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# [***Salazar v. Cty. of L.A.***](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5PKD-01K1-F04C-T075-00000-00&context=)

United States District Court for the Central District of California

September 26, 2016, Decided; September 26, 2016, Filed

Case No. CV-15-09003-MWF-JC; CV-15-01079-MWF-JC; CV-16-02477-MWF-JC; CV-16-02478-MWF-JC; CV-16-02479-MWF-JC

**Reporter**

2016 U.S. Dist. LEXIS 190608 \*

Star Salazar, et al. -v- County of Los Angeles

**Subsequent History:** Motion denied by, Claim dismissed by [*Kaelin v. Cty. of Riverside, 2016 U.S. Dist. LEXIS 192339 (C.D. Cal., Dec. 20, 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5R9W-TMJ1-F04C-T1MV-00000-00&context=)

**Core Terms**

Plaintiffs', commissions, rates, prison, telephone, inmates, ***Antitrust***, damages, taking clause, caps, site, parties, jails, Defendants', contracts, phone, providers, first amendment right, primary jurisdiction, alleged violation, motion to dismiss, Violations, property interest, district court, leave to amend, proceedings, ***regulations***, counties, services, cases

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**Judges:** Honorable MICHAEL W. FITZGERALD, United States District Judge.

**Opinion by:** MICHAEL W. FITZGERALD

**Opinion**

CIVIL MINUTES—GENERAL

**Proceedings (In Chambers)**: ORDER RE: OMINBUS MOTION TO DISMISS AMENDED COMPLAINTS [15-1079: 35] [15-9003: 38] [16-2477: 9] [16-2478: 7] [16-1079: 6]

On May 20, 2016, Defendant County of Riverside filed a Motion to Dismiss First Amended Complaint ("Omnibus Motion"), in which all Defendants in the related actions joined. (Docket**[\*4]** Nos. 16-2477: 9; 15-1079: 35; 15-9003: 38; 16-2478: 7; 16-1079: 6). All Plaintiffs filed a single Opposition on June 20, 2016, and Defendants' Reply ("Omnibus Reply") followed on July 8, 2016. (Docket Nos. 16-2477: 15, 17). Plaintiffs filed a Sur-Reply on July 19, 2016. (Docket No. 16-2477: 27). The Court reviewed and considered the parties' submissions, and held a hearing on **August 11, 2016**.

The Motion is **GRANTED** in only the following respects:

• **GRANTED *with leave to amend***: Plaintiffs' claims premised on alleged violations of the *Equal Protection Clause*;

• **GRANTED *with leave to amend***: Plaintiffs' claims premised on alleged violations of the *Due Process Clause*;

• **GRANTED *without leave to amend***: Plaintiffs' claims premised on alleged violations of the *Takings Clause*;

• **GRANTED *without leave to amend***: Plaintiffs' claims for emotional distress damages.

The Motion is **DENIED** as follows:

• The Court declines to exercise primary jurisdiction referral or dismiss proceedings pending resolution of the D.C. Circuit's ruling in *Global Tel\*Link v. FCC, et al.*;

• The Court **DENIES** the Omnibus Motion to Dismiss Plaintiffs' claims for failure to join telecommunications companies as necessary parties under [*Federal Rule of Civil Procedure 19(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2101-FG36-137D-00000-00&context=);

• The Court **DENIES** the Omnibus Motion to Dismiss Plaintiffs'**[\*5]** claims under *42 U.S.C. § 1983* for lack of standing;

• The Court **DENIES** the Omnibus Motion to Dismiss Plaintiffs' claim under the *First Amendment*;

• The Court **DENIES** the Omnibus Motion to Dismiss Plaintiffs' claim under the Sherman ***Antitrust*** Act. The Omnibus Motion is **GRANTED *without leave to amend*** insofar as Plaintiffs seek restitution for this claim.

**I. BACKGROUND**

Jail inmates and their family members bring these putative class actions against five California counties that run some of the largest jails in the nation. The Complaints in all five actions make the following allegations, which the Court must accept as true for the purposes of ruling on this Omnibus Motion:

The inmates housed in Defendants' jails are, by and large, indigent individuals whose families lack significant financial resources. But despite that known reality, Defendants charge grossly excessive rates for telephone services that inmates must use to communicate with the outside world. Defendants do so by granting two private telecommunication companies that provide inmate calling services ("ICS")—Global Tel\*Link Corporation ("GTL") and Securus Technologies, Inc. ("Securus")—monopoly power over the jails in exchange for "outrageous" multi-million-dollar**[\*6]** commissions. The telecommunication companies then incorporate those commissions into the prices of their telephone services, resulting in "unjust" and "unreasonable" rates that are borne on inmates and their families. The impact of the inflated rates has been financially devastating. (*See* Alari Amended Complaint ¶¶ 3, 6, 8-9, 18-19, 22, 31-39 (No. 15-1079: 33); Salazar Second Amended Complaint ("SAC") ¶¶ 3, 6, 8-9, 18-21, 24, 34-43 (No. 15-9003: 35); Kaelin Amended Complaint ¶¶ 3, 6, 8-9, 18-21, 23, 34-42 (No. 16-2477: 5); Bohanon Amended Complaint ¶¶ 3, 6, 8-9, 18-19, 21, 30-38 (No. 16-2478: 6); Gallardo Amended Complaint ¶¶ 3, 6, 8-9, 17-19, 20, 30-38 (No. 16-2479: 5)).

The experiences of Plaintiff Ronny Salazar and his wife, Plaintiff Star Salazar, exemplify the damage inflicted by Defendants'"money making schemes." (Salazar SAC ¶ 3). Plaintiff Ronny Salazar is currently incarcerated in the Men's Central Jail in the Los Angeles County. (*Id.* ¶ 31). The Los Angeles County has an agreement with GTL that guarantees it an annual commission of either $15 million or 67.5% of GTL's revenue derived from servicing the county jails, whichever amount is greater. (*Id.* ¶ 40). Because GTL passes**[\*7]** those costs onto the inmates, Plaintiffs Ronny and Star Salazar have now paid ***thousands*** of dollars that they desperately need to simply communicate with each other through telephone. (*Id.* ¶ 31).

Based on these and other similar allegations, Plaintiffs assert the following claims for relief on behalf of themselves and putative class members:

1. Violations of [*§201(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GMC1-NRF4-43T1-00000-00&context=) of the Federal Communications Act ("FCA");

2. Violations of *42 U.S.C. §1983* as well as the *First* and *Fifth Amendments to the Federal Constitution* (brought by only those Plaintiffs who are not incarcerated);

3. Violations of the *Sherman* ***Antitrust*** *Act*;

4.Violations of Articles 13C and 13D of the California Constitution;

5. Violations of the free speech, due process, equal protection, and *takings clauses* of the California Constitution;

6. Violations of [*California Government Code § 11135, et seq.*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:8MP9-30W2-8T6X-740S-00000-00&context=); and

7. Violations of [*California Civil Code § 52.1*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5J6R-DM91-66B9-809D-00000-00&context=).

(*See* Alari Amended Complaint ¶¶ 80-140 (No. 15-1079: 33); Salazar SAC ¶¶ 84-144 (No. 15-9003: 35); Kaelin Amended Complaint ¶¶ 82-142 (No. 16-2477: 5); Bohanon Amended Complaint ¶¶ 79-138 (No. 16-2478: 6); Gallardo Amended Complaint ¶¶ 78-138 (No. 16-2479: 5)). Plaintiffs have since explicitly abandoned their claims under the FCA. (Opposition at 1). On September 19, 2016, the parties filed a stipulation to dismiss all California state law claims without prejudice, which the Court granted**[\*8]** on September 20, 2016. (Docket Nos. 16-2477: 34, 35).

Defendants now seek to dismiss all remaining claims asserted in the Complaints under [*Federal Rules of Civil Procedure 12(b)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) and [*12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=).

**II. LEGAL STANDARD**

In ruling on a motion under [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), the Court follows [*Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4NSN-8840-004C-002M-00000-00&context=), and [*Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=). "To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" [*Iqbal, 556 U.S. at 678*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=) (citation omitted). "All allegations of material fact in the complaint are taken as true and construed in the light most favorable to the plaintiff." *Williams v. Gerber Prods. Co., 552 F.3d 934, 937 (9th Cir. 2008)* (holding that a plaintiff had plausibly stated that a label referring to a product containing no fruit juice as "fruit juice snacks" may be misleading to a reasonable consumer). The Court need not accept as true, however, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements . . . ." [*Iqbal, 556 U.S. at 678*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=). The Court, based on judicial experience and common-sense, must determine whether a complaint plausibly states a claim for relief. [*Id. at 679*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4W9Y-4KS0-TXFX-1325-00000-00&context=).

