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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

TODD KAELIN et al. Plaintiffs, vs. COUNTY OF RIVERSIDE, et al., Defendants.	CASE NO: 2:16-cv-02477-MFW(JC) Consolidated with: 2:15-cv-09003 2:16-cv-01079 2:16-cv-02478 2:16-cv-02479 CONSOLIDATED OPPOSITION TO DEFENDANTS' MOTION TO DISMISS Date: August 8, 2016 Time: 10:00 A.M. Courtroom: 1600

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TABLE OF AUTHORITIES

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I. INTRODUCTION

Defendants challenge Plaintiffs' claims on every conceivable front. To begin, Plaintiffs advise the Court that they will not pursue the Federal Communications Act ("FCA") claim. The appropriate vehicle to dismiss a claim as opposed to a whole action is to abandon the claim by filing an amended complaint under Rule 15. *See, e.g., Hells Canyon Pres. Council v. U.S. Forest Serv.*, 403 F.3d 683, 687 (9th Cir. 2005). Accordingly, Plaintiffs will file an amended complaint without the FCA claim after the Court rules on the pending motion (along with any other changes if ordered by the Court).

As to Defendants'other arguments, they are not well-taken. Particularly in light of the abandonment of the FCA claim, Defendants' reliance on the primary jurisdiction rule (that the FCC exclusively sets rates) is inapplicable. Plaintiffs do not seek to set rates but argue that the Counties' conduct as a government entity violates their rights for multiple reasons. There is ample authority for Plaintiffs'federal First Amendment, unconstitutional conditions/takings and Sherman Act claims, as there is for Plaintiffs' state law tax, disparate impact, and Civil Code § 52.1 claims. These are all discussed at length in the body of the Memorandum. (Because of the interconnection between the First Amendment and state tax claims, we have positioned the state tax discussion immediately after the First Amendment. Finally, Plaintiffs' state law claims do not involve novel and complex questions over which this Court should decline to exercise jurisdiction.

II. THE PRIMARY JURISDICTION RULE DOES NOT APPLY BECAUSE THE FCC ALREADY HAS ISSUED ITS ORDERS ON THIS VERY ISSUE

Because, as noted, Plaintiffs are dismissing their FCA claim, primary jurisdiction should no longer be at issue. Further, because the FCC has now acted on both the intrastate and interstate call issues, *Rates for Interstate Inmate Calling Services*, 28 FCC Rcd 14107 (2013) (*2013 Order*); *Rates for Interstate Inmate*

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Calling Services, 30 FCC Rcd 12763 ¶ 9 (Nov. 5, 2015), the policy considerations deferring to the FCC have been met. The FCC has provided the necessary "analysis and guidance." *See Wright v. Corrections Corporation of America, et al.*, No. 00-cv-0293-GK (D.D.C) (class action complaint filed in 2000 dismissed until FCC action under the "primary jurisdiction" doctrine).[1]

A. STANDARDS FOR PRIMARY JURISDICTION

"Primary jurisdiction applies in a limited set of circumstances." *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008). *See also United States v. Henderson*, 416 F.3d 686, 691 (8th Cir. 2005) (The doctrine of primary jurisdiction "should be used sparingly."). The doctrine is used only if a claim "requires resolution of *an issue of first impression*, or of a particularly complicated issue that Congress has committed to a regulatory agency. *Brown v. MCI WorldCom Network Servs.*, 277 F.3d 1166, 1172 (9th Cir. 2002) (citing *Tex & Pac. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 442 (1907) (emphasis added). Invoking primary jurisdiction is disfavored if it would needlessly delay resolution of claims. *E.g., Rhoades v. Avon Prods., Inc.*, 504 F.3d 1151, 1165 (9th Cir. 2007) ("efficiency" is the "deciding factor" in whether to invoke primary jurisdiction).

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[1] In March 2016, the US Court of Appeals for the District of Columbia stayed the implementation of the rate caps in the 2015 Order, but did not stay the limits on ancillary fees. *Global Tel*Link v. Federal Communications Commission, et al.*, Case No. 15-1461, Dkt No. 1602581 (D.C. Cir. Mar. 7, 2016). Effective June 20, 2016, there will be caps on the per-minute rates for interstate calls and limits on ancillary fees. Therefore, any ruling by the D.C. Circuit will not have any effect on the 2013 Order or much of the 2015 Order. Furthermore, although the D.C. Circuit may find that the "hard caps" for intrastate rates should be prospectively increased from the caps ordered by the FCC, the court's decision will have no effect on the dispositive issue in Plaintiffs' claim, the FCC's conclusion that the previous rates violated Sections 201 and 276 of the FCA. *Compare Fontes v. Time Warner Cable*, 2015 U.S. Dist. Lexis 169580, at *8 (C.D. Cal. 2015) (noting that the Court of Appeal's ruling may vacate the FCC's ruling on "many dispositive issues in the case").

Primary jurisdiction is improper where an agency has already decided the issue. *See, e.g., Klicker v. Northwest Airlines, Inc*., 563 F.2d 1310, 1313 (9th Cir. 1977) *Fontan-de-Maldonado v. Lineas Aeras Costarricenses, S.A.,* 936 F.2d 630, 631 (1st Cir. 1991) ("*Of course, if the agency has already announced its views, there is no need to apply the [primary jurisdiction] doctrine*") (emphasis added). Given the FCC proceedings that have already transpired, there remains no issue in this litigation that should or must be referred to the FCC.[2]

B. ANOTHER DISTRICT COURT ALREADY DENIED THE SAME ARGUMENT WITH EVEN LESS INPUT FROM THE FCC THAN THIS COURT HAS BEFORE IT.

In January 2015, *before* the FCC issued its 2015 Order concerning intrastate rates, a District Court in Arkansas, presiding over the consolidated nationwide class action against Securus and GTL alleging unjust and unfair rates in violation of the FCA, denied Defendants' Motion for Stay based on primary jurisdiction. *See* Request for Judicial Notice, Ex. 6, (*Securus v. Mojica*, Case No. 5:14-cv-5258-TLB, Doc. 36 (W.D. AK Jan. 29, 2015) (FCC had "already made available a good deal of [its] expertise" by Nov. 13). In contrast, this Court now has the benefit of both FCC Orders – concerning interstate and intrastate rates.

C. THE PRIMARY JURISDICTION DOCTRINE WOULD ONLY APPLY TO PLAINTIFFS' FEDERAL COMMUNICATIONS ACT CAUSE OF ACTION IF THEY WERE PURSUING IT.

Other than the to be dismissed FCA claim, Plaintiffs' Complaint does not implicate the primary jurisdiction doctrine because the only technical issue within the FCC's expertise is whether the rates violate Sections 201 and 276 of the Federal Communications Act. The other causes of action concern legal questions

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[2] Nearly all of the cases relied on by Defendants at pages 6-7 of their Motion are misplaced either because they were decided years before the applicable FCC Orders concerning inmate phone rates (Mot. at 6:17-24) or because, as Defendants note, the respective court issued its order while the FCC was still considering the particular issue before that court. Mot. at 7:7-12.

implicating the United States and California constitutions, the Sherman Antitrust Act, and certain California statutes. *See, e.g., Brown,* 277 F.3d at 1172 *quoting United States v. General Dynamics*, Inc. 828 F.2d 1356, 1365 (9th Cir. 1987) ("primary jurisdiction is properly invoked when a case presents a far-reaching question that requires expertise or uniformity in administration").[3] Since, for reasons unrelated to primary jurisdiction, Plaintiffs are not pursuing their FCA claim, the Court need not spend time on it.

III. THE IMPOSITION OF THE UNLAWFUL TAX UNCONSTITUTIONALLY BURDENS PLAINTIFFS' FIRST AMENDMENT RIGHT TO FREE SPEECH

In contrast to Defendants' contentions, inmates do "have a First Amendment right to telephone access" under Ninth Circuit law (in contrast to other circuits)[4] which right is subject to "reasonable limitations arising from the legitimate penological and administrative interests of the prison system." *Johnson v. State of Cal*., 207 F.3d 650, 656 (9th Cir. 2000).[5] Defendants misdirect the issue by arguing that "prisoners are [not] entitled to a specific rate for their telephone calls." Mot. at 14:5-8 (citing *Johnson)*. [6] However, Plaintiffs do not seek to set specific

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[3] *See also, e.g.,, Allnet Communication Serv., Inc. v. National Exch. Carrier Ass'n, Inc.*, 965 F.2d 1118, 1121 (D.C. Cir. 1992); *New York State Thruway Auth. v. Level 3 Communications, LLC, 734 F.Supp.2d 257, 267-71* (N.D.N.Y. 2010) (doctrine inapplicable to "questions within the conventional competence of the courts").

[4] Defendants rely on cases from outside the Ninth Circuit that inmates have no First Amendment right to *even speak on the telephone*. *Holloway v. Magness*, 666 F.3d 1076 (8th Cir. 2012); *Arsberry v. Illinois*, 244 F.3d 558, 566 (7th Cir. 2001). But *Johnson* expressly holds that inmates do have such a First Amendment right, rendering these cases inapposite.

[5] *See also e.g., Keenan v. Hall*, 83 F.3d 1083, 1092 (9th Cir. 1996) ("Prisoners have a First Amendment right to telephone access, *subject to reasonable security limitations*") (emphasis added); *Stanburg v. City of Helena*, 791 F.2d 744, 747 (9th Cir. 1986) (same); *Washington v. Reno*, 35 F.3d 1093, 1100 (6th Cir. 1994); *Johnson v. Galli*, 596 F.Supp. 135, 138 (D. Nev. 1984).

[6] Defendants cite to several decisions that used this exact quote to summarily dismiss First Amendment challenges based on the cost of the phone calls. However, none of these

phone rates, but challenge the burden on first amendment rights that the County Defendants' policies and practices impose. Plaintiffs contend that the amount of the telephone charges given to the County Defendants must not prohibit reasonable telephone access and must be related to legitimate penological interests of the prison system, namely security.[7]

Plaintiffs have alleged that the commissions imposed by the County Defendants "fleece" those who have to pay, are "unconscionable," are mere "money-making schemes," constitute a form of "extortion," are "unreasonable, unjust and exorbitant," and are "not reasonably related to their costs." Whether the charges constitute "reasonable limitations arising from the legitimate penological and administrative interests" (*Johnson*) requires a factual record not yet before the Court. *See, e.g., McGuire v. Ameritech Servs, Inc*., 253 F.Supp.2d 988, 1001-02 (2003) (it would be improper to dismiss the First Amendment and equal protection claims in similar case on a motion to dismiss).[8]

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decisions followed the Ninth Circuit's mandate to consider whether the rates were "reasonable" and related to "legitimate penological and administrative interests of the prison system." *See Shakur v. Schriro*, 514 F.3d 878, 885 (9th Cir. 2008) (noting that a court must balance the four *Turner* factors and it is "insufficient" to simply rely on other decisions holding that the same prison regulation was rationally related to legitimate penological interests).

[7] Moreover, there is a class of call recipient inmates, largely family members, to whom no penological considerations apply. The Court must also consider the burden on them, too, as they must have the ability to "exercise[e] their own constitutional rights by reaching out to those on the inside.'" *Thornburgh v. Abbott*, 490 U.S. 401, 407 (1989).

[8] ; *See also, e.g., Nelson v. City of Los Angeles,* 2015 WL 1931714, at *14 (C.D. Cal. 2015) (denying Motion to Dismiss claim that Defendant's policy of limiting mail to postcards violated First Amendment rights; "[nothing in the [Complaint] indicate[d] that any penological interest was furthered by the… policy or shows that the policy was reasonably related to that interest"); *Riker v. Lemon*, 798 F.3d 546, 553 (7th Cir. 2015) (*quoting* V*an Den Bosch v. Raemisch*, 658 F.3d 778, 785 (7th Cir. 2011) (while prisoner has the burden of persuasion "to disprove validity of a legitimate governmental interest in the regulation,' prison officials 'must still articulate their legitimate governmental interest in the regulation' and provide some evidence supporting their concern'"); *Beerheide v.*

1 Plaintiffs intend to prove, as shown below, that the increase in rates based on
2 the commissions have no reasonable relationship to "legitimate penological and
3 administrative interests of the prison system," *Johnson*, 207 F.3d at 656, including
4 any security concerns. *Keenan v. Hall*, 83 F.3d at 1092 , *opinion amended on*
5 *denial of reh'g,* 135 F.3d 1318 (9th Cir. 1998). Indeed, jail administrators have no
6 input on the rates. Rather, the rates are set by some combination of the phone
7 companies and the County Boards of Supervisors, not the jails. The phone
8 companies are selected by the respective County's Board of Supervisors based
9 solely on which company offers the highest commission. On its face, this carries an
10 initial burden of persuasion to establish that the rates and commissions are not
11 based on legitimate penological interests.
12 Further, the Complaint unequivocally alleges that the rates are not
13 "reasonable," including that the Federal Communications Commission itself has
14 expressly concluded that the phone rates at issue were not reasonable, and that the
15 site commissions were a significant factor causing the high rates. Complaint, ¶¶ 4,
16 32, 82. None of the cases relied upon by Defendants had the benefit of the FCC's
17 definitive conclusions that the charges were unjust and unreasonable.
18 An "excessive fee that is used to generate general revenue becomes a tax."
19 *Morning Star Co. v. Bd. of Education*, 201 Cal.App.4th 737, 751 (2011). The
20 Complaint also alleges that the commission is a tax under California law. *See*
21 *Article IV, infra.* Therefore, this case presents an issue not presented in *Johnson* or
22 any other First Amendment challenges to inmate phone service charges: Whether,
23 as a tax, the commissions impose an unconstitutional burden upon Plaintiffs' First
24 Amendment rights even if it would not so qualify if it were not a tax.
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Suthers, 286 F.3d 1179, 1189 (10th Cir. 2002) ("prison officials *must present credible evidence* to support their stated penological goals") (emphasis in original).

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A. THE COMMISSION IS AN IMPERMISSIBLE TAX IMPOSED ON PLAINTIFFS' FIRST AMENDMENT RIGHTS TO FREE SPEECH.

