exigency of federal legislation to the extent that prisoners paying totally different phone bills depending on where they are incarcerated is unfair.<sup>192</sup> A much better arrangement would be the FCC establishing “a federal ceiling with rate caps,”<sup>193</sup> with states regulating in concert.

<sup>187</sup> Lauren McGaughy, *Texas prisons slash inmate phone call rates from 26 to 6 cents per minute*, DALLAS MORNING NEWS (Aug. 24, 2018), <https://www.dallasnews.com/news/crime/2018/08/24/texas-prisons-slash-inmate-phone-call-rates-26-6-cents-per-minute> [<https://perma.cc/L4S3-SU3X>].

<sup>188</sup> Zoe Greenberg, *Phone Calls From New York City Jails Will Soon Be Free*, N.Y. TIMES (Aug. 6, 2018), <https://www.nytimes.com/2018/08/06/nyregion/phone-calls-free-nyc-jails.html> [<https://perma.cc/D96E-UH7V>].

<sup>189</sup> 2015 ICS Order, *supra* note 16, at 195.

<sup>190</sup> See *Intrastate (in-state) Collect Prison Phone Rates*, PRISON PHONE JUST., <https://www.prisonphonejustice.org> [<https://perma.cc/G646-3TXP>].

<sup>191</sup> See Peter Wagner & Alexi Jones, *State of Phone Justice: Local jails, state prisons and private phone providers*, PRISON POLY INITIATIVE (Feb. 2019), [https://www.prisonpolicy.org/phones/state\\_of\\_phone\\_justice.html](https://www.prisonpolicy.org/phones/state_of_phone_justice.html) [<https://perma.cc/83Q7-LXR8>]. Wagner and Jones note that phone service is not any more expensive to provide at local jails than it is at larger facilities—rather, local jails are particularly vulnerable to the types of predatory contracts this Article has discussed. See *id.*

<sup>192</sup> Differences among the states pose a “collective action problem,” which is exactly the kind of problem that demands a federal solution. See Robert D. Cooter & Neil S. Siegel, *Collective Action Federalism: A General Theory of Article I, Section 8*, 63 STAN. L. REV. 115, 117 (2010).

<sup>193</sup> 2015 ICS Order, *supra* note 16, at 195. In her statement, Commissioner Clyburn also wrote, “there is nothing stopping states that have yet to reform to follow the lead of New Jersey, New York, Ohio and others to further reduce fees, and I hope that with collective encouragement, this will happen soon.” *Id.*

### C. Potential Litigation Strategies

Although this Article is primarily focused on institutional (*i.e.* legislative/administrative) solutions to the inmate calling crisis, reform is theoretically possible through litigation as well. That would presumably mean challenging exorbitant ICS rates under the APA or on a constitutional basis. It is not clear that either strategy would work, but perhaps a wave of litigation would at least signal to Congress that ICS is a serious issue.

First, individuals with standing (likely inmates and their families) could bring suit against the FCC for violating the APA. Plaintiffs are not likely to succeed if they simply argue that the agency should engage in more rulemaking; while the APA provides for judicial review when an agency “acted or failed to act,”<sup>194</sup> it is difficult to challenge *inaction* because courts generally defer to agency prioritization.<sup>195</sup> Instead, the most viable APA claim would be that the agency’s decision not to defend its 2015 Order in the D.C. Circuit was itself arbitrary and capricious.<sup>196</sup> An agency action<sup>197</sup> is “arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider[.]”<sup>198</sup> On the one hand, the FCC abandoned its position due to a change in the composition of the Commission,<sup>199</sup> which feels inconsistent with the fundamental purpose of an independent agency. On the other, it is unclear that the agency’s letter even qualifies as reviewable agency action and, moreover, courts do not require much for agencies to change their minds.<sup>200</sup> Altogether, an APA claim in the ICS context may be a long shot.

Second, litigants could bring a constitutional challenge to high ICS rates. Nearly two dozen cases have already raised constitutional issues, covering free speech under the First Amendment to equal protection under the Fourteenth Amendment.<sup>201</sup> Arguably the best argument is that excessive ICS rates constitute “cruel and unusual punishment” in violation of the Eighth Amendment.<sup>202</sup> In some cases, Eighth Amendment claims can stem from

<sup>194</sup> 5 U.S.C. § 702 (2012).

<sup>195</sup> *Cf.* Heckler v. Chaney, 470 U.S. 821, 831 (1985) (“This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement.”).