If a defendant seeks to challenge not the plaintiff's substantive allegations but the Court's subject matter jurisdiction, the motion to dismiss must be brought under [*Rule 12(b)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=). A jurisdictional attack under [*Rule 12(b)(1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) may be "facial or factual."**[\*9]** [*Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4CRY-X2W0-0038-X00C-00000-00&context=). In a facial attack, the complaint's allegations must be accepted as true. *Id.* But "in a factual attack, the challenger disputes the truth of the allegations that, by themselves, would otherwise invoke federal jurisdiction." *Id.* "In resolving a factual attack on jurisdiction, the district court may review evidence beyond the complaint without converting the motion to dismiss into a motion for summary judgment." *Id.*

**III. REQUEST FOR JUDICIAL NOTICE**

As a general rule, a district court may not consider any material beyond the pleadings in ruling on a [*12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion to dismiss for failure to state a claim. [*Skilstaf, Inc. v. CVS Caremark Corp., 669 F.3d 1005, 1016, n.9 (9th Cir. 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:54XJ-3HH1-F04K-V0SP-00000-00&context=). The Court may, however, take judicial notice of matters of public record outside the pleadings that are not subject to reasonable dispute. *Id.*; [*Fed. R. Evid. 201(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-11WV-00000-00&context=). Defendants filed a Request for Judicial Notice ("RJN I") with their Motion, asking the Court to take judicial notice of certain records related to ***regulations*** issued by the Federal Communications Commission ("FCC") and filings in a District of Columbia Circuit case *Global Tel\*Link v. FCC*, No. 15-1461. (RJN (No. 16-2477: 10, 19)). On August 10, 2016, Defendants filed a second Request for Judicial Notice ("RJN II") of an Order on Reconsideration**[\*10]** that was issued by the FCC on August 9, 2016 as well as an updated docket on *Global Tel\*Link v. FCC*, No. 15-1461, showing that the FCC had filed a motion to hold the case in abeyance. (RJN II (No. 16-2477: 30-1)). On September 7, 2016, Defendants filed a third Request for Judicial Notice ("RJN III") attaching an order from the D.C. Circuit Court denying the motion to hold the case in abeyance, setting a briefing schedule, and addressing future motions. (RJN III (No. 16-2477: 32)). These requests are unopposed. The Court takes judicial notice of the documents submitted by Defendants because they are not subject to reasonable dispute and are proper subjects of judicial notice. *See* [*Fed. R. Evid. 201(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2991-FG36-11WV-00000-00&context=) (documents are of public record and are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned).

**IV. DISCUSSION**

Defendants challenge Plaintiffs' claims on numerous procedural and substantive grounds. The Court examines each of Defendants' contentions in turn.

**A. Primary Jurisdiction Rule**

Defendants first seek to dismiss Plaintiffs' claims under the "primary jurisdiction" doctrine arguing that "[s]etting rates for telephone services is a complex matter which Congress**[\*11]** delegated to the Federal Communications Commission." (Omnibus Motion at 6). "The primary jurisdiction doctrine allows courts to stay proceedings or to dismiss a complaint without prejudice pending the resolution of an issue within the special competence of an administrative agency." [*Clark v. Time Warner Cable, 523 F.3d 1110, 1114 (9th Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SD8-RX30-TXFX-D26M-00000-00&context=). The Ninth Circuit characterized the doctrine as "a prudential one, under which a court determines that an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with ***regulatory*** authority over the relevant industry rather than by the judicial branch." *Id.* (internal quotation marks and citation omitted). The doctrine is limited in scope; "it is to be 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." *Id.* (internal quotation marks and citation omitted).

Four factors are "uniformly present in cases where primary jurisdiction is properly invoked: (1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having ***regulatory*** authority (3) pursuant to a statute that**[\*12]** subjects an industry or activity to a comprehensive ***regulatory*** scheme that (4) requires expertise or uniformity in administration." [*United States v. General Dynamics Corp., 828 F.2d 1356, 1362 (9th Cir. 1987)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BRN0-001B-K2PP-00000-00&context=).

As an initial matter, Plaintiffs argue that because they have voluntarily dismissed their FCA claim, there is no need to discuss primary jurisdiction. (Opposition at 3-4). However, claims that do not explicitly assert violations of federal law may still require proof of a federal violation in order to succeed. *See* [*Free Conferencing Corp. v. T-Mobile US, Inc., No. 2:14-cv-07113-ODW (SHx), 2014 U.S. Dist. LEXIS 178713, at \*20-\*22 (C.D. Cal. Dec. 30, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5DYN-0T51-F04C-T51J-00000-00&context=). As such, it is necessary for the Court to determine if the primary jurisdiction rule applies as to the claims Plaintiffs have not voluntarily dismissed.

There is no dispute that the second, third, and fourth factors are met here. The primary jurisdiction doctrine is designed to protect agencies possessing "quasi-legislative powers" and that are "actively involved in the administration of ***regulatory*** statutes." [*United States v. Gen. Dynamics Corp., 828 F.2d 1356, 1365 (9th Cir. 1987)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BRN0-001B-K2PP-00000-00&context=). Charged with the administration of the Telecommunications and Federal Communications Acts, the FCC is such an agency. [*Clark v. Time Warner Cable, 523 F.3d 1110, 1115 (9th Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SD8-RX30-TXFX-D26M-00000-00&context=) (citing [*47 U.S.C. §§ 151*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GPV1-NRF4-429K-00000-00&context=), [*154*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GRD1-NRF4-42HS-00000-00&context=)). Indeed, congress has given the FCC broad authority to issue ***regulations*** to implement the FCA. *See* [*47 U.S.C. §§ 154(i)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GRD1-NRF4-42HS-00000-00&context=), [*201(b)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GMC1-NRF4-43T1-00000-00&context=), [*303(r)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GVC1-NRF4-40XS-00000-00&context=).

As to the first factor, however, the parties disagree.**[\*13]** Defendants argue that the FCC is "actively ***regulating***" rates for calls from jails and prisons. (Omnibus Motion at 7). Plaintiffs counter that the FCC has already resolved the matter by issuing two orders and, therefore, there is no need for primary jurisdiction referral because there is no need for the FCC to resolve an issue of first impression. (Opposition at 2).

On September 26, 2013, the FCC released a "Report and Order and Further Notice of Proposed Rulemaking," [*WC Docket No. 12-375, FCC 13-113, 28 FCC Rcd 14107*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:59GM-TVC0-01KR-928J-00000-00&context=) ("2013 Order"). (RJN I, Ex. 1 at 1). In the 2013 Order, the FCC adopted interim safe harbor rates and an interim hard cap on ICS providers' rates for interstate calls. (*Id.* at ¶ 5). The FCC further found that "site commission payments and other provider expenditures that are not reasonably related to the provision of ICS are not recoverable through ICS rates, and therefore may not be passed on to inmates and their friends and families" and required that "charges for services ancillary to the provision of ICS must be cost-based." (*Id.* at ¶ 7).

On November 5, 2015, the FCC released a "Second Report and Order and Third Further Notice of Proposed Rulemaking," [*WC Docket No. 12-375, FCC 15-136, 30 FCC Rcd 12763*](https://advance.lexis.com/api/document?collection=administrative-materials&id=urn:contentItem:5HC3-YP20-01KR-94DK-00000-00&context=) ("2015 Order").**[\*14]** (RJN I, Ex. 2). In the 2015 Order, the FCC adopted rate caps that apply to all interstate and intrastate ICS and excluded site commission costs from the rate caps. (*Id.* at ¶ 9). Specifically, the FCC affirmed its finding in the 2013 Order that site commissions do not constitute a legitimate cost to the providers of providing ICS and, while the FCC declined to prohibit site commissions, it did not include site commission payments in the data it used to set rate caps. (*Id.* at ¶¶ 118, 123, 128). In declining to prohibit site commissions, the FCC noted that it expected providers and correctional facilities to "find an approach that meets their needs and complies with [the] rate caps . . . ." (*Id.* at ¶128). The adopted reforms superseded the 2013 Order. (*Id.* at ¶ 10). The FCC noted that it would continue to monitor the market and take appropriate action if it was found that, notwithstanding the rate caps, site commissions were still driving ICS rates to "unjust, unreasonable, or unfair" levels. (*Id.* at ¶ 119).

On August 9, 2016, the FCC released an "Order on Reconsideration," which raised the previous rate caps to account for costs facilities may incur that are reasonably related to the**[\*15]** provision of ICS. (RJN II, Ex. 1) ("2016 Order"). The FCC explicitly stated that there was no need to reconsider its decision to refrain from ***regulating*** site commissions, leaving the decision as to whether to provide commissions to the providers. (*Id.* ¶¶ 35-38).

Although the FCC will continue evaluating the impact of these reforms, the 2013 Order and 2015 Order evidence the FCC's definitive statement on the issue of prison call rates and commissions. Although the FCC amended its rate caps with the 2016 Order, its decision not to include commissions in deciding rate caps and to decline to prohibit commissions has been consistent throughout all three orders. In fact, the FCC specifically left the decision of whether to incorporate commissions to ICS providers and correctional facilities, so long as they complied with the FCC's rate caps.