"A tax that burdens rights protected by the First Amendment cannot stand unless the burden is *necessary to achieve an overriding governmental interest*." *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 582 (1983) (emphasis supplied).[9] Therefore, the government may not impose a fee not reasonably related to the regulatory costs incurred in regulating expressive activity. *Murdock v. Pennsylvania*, 319 US 105 (1943).

In *Murdock*, the Supreme Court struck down a licensing fee for distributing literature because it was not "imposed as a regulatory measure to defray the expenses of policing the activities in question," but rather served as "a flat license tax levied and collected as a condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment." *Id.* at 113-14. Since *Murdock*, courts have consistently struck down taxes that go beyond defraying related costs, and actually tax speech.[10] Here, the tax is unrelated to the government's cost to provide inmate

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[9] Even in *Arsberry v. Illinois, supra*, Judge Posner acknowledged that *Minneapolis Star* applies *if there is a First Amendment right at issue*. *Arsberry*, 244 F.3d at 564 (the "vital distinction" between *Minneapolis Star* and *Arsberry* is that the newspaper communications at issue in *Minneapolis Star* were protected by the First Amendment while the telephone calls in *Arsberry* were not"). Unlike the Seventh Circuit, the Ninth Circuit has held that there is such a right.

[10] *See, e.g., Baldwin v. Redwood City*, 540 F2d 1360, 1371 (9th Cir. 1976) (striking down fees on postering; the fee is not in fact reimbursement for the cost of inspection but an unconstitutional tax upon the exercise of First Amendment rights"); *TK's Video, Inc. v. Denton County, TX*, 24 F.3d 705 (5th Cir. 1994) ("Government can't tax first amendment rights, but it can extract *narrowly tailored fees* to defray administrative costs of regulation") (emphasis supplied); *Nat'l Awareness Found. v. Abrams*, 50 F.3d 1159, 1165 (2d Cir. 1995) ("Thus, fees that serve not as revenue taxes, but rather as means to meet the expenses incident to the administration of a regulation and to the maintenance of public order in the matter regulated are constitutionally permissible"); *Sentinel Communications Co. v. Watts*, 936 F2d 1189, 1205 (11th Cir. 1991) (holding that "[t]he government may not profit by imposing licensing or permit fees on the exercise of First Amendment rights"); *Eastern Conn. Citizen Action Group v. Powers*, 723 F2d 1050, 1056 (2d Cir. 1983).

phone services, taxes speech and passes the tax revenue through to each respective County for their Inmate Welfare Funds.

Furthermore, this tax was not passed legally or through any democratic process at all. By circumventing Proposition 26, the County imposed a tax that only applies to a constituency, inmates and their families, who are without the popular support to fight back through the political process. *Cf., e.g., Battle v. Anderson* 564 F.2d388, 398 (10th Cir. 1977) (plaintiffs in prisoner class actions "are generally a feared and despised class").[11] This concern has been acknowledged by the Supreme Court. *See Leathers v. Medlock*, 499 U.S. 439, 445 (1991) ("[T]he general applicability of any burdensome tax law helps to ensure that it will be met with widespread opposition. When such a law applies only to a single constituency, however, it is insulated from the political constraint").[12]

Finally, the impact on Plaintiffs' First Amendment rights is correlated with their financial means. Those with more money can absorb the cost of the tax and enjoy more phone communication than the poor, who compose the majority of the inmate population and are disproportionately affected by this tax. This is a recognized consideration when adjudicating First Amendment rights. *See, e.g., Martin v. Struthers*, 319 U.S. 141, 146 (1943) (striking down ban on door-to-door distribution of circulars in part because it was "essential to the poorly financed causes of [the speakers"); *Marsh v. Alabama*, 326 U.S. 501 (1946).

B. THE COURT SHOULD REVIEW THE TAX UNDER HEIGHTENED SCRUTINY.

Federal law provides deference to correctional authorities when it comes to security and maintaining order. However, that deference is not absolute, and the

[11] *Morales Feliciano v. Hernandez Colon*, 697 F.Supp.51, 60 (D. Puerto Rico 1988) ("The general population's attitude toward those who commit or are accused of committing crimes is understandably one bordering in despise").

[12] *Cf. Romer v. Evans*, 517 U.S. 620, 634, 116 S. Ct. 1620, 1628, 134 L. Ed. 2d 855 (1996) (laws aimed at gays and lesbians "raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected").

reasons for that deference are not present in this case. The commissions, which are admittedly for the purpose of raising funds to support the jails' operation, do not further a *penological* interest at all. *See Turner v. Safley,* 482 U.S. 78, 107 (1987) (must be a "logical connection between the regulation and the asserted [penological] goal").[13] Simply stated, the tax does not implicate security needs or intrude into the "day to day" judgments of prison officials. In fact, as discussed above, prison officials do not make any determination concerning the commissions or phone rates. Therefore, this tax burdening First Amendment rights should not be analyzed under the more deferential *Turner* standard, in which the court determined that "[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to *anticipate security problems* and to adopt innovative solutions to intractable problems of prison *administration*." *Turner v. Safley*, 482 U.S. at 89 (emphasis added).

In *Thornburgh v. Abbott*, 490 U.S. 401*,* 407 (1989), the Supreme Court explained that the *Turner* rule was founded on the courts' sensitivity "to the delicate balance that prison administrators must strike between order and security … and the legitimate demands of those on the 'outside' who seek to enter that environment, in person or through written word." Thus, "certain proposed interactions, though seemingly innocuous to laymen, have potential significant implications for the order and security of prison" and warranted deference to prison officials "who, *in the interest of security*, regulate the relations between prisoners and the outside world." *Id.* at 408. (emphasis added).[14]

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[13] The fact that Plaintiffs are in county jails, and many are pretrial detainees, not convicted felons, is relevant. *Coronel v. State of Hawaii, Dept. of Corrections*, 1993 WL 147318 at *2 (9th Cir. 1993) (distinguishing First Amendment right to telephone access by pretrial detainees from more limited rights afforded to convicted felons).

[14] *See also Keenan*, 83 F.3d at 1092 ("Prisoners have a First Amendment right to telephone access, *subject to reasonable security limitations*"); *Hutchings v. Corum*, 501 F.Supp. 1276, 1296 (W.D. Mo. 1980) ("[i]t has been long held that inmates have the First Amendment right to communicate with friends and relatives by means of visits,

In *Pitts v. Thornburgh*, 866 F.2d 1450 (D.C. Cir. 1989), plaintiffs challenged prison policies involving "general budgetary and policy choices," not security concerns or "regulations that govern the day-to-day operations of prisons" *Id.* at 1454. Traditional intermediate scrutiny, not *Turner* deference, applied in analyzing the validity of the regulation. *Id. See also Jordan v. Gardner*, 986 F.2d 1521, 1530 (9th Cir. 1993); *Beauchamp v. Murphy*, 37 F.3d 700, 704 (1st Cir. 1994). Indeed, this very issue was correctly resolved in *Byrd v. Goord,* 2005 WL 2086321 (S.D.N.Y. 2005)*,* where the Court found that phone commissions were not a prison regulation related to the functioning of a prison and did not involve matters "relating to security or safety." Thus, *Turner* deference did not apply. The Court denied motions to dismiss plaintiffs' First Amendment, due process and equal protection challenges. 2005 WL 2086321 at *8-9.

Defendants will have the opportunity to present evidence regarding the relationship of the commissions to security and order; it is inappropriate at the pleading stage. Defendants' contention that deferential review applies to any prison revenue-raising scheme would be a significant departure from the rationale of *Turner* and *Thornburgh*.

C. EVEN UNDER THE MORE DEFERENTIAL *TURNER* STANDARD, THE TAX IS STILL UNCONSTITUTIONAL

Even applying the *Turner* standard, the charges/tax at issue is not reasonably related to legitimate penological interests. *Turner* articulates four factors: (1) whether the regulation is rationally related to a legitimate and neutral governmental objective; (2) whether there are alternative avenues that remain open ... to exercise the right; (3) the impact that accommodating the asserted right will have on other

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correspondence and telephone calls," subject only to "rational limitations in the face of *legitimate security interests* of the penal institution"). Similarly, the cases relied on by *Turner* and *Thornburgh* involved prison regulations promulgated for security reasons. *See Block v. Rutherford*, 468 U.S. 576 (1984); *Bell v. Wolfish*, 441 U.S. 520, 548-49 (1979); *Jones v. N.C. Prisoners' Labor Union, Inc.*, 433 U.S. 119, 126-27 (1977).

guards and prisoners, and on the allocation of prison resources; and (4) whether the existence of easy and obvious alternatives indicates that the regulation is an exaggerated response by prison officials. *Prison Legal News v. Cook*, 238 F.3d 1145, 1149 (9th Cir. 2001) (citing *Turner*, 482 U.S. at 89).[15]

Turner requires "considerable deference to the expertise and decision-making of *prison administrators*." *Id.* (emphasis added). [16] However, *Turner's* "reasonableness standard is not toothless," *Thornburgh,* 490 U.S. at 414. Prison authorities must "show more than a formalistic logical connection between a regulation and a penological objective." *Beard v. Banks,* 548 U.S. 521, 535 (2006). The level of scrutiny to be applied depends on the circumstances in each case. *Frost v. Symington,* 197 F.3d 348 (9th Cir.1999). In *Frost*, the Ninth Circuit explained that, where the inmate presents sufficient evidence to refute "a common-sense connection between a legitimate objective and a prison regulation," the burden shifts to the prison, which must then "present enough counter-evidence to show that the connection is not so remote as to render the policy arbitrary or irrational." *Id.* at 357. If the inmate fails to carry that initial burden, *Turner's* first prong ("reasonably related to legitimate penological interests") is met, presuming the governmental objective is legitimate and neutral. *Id*. But, "if the prison fails to show that the regulation is rationally related to a legitimate penological objective, [the court does] not consider the other factors." *Hrdlicka,* 631 F.3d at 1051 (quoting *Ashker v. Cal. Dep't of Corr*., 350 F.3d 917, 922 (9th Cir. 2003).

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[15] Most decisions applying *Turner* are rendered via a motion for summary judgment, not a motion to dismiss. *See, e.g., Prison Legal News*, 238 F.3d at 1145 (denying Defendants' Motion for Summary Judgment because Defendants presented no evidence that ban on standard mail was rationally related to their purported legitimate penological objectives); *Hrdlicka v. Reniff*, 631 F.3d 1044, 1050-51 (9th Cir. 2001) (same); *Nelson,* 2015 WL 1931714, at *14.

[16] Defendants' decision of which phone company to contract with is not based on the expertise and decision making of prison administrators; it is based on which company is willing to pay the highest kickback.

Here, there is no logical connection between the tax on phone calls that goes to the Inmate Welfare Fund and furthering a legitmate penological objective. Getting money for the jail is not a *penological* objective. Any connection is arbitrary; the phone company is simply selected based on who offers the highest commission. Finally, the tax is indisputably unrelated to security or other functioning of the jail. *Byrd*, 2005 WL 2086321 at *9.

The second *Turner* factor (alternative means available to the prisoner) is also not met. Although other mediums may play a part in free speech balancing, that does not mean "the existence of other alternatives extinguishes altogether any constitutional interest on the part of the [plaintiffs] in this particular form of access." *Kleindiest v. Mandel*, 408 U.S. 753, 765 (1972) (limitations on face-to-face communications implicated the First Amendment even though books, speeches, telephones and tapes provided other means of communication).

In 2016, the telephone is an irreplaceable means of communication and is often the only means whereby Plaintiffs and class members are able to maintain familiar relationships and effective counsel. *Cf. In re Grimes*, 208 Cal.App.3d 1175, 1182 (1989) ("telephone communications is essential for inmate contact with attorneys." (citing *Johnson v. Galli*, 596 F.Supp. at 138). The same applies to personal and family contacts, especially since many inmates here are pre-trial detainees. *Johnson,* 596 F.Supp. at 138 ("Often times use of a telephone is essential for a pretrial detainee…").

Letter writing is not an adequate alternative in today's world. Today, letters are rarely if ever used to communicate. "Mail service …is often ineffective, particularly where an inmate requires immediate contact with an attorney." *In re Grimes*, 208 Cal.App.3d at 1183. Furthermore, for many people with disabilities and conditions that affect their ability to write, letter writing is not an option. It is not an option for the 40% of the national prison population that is illiterate. *See* The Center on Crime, Communities & Culture, Education as Crime Prevention:

Providing Education to Prisoners 3 (Sept. 1997), available at
http://www.prisonpolicy.org/scans/research_brief_2.pdf.

Finally, "the family of a detainee or inmate may live so far away [as to make personal visitation impractical." *Johnson*, 596 F.Supp. 138. For example, here, Plaintiff Ronnie Salazar is incarcerated in Los Angeles, but his wife and their children live in Sacramento for work and child care reasons. With the distance and cost of travel, the telephone is the only practical way for Star Salazar and her children to hear Ronnie Salazar's voice. Unable to yet read and write due to their young age, this is the *only way* for their children to speak with their father.

The third *Turner* factor is the impact that accommodation of the constitutional right will have on guards and other inmates. *Id.* Eliminating the tax will have no adverse impact on the guards or inmates since it is entirely unrelated to security or day to day operations at the jails; by law, all of the money must be transferred to the Inmate Welfare Fund. Penal Code § 4025. Making the cost of calls reasonable would, if anything, further security, improve prisoner's behavior and rehabilitation, and lead to *fewer disciplinary incidents*.[17] Furthermore, neither administrative inconvenience nor lack of resources provide justification for deprivation of constitutional rights. *See Rufo v. Inmates of Suffolk County Jail,* 502 U.S. 367, 392, 112 S.Ct. 748, 116 L.Ed.2d 867 (1992) ("financial constraints may not be used to justify the creation or perpetration of Constitutional violations.").[18]

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[17] *See* Bureau of Prisons Program Statement No. 5264.07, Telephone Regulations for Inmates (2002) ("Telephone privileges are a supplemental means of maintaining community and family ties that will contribute to an inmate's personal development….Contact with the public is a valuable tool in the overall correctional process").