<sup>196</sup> 5 U.S.C. § 706(2)(A) (2012).

<sup>197</sup> *See* 5 U.S.C. § 551(13) (2012) (“[A]gency action’ includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act[.]”).

<sup>198</sup> *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>199</sup> *See* Letter to Mark J. Langer from David M. Gossett, *supra* note 148.

<sup>200</sup> *See* *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (“[O]f course the agency must show that there are good reasons for the new policy. But it need not demonstrate to a court’s satisfaction that the reasons for the new policy are better than the reasons for the old one; it suffices that the new policy is permissible under the statute, that there are good reasons for it, and that the agency believes it to be better, which the conscious change of course adequately indicates.”).

<sup>201</sup> *See* Severin, *supra* note 25, at 1513 n.237.

<sup>202</sup> *See* U.S. CONST., amend. VIII.

egregious prison conditions,<sup>203</sup> including conditions that violate “broad and idealistic concepts of dignity, civilized standards, humanity, and decency.”<sup>204</sup> Personal connection is a fundamental human need. In that sense, exorbitant ICS rates are tantamount to solitary confinement insofar as they cut people off from communicating with the outside world.<sup>205</sup> Justice Kennedy wrote, “The human toll wrought by extended terms of isolation long has been understood . . . Yet despite scholarly discussion and some commentary from other sources, the conditions in which prisoners are kept simply has not been a matter of sufficient public inquiry or interest.”<sup>206</sup> The problem with analogizing ICS rates to solitary confinement, however, is that not even that practice is unconstitutional.<sup>207</sup> Realistically, Eighth Amendment jurisprudence is messy,<sup>208</sup> which makes relief for ICS users unlikely. In the end, the difficulty of defeating ICS rates through litigation merely reinforces the urgency of Congressional intervention.

### CONCLUSION

Ofentimes, regulating the communications industry is complex, with highly sophisticated technologies and various cross-cutting interests. As a result, the FCC frequently faces “polycentric”<sup>209</sup> problems—nuanced issues with a web of possible, interrelated explanations. Outrageous inmate calling service rates, however, is not that kind of problem. For too long, the FCC was unresponsive in the face of blatant market failure, which has had a disproportionate impact on the most marginalized group in society—the incarcerated and the condemned. The Commission turned a blind eye to the nearly three million children in the United States for whom extortionate phone bills made unfettered communication with a parent in jail virtually impossible. And the Commission was not sympathetic to individuals like Martha Wright, who became saddled in her retirement with onerous phone bills. Eventually, the FCC promulgated adequate ICS reform regulations,

<sup>203</sup> See, e.g., *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981).

<sup>204</sup> *Hutto v. Finney*, 437 U.S. 678, 685 (1978) (quoting *Estelle v. Gamble*, 429 U.S. 97, 102 (1976)); see also Sharon Dolovich, *Cruelty, Prison Conditions, and the Eighth Amendment*, 84 N.Y.U. L. REV. 881, 891 (2009) (“The state therefore has an affirmative obligation to protect prisoners from serious physical and psychological harm. This obligation, which amounts to an ongoing duty to provide for prisoners’ basic human needs, may be understood as the state’s carceral burden.”).

<sup>205</sup> Cf. Rick Raemisch, *Why I Ended the Horror of Long-Term Solitary in Colorado’s Prisons*, ACLU (Dec. 5, 2018), <https://www.aclu.org/blog/prisoners-rights/solitary-confinement/why-i-ended-horror-long-term-solitary-colorados-prisons> [<https://perma.cc/C2MT-5EQZ>] (“In practice, long-term isolation punished people in a way that not only lacked humanity but sense. And when a program lacks both sense and humanity, the results are as clear as they are disastrous: dehumanization and harm.”).

<sup>206</sup> *Davis v. Ayala*, 135 S. Ct. 2187, 2209 (2015) (Kennedy, J., concurring).

<sup>207</sup> Jules Lobel, *Prolonged Solitary Confinement and the Constitution*, 11 U. PA. J. CONST. L. 115, 117 (2008).

<sup>208</sup> See Dolovich, *supra* note 204, at 890.

<sup>209</sup> See Lon L. Fuller & Kenneth I. Winston, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 371 (1978).



but the D.C. Circuit invalidated those rules. Today, inmate calling services remains an urgent problem at prisons and jails across the country; the legal and regulatory rigmarole surrounding this problem underscores the necessity of a federal solution. Congress should empower the FCC to regulate *all* inmate calling rates and finally give inmates and their families the justice they deserve.