The Ninth Circuit cases to which Defendants cite are not persuasive as, in both opinions, the FCC had not yet issued an order and, as such, was still actively considering the issues. *See* [*N. Cty. Commc'ns Corp. v. California Catalog & Tech., 594 F.3d 1149, 1155 (9th Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XS4-7RJ0-YB0V-P01D-00000-00&context=) ("Absent a supporting Commission determination, and with no showing of Congressional intent to create a private right of action, North County cannot assert a viable claim**[\*16]** for [a declaratory judgment]."); [*Clark, 523 F.3d at 1115*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4SD8-RX30-TXFX-D26M-00000-00&context=) ("[T]he FCC's Notice of Proposed Rulemaking demonstrates that the agency is actively considering how it will ***regulate*** [Voice over Internet Protocol] services . . . .").

Accordingly, the Omnibus Motion is **DENIED** insofar as it seeks primary jurisdiction referral.

Defendants further argue that, pursuant to the primary jurisdiction rule, the case should be dismissed because the District of Columbia Circuit is currently reviewing the 2015 Order. (Omnibus Motion at 9; Omnibus Reply at 2). After the FCC issued the 2015 Order, several petitions for review were filed and consolidated before the D.C. Circuit in *Global Tel\*Link v. FCC, et al.*, No. 15-1461. (Omnibus Motion at 9; RJN I, Ex. 3). The D.C. Circuit stayed provisions of the 2015 Order regarding [*47 C.F.R. §§ 64.6010*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5SW8-VK40-008H-0088-00000-00&context=) (setting caps on calling rates) and [*64.6020(b)(2)*](https://advance.lexis.com/api/document?collection=administrative-codes&id=urn:contentItem:5SW8-VK40-008H-0089-00000-00&context=) (setting caps on fees for single-call services). (RJN I, Ex. 4). The D.C. Circuit will decide (1) whether the FCC violated the FCA in excluding site commissions from its calculation of the cost of providing ICS, (2) whether the FCC violated the *Constitution's Takings Clause* in excluding site commissions from its calculation of the cost of providing ICS, (3) whether the FCC's decision to exclude**[\*17]** site commissions from its calculation of the cost of providing ICS was "arbitrary, capricious, not in accordance with law, or in excess of statutory jurisdiction," (4) whether the rate caps are "arbitrary, capricious, an abuse of discretion, otherwise not in accordance with law or in excess of statutory jurisdiction," and (5) whether the FCC has authority to reduce and cap intrastate ICS rates. (RJN I, Ex. 3). The parties will file final briefing by October 5, 2016. (RJN I, Ex. 5).

Defendants confuse primary jurisdiction with the Court's power to stay proceedings pending resolution of an appeal in another action. In deciding whether to stay proceedings pending resolution of an appeal in another action, a district court must weigh various competing interests, including (1) the possible damage which may result from the granting of a stay; (2) the hardship a party may suffer if the case is allowed to go forward; and (3) "the orderly course of justice measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected to result from a stay." [*Lockyer v. Mirant Corp., 398 F.3d 1098, 1110 (9th Cir. 2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4FFR-CC90-0038-X038-00000-00&context=).

The majority of cases Defendants rely on concern whether the courts should await the FCC's resolution**[\*18]** of the definition of "automatic telephone dialing systems" under the Telephone Consumer Protection Act ("TCPA"). (*See* Omnibus Motion at 7). These TCPA cases predated the FCC's issuing an order and the courts issued stays pursuant to the primary jurisdiction doctrine. (*Id.*). Defendants cite to only one case that *postdated* the FCC issuing an order on the TCPA. *See* [*Fontes v. Time Warner Cable Inc., No. CV14-2060-CAS(CWx), 2015 U.S. Dist. LEXIS 169580, at \*1 (C.D. Cal. Dec. 17, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HMX-DD11-F04C-T421-00000-00&context=). In *Fontes*, the district court stayed the case pending resolution by the D.C. Circuit of the FCC order, noting that the Commissioner panel was sharply divided, three to two, on the proper definition of an autodialer. [*Id. at \*7-\*8, \*12*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HMX-DD11-F04C-T421-00000-00&context=). The district court also noted that this issue "could potentially be dispositive of the outcome" of the case if the D.C. Circuit were to find the FCC reached the wrong conclusion. [*Id. at \*13*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HMX-DD11-F04C-T421-00000-00&context=).

Similarly to [*Fontes*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5HMX-DD11-F04C-T421-00000-00&context=), the FCC was divided three to two in deciding the 2015 Order and the 2016 Order. (RJN I, Ex. 2; RJN II, Ex. 1). Defendants contend that the D.C. Circuit's decision will resolve Plaintiffs' *First Amendment*, Due Process, Equal Protection, and ***antitrust*** claims. (Omnibus Reply at 4). The Court disagrees. Whether the FCC's decision to refuse to consider site commissions in setting rate**[\*19]** caps violated the FCA, the *Takings Clause*, or was arbitrary, capricious, and not in accordance the law is independent from whether the commissions themselves are unconstitutional or are anticompetitive.

Furthermore, Defendants do not demonstrate that they will suffer hardship or inequity if they are required to go forward save from the risk that the outcomes of the pending proceedings in the D.C. Circuit and FCC may moot Plaintiffs' claims. Although the time and expense of wasted discovery is a legitimate concern, "it does not outweigh the risk that a stay pending the related proceedings' resolution would simply delay Plaintiffs' day in Court." *See* [*Mojica v. Securus Techs., Inc., No. 5:14-CV-5258, 2015 U.S. Dist. LEXIS 12664, at \*10 (W.D. Ark. Jan. 29, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F6W-HP21-F04C-R036-00000-00&context=).

The Court notes that other district courts have addressed whether cases should be stayed pending the D.C. Circuit's resolution of *Global Tel\*Link v. FCC*. These opinions were issued after the 2013 Order but prior to the 2015 Order and 2016 Order, and each district court reached different outcomes as to whether a stay should be granted. *See* [*Mojica v. Securus Techs., Inc., No. 5:14-CV-5258, 2015 U.S. Dist. LEXIS 12664 (W.D. Ark. Jan. 29, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F6W-HP21-F04C-R036-00000-00&context=) (denying primary jurisdiction and motion to stay proceedings pending the D.C. Circuit appeal); [*Chruby v. Glob. Tel\*Link Corp., 119 F. Supp. 3d 395 (E.D. Va. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GNW-TB01-F04F-F1K9-00000-00&context=) (granting stay pending resolution of D.C. Circuit's decision in *Global Tel\*Link v. FCC*, No. 13-1281);**[\*20]** [*Chruby v. Glob. Tel\*Link Corp., 119 F. Supp. 3d 399 (E.D. Va. 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5GNW-TB01-F04F-F1KB-00000-00&context=) (lifting prior stay given D.C. Circuit's decision to await FCC's final proposed rules before considering any issues underlying the case); [*James v. Glob. Tel\*Link Corp., No. 13-4989-WJM-MF, 2014 U.S. Dist. LEXIS 124708 (D. N.J. Sep. 8, 2014)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5D3D-HF21-F04D-W10B-00000-00&context=) (granting stay pending resolution of D.C. Circuit's decision in *Global Tel\*Link v. FCC*, No. 13-1281). Because there is no definitive guidance from other district courts on the issue, and the D.C. Circuit's ruling will not significantly affect the remaining claims for relief, the Court also declines to stay the case pending the resolution by the D.C. Circuit.

Accordingly, the Omnibus Motion is **DENIED** insofar as it seeks to dismiss or stay Plaintiffs' claims pending resolution of the D.C. Circuit's ruling in *Global Tel\*Link v. FCC, et al.*

**B. Joinder of Indispensable Parties**

Defendants next contend that Plaintiffs' claims should be dismissed for failure to join GTL and Securus as indispensable parties under [*Federal Rule of Civil Procedure 19*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2101-FG36-137D-00000-00&context=). As an initial matter, Defendants fail to bring this under the proper procedural mechanism—[*Federal Rule of Civil Procedure 12(b)(7)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=). Under [*Rule 12(b)(7)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), a defendant may move to dismiss a complaint for failure to join a party under [*Rule 19*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2101-FG36-137D-00000-00&context=). A**[\*21]** [*Rule 12(b)(7)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion to dismiss for failure to join will be granted only if the Court determines that the absent party is necessary, joinder is not feasible, and the party is "indispensable." [*Shermoen v. United States, 982 F.2d 1312, 1317 (9th Cir. 1992)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4W-YCW0-008H-V1JG-00000-00&context=).