[18] . *See also, e.g., Bounds v. Smith*, 430 U.S. 817, 825 (1977) ("the cost of protecting a constitutional right cannot justify its total denial"); *Stone v. City and County of San Francisco,* 968 F.2d 850, 858 (9th Cir.1992) ("federal courts have repeatedly held that financial constraints do not allow states to deprive persons of their constitutional rights"); *N.G. v. Connecticut,* 382 F.3d 225, 234 (2d Cir.2004) ("[m]ere convenience…cannot … justify such a serious impairment of privacy").

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The fourth *Turner* factor (existence of ready alternatives that the prison administrators can use to achieve the same goals) is not applicable because, as explained, jail regulations are not at issue. Even if this factor were applicable, there is an easy alternative – appropriations from the County's budget just as the County is responsible for funding the rest of the jail. Instead, for political reasons, Defendants raise revenue disproportionately on the backs of Plaintiffs and the class, an overwhelming low-income, minority group that is unpopular with the community at large. If the County needs to raise additional money, it can do so by seeking to raise taxes on the entire County rather than Plaintiffs and the Class.

Because of its organic connection to this First Amendment argument, we now explain why the commissions are a tax under California law.

IV. THE COMMISSIONS ARE AN ILLEGAL TAX IN VIOLATION OF CAL. CONST. ART. XIII C (PROPOSITIONS 218 AND 26).

A. BACKGROUND ON PROPOSITIONS 218 AND 26

California voters adopted Proposition 13 in 1978 (Cal. Const., art XIII A) to require *inter alia* that any "special taxes" for cities, counties, and special districts be approved by two thirds of voters. (Art. XIII A, § 4.). Many local government entities began charging new or higher taxes, fees, charges, and assessments in an effort to circumvent Prop. 13. *See Tiburon v. Bonander*, 180 Cal.App.4th 1057, 1072-74 (2009). In response, in 1996, California voters adopted Proposition 218 (Art. XIII D). One of its aims was "to tighten the two-thirds voter approval requirement for 'special taxes' and assessments imposed by Proposition 13." *Brooktrails Township Community Services Dist. v. Board of Supervisors of Mendocino County*, 218 Cal.App.4th 195, 197 (2013). Proposition 218 added Article XIII C to require that new taxes imposed by a local government be subject to vote by the electorate. (Art. XIII A, § 4, Art. XIII C, § 1; see also 2B West's

Ann. Cal. Codes (2013) pp. 362-363.) General taxes require a simple majority, but special taxes require two-thirds voter approval. (Art. XIII C, § 2, subds. (c) & (d).)

Proposition 218 was designed to "make it easier for taxpayers to win lawsuits; and limit the methods by which local governments exact revenue from taxpayers without their consent." *Silicon Valley Taxpayers Ass'n, Inc. v. Santa Clara Open Space Authority*, 44 Cal.4th 431, 448 (2008). Its provisions "shall be liberally construed to effectuate its purposes of limiting local government revenue and enhancing taxpayer consent.'" *Id.* (quoting voter pamphlet).

Local governments again sought to circumvent constitutional restrictions on revenue generation and began broadening the scope of fees, leading to the passage of Proposition 26 in 2010. *Schmeer v. County of Los Angeles*, 213 Cal.App.4th 1310, 1322 (2013). Proposition 26 added subdivision (e) to section 1 of article XIII C, which expanded the definition of a "tax" to include "*any* levy, charge, or exaction of *any* kind imposed by a local government." Art. XIII C, § 1, subd. (e).) (emphasis added).

Subdivision (e) incorporated seven exceptions to this definition of tax. *Id.* Defendants assert that the following three of the seven exceptions apply:

- "A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, *and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege*." Art. XIII C, § 1, subd. (e) (1) (emphasis added).
- "A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, *and which does not exceed the reasonable costs to the local government of providing the service or product*." Art. XIII C, § 1, subd. (e) (2) (emphasis added).

- "A charge imposed for entrance to or use of local government property, or the purchase, rental, or lease of local government property." Art. XIII C, § 1, subd. (e) (4).

Article XIII C § 1 concludes, following the list of exceptions, by stating the government's burden of proof as follows:

> Furthermore, "***the local government*** **bears the burden of proving by a preponderance of the evidence** that its levy, charge, or other exaction **is not a tax**, that the **amount is no more than necessary to cover the reasonable costs of the governmental activity**, and that the **manner in which those costs are allocated to a payor bear a fair a reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity**."

(Art. XIII C, § 1 [last para.]) (emphasis added).

B. THE COMMISSIONS DO NOT FALL WITHIN ANY OF THE EXCEPTIONS IN PROPOSITION 26 (ART. XIII C, § 1, SUBD. (E)).

Defendants do not deny that the commissions at issue constitute a levy, charge or exaction. Instead, Defendants argue that the commissions are not taxes because they fall into three of Article XIII C, section 1, subdivision (e)'s seven exceptions: (e)(1)[19]; (e)(2); and (e)(4). Mot. at 38:21-25.

The first and second exceptions—for a specific benefit conferred or privilege granted directly to the payor, or for a specific government service or product provided directly to the payor (subds. (e)(1) & (e)(2))—do not apply since the commissions are not capped so that they "do[] not exceed the reasonable costs to the local government" of conferring the benefit, granting the privilege, or providing the service or product. In short, *the amount paid to the Counties has no relation to the reasonable costs to the local government of providing the telephone service*. Each county agreed on an arbitrary percentage of the customers' money to be passed through to the Counties for their Inmate Welfare Funds, essentially

[19] Defendants reference subdivision (e) (1) and state that it completely overlaps with subdivision (e) (2). Mot. at 37., fn. 6.

guided by the principle of “as much as the traffic will bear.” *Cf. Citizens for Fair Reu Rates v City of Redding*, 182 Cal.Rptr.3d 722, 729 (2015) (quoting *Howard Jarvis Taxpayers Assn v. City of Roseville*, 97 Cal.App.4th 637, 648 (2002) (“It cannot be said that this flat fee on budgets coincides with these costs”).

Under any reasonable reading of the language added by Prop. 26, the only potentially applicable exceptions are (e)(1) or (2), both of which involve “charges imposed for a specific…benefit [or]…privilege granted [or]…service or product provided,” and both of which must “not exceed the reasonable costs to the local government” of conferring the benefit/privilege or providing the service/product. They do not qualify as an exception, and are taxes, because they do not bear a reasonable relationship to costs incurred or services provided.

Rather than acknowledge that these are the relevant exceptions, Defendants argue primarily that the “site commissions are a charge for use of local government property” (Mot. at 38:39:3) under subdivision (e)(4), namely the “telephone equipment at the jail.” Mot. at 38:27.[20] But this is not true. First, it is the Plaintiffs that pay the fees that are passed through to the Counties, and they do not receive rights to enter or use government property. Second, even if the telephone companies are considered the “user” under subdivision (e)(4), they do not pay money to the County; they essentially collect the money for the County from the County’s captive consumer. And third, the primary, if not sole, purpose of the money is to raise revenue for the Counties’ respective Inmate Welfare Funds. Where *“revenue is the primary purpose, and regulation is merely incidental, the imposition is a tax.*” *Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal. 4th 866, 880, 937 P.2d 1350, 1358 (1997) (emphasis added). *See also Morning Star Co.,* 201 Cal.App.4th at 751 (“An excessive fee that is used to generate general

[20] Plaintiffs dispute that the telephone equipment at the jail is owned by the Defendant Counties. Rather, the telephone companies install their own equipment in each jail. If the Court has a question on this issue, the answer will be revealed in discovery.

revenue becomes a tax"). In contrast, permissible fees "do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes." *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles*, 24 Cal.4th 830, 843 (2001)).

At minimum, it is a disputed fact whether the purpose of the surcharges collected by the Counties is not for allowing the telephone companies to use telephone equipment. Plaintiffs squarely allege that their purpose is to raise revenue for the Counties. What's more, it would be contrary to the voters' intent that Proposition 26 be construed so as not to inure to the benefit of the taxpayer and to limit the abusive practice of mislabeling taxes as fees. *See Brooktrails Twp. Cmty. Servs. Dist.*, 218 Cal. App. 4th at 203, *as modified* (July 24, 2013) ("Proposition 26… *expanded the definition of … a 'tax'* …. One of the declared purposes of Proposition 26 was to halt evasions of Proposition 218") (emphasis added).

Because the only reasonably applicable provisions of subdivision (e) are (1) and (2), and not (4), the Court need not reach the issue of the meaning and scope of its last paragraph. In any event, the reasonable reading of that paragraph is that all its enumerated exceptions are constrained by the last paragraph, which requires not only that the public entity bear the burden of proving a levy etc. is not a tax, but that the charges must be necessary to cover the costs or bear a reasonable relationship to the burdens or benefits of the government activity. "Proposition 26 requires by its terms an allocation method that bears a reasonable relationship to the payor's burdens on or benefits from the Agency's activity." *Newhall County Water District v. Castaic* Lake *Water Agency*, 243 Cal.App.4th 1430, 1446 (2016). Thus, if the Court were to conclude that subdivision (e)(4) is the relevant potential exception, that "reasonable relationship" standard applies to it as well.

Defendants contend that the last paragraph of Art. XIII (e) cannot apply because, for example, "what cost is to be recovered from use of a parking meter"

or to "use a paddle boat in a pond" if they are on government property. Mot. at 40. First, costs can be determined, and it is an evidentiary question not to be answered at this stage. Second, the last paragraph's reference to "burdens" and "benefits" provides an additional gauge that is applicable across the board.

Defendants ask the Court to conclude that this last paragraph is superfluous. When "interpreting a voter initiative, including one amending the state Constitution," the Court applies "the same principles governing statutory construction." *Santos v. Brown*, 238 Cal. App. 4th 398, 409, (2015). The Court must give the initiative's "words their ordinary meaning" and construe the "language in the context of the statute and initiative as a whole." If there are ambiguities, "courts may consider ballot summaries and arguments in determining the voters' intent and understanding of a ballot measure." *People v. Superior Court (Pearson)*, 48 Cal.4th 564, 571, (2010) (citations omitted).

The court's "task is simply to interpret and apply the initiative's language so as to effectuate the electorate's intent." *Hi-Voltage Wire Works, Inc. v. City of San Jose*, 24 Cal.4th 537, 576 (2000). Effectuating the voters' intent includes "*giv[ing] meaning to each word and phrase*." *People v. Stringham*, 206 Cal.App.3d 184, 196–197, 253 Cal.Rptr. 484 (1988) (citations omitted) (emphasis supplied).[21] In contradiction to this teaching, Defendants write the last paragraph out of the law.

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[21] As relevant to this case, Proposition 26's findings and declaration of purpose state that Proposition 218 provided that voters must approve tax increases, which have nonetheless "continued to escalate." It discussed, inter alia, "use taxes" as well as "recent phenomenon whereby the Legislature and local governments have disguised new taxes as 'fees'" and fees "couched as 'regulatory but which exceed the reasonable costs of actual regulation or are simply imposed to raise revenue for a new program and are not part of any licensing or permitting program are actually taxes and should be subject to the limitations applicable to the imposition of taxes." Thus, Proposition 26 defined tax "**so that neither the Legislature nor local governments can circumvent these restrictions on increasing taxes by simply defining new or expanded taxes as 'fees**.'" (Prop. 26, § 1, subds. (b), (c), (e), (f), reprinted at Historical Notes, 2B West's Ann. Cal. Codes (2013) foll. Art 13A, § 3, pp. 296-297 (emphasis added); *see also, e.g. Professional Engineers in*

Defendants bear the burden both on the applicability of the exceptions *and* this trailing paragraph. *Newhall County Water District*, 243 Cal.App.4th at 1441 (challenged rates are not a tax under Prop 26 if rates fall within one of the seven exceptions of Art. XIII C § 1 (in that case Art. XIII C § 1(e)(2); and Defendant "bears the burden of proving by a preponderance of the evidence" that its charges are not a tax under the final paragraph of Art. XIII C § 1(e)).

Contrary to Defendants' claim that this last paragraph is superfluous, it is independently substantive. Art. XIIIC, § 1(c) begins with the statement that a tax means "any levy, charge, or exaction of any kind" and excepts the seven enumerated exceptions. It then concludes with the stand alone general paragraph allocating not only the burden of proof to the government that the levy, etc. is not a tax, but also to prove "that the amount is no more than necessary to cover the reasonable costs of the governmental activity and that the manner in which those costs are allocated to the payor bears a fair and reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." It does not say that the latter provision applies only to certain of the enumerated exceptions.

If the obligation to limit fees were only to apply to Article XIII C (e) (1-3) with their necessary or reasonable relationship limitation language, it would have been very simple to say so. This conclusion is reinforced by the fact that provisions that are classic illustrations of potential government abuse of fees such as charges imposed as a condition of property development or property related fees (subdivisions (e)(6) and (7), which, as noted in Section V, *infra*, have been found at times to constitute a taking without just compensation and limitations on which go back to Proposition 13) do not contain the Defendants' talismanic language.

California Government v. Kempton, 40 Cal.4th 1016, 1037 (2007) ("[b]allot summaries and arguments may be considered when determining the voters' intent and understanding of a ballot measure").

Defendants attempt to sweep away the problem of sub-sections (e) (6) and (e) (7) by saying that Article XIII (D) limits such charges to costs. See Mot. at 39. However, nowhere does Article XIII (C)(1) reference the limitations of Article XIII (D). It is black letter law that "when two acts governing the same subject matter cannot be reconciled, the later-enacted statute will prevail over the earlier-enacted statute." *Stone St. Capital, LLC v. California State Lottery Comm'n*, 165 Cal. App. 4th 109, 123, 80 Cal. Rptr. 3d 326, 336 (2008). Given the specificity of sub-sections 13 (1)(e) to property related fees as an exception, the logic of Defendants' interpretation is that it modified Article XIII (D). Of course, this is contrary to the purpose of Prop. 26. But that is precisely the point. It was intended to place constraints on fees, an intent Defendants want to obviate.

Article XIII D was enacted as part of Proposition 218 and "was intended to provide effective tax relief and to require voter approval of tax increases." *Apartment Ass'n of Los Angeles Cty., Inc. v. City of Los Angeles*, 24 Cal. 4th 830, 838, 14 P.3d 930, 935 (2001) (quoting voter pamphlet). Proposition 26 was intended to ensure that potential loopholes in the pre-existing limitiations be closed. It "defines a 'tax' for state and local purposes so that neither the Legislature nor local governments can circumvent these restrictions on increasing taxes by simply defining new or expanded taxes as 'fees.'" (Prop. 26, § 1, subds. (b), (c), (e), (f), reprinted at Historical Notes, 2B West's Ann. Cal. Codes (2013) foll. art. 13A, § 3, pp. 296–297.