An absent party is necessary in two circumstances. First, if in the party's absence the Court is unable to accord complete relief to the parties present, the party is necessary. [*Fed. R. Civ. Proc. 19(a) (1)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2101-FG36-137D-00000-00&context=). Second, an absent party is necessary if disposition of the case without that party would as a practical matter impair his ability to protect his interests, or would subject existing parties to multiple or inconsistent obligations. [*Fed. R. Civ. P. 19(a)(2)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2101-FG36-137D-00000-00&context=).

Defendants argue that GTL and Securus are indispensable parties because they have an obvious interest in litigating whether their rates should be retroactively reduced. (Omnibus Motion at 10). Plaintiffs do not seek an order setting aside current contracts between Defendants and GTL or Securus. Nor do Plaintiffs seek a reduction of phone rates. Plaintiffs instead focus specifically on the *commissions* Defendants collect by way of the contracts with GTL and Securus. Indeed, Plaintiffs seek relief for the monies they paid that "were used to pay the contracted commissions to County Defendants the amounts**[\*22]** contracted for in connection with the inmate calling agreements of each with telecommunications companies." (Prayer for Relief ¶ 2 (No. 16-2477: 5)). The injunctive relief sought is to prohibit contracts that Defendants will renew or enter into for inmate calling services and to place commissions in a court supervised fund to be restored to Plaintiffs. (*Id.* ¶ 4(a)-(b)). As Plaintiffs only seek damages and injunctive relief related to the commissions collected by Defendants, the Court would be able to accord complete relief without the joinder of the telephone companies. Nor is the ability of the telephone companies to protect their interests impaired because existing contracts between them and Defendants are not at issue.

Accordingly, the Omnibus Motion is **DENIED** insofar as it as argues that GTL and Securus are necessary parties under [*Rule 19(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-2101-FG36-137D-00000-00&context=).

**C. Plaintiffs' Standing to Bring Claims under *42 U.S.C. § 1983***

Defendants argue that Plaintiffs who are not currently incarcerated have no standing to bring claims on behalf of individuals who are. (Omnibus Motion at 10-11). Defendants' contention confuses the requirements of standing under Article III of the Constitution with class certification requirements under *Federal Rule of Civil Procedure 23*. There can be no doubt that any**[\*23]** Plaintiffs who paid the allegedly excessive telephone fees have suffered concrete injuries that confer Article III standing. Whether Plaintiffs who are not currently incarcerated county inmates may represent a class of inmates should be decided at the class certification stage.

Accordingly, the Omnibus Motion is **DENIED** to the extent it seeks to dismiss Plaintiffs' claims under *§ 1983* for lack of standing.

**D. Viability of Plaintiffs' Claims Under *42 U.S.C. § 1983***

**1. Alleged Violation of the *First Amendment***

Plaintiffs argue that the commissions from telephone charges amount to a tax on Plaintiffs' *First Amendment* right to free speech. (Opposition at 7). As Plaintiffs note, this issue has not been presented in any other *First Amendment* challenges to inmate phone service charges. (*Id.* at 6). Several Supreme Court cases have held taxes to be unconstitutional because they infringe on the exercise of protected *First Amendment* rights. *See* [*Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, 460 U.S. 575, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5310-003B-S069-00000-00&context=) (tax on paper and ink infringed on freedom of the press); [*Murdock v. Com. of Pennsylvania, 319 U.S. 105, 63 S. Ct. 870, 87 L. Ed. 1292 (1943)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4KJ0-003B-72S3-00000-00&context=) (licensing tax for all persons canvassing for or soliciting within the borough infringed on their freedom of speech, press, and religion); [*Baldwin v. Redwood City, 540 F.2d 1360 (9th Cir. 1976)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1NN0-0039-M30T-00000-00&context=) (provision of city ordinance requiring payment of $1 nonrefundable inspection fee before displaying a temporary political campaign sign was an unconstitutional tax**[\*24]** upon exercise of *First Amendment* rights). In *Minneapolis Star*, the Supreme Court found that a tax cannot stand if it "burdens rights protected by the *First Amendment*" and the burden is not "necessary to achieve an overriding governmental interest." [*460 U.S. at 582*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5310-003B-S069-00000-00&context=).

Therefore, the threshold determination as to whether the commissions exact an unconstitutional tax on Plaintiffs' free speech is whether the right is protected by the *First Amendment*. Defendants contend that there is no *First Amendment* right to provide any telephone service in jails, much less provide telephone service at a specific rate. (Omnibus Motion at 12-15) (citing [*Arsberry v. Illinois, 244 F.3d 558 (7th Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42M5-BRJ0-0038-X104-00000-00&context=) and [*Holloway v. Magness, 666 F.3d 1076 (8th Cir. 2012))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:54W2-0231-F04K-S04S-00000-00&context=). Plaintiffs argue that the right at issue is not the right to a specific telephone rate, but the right to telephone access. (Opposition at 5-6). Contrary to the majority of other circuits, the Ninth Circuit has recognized in dicta that inmates have a right to telephone access in jails. *See* [*Valdez v. Rosenbaum, 302 F.3d 1039, 1047 (9th Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:46P5-76K0-0038-X3B7-00000-00&context=) ("We have previously stated in dicta that prisoners have a *First Amendment* right to telephone access, subject to reasonable security limitations.") (internal quotation marks omitted); [*Johnson v. State of Cal., 207 F.3d 650, 656 (9th Cir. 2000)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3YVM-HV20-0038-X0WM-00000-00&context=); [*Strandberg v. City of Helena, 791 F.2d 744, 747 (9th Cir. 1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-4WS0-0039-P1CF-00000-00&context=) ("Courts have recognized detainees' and prisoners' *first amendment* right to telephone access.").

In *Valdez v. Rosenbaum*, the Ninth Circuit recognized that the genesis of the purported right to telephone**[\*25]** access is "obscure" in that cases "have not identified the source of the right, and our pronouncements of its existence have been conclusory and unnecessary to the decisions." [*Valdez, 302 F.3d at 1048*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:46P5-76K0-0038-X3B7-00000-00&context=). The Ninth Circuit examined whether state officials had violated a pretrial detainee's *First Amendment* rights by imposing restrictions on his telephone access during his four and a half month pretrial detention. [*Id. at 1042*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:46P5-76K0-0038-X3B7-00000-00&context=). The Ninth Circuit observed that "[w]hile it is clear that the *First Amendment* right of free speech applies within prison walls," in analyzing how the "contours" of that right, it must "'sensibly and expansively' define the *First Amendment* right at issue" and then consider whether the restriction violated the right under Turner. [*Id. at 1048*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:46P5-76K0-0038-X3B7-00000-00&context=). The Ninth Circuit then defined the right at issue as "the right to communicate outside prison walls," noting that the "[u]se of a telephone provides a *means* of exercising this right." *Id.* (emphasis in original). The Ninth Circuit then concluded the telephone restriction did not violate the *First Amendment* based on the *Turner* factors.

This Court is bound by the Ninth Circuit's analysis in [*Valdez*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:46P5-76K0-0038-X3B7-00000-00&context=). As in *Valdez*, Plaintiffs here define the right at issue as telephone access, which the Court now "sensibly and expansively" defines as "the right to communicate**[\*26]** outside prison walls." *See* [*id. at 1048*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:46P5-76K0-0038-X3B7-00000-00&context=). The Court must now determine whether the commissions restrict this right under *Turner*.

Under a *Turner* analysis, a court weighs a prisoner's constitutional right against the interests of prison administration, according a "deferential standard of review" to challenges regarding prison ***regulations*** and upholding the ***regulation*** if it is "reasonably related to legitimate penological interests." [*Mauro v. Arpaio, 188 F.3d 1054, 1058 (9th Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3X6J-06B0-0038-X494-00000-00&context=). In making the "reasonableness" inquiry, courts consider four factors: (1) whether there is a valid, rational connection between the restriction and the legitimate governmental interest put forward to justify it; (2) whether there are alternative means of exercising the right; (3) whether accommodating the asserted constitutional right will have a significant negative impact on prison guards and other inmates, and on the allocation of prison resources generally; and (4) whether there are obvious, easy alternatives to the restriction showing that it is an exaggerated response to prison concerns. [*Turner v. Safley, 482 U.S. 78, 89-90, 107 S. Ct. 2254, 96 L. Ed. 2d 64 (1986)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H880-003B-4556-00000-00&context=); [*Mauro, 188 F.3d at 1058-59*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3X6J-06B0-0038-X494-00000-00&context=).

At the hearing, Plaintiffs argued that a *Turner* analysis rests on factual development, which the parties have not yet been able to perform. The Court agrees. *Valdez* was decided**[\*27]** on summary judgment. Plaintiffs have sufficiently alleged that the commissions limited Plaintiffs' right to communicate outside prison walls. Whether the commissions are reasonably related to legitimate penological interests goes to the merits of Plaintiff's claim, not whether they have stated a claim. *See* [*Barrett v. Belleque, 544 F.3d 1060, 1062 (9th Cir. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4THD-TKM0-TX4N-G077-00000-00&context=) (questions going to the merits of *First Amendment* claim not appropriately resolved on the pleadings); [*Dunn v. Castro, 621 F.3d 1196, 1205 n.7 (9th Cir. 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5115-09M1-652R-8001-00000-00&context=) ("We . . . decline to render any decision on the application of *Turner* to the facts at issue in this case [at the [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) stage]); [*Sims v. Biter, No. 1:14-CV-00131 AWI, 2015 U.S. Dist. LEXIS 6779, 2015 WL 269215, at \*2 (E.D. Cal. Jan. 21, 2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5F4B-1TH1-F04C-T07C-00000-00&context=) ("The *Turner* analysis is beyond the scope of a [*12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=) motion."), aff'd, [*No. 15-15895, 645 Fed. Appx. 555, 2016 WL 1128109 (9th Cir. Mar. 23, 2016)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5JC8-M2G1-F04K-V3X2-00000-00&context=); [*Hightower v. Tilton, No. C08-1129-MJP, 2012 U.S. Dist. LEXIS 50362, 2012 WL 1194720, at \*7 (E.D. Cal. Apr. 10, 2012)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:55CN-X991-F04C-T0SN-00000-00&context=) ("[I]t is inappropriate to require a complaint to address [*Turner*] factors at the motion to dismiss stage.")

Accordingly, the Omnibus Motion is **DENIED** as to Plaintiffs' claims premised on alleged violations of the free speech clause of the *First Amendment*.

**2. Alleged Violation of Equal Protection**

Plaintiffs argue that their Equal Protection claim is adequately pled for the same reasons that their *First Amendment* claim was adequately pled. (Opposition at 34-35). According to Plaintiffs, the impermissible tax imposed by the phone services impermissibly burdens Plaintiffs' fundamental right to**[\*28]** free speech and is not reasonably related to penological interests. (*Id.* at 35). Plaintiffs fail to address how one group is being treated differently from another, which is key to an Equal Protection claim. *See* [*Fennell v. Gregory, 414 F. App'x 32, 35 (9th Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:522T-K6W1-652R-80XS-00000-00&context=) ("Because [plaintiff-appellee] fails to allege differential treatment from similarly situated individuals, any equal protection claims also must be dismissed for failure to state a claim.") (citing [*City of Cleburne, Tex. v. Cleburne Living Ctr., Inc., 473 U.S. 432, 439, 105 S. Ct. 3249, 87 L. Ed. 2d 313 (1985))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-9Y50-0039-N48B-00000-00&context=). As such, this claim fails.

Accordingly, the Omnibus Motion is **GRANTED *with leave to amend*** as to Plaintiffs' claims premised on alleged violations of the *equal protection clause of the Fourteenth Amendment*. The Court is quite dubious that Plaintiffs can successfully amend but will allow them one attempt to do so.

**3. Alleged Violation of Due Process**

Plaintiffs argue that their substantive due process rights were violated because Defendants' commissions bear no reasonable relationship to "public health, safety, morals, or general welfare." (Opposition at 35). But Plaintiffs fail to allege, either in their Amended Complaint or their Opposition, what fundamental right or liberty is at stake. The Ninth Circuit observed that there are two elements of a substantive due process analysis:

First, we have regularly observed that the *Due Process Clause* specially protects those fundamental**[\*29]** rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest.

[*Raich v. Gonzales, 500 F.3d 850, 862 (9th Cir. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4N87-5T50-0038-X26K-00000-00&context=) (quoting [*Washington v. Glucksberg, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S65-HXP0-003B-R167-00000-00&context=). Plaintiffs provide no "careful description" of the asserted liberty interest, only that the commissions bore no reasonable relationship to "public health, safety, morals, or general welfare."

Accordingly, the Omnibus Motion is **GRANTED *with leave to amend*** as to Plaintiffs' claims premised on alleged violations of the *Due Process Clause*. Again, the Court believes that a successful amendment is unlikely.

**4. Alleged Violation of the *Takings Clause***

Plaintiffs argue that Defendants violated the *Takings Clause*, which states that "private property [shall not] be taken for public use, without just compensation." *U.S. Const. amend. V*. Without reaching Plaintiffs' takings claim, Defendants first argue that Plaintiffs did not exhaust their state remedies prior to filing their action in federal court. (Omnibus Reply at 12-13).

Under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson****[\*30]*** *City*, a takings claim is ripe only if the plaintiff can establish it has sought "compensation through the procedures the State has provided for doing so." [*473 U.S. 172, 186, 194, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B0C0-0039-N4CM-00000-00&context=). A plaintiff may be excused from exhausting state remedies if the plaintiff demonstrates that the remedies are "unavailable or inadequate." [*Id. at 196-97*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-B0C0-0039-N4CM-00000-00&context=). Plaintiffs contend that "there is no available California administrative remedy" because the jail's administrative remedies are not an available remedy and "[i]nverse condemnation is not available for the type of taking here." (Opposition at 33-34).

California provides inverse condemnation proceedings to address takings claims. *See* [*Jones Intercable v. City of Chula Vista, 80 F.3d 320, 324 (9th Cir.1996)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-2R50-006F-M1RJ-00000-00&context=) (observing that a California plaintiff's federal takings claim will not ripen until the party has first sought compensation through that state's inverse condemnation proceedings). To establish liability for inverse condemnation, plaintiffs must establish, by a preponderance of the evidence, four elements: "First, that [they] ha[ve] an interest in real or personal property; Second, the [County] substantially participated in the planning, approval, construction or operation of a public project or public improvement; Third, [plaintiffs'] property suffered damage; and Fourth, the [County's] project,**[\*31]** act or omission was a substantial cause of the damage." [*Yamagiwa v. City of Half Moon Bay, 523 F. Supp. 2d 1036, 1088 (N.D. Cal. 2007)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4RSJ-W090-TXFP-C3FD-00000-00&context=) (emphasis omitted). A landowner who seeks to sue in federal court before seeking compensation from the state bears the burden of establishing that state remedies are inadequate; a landowner fails to discharge this burden by showing that state procedures are untested or uncertain. [*Carson Harbor Village, Ltd. v. City of Carson, 353 F.3d 824 (9th Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4BD0-4F30-0038-X0G5-00000-00&context=).

Given the elements required to establish liability for inverse condemnation under California law, the Court finds that an inverse condemnation proceeding would not be an adequate remedy for the taking Plaintiffs allege in this case. The second element is particularly inapplicable in this situation, as Defendants have not substantially participated in a public project or improvement with regards to setting rates for prison phone calls. *See* [*Yamagiwa, 523 F. Supp. 2d at 1088*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4RSJ-W090-TXFP-C3FD-00000-00&context=) ("Inverse condemnation is a constitutional remedy permitting recovery of consequential damages arising from public projects.").

As Plaintiffs' takings claim is ripe, the Court now addresses whether Plaintiffs have sufficiently alleged an unconstitutional taking. There are very few cases that have analyzed whether commissions taken from prison phone rates amount to an unconstitutional taking. Of the courts that have**[\*32]** addressed this issue, their analysis has been cursory, but they have found that no taking was present. *See* [*Arsberry v. Illinois, 244 F.3d 558, 565 (7th Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42M5-BRJ0-0038-X104-00000-00&context=); [*Walton v. New York State Dep't of Corr. Servs., 13 N.Y. 3d 475, 489, 921 N.E. 2d 145, 154, 893 N.Y.S.2d 453 (2009)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7X5C-R280-YB0T-201W-00000-00&context=) ("[A] 'taking' cannot occur in the absence of government compulsion."); *but see* [*Walton, 13 N.Y. 3d at 502*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7X5C-R280-YB0T-201W-00000-00&context=) (Smith, J., dissenting) (disagreeing with the majority's denial of petitioners' takings claim based on the "rough proportionality" standard under *Nollan* and *Dolan*).

In order to state a claim under the *Takings Clause*, a plaintiff must first establish the constitutionally protected "property interest" at issue. [*McIntyre v. Bayer, 339 F.3d 1097, 1099 (9th Cir. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4993-8350-0038-X48N-00000-00&context=) (citing [*Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1000-01, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-3BD0-003B-S307-00000-00&context=). Plaintiffs do not attempt to argue that they have a property interest in phone call rates at a certain price. Instead, they argue that they have a "property interest" in their own money, which they are coerced into paying in order to exercise their *First Amendment* right of communication. (Opposition at 29). In support of their argument, Plaintiffs cite solely to [*McGuire v. Ameritech Servs., Inc., 253 F. Supp. 2d 988, 1004 (S.D. Ohio 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:491S-1G60-0038-Y4D8-00000-00&context=) ("Money is certainly a property interest."). But the district court in *McGuire* addressed whether money was a property interest under a procedural due process claim, not a takings claim, and is therefore distinguishable.