Yet, because exceptions (6) and (7) do not contain the reasonable relationship language, Defendants' logic means there is absolutely no limit on property related fees, contrary to the 35 year trajectory of initiatives placing limitations on taxes disguised as fees, especially those related to real property. Well before Prop. 26, the California Supreme Court recognized the distinction between government charges that did not bear a reasonable relationship to costs and those that did. The former were a tax. *See Sinclair Paint Co*, 15 Cal.4th at 876

(pre-Prop. 218 and 26 "fees charged in connection with regulatory activities which fees do not exceed the reasonable cost of providing services necessary to the activity for which the fee is charged and which are not levied for unrelated revenue purposes" are not a tax). Since this was the standard distingusing taxes from legitimate charges before both Prop. 218 and 26 were enacted, the logical and reasonable reading of the last paragraph is that it refers to even charges that qualify as an exception under Article XIII C § (1)(e). The difference is that anything that does not fit within an exception is automatically a tax, whereas things that do fall under the exceptions may not be a tax if they bear a reasonable relationship to cost and benefit.

In addition to the "reasonable relationship" standard, this final paragraph of Art. XIII C § 1 (e) includes another change to the law that demonstrates that the paragraph was intentionally phrased. After Prop. 26, Defendants are *constitutionally required* to prove each element of the last paragraph by a preponderance of the evidence, whereas they previously only had the initial burden of production of evidence to support its determination to approve the imposition of a fee or charge (but not the ultimate burden of proof). *Homebuilders Association of Tulare/Kings Counties, Inc. v. City of LeMoore*, 185 Cal.App.4th 554, 562 (2010).

In sum, Plaintiffs allege that there is no connection or relationship at all, much less a reasonable one, between the money that flows through to the Counties from purchase of telephone calls and any costs, burdens or benefits of phone service to Plaintiffs and the class who use inmate phone services. *The burden is on the Counties* to prove that such a "reasonable relationship" exists**.**

C. DEFENDANTS IMPOSE A FEE ON PLAINTIFFS TO USE THE INMATE PHONE SERVICES

Without meaningful authority, Defendants claim that the tax was not imposed because Plaintiffs "voluntarily" chose to use the inmate telephone services; thus, according to Defendants, the tax was not imposed with "authority and force." On the contrary, like any tax, by its nature, it is imposed (or

established) by “authority and force,” because *Plaintiffs must pay it if they use the respective County’s inmate phone services*. *See Ponderosa Homes, Inc. v. City of San Ramon*, 23 Cal.App.4th 1761, 1770 (1994) (to impose a fee means that it is “required by authority of the government”) (cited by Defendants). *Ponderosa* explained that “there is a logical distinction between the act of imposing something and the act of complying with that which has been imposed. As applicable here, *the phrase [to impose] refers to the creation of a condition or fee by authority of local government….*” *Id.* (emphasis added).

Defendants’ narrow interpretation of “impose” would render Prop 26 meaningless. For example under Defendants’ interpretation, despite the plain language of the statute, a tax is not really imposed on an owner of a race horse because that person, surely, did not have to purchase a race horse. *See* Cal. Rev & Tax Code § 5721 (“there is hereby *imposed* an annual tax on owners of racehorses for such racehorses domiciled in this state”) (emphasis added). Likewise, a tax is not imposed on the purchase of gasoline because one does not have to drive a car. *See* Cal. Rev & Tax Code § 8651 (a) (“An excise tax is hereby *imposed* for the use of fuel at the following rate per gallon”) (emphasis added).

Defendants’ argument is even more outlandish here because Plaintiffs have no alternative but to use the respective Counties’ inmate phone services. Therefore, Plaintiffs’ choice whether to use the inmate phone services is not meaningfully voluntary in any sense. *See Koontz v. St. Johns River Water Mgmt. Dist.*, *supra*, 133 S. Ct. at 2594 (land-sue permits not necessarily voluntary given that “the government often has broad discretion to deny a permit”).

Further as discussed at Section D, the tax is not imposed on the telephone companies; it is imposed on the Plaintiffs, the customers. The phone companies are just a conduit through which the tax revenues flow. The Counties have a monopoly on inmate phone services within their respective jails, allowing them to charge

whatever fees they want. The phone companies have no incentive to resist or negotiate lower amounts because the fees are passed through to the customers.

Finally, Defendants cannot reasonably claim that the tax was not imposed in violation of Prop 26. In *Howard Jarvis Taxpayers Assn. v. City of La Habra*, 25 Cal.4th 809 (2001), the California Supreme Court considered when a tax on utility rates is "imposed." *Id.* at 818. The Court rejected the argument that "when a city disregards the approval requirements in imposing a tax, the imposition has never happened and thus may not be challenged." *Id.* The Court explained that, Proposition 62, which added voter-approval requirements for local taxes, "prohibited the imposition of a general tax 'unless and until such general tax is submitted to the electorate' (Gove. Code, § 53723). That command is allegedly violated each time the *City collects its utility tax through the service providers.*" *Id*. at 823 (emphasis added). The same reasoning applies here. The Counties impose a tax that is collected by the phone providers.

D. PLAINTIFFS HAVE STANDING TO SUE.

To have standing, "a party must be beneficially interested in the controversy, and have 'some special interest to be served or some particular right to be preserved or protected.' …This interest must be concrete and actual, and must not be conjectural or hypothetical." *Sipple v. City of Hayward*, 225 Cal.App.4th 349, 358-359 (2014) (citations and quoted case omitted).

Here, there is no question that Plaintiffs are beneficially interested in this matter and, therefore, have standing. Plaintiffs allege the concrete and actual interest that they paid an illegal tax and are thus entitled to a refund. The contracts required the telephone companies to pass through a specific percentage of the money paid by the Plaintiffs. Thus, the telephone companies served as the conduit for this money that went from Plaintiffs to the Defendants. *See McWilliams v. City of Long Beach*, 56 Cal. 4th 613, 617, 300 P.3d 886, 887 (2013) (assuming standing

without discussion for taxpayers who paid taxes collected by telephone companies).

Defendants' cases do not say otherwise,[22] and primarily discuss *whether a business has standing to seek tax refunds on behalf of its customers.* None dispute that a customer that has paid the tax has standing. *See Scol Corp v. City of Los Angeles*, 12 Cal.App.3d 805, 808-809 (business did not have standing to seek tax refunds on behalf of its customers); *TracFone Wireless, Inc. v. County of Los Angeles*, 163 Cal.App.4th 1359, 1364 (2008) (company had standing because it paid taxes from its own funds rather than funds collected from its customers). Similarly, in *Sipple*, 225 Cal.App.4th at 358, defendant cities argued that New Cingular Wireless lacked standing to recover refunds of an illegal tax because it passed through the taxes paid by its customers and, thus, suffered no injury. There was no dispute that the customers were the injured parties who had paid the tax. New Cingular Wireless did have standing because, through a settlement agreement, *the customers authorized the company to seek taxes for the benefit of its customers*. *Id.* at 361. *See also Decorative Carpets, Inc. v. State Board of Equalization*, 58 Cal.2d 252, 253 (1962) (company had standing to seek tax refund on the condition that the monies be returned to the customers).

Defendants' claim that the telephone companies are the real "taxpayer" is wrong. Defendants cite *Scol Corp v. City of Los Angeles*, 12 Cal.App.3d 805, but, as discussed above, *Scol* is inapposite. Moreover, "[t]o the extent that *Scol* stands for the proposition that a party lacks standing to challenge a tax unless it is the

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[22] *Torres v City of Yorba Linda,* 13 Cal.App.4th 1035 (1993) involved whether a party had standing to challenge a city redevelopment project under Cod. Civ. Proc. §§ 526a and 863. *Grotenhuis v. County of Santa Barbara*, 182 Cal.App.4th 1158 (2010) rejected the Plaintiff's attempt to use an alter ego theory to confer standing for purposes of a statutory property tax exemption..

denominated 'taxpayer' under the statutory or regulatory scheme imposing the tax, it is outdated." *TracFone*, 163 Cal.App.4th at 1364.

In essence, Defendants argue that, while Propositions 218 and 26 prohibit taxes without voter approval, they permit imposition of the functional equivalent of a tax provided it does so with a third party accomplice who launders the tax into a user fee. Aside from exemplifying exactly the sort of behavior Propositions 218 and 26 were meant to stop in the first place, this proposed exception would provide an easily exploitable loophole. Local governments could outsource any governmental function they desire packaged with fee agreements in any amount.

Finally, if Plaintiffs were not permitted to seek refunds of the illegal taxes that they paid, their due process rights would be violated. *Richards v. Jefferson County, Alabama*, 517 U.S. 793 (1996); *TracFone,* 163 Cal.App.4th at 1365-1366 ("because California requires payment of a tax prior to challenging it, the right to due process requires some procedure affording a meaningful opportunity for review"). And Defendants would be unjustly enriched. The phone companies have no incentive to seek a refund that would not go to them and would undermine their lucrative relationships with the Defendants. *See Javor v. State Board of Equalization*, 12 Cal.3d 790, 800-801 (1974) (proper to add automobile purchaser to join the State Board of Equalization as a party to a suit against retailers for recovery of sales taxes paid to the Board; although only the retailers could obtain refunds under the Board's procedures, they had no incentive to seek refunds that would be returned to the purchasers); *see also TracFone*, 163 Cal.App.4th at 1365 ("The person who paid the tax must be afforded some remedy to prevent the unjust enrichment of the taxing authority").

V. THE COUNTY VIOLATED THE UNCONSTITUTIONAL CONDITIONS DOCTRINE BY CONDITIONING PLAINTIFFS' ABILITY TO COMMUNICATE BY TELEPHONE UPON WAIVING RIGHT TO RECEIVE JUST COMPENSATION.

"Under the well settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right…in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994). In this case, the commissions result in excessive inmate phone charges unrelated to the cost of the telephone calls. Indeed, most of the money is passed through to the County's Inmate Welfare Fund, and does not compensate for County costs. This constitutes a taking for which Plaintiffs are entitled to just compensation. Because Plaintiffs have no lower cost option, they must pay far more than what they receive in exchange. As stated in *Koontz v. St. Johns River Water Management Dist.*, 133 S. Ct. 2586, 2595 (2013), "Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them."

Thus, even for completely discretionary privileges or benefits, the government "cannot grant the privilege subject to conditions that improperly 'coerce, 'pressure,' or 'induce' the waiver of that person's constitutional rights." Richard A. Epstein, *Bargaining with the State* 5 (1993). The doctrines enforces a Constitutional limit on government authority. *See, e.g.*, *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583, 593-94 (1926) (invalidating state law under unconstitutional conditions doctrine that required a trucking company to dedicate personal property to public uses as a condition for permission to use highways; if "the state may compel the surrender of one constitutional right as a condition of its favor, it may compel a surrender of all").

The doctrine has been applied in a variety of contexts. [23] *See, e.g. Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 255 (1974) (statute that forced a newspaper to incur additional costs by adding more material to an issue or remove material it desired to print); *Perry v. Sinderman*, 408 U.S. 593 (1972) (refusal to renew professor's employment contract in retaliation for critical testimony regarding the university's board of regents); *see also* James Burling & Graham Owen, *The Implications of Lingle on Inclusionary Zoning and other Legislative and Monetary Exactions*, 28 Stan.Envtl. L.J. 397, 407 (2009) (doctrine has been applied where the "government has traded with people for their right to free speech, their right to freedom of religion, their right to be free from unreasonable searches, their right to equal protection, and their right to due process of law").

The Supreme Court has applied the doctrine to invalidate laws that required a waiver of the plaintiff's right to just compensation, for real and personal property, under the Takings Clause of the Fifth Amendment. *See, e.g., Horne v. Dept. of Agriculture*, 135 S. Ct. 2419 (2015) (invalidating provision of the Agricultural and Marketing Agreement Act of 1938 that required raisin growers to give a certain percentage of their raisins to the government for free as a condition of being able to sell the rest of their raisins); *Koontz*, 133 S.Ct. at 2586 (government cannot condition a land permit on a monetary exaction unless that monetary exaction bears an "essential nexus" and "rough proportionality" to the impact of the proposed development for which the permit is sought).

[23] Inmate class members, as well as the call recipient class members, have such protection. "Even in a prison setting, the Constitution places limits on a State's authority to offer discretionary benefits in exchange for a waiver of constitutional rights." *Vance v. Barrett*, 345 F.3d 1083, 1092 (9th Cir. 2003) (quoting *Vignolo v. Miller*, 120 F.3d 1075, 1078 (9th Cir. 1997) (prison officials conditioned inmate's right to employment on waiving inmate's property rights to accrued interest from his inmate trust account).

A. PLAINTIFFS HAVE A PROPERTY INTEREST IN THE MONEY THAT THEY PAY FOR PHONE CALLS FOR WHICH THEY ARE ENTITLED TO JUST COMPENSATION.

The uncompensated taking of private property for a public purpose is prohibited by the Takings Clause, whose purpose is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see also Monongahela Navigation Co. v. United States*, 148 U.S. 312, 315 (1893) (requiring just compensation "prevents the public from loading upon one individual more than his just share of the burdens of government").

Defendants distort Plaintiffs' Takings contention by characterizing the property right at issue as the "right to make telephone calls at some unspecified but lower price than the price actually charged." Mot. at 21:6-7. They are wrong. The property right is the Plaintiffs' interest in their own money, which they must pay as a condition of exercising their First Amendment right of communication. "Money is certainly a property interest," *McGuire v. Ameritech Services, Inc.*, 253 F.Supp.2d 988, 1004 (S.D. Ohio 2003), and has long been presumptively entitled to Takings Clause protection. *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 169, 172 (1998) (money and interest accrued thereon is property within the meaning of the Takings Clause); *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 163 (1980) ("exaction [of money interest] is a forced contribution to general governmental revenues"); *Schneider v. Dep't of Corr.*, 151 F.3d 1194, 1201 (9th Cir. 1998), subsequent opinion at 345 F.3d 716 (2003) (California's failure to pay interest on inmate funds diverted to the Inmate Welfare Fund was a taking).