The issue of whether Plaintiffs have a property interest in their own money that is constitutionally protected by the *Takings Clause* raises a host of complicated**[\*33]** issues that is addressed by neither party. As an initial matter, the Court notes that Plaintiffs have not specified whether the taking of their money is a *per se* taking or a ***regulatory*** taking. The distinction is crucial as the Supreme Court has stressed the "longstanding distinction" between government acquisition of property and ***regulations***. *See* [*Horne v. Dep't of Agric., 135 S. Ct. 2419, 2427-28, 192 L. Ed. 2d 388 (2015)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G8K-M9B1-F04K-F007-00000-00&context=). The Supreme Court and the Ninth Circuit have recognized that because money is fungible, there can be no permanent physical occupation of it, and a requirement to pay money is not viewed as a *per se* taking. [*Washington Legal Found. v. Legal Found. of Washington, 271 F.3d 835, 854 (9th Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:44FD-4VH0-0038-X1D2-00000-00&context=) (citing [*Eastern Enterprises v. Apfel, 524 U.S. 498, 530, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TGV-N280-002K-600B-00000-00&context=) and [*United States v. Sperry Corp., 493 U.S. 52, 62 n.9, 110 S. Ct. 387, 107 L. Ed. 2d 290 (1989))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-8RT0-003B-432K-00000-00&context=).

But the more fatal flaw in Plaintiffs' argument is that Plaintiffs' interest in their money is not a specific property right or interest that is protected by the *Takings Clause*. In the Supreme Court's decision in *Eastern Enterprises*, Justice Kennedy concluded that the *Takings Clause* does not apply to government-imposed financial obligations that "d[o] not operate upon or alter an unidentified property interest." [*Eastern Enterprises v. Apfel, 524 U.S. 498, 540, 118 S. Ct. 2131, 141 L. Ed. 2d 451 (1998)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TGV-N280-002K-600B-00000-00&context=) (Kennedy, J., concurring in judgment and dissenting in part). At issue in *Eastern Enterprises* was the Coal Act's requirement that coal operators fund health benefits for retired employees and their dependents. Justice Kennedy dissented in part**[\*34]** from the plurality's analysis of the *Takings Clause*, observing that while the Coal Act imposes a financial burden on coal operators, it did not "appropriate, transfer, or encumber an estate in land (*e.g.*, a lien on a particular piece of property), a valuable interest in an intangible (*e.g.*, intellectual property), or even a bank account or accrued interest." [*Id. at 540*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TGV-N280-002K-600B-00000-00&context=). As the law simply "imposed an obligation to perform an act" but was "indifferent as to how the ***regulated*** entity elects to comply or the property it uses to do so," the law's requirement to pay did not constitute a taking. *Id.* As such, the Coal Act was better analyzed under the *Due Process Clause* rather than the *Takings Clause*. [*Id. at 547*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TGV-N280-002K-600B-00000-00&context=). Four Justices concurred with Justice Kennedy's analysis, observing that the "'private property' upon which the [Takings] Clause traditionally has focused is a specific interest in physical or intellectual property." [*Id. at 554*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TGV-N280-002K-600B-00000-00&context=) (Breyer, J., Stevens, J., Souter, J., Ginsburg, J., dissenting).

The Ninth Circuit has only recognized this aspect of the *Eastern Enterprises* holding in passing. *See* [*Chevron USA, Inc. v. Bronster, 363 F.3d 846 (9th Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4C2J-JCM0-0038-X1KT-00000-00&context=) (observing that the disagreement between the plurality and the other five Justices over whether the challenge to the Coal Act is properly viewed as a due process or takings**[\*35]** claim focused on the limited question of whether a ***regulatory*** takings claim requires that the challenged ***regulation*** affects a "specific property right or interest," which is inapplicable to this case), rev'd sub nom. [*Lingle v. Chevron USA, Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4G7D-DVC0-004C-2008-00000-00&context=); [*Washington Legal Found. v. Legal Found. of Washington, 271 F.3d 835, 854 (9th Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:44FD-4VH0-0038-X1D2-00000-00&context=) (observing that, in *Eastern*, the Supreme Court affirmed that payment of millions of dollars to employee benefit funds was not a *per se* taking); [*Quarty v. U.S., 170 F.3d 961, 969 (9th Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W4P-2CW0-0038-X2JF-00000-00&context=) (applying the takings analysis of the *Eastern Enterprises* plurality opinion to retroactive application of a statute).

In interpreting *Eastern Enterprises*, courts in other circuits have generally held that "[t]he mere imposition of an obligation to pay money . . . does not give rise to a claim under the *Takings Clause of the Fifth Amendment*." [*Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1340 (Fed. Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:44GP-RVP0-003B-93GW-00000-00&context=) (en banc); *see also* [*W. Virginia CWP Fund v. Stacy, 671 F.3d 378, 387 (4th Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:54DX-71G1-F04K-M31P-00000-00&context=); [*Adams v. United States, 391 F.3d 1212, 1224 (Fed. Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4F09-4XH0-003B-91P2-00000-00&context=); [*Unity Real Estate Co. v. Hudson, 178 F.3d 649, 659, 674 (3d Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W4G-X4H0-0038-X2H9-00000-00&context=) ("[W]e are bound to follow the five-four vote against the takings claim in *Eastern*."); [*Parella v. Ret. Bd. of the R.I. Employees' Ret. Sys., 173 F.3d 46, 58 (1st Cir. 1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3W8W-NJ00-0038-X535-00000-00&context=). The Court applies their analysis here.

Here, Plaintiffs allege that Defendants, in choosing to enter into contracts with telephone companies who offer the highest commissions, effectively set higher phone rates, which Plaintiffs are then coerced to pay in order to exercise their *First Amendment* right to communication. But there is no property right or interest implicated by a mere imposition of an obligation to pay money. As such, Plaintiffs**[\*36]** have failed to allege how Defendants took their money in any constitutionally infirm way.

Moreover, unlike in [*Eastern Enterprises*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3TGV-N280-002K-600B-00000-00&context=), Plaintiffs were not compelled by statute to pay to make phone calls. Plaintiffs authorized payment of the telephone rates with full knowledge of the cost of their calls. *Cf.* [*Godoy v. Horel, No. C 09-4793 PJH, 2010 U.S. Dist. LEXIS 20465, 2010 WL 890148, at \*2-\*3 (N.D. Cal. Mar. 8, 2010)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:7XYV-4DF0-YB0M-N03F-00000-00&context=), aff'd, [*442 F. App'x 326 (9th Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:539N-VH51-JCNJ-40XS-00000-00&context=) (plaintiffs failed to allege that defendants' raising the price of coffee at the prison canteen constituted an unjust taking of plaintiffs' money because plaintiffs were aware of the prices and authorized the expenditures). Plaintiffs argue that the payment of the rates was not "voluntary" because, per the unconstitutional conditions doctrine, "an unconstitutional condition rendered the conduct not truly 'voluntary,'" (Opposition at 31 (citing for [*Horne v. Dep't of Agric., 135 S. Ct. 2419, 192 L. Ed. 2d 388 (2015))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G8K-M9B1-F04K-F007-00000-00&context=). In so arguing, however, Plaintiffs put the cart before the horse. A "prerequisite to discerning a constitutional violation for an unconstitutional condition or unconstitutional retaliation [is] . . . the validity of the underlying alleged constitutional rights." [*Vance v. Barrett, 345 F.3d 1083, 1088 (9th Cir. 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:49N9-VWF0-0038-X376-00000-00&context=) (affirming dismissal of plaintiff's takings claim because a "reasonable user fee is not a taking if**[\*37]** it is imposed for the reimbursement of the cost of government services," and inmate did not allege that the charges were "unreasonable" or "unrelated to the administration of his [trust] account"); *see also* [*Honolulu Rapid Transit Co. v. Dolim, 459 F.2d 551, 552 (9th Cir. 1972)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-5WK0-0039-X4T1-00000-00&context=) ("Thus there was no event to which [plaintiffs'] asserted constitutional rights attached. The transaction had 'passed out of the range of the *Fifth Amendment*' and was a situation where 'Parties, supposedly with due regard to their own interests, bargain between themselves as to compensation.'"). As stated above, Plaintiffs have alleged no valid property interest in their own money. To the extent that Plaintiffs rely on *Horne v. Department of Agriculture* for the proposition that Plaintiffs' payments were not voluntary, *Horne* is distinguishable because it concerned a physical *per se* taking. [*135 S. Ct. at 2428*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G8K-M9B1-F04K-F007-00000-00&context=) ("The reserve requirement imposed by the Raisin Committee is a *clear* physical taking.") (emphasis added). Moreover, unlike the Plaintiffs' property interest in money, the raisin growers' property interest in their personal property—their grape harvest—was well-established. [*Id. at 2427*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:5G8K-M9B1-F04K-F007-00000-00&context=) ("Nothing in this history suggests that personal property was any less protected against physical appropriation than real property.").