The Takings Clause is also implicated where, as here, fees or conditions are excessive or unrelated to what is received in exchange. *See Webb's*, 449 U.S. at 155 ("exaction [which was] a forced contribution to general government revenues, and was not reasonably related to the costs of using the courts" unconstitutional); *Parks v. Watson*, 716 F.2d 646, 652 (1983) ("A condition requiring an applicant

for a governmental benefit to forgo a constitutional right is unlawful if the condition is not rationally related to the benefit conferred"), *U.S. v. Sperry Corp*., 493, U.S. 52, 62 (1989) (1.5% deduction by the United States for its expenses in arbitration, administration and collection of settlement fund collected from Iran was a user fee, not a taking because "a reasonable user fee is not a taking if it is imposed for the reimbursement of the cost of government services"); *Massachusetts v. United States*, 435 U.S. 444, 463, n. 19 (1978) (To qualify as a user fee, the fee must be a "fair approximation of the cost of the benefits supplied").[24]

Here the complaints allege that the charges Plaintiffs pay in order to use the Inmate Telephone Services are *far in excess of, and unrelated to, the actual costs to provide that service*, and, but for the commissions at issue, these phone rates would be much less, an arrangement that results in Plaintiffs being "fleece[d]." *Id.* ¶ 5 (quoting former Los Angeles County Supervisor Zev Yaroslavsky). *Compare Sperry*, 493 U.S. at 62 ("This is not a situation where the Government has appropriated all, or most, of the award to itself…"). Plaintiffs further allege that most of the money that they pay to either GTL or Securus is passed through to the respective County *not for reimbursement of the cost of providing the service* but to fund the County's Inmate Welfare Fund (Complaint, ¶¶ 7, 35-36, 86), costs which "in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49. Accordingly, the amount of the phone costs paid by Plaintiffs *that are passed through to the County's Inmate Welfare Fund* are a taking for which they are entitled to just compensation.

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[24] *See also Vance*, 345 F.3d at 1090 ("Because Vance does not allege that the charges are unreasonable or unrelated to the administration of his account, his takings claim must fail"); Eric Kades*, Drawing the Line Between Taxes and Takings: The Continuous Burdens Principle, and Its Broader Application,* 97 Nw. U. L. Rev. 189, 256 (2002) (fee exceeding government's cost of delivering the service or good includes an implicit tax, and presumably is used as general revenue subject to review under the Takings Clause).

B. PLAINTIFFS' PAYMENTS ARE NOT VOLUNTARY

Defendants argue that there is no taking because Plaintiffs voluntarily choose to pay for these calls: "No one forces inmates to make telephone calls or non-inmate relatives to receive telephone calls." Mot. at 21/22-25. Their argument relies on a series of inapposite cases where the issue was solely whether there was a taking without the imposition of a burden on a constitutional right. [25]

In cases such as this, where Plaintiffs claim an unconstitutional condition, voluntariness is not a defense because an unconstitutional condition renders the conduct not truly "voluntary." The Supreme Court explained this as early as *Union Pacific Railroad Co. v. Public Service Commission of Missouri*, 248 U.S. 67 (1918). The Court overruled the Missouri Supreme Court's decision that charges in exchange for permission to issue bonds were voluntary. "[I]t always would be possible for a State to impose an unconstitutional burden by the threat of penalties worse than in case of a failure to accept it, and then to declare the acceptance voluntary." *Id.* at 70. *See also Parks v. Watson,* 716 F.2d at 652 (fact that Plaintiff "was free to reject the terms….does not render the condition placed on obtaining the street vacation any less objectionable").

This position was reiterated in *Horne*, where the Government insisted that there was no taking because raisin growers voluntarily choose to participate in the market and could have instead "'plant[ed] different crops,' or '[sold] their raisin-variety grapes as table grapes or for use in juice or wine." 135 S.Ct. at 2430. The

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[25] For example, Defendants rely on *Walton v. DOCS,* 921 N.E.2d 145 (2009), which relied solely on New York case law to find no taking and that the calls were voluntary. Plaintiffs contend that the analytical approach of this case was abrogated by *Koontz* and *Horne*. Regardless, where there is an unconstitutional conditions challenge, *Walton* is inapplicable and as applied to this case, "wrong as a matter of law." *Horne*, 135 S.Ct. at 2430. Finally, unlike here, the *Walton* Plaintiffs did not allege that the rates charged were higher than calls outside the inmate calling context. The conclusion there that the Plaintiffs received "just compensation" in the form of telephone services does not apply where the allegation is the charges are excessive and unrelated to reasonable costs.

1 Court rejected this argument "as a matter of law." It cited *Loretto v. Teleprompter*
2 *Manhattan CATV Corp.*, 458 U.S. 419, 439, n. 17 (1982)), which "rejected the
3 argument that a New York law was not a taking because a landlord could avoid the
4 requirement by ceasing to be a landlord" and found that "a landlord's ability to rent
5 his property may not be conditioned on his forfeiting the right to compensation for
6 a physical occupation." *Horne*, 135 S.Ct. at 2430 (quoting *Loretto*).

7 Because the charges here are excessive and entirely unrelated to the cost of
8 the telephone calls, and because there are no alternative means of phone
9 communication except through the Inmate Phone Services, Plaintiffs have no
10 choice but to pay these charges if they want to exercise their right to speak on the
11 phone. Like the raisin growers in *Horne* or the landlord in *Loretto*, this "exaction"
12 is not a voluntary choice. Plaintiffs in this case, like the land use applicants in
13 *Koontz*, "are especially vulnerable to the type of coercion that the unconstitutional
14 conditions doctrine prohibits because the government often has broad discretion [in
15 regulating prison conditions]." *Koontz*, 133 S.Ct. at 2594. By conditioning the
16 ability to speak on the telephone on the Plaintiffs paying excessive fees, "the
17 government can pressure an owner into voluntarily giving up property for which
18 the Fifth Amendment would otherwise require just compensation." *Id.* In sum,
19 "although certainly subject to reasonable government regulation," the ability to
20 speak with loved ones on the telephone "may [not be held] hostage, to be ransomed
21 by the waiver of constitutional protection." *Horne*, 135 S.Ct at 2430-2431.

22 **C. THE REQUIREMENT TO EXHAUST STATE REMEDIES IS**
23 **INAPPLICABLE.**

24 Where "a State provides an adequate procedure for seeking just
25 compensation, the property owner cannot claim a violation of the Just
26 Compensation Clause until it has used the procedure and been denied just
27 compensation." *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of*
28 *Johnson City*, 473 U.S. 172, 194-95, 105 S. Ct. 3108, 3121, 87 L. Ed. 2d 126

(1985). Exhaustion is essentially a question of ripeness. Until the "government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue," the claim is not ripe. *Id*., 473 U.S. at 186. However, state procedures such as a declaratory judgment would not have to be exhausted because they "clearly are remedial" and "would result in a judgment whether the Commission's actions violated any of respondent's rights," which an aggrieved party is not required to pursue in state court. *Id*. at 193. The only potential exception is where "a reasonable, certain and adequate [state law] provision for obtaining compensation exists at the time of the taking." *Id*. at 194 (internal quotation marks omitted). The typical exception, as in *Williamson,* is a state inverse condemnation action.

Here, there is no available administrative mechanism to challenge the action. The Jail's administrative remedies are not an available remedy for the reasons explained in Section XII. Nor does state law provide "a reasonable, certain and adequate provision for obtaining compensation." Inverse condemnation is not available for the type of taking here. *See Yamagiwa v. City of Half Moon Bay,* 523 F.Supp.2d 1036, 1088 (N.D.Cal.2007) (citing *Albers v. County of Los Angeles,* 62 Cal.2d 250, 263–264 (1965) (elements of California inverse condemnation law include that a government entity "substantially participated in the planning, approval, construction or operation of a public project or public improvement," which does not exist here.

The claims for compensation that are available under state law for the taking here are a damages and/or injunctive relief action, which is unquestionably the type of "remedial" action to determine whether the government's "actions violated any of respondent's rights" that a Takings plaintiff need not pursue. Any available damages remedy under California law does not provide "a reasonable, certain and adequate provision for obtaining compensation." Instead, state law is riddled with potential immunities that disqualify it as a "certain" avenue of compensation. *See,*

e.g., Government Code section 820.2 (granting immunity for the "exercise of discretion vested in" a government official); *People ex rel. Harris v. Rizzo*, 214 Cal. App. 4th 921, 943, 154 Cal. Rptr. 3d 443, 463 (2013) ("the doctrines of separation of powers, legislative immunity, and discretionary act immunity prevent courts from considering the wisdom of legislative and executive decisions").[26]

This conclusion is reinforced by the fact that this case includes a parallel unconstitutional conditions/takings claim under the California Constitution, a claim which the California Supreme Court recognizes. *See California Bldg. Indus. Assn. v. City of San Jose*, 61 Cal. 4th 435, 455 et seq., 351 P.3d 974, 986 (2015). Given that there is no available California administrative remedy, any exhaustion requirement is satisfied by the supplemental state law claim, for which the standards are the same.

VI. PLAINTIFFS HAVE SUFFICIENTLY ESTABLISHED AN EQUAL PROTECTION AND DUE PROCESS VIOLATION.

Plaintiffs' Equal Protection claim closely overlaps with their First Amendment claim. *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 94-95; *McGuire v. Ameritech Services, Inc.*, 253 F.Supp.2d at 998-1000. The Equal Protection Clause protects infringements of fundamental rights, including the First Amendment. *Id.* at 999 ("Obviously the rights of free speech and free association are fundamental in our society"). As explained, the Ninth Circuit has held that inmates (and call recipients) have a First Amendment right to reasonable telephone access. Plaintiffs have sufficiently pled an Equal Protection claim for the same

[26]The Ninth Circuit, in applying *Williamson*, has accordingly found that exhaustion "is not relevant to a physical taking claim because there are no administrative avenues of relief to exhaust: the taking itself firmly establishes the extent of the deprivation." *Sinaloa Lake Owners Ass'n v. City of Simi Valley*, 882 F.2d 1398, 1407 (9th Cir. 1989) *overruled on other grounds by Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996). It has also concluded that *Williamson's* exhaustion requirement does not apply where substantive due process is implicated because the government conduct is "arbitrary and capricious." *Id*. Both of those considerations apply here.

reasons that they have pled a valid First Amendment claim. The impermissible tax burdens Plaintiffs' fundamental right to free speech and is "not reasonably related to legitimate penological interests." *See Byrd*, 2005 WL 2086321 at *9 (inmate phone fees are "neither a rule nor regulation related to the functioning of a prison").

Similarly, Plaintiffs have sufficiently pled a due process violation. "[T]he due process clause includes a substantive component which guards against arbitrary and capricious government action." *Sinaloa Lake Owners Ass'n*, 882 F.2d at 1407. Substantive due process is violated where the government's action was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395, 47 S.Ct. 114, 121, 71 L.Ed. 303 (1926) (quoted in *Sinaloa Lake*, 882 F.2d at 1407). Government power "wielded in an abusive, irrational or malicious fashion … can cause grave harm." *Id*. at 1408. Because the commissions bear no reasonable relationship to "public health, safety, morals, or general welfare," plaintiffs have adequately alleged a violation of due process.

VII. DEFENDANTS HAVE VIOLATED THE SHERMAN ANTITRUST ACT.

A. STATE ACTION IMMUNITY DOES NOT APPLY.

"The state-action immunity doctrine is 'disfavored,' and is to be interpreted narrowly, as a 'broad interpretation of the doctrine may inadvertently extend immunity to anticompetitive activity which the states did not intend to sanction.'" *Cost Mgmt. Servs., Inc. v. Wash Nat. Gas Co*., 99 F.3d 937, 941 (9th Cir. 1996) (citing *FTC v. Ticor Title Ins. Co*, 504 U.S. 621, 636 (1992). State-action immunity does not apply directly because Defendants are not states. *See Columbia v. Omni Outdoor Advertising, Inc*., 499 U.S. 365, 370 (1991). Accordingly, " '[c]loser analysis is required.'" *Phoebe Putney,* 122 S. Ct., 1003, 1010 (2013) (quoting *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984).

1 To receive immunity, Defendants' activities must be "undertaken pursuant
2 to a 'clearly articulated and affirmatively expressed' state policy to displace
3 competition." *Phoebe Putney*, 122 S.Ct. at 1011 (quoted citation omitted). To pass
4 the clear articulation test, the anticompetitive effect must at least be the
5 "foreseeable result of what the State authorized." *Hallie v. Eau Claire*, 471 U.S.
6 34, 42 (1985) (citations and internal quotation marks omitted). "[S]tate-law
7 authority to act is insufficient to establish state-action immunity; the sub-state
8 governmental entity must also show that it has been delegated authority to act or
9 regulate anticompetitively." *Phoebe Putney*, 122 S.Ct. at 1012. Thus, "*the State*
10 *must have foreseen and implicitly endorsed the anticompetitive effects as*
11 *consistent with its policy goals." Id*. at 1012-1013 (emphasis added).
12 In *Phoebe Putney*, a county purchased the only two hospitals in the county,
13 thereby lessening competition, pursuant to a law allowing political subdivisions to
14 create "hospital authorities" with the power to acquire and lease hospitals and other
15 public health facilities. *Id.* at 1007-08. The Supreme Court rejected the argument
16 that the anticompetitive conduct was a foreseeable result of the law, finding that
17 the law was a grant of general corporate power to act, often provided to local
18 authorities, and there was no evidence that the State affirmatively contemplated
19 that hospital authorities would use these corporate powers to displace competition
20 by consolidating hospital ownership. *Id.* at 1011-1012. Accordingly, the law did
21 "not clearly articulate and affirmatively express a state policy empowering the
22 Authority to make acquisitions of existing hospitals that will substantially lessen
23 competition." *Id.* at 1012.
24 Similarly, and directly applicable here, in *McGuire* , 253 F. Supp. 2d at
25 1017-1018 , the defendant counties invoked a series of state laws giving counties
26 the power to provide for the operation of their jails, including laws requiring the
27 counties to equip their jails with collect calling phone systems and, as in the instant
28 case, dictating how the commission revenue is to be spent. *Id.* at 1002, 1017-1018.

The court held that it was a question of fact whether the State of Ohio "contemplated" that the authority provided authorized the counties to "establish their collect calling phone systems on a monopolistic basis." *Id.* at 1018. Accordingly, the court declined to find state action immunity at the pleading stage, noting that "exactly how County Defendants actually procured their inmate telephone service systems is a question of fact which the Court may not address at this juncture…. [T]he counties of Ohio are not on equal sovereign footing as the State itself." *Id.*

Here, Defendants invoke Penal Code § 4025 (d) as a clearly articulated and affirmatively expressed state policy to displace competition. However, as explained in *McGuire*, this code section merely provides that any commission received from a telephone company must be deposited into the Inmate Welfare Fund. This code section says nothing about counties being able to establish their inmate calling systems on a monopolistic basis. Therefore, at this stage, as in *McGuire,* it is a question of fact whether this code section constitutes an affirmatively expressed state policy to allow the monopolistic contracts, policies and practices at issue here. Nothing in the statute indicates that these commissions should be monopolistic, anti-competitive, egregious or borne solely by the inmates and call recipients on top of substantial telephone company profits. The State's own actions in ending commissions belies the contention that the State "endorse[s] Defendants' activities as consistent with its policy goals." *Phoebe Putney*, 122 S.Ct. at 1013. *See* Compl., ¶ 7 (in 2007, the State eliminated commissions entirely from state prisons, resulting in significantly lower telephone rates).

B. THE ONLY COURTS TO HEAR SIMILAR CLAIMS HAVE OVERRULED DEFENDANTS' MOTIONS TO DISMISS.

Plaintiffs' antitrust contentions have not been rejected in other cases, contrary to Defendants's contentions. Mot. at 26:13. In comparable antitrust claims against *non-state entities* like the Defendants in this case, **the courts declined to**

1 **invoke the state action immunity doctrine to dismiss the claims against the**
2 **counties**. *See Daleure v. Kentucky*, 119 F.Supp.2d 683 (W.D. Ky. 2000); *McGuire*,
3 253 F. Supp. 2d 988.

4 In the two cases cited by Defendants, *the defendants were states, not*
5 *counties.* This distinction is critical because the doctrine applies only to states or to
6 sub-state polictical entities where there is a clearly articulated and affirmatively
7 expressed state policy. Thus, in *McGuire*, a Sherman Act claim was dismissed
8 against the State of Ohio on state immunity grounds, but not against the county
9 defendants. *Id.* at 1018-1019. While *McGuire* relied on the same language from
10 *Arsberry* that Defendants quote in the instant Motion, it was only relevant to
11 whether the state action immunity doctrine applied to the state, not the counties. *Id*
12 at 1010. Similarly, Defendants' reliance on *Arsberry*, 244 F.3d at 566, is misplaced
13 because the defendant in *Arsberry* was solely the State of Illinois.

14 **C. PLAINTIFFS DO NOT SEEK ANTITRUST DAMAGES.**

15 Plaintiffs seek injunctive relief under the Antitrust Cause of Action (Compl.,
16 ¶ 110, ¶ 4(a) of the Prayer for Relief) and, if the Court so determines, restitution. (¶
17 2 of the Prayer). Plaintiffs maintain that restitution qualifies as injunctive relief
18 because it is commonly considered a form of equitable relief. *See, e.g., Chauffeurs,*
19 *Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570, 110 S. Ct. 1339,
20 1348, 108 L. Ed. 2d 519 (U.S. 1990) ("we have characterized damages as equitable
21 where they are restitutionary"); *FTC v. Mylan Labs., Inc*., 62 F. Supp. 2d 25, 36-37
22 (D.D.C. 1999) (FTC has authority under equitable remedies of the Sherman Act to
23 seek monetary equitable relief, including disgorgement and restitution). In any
24 event, even if the Court were to conclude that restitution is not available here,
25 Plaintiffs would still be entitled to injunctive relief to prohibit the illegal activity on
26 a going forward basis. Thus, this is not a reason to dismiss the claim.

27 Defendants' contention that an "indirect purchaser" cannot sue for damages
28 (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707

1 (1977)) is misplaced. First, as indicated, Plaintiffs do not seek damages, and the
2 "reason for the standing limitation in antitrust cases brought under section 4 is to
3 avoid overdeterrence resulting from the use of the somewhat draconian treble-
4 damage award." *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1449 (11th
5 Cir. 1991). Thus, the appropriate analysis is to "to evaluate the plaintiff's harm, the
6 alleged wrongdoing by the defendants, and the relationship between them."
7 *Associated Gen. Contractors of California, Inc. v. California State Council of*
8 *Carpenters*, 459 U.S. 519, 535, 103 S. Ct. 897, 907, 74 L. Ed. 2d 723 (1983). As
9 one Court well explained,

10 > [T]wo factors emerge as tests for the standing of antitrust plaintiffs: First, the
11 > plaintiff's status, and second, the plaintiff's proximity or remoteness from the
12 > center of the alleged conspiracy. Thus, as to status, in each case the plaintiff
> which was held to lack standing suffered injury which was "derivative", that
13 > is, one suffered not because of the plaintiff's role in the market but because
14 > of its status as a " creditor, stockholder, employee, subcontractor, or supplier
> of goods and services," [citation omitted], or something of the like….As to
15 > proximity or remoteness, the injury of the plaintiff in the cited cases was
16 > found to be several steps removed from the immediate impact of the alleged
> violation.

17 *Reading Indus., Inc. v. Kennecott Copper Corp.*, 477 F. Supp. 1150, 1160
18 (S.D.N.Y. 1979), *aff'd,* 631 F.2d 10 (2d Cir. 1980); *see also, e.g.*, *In re Flash*
19 *Memory Antitrust Litig.*, 643 F. Supp. 2d 1133, 1151 (N.D. Cal. 2009) (reciting
20 standing facts and finding that indirect purchasers there qualified).

21 Here, the telephone companies are not the ones affected; the charges have no
22 financial effect on them. It is those who pay the telephone companies who are
23 directly affected. They are not remote. Unless they have standing, no one does.

24 **D. PLAINTIFFS HAVE STANDING BECAUSE THE ACTIVITIES AT ISSUE**
25 **HAVE AN EFFECT ON INTERSTATE COMMERCE.**

26 Courts have liberally construed the commerce clause requirements under
27 antitrust laws, recognizing that Congress intended to exercise its jurisdictional
28 powers to the fullest extent possible. *See, e.g., Musick v. Burke*, 913 F.2d 1390,

1395 (9th Cir. 1990). The "focus of the [jurisdictional] inquiry is the defendant's business activities." *Western Waste Service Systems v. Universal Waste Control*, 616 F.2d 1094 (9th Cir. 1980) (citing *McLain v. Real Estate Bd.*, 444 U.S. 232, 242 (1980)).[27] To satisfy this requirement, the relevant activities either must be in interstate commerce or, even if intrastate in nature, have an effect on interstate commerce. *Summit Health, Ltd. v. Pinhas*, 500 U.S. 322, 331 (1991) (allegations that hospital, its owner, and medical staff conspired to exclude duly licensed and practicing physician and surgeon from market for ophthalmological services in Los Angeles sufficient); *McLain*, 444 U.S. 232 at 242, 245 (substantial effect on interstate commerce generated by defendants' brokerage activity sufficient, pointing to interstate commerce "involved in the financing of residential property in the Greater New Orleans area and in the insuring of titles to such property" where out of state funds were raised and mortgages were traded on the secondary market). The in-commerce test requires proof that a transaction involves a substantial volume of interstate commerce and that the challenged activity is an integral part of the transaction and indispensable from interstate aspects. *Id.* A transaction must involve an appreciable amount of commerce which has a "not insubstantial" effect on interstate commerce. *Id.* There does not need to be an actual, demonstrable effect on interstate commerce. *Summit Health*, 500 U.S. at 331. It is sufficient to "demonstrate a substantial effect on interstate commerce" and a "more particularized showing of an effect on interstate commerce caused by the alleged conspiracy" is not required *McLain*, 444 U.S. at 242-243.

Here, the activities satisfy the interstate commerce jurisdiction requirement. First, *Defendants' contracts are with GTL and/or Securus, both nationwide*

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[27] *See also Cardio-Medical Associates, Ltd. v. Crozer-Chester Medical Center*, 721 F.2d 68 (3d. Cir. 1983) (there is no reason a defendant engaged in nationwide anticompetitive conduct should not be subject to suit by a local victim simply because the defendant's conduct as it affects the local victim does not affect interstate commerce).

1 *companies, and headquartered in Alabama and Texas, respectively*. Compl., ¶ 108.
2 These companies headquartered in other states pay millions derived from the
3 commissions to the Defendants in California. If this lawsuit is successful, this
4 revenue will significantly decrease. *See Hospital Bldg. v Co. v. Trustees of Rex*
5 *Hosp.*, 425 U.S. 738, 744 (1976) (acts affecting out-of-state purchases, financing,
6 and revenues of intrastate businesses provide a sufficient basis for Sherman Act
7 jurisdiction); *Summit Health*, 500 U.S. at 329; *Western Waste Service Systems,* 616
8 F.2d at 1098 (company's business substantially affected interstate commerce
9 where company spent hundreds of thousands of dollars for out of state equipment).
10 Furthermore, regardless of where the physical telephones are located, people
11 in different states, including California, pay money to GTL and Securus. Compl., ¶
12 108. Indeed, there are different phone rates when inmates make intrastate calls
13 versus *interstate* calls. *Id.*, ¶ 88. If the commissions are eliminated, the cost of
14 these *interstate* phone calls will likely decrease. *Id.*, ¶¶ 7, 82. *See Summit Health,*
15 *Ltd.*, 500 U.S. at 329-30 (ophthalmological "services are regularly performed for
16 out-of-state patients and generate revenues from out-of-state sources").
17 Defendants claim that the payments from California occurred only in
18 California, but this is false. Payments from California residents flow to companies
19 headquartered out of state and then back to the California counties. The elimination
20 of commissions would likely result in lower rates, and GTL and Securus will
21 receive less revenue from out of state sources. *See Summit Health*, 500 U.S. at 329
22 (hospital's services generated revenues from out-of-state sources); *Rex Hospital*,
23 425 U.S. at 744 (interstate commerce would be affected by successful lawsuit
24 leading to reduced fees that plaintiff would pay to its out of state corporate parent);
25 *Western Waste Service Systems,* 616 F.2d at 1099. Defendants seem to
26 acknowledge that these out of state transactions are interstate commerce, but
27 wrongly contend that Plaintiffs do not have standing to sue on behalf of non-
28 California. Commerce can be interstate regardless of how local the activity: *See,*

e.g., United States v. Women's Sportswear Mfg. Ass'n (U.S. Reports Title: U.S. v. Women's Sportswear Mfrs. Ass'n), 336 U.S. 460, 464, 69 S. Ct. 714, 716, 93 L. Ed. 805 (1949) ("*If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze*") (emphasis supplied); *Rex Hospital*, 425 U.S. at 744 (purchase of out of state medicine and payment by out of state insurers established effect on interstate commerce; "indirect" effect on commerce is sufficient).

The complaint more adequately alleges an effect on interstate commerce, including that 1) GTL and Securus are national companies headquartered out of state, 2) they hire on a nationally centralized basis, 3) their human resources operations are nationally centralized, 4) their technology is centralized, 5) their equipment is purchased in the stream of interstate commerce, and 6) each County and County Jail regularly orders equipment and services from the stream of interstate commerce, including materials associated with the challenged contracts. Further, the complaint alleges that, at the time it was filed, the Plaintiffs were victims of the challenged conduct, which is all that is required to establish standing to seek injunctive relief. *See Cty. of Riverside v. McLaughlin*, 500 U.S. 44, 51, 111 S. Ct. 1661, 1667, 114 L. Ed. 2d 49 (1991) (allegation that Plaintiffs "were suffering a direct and current injury as a result of" Defendants' conduct, and "would continue" to do so established standing).

Defendants assert that, "[a]lthough Plaintiffs allege that unidentified proposed class members are outside California, a person does not have standing to sue based on a proposed class if the plaintiff is not a member of the class." Mot. at 29. They never explain why such class members lack standing. If the contention is that the named plaintiffs cannot represent out of state class members, it is flat out

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wrong.[28] The fact that the class is composed of persons from different states is of no moment in the standing analysis. *See Wal-Mart Stores, Inc.* (rejecting nationwide class not on standing grounds but because Rule 23 standards were not met); *1 McLaughlin on Class Actions* § 4:28 (12th ed.) (distinguishing "the threshold issue of whether the named plaintiff has individual standing from the inquiry into whether the named plaintiff can satisfy the requirements to certify a class under Rule 23"). Here, the class definition includes any person who paid money for a telephone account of an inmate within Defendants' jails, and is not limited to only those in California. Compl., ¶ 48. Therefore, named Plaintiffs have standing to sue on behalf of unnamed class members, whether they reside in California or not.

E. THE TURNER STANDARD HAS NO BEARING ON PLAINTIFFS' ANTITRUST CLAIM.

Defendants do not cite one case – and Plaintiffs are not aware of any - in support of their argument that they can violate the Sherman Antitrust Act because of alleged security concerns. The only immunity for violation of the antitrust laws is the state immunity discussed *supra* at Section A. Furthermore, the Ninth Circuit has often refused to stay antitrust actions on primary jurisdiction grounds when the agency's expertise is not essential to resolving the antitrust issues. *See, e.g., Cost Management*, 99 F.3d at 948-49; *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1012,

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[28] The claims here meet Rule 23's typicality and commonality standards (which "tend to merge", *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157 (1982)), qualifying them to represent the class. Commonality exists where, as here, "examination of all the class members' claims for relief will produce a common answer" to a central common question. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 131 S. Ct. 2541, 2552, 180 L. Ed. 2d 374 (2011), Typicality is met where, as here, "other members have the same or similar injury, … the action is based on conduct which is not unique to the named plaintiffs, and …. other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.*, 976 F. 2d 497, 508 (9th Cir. 1992). Plaintiffs have clearly alleged that "they personally have been injured." *Lierboe v. State Farm Mut. Auto Ins. Co.*, 350 F3d 1018, 1022 (9th Cir. 2003).