**[\*38]**Plaintiffs rely heavily on *Koontz*, contending that "extortionate demands of this sort" violate the unconstitutional conditions doctrine and Plaintiffs are like the land-use applicants in *Koontz* as they are "especially vulnerable" to the coercion forbidden by the unconstitutional conditions doctrine. (Opposition at 32 (quoting [*Koontz v. St. Johns River Water Management District, 570 U.S. 595, 133 S. Ct. 2586, 2594-95, 186 L. Ed. 2d 697 (2013)))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58RJ-V331-F04K-F07S-00000-00&context=). *Koontz* concerned a landowner's action against a water management district based on the district's denial of land use permits unless the landowner funded offsite mitigation project. In concluding that the denial of the permit constituted a taking, the Supreme Court observed that *land-use permit applicants* are "especially vulnerable" to coercion under the unconstitutional conditions doctrine because the government has such broad discretion to deny a permit that is worth far more than property it would like to take it. [*Id. at 2594*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58RJ-V331-F04K-F07S-00000-00&context=). Here, there is no land-use permit applicant requiring specific protection from extortion.

To be sure, the "extortionate demands of this sort" in *Koontz* referred to conditions imposed on land-use applicants and, when read within the context of the case, cannot be read to apply generally to all demands that ring of extortion. The Supreme Court in *Koontz* relied on its prior decisions concerning land-use exactions, *Nollan* and *Dolan*. Courts have recognized that "[t]he applicability of the *Nollan/Dolan* framework is limited . . . to adjudicative land-use exactions 'requiring dedication of private property' where a per se physical taking has occurred." [*Conklin Development v. City of Spokane Valley, 448 Fed. Appx. 687, 689 (9th Cir. 2011)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:830G-BK51-652R-82BX-00000-00&context=) (citing [*Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 547, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4G7D-DVC0-004C-2008-00000-00&context=); *see also* [*City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702, 119 S. Ct. 1624, 1635-36, 143 L. Ed. 2d 882 (1999)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3WJ6-BG10-004C-2005-00000-00&context=) ("[W]e have not extended the rough proportionality test of *Dolan* beyond the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use . . . ."); [*San Remo Hotel, L.P. v. San Francisco City and County, 364 F.3d 1088, 1098 (9th Cir. 2004)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4C5B-5SB0-0038-X2WX-00000-00&context=) (same). As such, to the extent that Plaintiffs argue that *Koontz* should be read to require particular exception for "especially vulnerable" populations such as Plaintiffs, who are not land-use permit applicants, this extension has not been recognized.**[\*39]**

Moreover, *Koontz* is further distinguishable as the Supreme Court recognized in *Koontz* that the conclusion of the five Justices in *Eastern Enterprises* did not control because, unlike the demand for money in *Eastern Enterprises*, "the monetary obligation burdened petitioner's ownership of a specific parcel of land." [*Koontz, 133 S. Ct. at 2599*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58RJ-V331-F04K-F07S-00000-00&context=). The "fulcrum" of *Koontz* was "the direct link between the government's demand and a specific parcel of real property." [*Id. at 2600*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:58RJ-V331-F04K-F07S-00000-00&context=). Unlike *Koontz*, the money obligation here is not tied to a specific parcel of land.

Accordingly, the Omnibus Motion is **GRANTED *without leave to amend*** as to Plaintiffs' claims premised on alleged violations of the *Takings Clause*.

**E. Viability of Plaintiffs' Claims Under the Sherman *Antitrust* Act**

Plaintiffs allege that Defendants' actions violate *Sections 1* and *2* of the Sherman ***Antitrust*** Act. (Kaelin Amended Complaint ¶¶ 105-107 (No. 16-2477: 5)). The Sherman ***Antitrust*** Act, *15 U.S.C. §§ 1* and *2* states as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to**[\*40]** be illegal shall be deemed guilty of a felony . . . .

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . .

In order to survive a motion to dismiss under [*Rule 12(b)(6)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5GYC-1WP1-6N19-F0YW-00000-00&context=), an ***antitrust*** complaint "need only allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by the ***antitrust*** laws." [*Newman v. Universal Pictures, 813 F.2d 1519, 1522 (9th Cir.1987)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-BPY0-001B-K2HK-00000-00&context=), cert. denied, *486 U.S. 1059, 108 S. Ct. 2831, 100 L. Ed. 2d 931 (1988)*.

Contrary to Defendants' argument that Plaintiffs have failed to allege an ***antitrust*** injury, the Court finds that Plaintiffs have sufficiently alleged that Defendants acted in contravention of ***antitrust*** laws. (*See* Omnibus Motion at 32-33). Plaintiffs allege that Defendants "used their market control over the jails to enrich themselves at the expense of the [inmates and call recipients]" by "entering into an exclusive agreement with the phone company willing to pay the highest kickback to the County." (Kaelin Amended Complaint ¶ 100 (No. 16-2477: 5)). This exclusive agreement with GTL and Securus allows Defendants to "prey on Plaintiffs and the**[\*41]** class they seek to represent by charging exorbitant rates, without any competitive pressures." (*Id.* at ¶101). They further allege that the charges paid by consumers to use inmate telephone services are "significantly above" the actual cost of providing the telephone services. (*Id.* at ¶ 105). Via the contracts, GTL and Securus agreed to pay $2 million per year and $2.5 million per year to the County respectively. (*Id.*). Plaintiffs allege that if Defendants allowed more than one company to provide phone services in the jails or selected an exclusive provider based on competitive pricing instead of highest commission, Plaintiffs would benefit from market competition, including lower prices." (*Id.* at ¶102).

Defendants first contend that other courts have rejected ***antitrust*** claims as to prison telephone rates. (Omnibus Motion at 26-28). In *Arsberry v. Illinois*, the Seventh Circuit rejected plaintiff inmates' ***antitrust*** argument based on the "vertical arrangement" with phone companies because the "filed-rate doctrine" served as a "jurisdictional bar." [*244 F.3d 558, 566 (7th Cir. 2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42M5-BRJ0-0038-X104-00000-00&context=). The "filed-rate doctrine" "forbids a court to revise a . . . common carrier's filed tariff, which is to say the terms of sale that the carrier**[\*42]** has filed with the agency that ***regulates*** the carrier's service." [*Id. at 562*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42M5-BRJ0-0038-X104-00000-00&context=). A customer or competitor "can challenge the tariff before the agency itself, and if disappointed with the agency's response can seek judicial review . . . but it cannot ask the court in any other type of suit . . . to invalidate or modify the tariff." *Id.* Defendants do not raise the same "filed-rate doctrine," and for good reason; the Defendants here are counties, not common carriers. Defendants are thus not subject to the Seventh Circuit's holding in *Arsberry*. The other case Defendants rely on is a Southern District of Ohio case [*McGuire v. Ameritch Services, Inc. 253 F. Supp. 2d 988 (S.D. Ohio 2003)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:491S-1G60-0038-Y4D8-00000-00&context=). But the portion cited discusses the *state's* liability under the Sherman ***Antitrust*** Act, not the counties'. The district court held in *McGuire* that it could not dismiss the ***antitrust*** claim as to the counties at the motion to dismiss stage. [*Id. at 1018*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:491S-1G60-0038-Y4D8-00000-00&context=).

Defendants next argue in that "state action immunity" applies. (Supplement to Omnibus Motion to Dismiss at 2 (No. 16-2477: 12)). The Sherman ***Antitrust*** Act was intended to prohibit *private* restraints on trade. However, there was no intent for the act to apply to the anticompetitive conduct of a state acting through its legislature due to state sovereignty**[\*43]** concerns. *See* [*Hallie v. Eau Claire, 471 U.S. 34, 38, 105 S. Ct. 1713, 85 L. Ed. 2d 24 (1985)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-C160-0039-N0WV-00000-00&context=). Local governments, on the other hand, are not beyond the reach of ***antitrust*** laws because they are not themselves sovereign—hence, the "state action immunity" doctrine. *Id.* Local governments are exempt, however, if they are acting "pursuant to a clearly expressed state policy." [*Id. at 40*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-C160-0039-N0WV-00000-00&context=). To receive immunity, the local government must show that their actions were "undertaken pursuant to a 'clearly articulated and affirmatively expressed' state policy to displace competition." [*F.T.C. v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 133 S. Ct. 1003, 1011, 185 L. Ed. 2d 43 (2013)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:57SP-PBF1-F04K-F00D-00000-00&context=).

It is "not necessary" that the Court find that the State explicitly stated that it expected Defendant counties "to engage in conduct that would have anticompetitive effects" so long as "it is clear that anticompetitive effects logically would result from this broad authority to ***regulate***." [*Hallie, 471 U.S. at 42*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-C160-0039-N0WV-00000-00&context=). Defendants argue that there is a "clear California policy of allowing jails to receive site commissions from telephone calls" citing to Penal Code [*§ 4025(d)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5JFB-0WV1-DYB7-W09G-00000-00&context=). (Supplement to Omnibus Motion to Dismiss at 2 (No. 16-2477: 12)). [*Section 4025(d)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5JFB-0WV1-DYB7-W09G-00000-00&context=) provides that "any money, refund, rebate, or commission received from a telephone company or pay telephone provider when [it] is attributable to the use of pay telephones which are primarily used by inmates**[\*44]** while incarcerated" "shall be deposited in the inmate welfare fund . . . ." [*Cal. Pen. Code § 4025(d)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5JFB-0WV1-DYB7-W09G-00000-00&context=). This section could be read as either an authorization or a limitation.