1031 (9th Cir. 1989), aff'd 500 U.S. 322 (1991); *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 778 F.2d. 1365, 1370-71 (9th Cir. 1985). Thus, even if jail administrators' decisions were at issue, and they are not, they have no bearing on the antitrust issues here. Certainly, the Court cannot not simply accept Defendants' factual claim at the pleading stage.

F. PLAINTIFFS' ALLEGE AN ANTITRUST INJURY.

Defendants wrongly state that Plaintiffs' allegations of antitrust injury are "vague" and "abstract." Mot. at 32:10-15. To the contrary, Plaintiffs' antitrust injury is straightforward and "flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). *See also In re Online DVD-Rental*, 779 F.3d 914, 922 (9th Cir. 2015) (explaining that antitrust injury "can be established by showing that consumers paid higher prices for a product due to anticompetitive actions of a defendant....").

Plaintiffs allege that they "have been injured by being charged supra-competitive prices for use of inmate phone services within the County's jails." Compl., ¶¶ 99-104. Plaintiffs' contention is not speculative. Indeed, as an example, they describe the significant decrease in charges when California prison commissions were eliminated. *Id.*, ¶ 7. In addition, the FCC has concluded that "where site commission payments exist, they are a significant factor contributing to high rates." *Id.*, ¶ 82; *accord Daleure*, 119 F. Supp. 2d at 692 ("awarding contracts based on the highest commission… all but require[s] the Telephone Companies to take advantage of their market power" to obtain a non-competitive price).

VIII. THE TELEPHONE COMPANIES ARE NOT NECESSARY PARTIES AND, THUS, ARE NOT INDISPENSABLE PARTIES.

This lawsuit does not seek an order setting aside the *current* contracts between the Defendants and telephone companies. Nor does it seek an order

reducing any phone rates.[29] Rather, Plaintiffs seek an order (1) finding the commissions paid to Defendants illegal; (2) prohibiting Defendants from renewing current contracts, or entering into new contracts, that provide for these illegal commissions; and (3) restitution (with interest).

Since the telephone companies are subject to service of process, and their joinder would not deprive the court of subject-matter jurisdiction, the sole issue is whether they are required (necessary) parties under Rule 19(a). As the moving parties, Defendants bear the burden of persuading the court that a party must be joined. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990).

"A party may be necessary under Rule 19(a) in three different ways." *Salt River Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1179 (9th Cir. 2012). "First, a person is necessary if, in his absence, the court cannot accord complete relief among existing parties." *Id.* (citing Fed. R. Civ. P. 19(a)(1)(A)). "Second, a person is necessary if he has an interest in the action and resolving the action in his absence may as a practical matter impair or impede his ability to protect that interest." *Id.* (citing Fed. R. Civ. P. 19(a)(1)(B)(i)). "Third, a person is necessary if he has an interest in the action and resolving the action in his absence may leave an existing party subject to inconsistent obligations because of that interest." *Id.* (citing Fed. R. Civ. P. 19(a)(1)(B)(ii)). However, even when a party has an interest in the litigation, that party may not be necessary under Rule 19(a) if it is "adequately represented" by a present party. *Id.* at 1180-81.

A. THE COURT CAN PROVIDE COMPLETE RELIEF WITHOUT JOINDER OF THE TELEPHONE COMPANIES.

"Complete relief 'is concerned with consummate rather than partial or hollow relief …, and with precluding multiple lawsuits on the same cause of action.'" *Alto v. Black*, 738 F.3d 111, 1126 (9th Cir. 2013) (quoting *Disabled*

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[29] Based on the experience of the State of California and findings of the FCC, Plaintiffs anticipate that elimination of the commissions will result in a decrease in the phone rates.

Rights Action Comm. v. Las Vegas Events, Inc., 375 F.3d 861, 879 (9th Cir. 2004)).The issue is "whether the absence of the party would preclude the district court from fashioning meaningful relief " *Disabled Rights*, 375 F.3d at 879.

Here, Plaintiffs' success would result in meaningful relief in the form of tax/ restitution refunds from Defendants, not the telephone companies. An injunction would prohibit Defendants from entering into future commission contracts; it would not order relief against the phone companies. Such an injunction would result in the relief that Plaintiffs seek. In sum, Plaintiffs do not seek relief that depends on the actions of the telephone companies. *Id.* at 880; *see also Ass'n to Protect Hammersley, Eld, & Totten Inlets v. Taylor Res, Inc*., 299 F.3d 1007, 1014-15 (9th Cir. 2002) (complete relief was possible where relief was available regardless of the absent party's participation); *compare, e.g., Dawavendewa v. Salt River Project Agric. Improvement & Power Dist*., 276 F.3d 1150, 1155 (9th Cir. 2002) (Navajo Nation was necessary party because without its participation, the relief requested, invalidation of a lease, could not be granted),

Finally, Defendants may file a Cross-Complaint against the telephone companies for indemnification. *Cf., e.g, Lennar Mare Island, LLC v. Steadfast Ins. Co*., 139 F.Supp. 3d 1141, 1150 (E.D. Cal. 2015). Indeed, in *Disabled Rights*, the Ninth Circuit did not view the specter of a contract dispute between the defendant and an absent party as requiring joinder. 375 F.3d at 880.

B. RESOLUTION OF PLAINTIFFS' CLAIMS WILL NOT IMPEDE THE TELEPHONE COMPANIES' ABILITY TO PROTECT THEIR INTERESTS.

As explained above, Defendants have misstated the relief Plaintiffs seek. Defendants contend that *Lomayaktewa v. Hathaway*, 520 F.2 1324 (9th Cir. 1975) and *Dawavendewa v. Salt River Project Agr. Imp. & Power Dist.*, 276 F.3d 1150, 1157 (9th Cir. 2002), mean that the telephone companies, as contract signatories, are automatically necessary parties. However, in *Disabled Rights*, 375 F.3d at 881, the Ninth Circuit limited the scope of these cases, holding that absentee signatories

were not necessary parties if the suit was not "an action to set aside a contract, …an attack on the terms of a negotiated agreement, or litigation seeking to decimate a contract." *See also Lennar Mare,* 139 F.Supp.3d at 1152 (noting that "the Ninth Circuit has read [those cases] narrowly on this point").

Because Plaintiffs do not seek an order setting aside any contract or lowering the contracted rates, the telephone companies' interests will not be impaired by a favorable ruling. Assuming that the relief would affect future revenues to the phone companies, a financial stake in the outcome of the litigation does not give rise to Rule 19 necessity." *Disabled Rights*, 375 F.3d at 883 (citing *Makah Indian Tribe*, 910 F.2d at 558). Furthermore, where a party aware of an action chooses not to claim an interest, the district court does not err by finding joinder unnecessary. *United States v. Bowen*, 172 F.3d 682, 689 (9th Cir. 1999). The telephone companies can move to intervene if they deem it in their interest.

If necessary, Plaintiffs are prepared to amend the complaint to allege the fact that each of the contracts contains an indemnification clause by which the telephone companies fully indemnify the Counties. Plaintiffs have filed a Request for Judicial Notice of the relevant contracts. *See Nat. Res. Def. Council v. Kempthorne*, 539 F. Supp. 2d 1155, 1167 (E.D. Cal. 2008) ("existence of [subject government] contracts are not reasonably subject to dispute and are the proper subject of judicial notice"). If granted, it would obviate any potential need to amend the Complaint so as to advise the Court of the indemnification agreement.

C. NO INCONSISTENT OBLIGATIONS WOULD BE CREATED.

"Inconsistent obligations are not the same as inconsistent adjudications or results." *Cachil Dehe Band of Wintun Indians of the Colusa Indian Cmty. v. California*, 547 F.3d 962, 976 (9th Cir. 2008). Inconsistent obligations occur when a party is unable to comply with one court's order without breaching another court's order concerning the same incident. *Id.* A ruling in Plaintiffs' favor will not result in Defendants having such inconsistent obligations. For example, an order to

reimburse money to class members will not conflict with any contractual obligation that Defendants owe the telephone companies.

D. THE TELEPHONE COMPANIES ARE ADEQUATELY REPRESENTED.

An absent party with an interest in the action is not a necessary party under Rule 19(a) "if the absent party is adequately represented in the suit." *Salt River*, 672 F.3d at 1180 (quoted citation omitted). The adequacy analysis assesses : (1) "whether the interests of a present party to the suit are such that it will undoubtedly make all of the absent party's arguments;" (2) "whether the party is capable of and willing to make such arguments;" and (3) "whether the absent party would offer any necessary element to the proceedings that the present parties would neglect." *Salt River*, 672 F.3d at 1180 (quoted citation omitted).

Here, Defendants' interests are "aligned" with the telephone companies'. *See, e.g. Lennar Mare*, 139 F.Supp.3d at 1154 ("The Navy's rights under the…policy may differ from LMI's and CCI's generally, but their interests all align with respect to Steadfast's counterclaim"). Defendants do not suggest otherwise. There is no basis to conclude that Defendants have not made, and will not continue to make, every reasonable argument that the telephone companies themselves would make, particularly given the indemnifications to "indemnify and hold harmless[,]…defend, at its sole expense." (Riverside contract). The five Defendants, each with separate counsel, all joined in one consolidated Motion. In fact, because Plaintiffs attack the commissions, and not telephone company profits, Defendants have an even greater interest in defending against these claims than do the telephone companies. Further, Defendants have not suggested that the telephone companies would offer any "necessary element to the proceedings that [any of the Defendants] would neglect." *Salt River,* 672 F.3d at 1180.

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IX. GOVERNMENT CODE SECTION 11135 DOES CREATE LIABILITY WHERE THERE IS A DISPARATE IMPACT

Government Code Section 11135 does permit claims based on disparate impact. *See* 22 Cal. Code Regs. § 98101 (i) (prohibiting "recipient[s]" of state funds from, *inter alia*, "utiliz[ing] criteria or methods of administration that…(1) have the purpose or *effect* of subjecting a person to discrimination….") (emphasis added). In 1999, Section 11135 et seq.was amended to provide that "[t]his article *and regulations adopted pursuant to this article* may be enforced by a civil action for equitable relief." Gov. Code § 11139 (emphasis added). *See Blumhorst v. Jewish Family Servs. of Los Angeles*, 126 Cal.App.4th 993, 1001 (2005) ("§ 11139 amendments "create[d] a private right of action"); *Darensburg v. Metropolitan Transp Com'n*, 636 F.3d 511, 518 (9th Cir. 2011) ("[T]he state burden-shifting framework for analyzing disparate impact cases [under § 11135] parallels the federal one [for cases under Title VI]….").[30]

Government Code § 11135 does not conflict with Penal Code § 4025.[31] There is no conflict because these two statutes do not concern the same subject matter. In contrast, in *State Dep't of Public Health v. Superior Court*, 60 Cal.4th 940, 952-953 (2015) (the case Defendants cite), there was a conflict because both statutes addressed the confidentiality of citations issued to long-term care facilities. One appeared to declare copies of the citations to be available under the Public Records Act while the other labeled them confidential. *See also Marsh v. Edwards Theatres Circuit, Inc.*, 64 Cal.App.3d 881, 890 (1976) ("A special statute dealing expressly with a particular subject controls and takes precedence over a more general statute covering *the same subject*") (emphasis added).

[30] Discriminatory intent is not required under a disparate impact theory. *Darensburg v. Metropolitan Transp. Com'n*, 611 F.Supp.2d 994, 1042 (N.D. Cal. 2009) (citing *Griggs v. Duke Power Co.,* 401 U.S. 424, 432, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971)).
[31] If Defendants' argument was accepted, it would mean that wherever a statue permitted the state to take certain action it could do so despite the fact that it was racially discriminatory in violation of Government Code § 11135.

A court must interpret statutes to give force to both. The applicable rules of statutory interpretation include (1) "where reasonably possible, harmonize statutes, reconcile seeming inconsistencies in them, and construe them to give force and effect to all of their provisions; (2) when "two codes are to be construed, they must be regarded as blending into each other and forming a single statute" and "read together and so construed as to give effect, when possible, to all the provisions thereof"; and (3) "all presumptions are against a repeal by implication." Repeal will be found "only when there is no rational basis for harmonizing" the statutes, which must be"irreconcilable, clearly repugnant, and so inconsistent" as to prevent "concurrent operation." *State Dep't of Public Health*, 60 Cal.4th at 955-956 (quoting *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles*, 55 Cal.4th 783 (2012) (internal quotation marks and citations omitted).

In the instant case, harmonization is simple and straightforward: Penal Code § 4025 merely recognizes the existence of inmate phone commissions and directs where commissions revenues go, but does not authorize discriminatory, excessive or unreasonable charges, including discrimination by entities receving government funds (Govt. Code § 11135). The fact that the Inmate Call Service charges may not discriminate intentionally or have a discriminatory impact does not mean that they cannot be charged. Under §11135, such charges are perfectly legal so long as they are not discriminatory. Thus, the two statutes are not in conflict.

X. PLAINTIFFS' HAVE PROPERLY STATED A CLAIM UNDER CIVIL CODE § 52.1.

§ 52.1 does not only include violation of constitutional rights, as the case Defendants quote makes clear. *See Spicer v. City of Camarillo*, 195 Cal. App. 4th 1423, 1429 (2011) (violation of "*statutory o*r constitutional rights) (emphasis supplied).

Defendants contend that there is no coercion here, but that is not so. They cite *Shoyoye v. County of Los Angeles*, 203 Cal. App. 4th 947 (2012), which was guided in part by a federal district court case, *Gant v. County of Los Angeles*

1 (C.D.Cal.2011) 765 F.Supp.2d 1238,1253, *affd. in part and revd. in part* in 772
2 F.3d 608 (9th Cir.2014). *Gant* relied on Massachusetts authority because the Bane
3 Act "was modeled closely on" a similar Massachusetts statute (*Shoyoye,* 203
4 Cal.App.4th at 960.) In *Buster v. George W. Moore, Inc.* (2003) 438 Mass. 635
5 [783 N.E.2d 399], the Supreme Judicial Court of Massachusetts explained that
6 coercion was "the application to another of such force, either physical or *moral,* as
7 to constrain him to do against his will something he would not otherwise have
8 done.'" (Internal quotations and citations omitted emphasis in *Buster*.) Thus,
9 "coercion may be found where one party deprives another of rights due under a
10 contract." *Id.* at pp. 646–647.