Regardless, it appears to be a question of fact as to whether, in giving Defendant counties the authority to ***regulate*** commissions from phone calls via [*section 4025(d)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:5JFB-0WV1-DYB7-W09G-00000-00&context=), the State contemplated that Defendant counties would in turn establish phone calling systems on a monopolistic basis. As noted above, the case most on point viewed this issue as one of fact. [*McGuire, 253 F. Supp. 2d at 1018*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:491S-1G60-0038-Y4D8-00000-00&context=). It is also a fact issue as to how Defendant counties procured the contracts with the telecommunications companies in question. *See* [*id. at 1017-18*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:491S-1G60-0038-Y4D8-00000-00&context=). These issues cannot be resolved at this stage of the litigation.

Defendants attempt to argue on reply that, while the "state action immunity" rule may not apply to Plaintiffs' claims about Defendants' exclusive contracts with GTL and Securus, the rule nonetheless applies to Plaintiffs' claim that Defendants receive site commissions. (Omnibus Reply at 16). The Court is puzzled by this argument as it sees nothing anti-competitive about Defendants' receiving site commissions. Defendants fail to elaborate. As such, the Court declines to apply the "state action immunity" doctrine**[\*45]** at this stage of the proceedings.

Defendants further argue that Plaintiffs have no standing to sue because "jurisdiction may not be invoked under [the Sherman ***Antitrust*** Act] unless the relevant aspect of interstate commerce is identified." (Omnibus Motion at 28 (quoting [*McLain v. Real Estate Bd., 444 U.S. 232, 242, 100 S. Ct. 502, 62 L. Ed. 2d 441 (1980)))*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-7NN0-003B-S3RT-00000-00&context=). Defendants contend that the only alleged commerce was Plaintiffs' payments to telephone companies and, thus, commerce occurred "entirely in California." (*Id.* at 29). Defendants are wrong. Defendants hold contracts with GTL and Securus, which provide telephone services across the nation and are themselves headquartered outside California. (Kaelin Amended Complaint ¶ 108 (No. 16-2477: 5)). Plaintiffs' payments "flow" from California to these out of state companies and back in the form of commissions to California counties. (Opposition at 40-41). Plaintiffs' success in the action would significantly decrease revenue for these out-of-state corporations. (*Id.*). As such, Plaintiffs have adequately alleged Defendants' actions' effect on interstate commerce.

Next, Defendants' invoke the four-factor *Turner* standard, arguing that it should apply to Plaintiffs' ***antitrust*** claim and, as such, must be reasonably related to legitimate security interests. (Omnibus**[\*46]** Motion at 30-32). The [*Turner*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-H880-003B-4556-00000-00&context=) standard only applies to prisoners' constitutional claims. *See* [*Shaw v. Murphy, 532 U.S. 223, 229, 121 S. Ct. 1475, 1479, 149 L. Ed. 2d 420 (2001)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:42VC-XK90-004B-Y04D-00000-00&context=) ("[I]n *Turner* we adopted a unitary, deferential standard for reviewing prisoners' constitutional claims . . . ."). As such, Plaintiffs' ***antitrust*** claims do not warrant *Turner* deference.

Defendants finally argue that public entities are not liable for damages under ***antitrust*** statutes and thus all claims for damages should be dismissed. (Omnibus Motion at 28). Indeed, the Sherman ***Antitrust*** Act prohibits ***monetary relief*** to be awarded against governments. [*15 U.S.C. §§ 35(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GV41-NRF4-43TD-00000-00&context=), [*36(a)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GM91-NRF4-4311-00000-00&context=). Plaintiffs argue that they seek injunctive relief prohibiting Defendants from renewing, or entering into new, ICS contracts in which they receive commissions or fees. (Opposition at 38 (citing Kaelin Amended Complaint, Prayer for Relief ¶ 4(a) (No. 16-2477: 5)). Plaintiffs also seek restitution, arguing that restitution qualifies as injunctive relief because it is commonly considered a form of equitable relief. (Kaelin Amended Complaint, Prayer for Relief ¶ 2 (No. 16-2477: 5)). The restitution Plaintiffs seek would require Defendants to "refund . . . monies paid" by Plaintiffs that were used to pay the contracted commissions. (*Id.*). Regardless of how Plaintiffs**[\*47]** characterize their damages, their prayer for restitution seeks monetary relief, which the Sherman ***Antitrust*** Act does not allow. *Cf.* [*In re Multidistrict Vehicle Air Pollution, 538 F.2d 231, 234 (9th Cir. 1976)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-1WK0-0039-M43V-00000-00&context=) ("[W]hether payments which appellants seek for some of their citizens is 'equitable' or not is of no consequence because [the Clayton Act [*15 U.S.C. § 16*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GR31-NRF4-44X5-00000-00&context=)] does not allow the claimed relief for past loss.").

Accordingly, the Omnibus Motion is **DENIED** as to Plaintiffs' claims under the Sherman ***Antitrust*** Act. The Omnibus Motion is **GRANTED *without leave to amend*** insofar as Plaintiffs seek restitution for their Sherman ***Antitrust*** Act claim.

**F. Damages**

Defendants finally argue that Plaintiffs' prayer for emotional distress damages, general damages, and damages based on the California Constitution should be dismissed. (Omnibus Motion at 43-44). As to Plaintiffs' prayer for emotional distress damages, Defendants contend that the Prison Litigation Reform Act (PLRA) prohibits all claims for emotional damages unless there was physical injury or sexual abuse. ([*Id. at 43*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:3S4X-C160-0039-N0WV-00000-00&context=)). The PLRA provides:

No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or**[\*48]** the commission of a sexual act . . . .

[*42 U.S.C. 1997e(e)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GS51-NRF4-4540-00000-00&context=). Defendants contend that several cases have expanded the PLRA limitation on damages to *all* claims, both state and federal, brought in federal court.

The Ninth Circuit has observed, however, that "[*§ 1997e(e)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GS51-NRF4-4540-00000-00&context=) applies only to claims for mental and emotional injury." [*Oliver v. Keller, 289 F.3d 623, 629-30 (9th Cir. 2002)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45R8-1DR0-0038-X1MT-00000-00&context=). In *Oliver*, appellant sought "broader forms of redress for the underlying constitutional violations alleged," including compensatory damages. *Id.* The Ninth Circuit held that appellant's claims for compensatory, nominal, or punitive damages that were "premised on violations of his *Fourteenth Amendment* rights, and not on any alleged mental or emotional injuries" were not barred by [*§ 1997e(e)*](https://advance.lexis.com/api/document?collection=statutes-legislation&id=urn:contentItem:4YF7-GS51-NRF4-4540-00000-00&context=). [*Id. at 630*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:45R8-1DR0-0038-X1MT-00000-00&context=); *see also* [*Cockcroft v. Kirkland, 548 F. Supp. 2d 767, 776-77 (N.D. Cal. 2008)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4S87-0NT0-TXFP-C2B1-00000-00&context=) ("The fact that [plaintiff] never suffered any physical injury as a result of [defendant's] alleged acts may make his *Eighth Amendment* claim of very little financial value but does not make the claim non-existent."). Plaintiffs also argue that "presumed damages" are available for constitutional violations even absent a physical injury. (Opposition at 56-57 (citing [*Carr v. Whittenburg, 2006 U.S. Dist. LEXIS 24565, 2006 WL 1207286, at \*3 (S.D. Ill. April 28, 2006)*](https://advance.lexis.com/api/document?collection=cases&id=urn:contentItem:4JVK-TXM0-TVTV-12WC-00000-00&context=) ("Further, [*First Amendment*] injury is compensable through so-called 'general damages' or 'presumed damages,' even in the absence of proof of injury.")). Defendants do not cite to case law that states to the contrary.**[\*49]** While the Court finds that Plaintiffs' claims for emotional distress damages are untenable, this fact does not invalidate their remaining damages claims.

As to Plaintiffs' prayer for damages for their California Constitution claims, Plaintiffs have voluntarily dismissed these claims.

Accordingly, the Omnibus Motion is **GRANTED *without leave to amend*** as to Plaintiffs' prayer for emotional distress damages and for damages for their California Constitution claims. The Omnibus Motion is otherwise **DENIED**.

**V. CONCLUSION**

For the foregoing reasons, the Motion is **GRANTED *in part*** and **DENIED *in part***. The Second Amended Complaint shall be filed by **October 17, 2016**.

IT IS SO ORDERED.

**End of Document**