11 Here, the theory of coercion is that Plaintiffs (both inmates and call
12 recipients) were faced with the coercive choice of either not communicating with
13 loved ones or paying predatory charges, the lion's share of the profits of which
14 went to the Counties. A court in this District, in an opinon post-dating *Shoyoye* and
15 *Allen v. City of Sacramento*, 234 Cal. App. 4th 41, 66-70 (2015) has determined
16 that forcing a coercive choice qualified as coercion under § 52.1. *McKibben v.*
17 *McMahon*, No. EDCV1402171JGBSPX, 2015 WL 10382396, at *3 (C.D. Cal.
18 Apr. 17, 2015) ("Plaintiffs allege they were subjected to a coercive *choice* while
19 incarcerated: remain in the ALT [separate gay, bisexual and transgender housing]
20 or be placed in general population" where they were at greater risk of violence)
21 (original emphasis). Similarly here, Plaintiffs were forced with a coercive choice.

22 The Supreme Court has explained that the doctrine of unconstitutional
23 conditions encompasses "land-use permit applicants [who] are especially
24 vulnerable to the type of *coercion* that the unconstitutional conditions doctrine
25 prohibits because the government often has broad discretion to deny a permit that
26 is worth far more than property it would like to take." *Koontz v. St. Johns River*
27 *Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594, 186 L. Ed. 2d 697 (2013) (emphasis
28 supplied). Plaintiffs' reading of the meaning of coercion is thus consistent with

well-established statutory and constitutional authority. (Of course, Plaintiffs still must establish that they were denied a statutory or constitutional right, issues addressed previously.)

Finally, Defendants claim that there cannot be coercion against plaintiffs not in custody. Of course, that would mean that the Supreme Court was wrong in *Koontz* when it said that forcing payment of money was a type of coercion.

XI. THE COURT SHOULD NOT DECLINE JURISDICTION OVER THE STATE LAW CLAIMS BECAUSE THEY ARE NOVEL AND COMPLEX.

Defendants contend that supplemental jurisdiction should be declined as the state law claims are novel and complex under 28 U.S.C., 1367(C)(1). However, the contention does not stand up to scrutiny. Beginning with Govt Code § 11135, the Ninth Circuit has considered the statute in the past without any difficulty. *See Darensburg v. Metropolitan Transp Com'n*, 636 F.3d 511, 518 (9th Cir. 2011).

As to the tax claims, the basic parameters of the limits on taxing authority were well established long before the passage of Proposition 26. Several California cases have addressed Proposition 26 since it passed and noted that, for the most part (and, we contend, as relevant here), it continued (and, if anything, strengthened), pre-existing law limiting fees to those bearing a reasonable relationship to costs incurred/benefits provided. The primary change was to allocate the burden of proof to Defendants and require a 2/3 approval vote for all new taxes. *See, e.g., Griffith v. City of Santa Cruz*, 207 Cal. App. 4th 982, 996,(2012) (annual inspection fees where the revenues and costs of enforcement were aligned not a tax; language of last paragraph of Prop. 26 (Article XIII C, § 1, subd. (e)(3) "repeats nearly verbatim the language of prior cases assessing whether a purported regulatory fee was indeed a fee or a special tax"; in *California Farm Bureau Federation v. State Water Resources Control Bd.* 51 Cal.4th 421 (2011),

1 the Supreme Court analyzed language from pre-Proposition 26 cases that was later
2 adopted by drafters of Prop. 26).[32]
3 As noted previously, Prop. 26 was intended to strengthen the reasonable
4 relationship language applied generally to the levy/fee issue in assessing what
5 qualifies as a tax, a standard that itself has long been in effect. Thus, the issue here
6 is the application of long recognized standards to the instant case. *See, e.g.,*
7 *Sinclair Paint, supra,* 15 Cal.4th 866 at p. 876 (fees imposed under the Childhood
8 Lead Poisoning Prevention Act on paint manufacturers and other producers
9 contributing to environmental lead contamination constituted "regulatory fees"
10 that, if they met the reasonable relationship standard, were not taxes); *California*
11 *Assn. of Prof'l Scientists v. Dep't of Fish & Game*, 79 Cal. App. 4th 935, 938-39,
12 94 Cal. Rptr. 2d 535, 538 (2000) (Department of Fish and Game flat environmental
13 review fee was a permissible regulatory fee); *Schmeer v. Cty. of Los Angeles*, 213
14 Cal. App. 4th 1310, 1313, 153 Cal. Rptr. 3d 352, 354 (2013), *as modified* (Mar. 11,
15 2013) (paper carryout bag $.10 charge is not a tax under Prop. 26). [33]
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[32] *See also* Collier *v. City and County of San Francisco,* 151 Cal.App.4th 1326, 1346 (2007) (quoting *San Diego & Electric Co. v. San Diego Air Pollution Control Dist*., 203 Cal.App.3d 1132, 1146 (1988) ("to show a fee is a regulatory fee and not a special tax, the government should prove (1) the estimated costs of the service or regulatory activity, and (2) the basis for determining the manner in which the costs are apportioned, *so that charges allocated to a payor bear a fair or reasonable relationship to the payor's burdens on or benefits from the regulatory activity*") (emphasis added).

[33] There is one Prop 218 case and one Prop. 26 case pending before the California Supreme Court. See *Jacks v. City of Santa Barbara*, 349 P.3d 1066 (Cal. 2015) (Prop 218) (granting review of appellate reported at 49 P.3d 1066 (Cal. 2015) and *Citizens for Fair Reu Rates v. City of Redding*, 347 P.3d 89 (Cal. 2015) (Prop 26) (granting review of appellate reported at 233 Cal. App. 4th 402 (2015). Neither case involves the straightforward issues here. *Jacks* in the intermediate opinion held that a 1% utility surcharge, characterized as a franchise fee, was a tax masquerading as a franchise fee. *Citizens* held that a pre-Prop. 26 annual City discretionary reauthorization line item transferring 1% of revenues from the City's municipally owned utility to its general fund was a tax unless the City could demonstrate that it did not exceed reasonable costs. Both cases thus involve the reach of either Prop 218 or Prop. 26 to relatively low fees (1%).

XII. INMATE PLAINTIFFS WERE NOT REQUIRED TO PLEAD EXHAUSTION AND, IN THE CONTEXT OF THIS CASE, WERE NOT REQUIRED TO EXHAUST ADMINISTRATIVE REMEDIES, TO PURSUE THEIR STATE LAW CLAIMS.

A. FEDERAL PLEADING RULES PROCEDURE DO NOT REQUIRE THAT EXHAUSTION BE PLED.

Federal law applies to procedural issues in supplemental claims. *In re Exxon Valdez*, 484 F.3d 1098, 1100 (9th Cir. 2007) (*Erie Railroad Co.* rule that federal courts apply "state substantive law and federal procedural law" applies in both diversity and supplemental jurisdiction cases) (internal quotation marks and citations omitted).

The PLRA exhaustion requirement is an affirmative defense and does not have to be pled. *See Jones v. Bock*, 549 U.S. 199, 212-14, 127 S. Ct. 910, 919-20, 166 L. Ed. 2d 798 (2007) ("The PLRA … is silent on the issue whether exhaustion must be pleaded by the plaintiff or is an affirmative defense. This is strong evidence that the usual practice should be followed, and the usual practice under the Federal Rules is to regard exhaustion as an affirmative defense").

B. Inmate Plaintiffs Were Not Required To Exhaust Admininistrative Remedies Because The Challenged Phone Contracts Are Not Departmental Policies Or Procedures.

Defendants cite *Parthemore v. Col*, 221 Cal. App. 4th 1372, 1379-80, 165 Cal. Rptr. 3d 367, 371-72 (2013) for the proposition that the inmate plaintiffs had to exhaust state administrative remedies to pursue their state law claims. *Parthemore* cites 372 Cal.Code Regs., tit. 15, §§ 3084.1–3084.7 as the source of the requirement; but that regulation establishes "*an administrative mechanism for review of departmental policies, decisions, actions, conditions, or omissions.*" (Emphasis supplied.) It provides a mechanism for any "inmate or parolee under the

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The amounts involved here (which indisputably have nothing to do with the cost of the service) do not remotely fit into the relatively low charges at issue in those two cases.

department's jurisdiction [to] appeal any policy, decision, action, condition, or omission by the department or its staff."

While we have no doubt that the various County Jails fully support these contracts, they are not departmental policies etc. nor do they fall under the Jails' jurisdictions. Title 15, *supra*; *Byrd v. Goord, supra,* 2005 WL 2086321 at *9 (telephone fee "is neither a rule nor regulation related to the functioning of a prison"). As contracts entered into by the respective Boards of Supervisors, the Jails have no legal ability or authority to cancel them even if they wished to do so. Further, as to the Call Recipient Class, they are not "inmates or parolee[s]" subject to the regulation.

XIII. INMATE PLAINTIFFS ARE ENTITLED TO PURSUE CLAIMS FOR COMPENSATORY DAMAGES, INCLUDING PRESUMED DAMAGES, AND VIOLATION OF CONSTITUTIONAL RIGHTS

Defendants contend that inmate Plaintiffs' claims, whether federal or state, for emotional distress and general damages must be dismissed due to the absence of physical injury. Plaintiffs recognize a split in authority on the applicability of this principle to state law claims. While "some courts have interpreted [§ 1997e(e)] to apply to state law claims as well as federal claims…[this Court] doubts that is the correct reading of the statute." *Mercado v. McCarthy,* 2009 WL 799465, 2 (D.Mass. March 25, 2009). *See also, e.g.,*; *Bromell v. Idaho Dep't of Corr.*, 2006 WL 3197157, at *5 (D. Idaho Oct. 31, 2006) ("Defendant has not provided any legal authority for his assertion that section 1997e(e) of the PLRA bars a state-law claim for intentional infliction of emotional distress"); *Albrecht v. Williams*, 2009 WL 3296649, (D.N.J. Oct. 13, 2009) ("Defendants have provided…no authority for the proposition that § 1997e(e) of the PLRA bars a state law claim for mental or emotional injury without prior showing of physical injury").

Regardless, compensatory damages for violation of constitutional rights are available to inmates even in the absence of physical injury. *Cockcroft v. Kirkland*, 548 F. Supp. 2d 767, 776-77 (N.D. Cal. 2008) summarized that Ninth Circuit law

provided that the physical injury requirement of the PLRA was of "limited application" and "does not bar an action for a violation of a constitutional right." *Cockcroft* cited *Oliver v. Keller,* 289 F.3d 623, 630 (9th Cir.2002) for the proposition that "§ 1997e(e) does not apply to claims for compensatory damages not premised on emotional injury," and that, "[t]o the extent that appellant's claims for compensatory, nominal or punitive damages are premised on alleged Fourteenth Amendment violations, and not on emotional or mental distress suffered as a result of those violations, § 1997e(e) is inapplicable and those claims are not barred." *See also, e.g., Canell v. Lightner*, 143 F.3d 1210, 1213 (9th Cir. 1998) (the deprivation of First Amendment rights entitles a plaintiff to judicial relief wholly aside from any physical injury he can show, or any mental or emotional injury he may have incurred").

In particular, the claim for presumed damages (also referred to at times as general damages) is distinct from emotional distress damages. Presumed damages are a form of compensatory damages for civil rights violations not readily capable of a compensatory damages calculation, including for First Amendment violations. *See, e.g., Carr v. Whittenburg,* 2006 WL 1207286 at 3 (S.D. Ill. April 28, 2006) (a First Amendment "injury is compensable through so called 'general-damages' or 'presumed damages,' even in the absence of proof of injury").[34]

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[34] *See also, e.g., City of Watseka v. Illinois Public Action Council,* 796 F.2d 1547, 1559 (7th Cir.1986) (upholding award of $5000 for violation of First Amendment rights *quoting Memphis Community School District v. Stachura,* 477 U.S. 299, 310, 311 N. 14 (1986), which discussed the availability of presumed damages in voting rights cases); *Villanueva v. George,* 659 F.2d 851, 855 (8th Cir. 1981) ("violations of certain substantive constitutional rights are redressable by substantial compensatory damages awards independent of actual injury"); *Hessel v. O'Hearn*, 977 F.2d 299, 302 (7th Cir. 1992) ("if your home is illegally invaded or you are illegally prevented from voting or speaking you can seek substantial compensatory damages without laying any proof of injury before the jury"); *Walje v. City of Winchester, Ky.*, 773 F.2d 729, 731 (6th Cir. 1985) (finding damages were presumed from the violation of the victim's right to bodily integrity); *Brandon v. Allen,* 719 F.2d 151, 154-55 (6th Cir.1983), *rev'd on other issues*

The presumed damages concept has specifically been applied to First and Eighth Amendment violations in the prison setting despite the PLRA's physical injury limitation. *See, e.g., Parrish v. Johnson*, 800 F.2d 600, 609-11 (6th Cir. 1986) (availability of presumed damages for Eighth Amendment violations were determined on a case by case basis); *King v. Zamiara*, 788 F.3d 207, 214 (6th Cir. 2015) ("When it is difficult to quantify precisely the damages caused by that injury, presumed damages may be awarded"; affirming PLRA presumed compensatory damages award); *Carr v. Whittenburg,* 2006 WL 1207286, p. 3 (S.D.Ill. Apr.28, 2006) (presumed damages for violation of a prisoner's First Amendment rights were not barred by 42 U.S.C. §1997e(e)).

Thus, inmate plaintiffs may seek presumed damages, damages for violation of constitutional rights, and damages not premised on emotional distress and financial damages. And, of course, non-inmate Plaintiffs are not subject to the PLRA at all.

XIV. CONCLUSION

For the reasons stated above, Defendants' motion should be denied.

Dated: June 20, 2016

Respectfully submitted,

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sub nom. Brandon v. Holt, 469 U.S. 464, 105 S.Ct. 873 (1985) (common law had permitted recovery for a wide array of intangible "dignitary interests," in which cases injury was presumed and general as distinguished from special damages were allowed).

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