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MEMORANDUM

To: Multicultural Media, Telecom and Internet Council (MMTC)

From: Daniella Infantino, Henry Rivera Fellow, and Scenic Mosley, Henry Geller Fellow

Re: Reforming Inmate Calling Services: Addressing the Inequities and Costs of Prison Phone Systems

Date: December 18, 2023

I. Overview of Inmate Telephony

Incarcerated individuals and their families face a conundrum when it comes to maintaining contact with one another due to exorbitant phone call rates. Correctional facilities enter exclusive contracts with Inmate Calling Service ("ICS") providers, often selected based on their willingness to share a portion of their inmate calling revenues as "site commissions" with the facility. In this competitive system, ICS providers vie to offer the highest site commission payments, which ultimately leads to elevated end-user rates. Consequently, inmates and their families are left with no option but to bear these inflated costs if they wish to communicate by phone.[1] This system provides them with no alternatives for more affordable communication services.[2] As a result, it is nearly impossible for inmates to maintain close contact with their loved ones and broader social support networks.[3]

Nationally, correctional institutions grapple with a systemic issue in their inmate phone systems, where inmates are burdened with exorbitant call rates that greatly surpass the actual cost of providing the service. These elevated rates persist because ICS providers maintain monopolistic control within prisons and jails.[4] As a result, inmates and their families are unfairly encumbered by these excessive costs if they desire to maintain contact with one another. This scenario significantly hampers inmates' ability to stay closely connected with loved ones and broader social support networks.

The Federal Communications Commission ("FCC") is an independent agency that has taken steps to address the issue by prohibiting excessive interstate phone call rates. However, it lacks the authority to rectify the problem of excessive intrastate phone call rates, since intrastate phone calls are within the states' province to regulate. Addressing this multifaceted challenge is vital to ensuring inmates are subject to just and reasonable phone call rates. Such action could potentially contribute to a reduction in recidivism rates, benefiting both society as a whole and individual families.

[1] Federal Communications Commission, *Report and Order and Further Notice of Proposed Rulemaking*, In re Rates for Interstate Inmate Calling Services at ¶ 1, WC Docket No. 12-375, (released Sept. 26, 2013), available at https://www.fcc.gov/document/fcc-releases-order-reducing-high-inmate-calling-rates [hereinafter "FCC"].
[2] *Glob. Tel*Link v. Fed. Commc'ns Comm'n*, 866 F.3d 397, 404 (D.C. Cir. 2017).
[3] FCC, *supra* note 1.
[4] Ben Iddings, *The Big Disconnect: Will Anyone Answer the Call to Lower Excessive Prisoner Telephone Rates?*, 8 N.C. J.L. & Tech. 159,159 (2006).

This paper will commence with an introductory overview of inmate telephone systems and the complexities encountered in managing both interstate and intrastate prison call systems, while also considering the impact of recidivism. Subsequently, the discussion will pivot to the FCC's authority in regulation and preemption. Following that, the paper will explore the measures taken by the FCC, analyzing the scope of federal jurisdiction as defined by two landmark United States Supreme Court rulings in the wake of the 1964 Civil Rights Act. Finally, this paper will utilize established legal precedents, recent developments, and the United States Constitution's Commerce Clause to argue for the FCC's capacity to regulate intrastate call rates.

II. The Dilemma

Inmates in numerous state prisons are forced to utilize the overly expensive services of companies which are granted exclusive contracts with, and thus monopolies over, their state's prison system.[5] Defenses typically raised by states and ICS providers include: "High rates are justified by the great expenses associated with prisons, and more specifically. . . the rates are justified by extra security measures phone companies must provide."[6] However, such high rates are often a result of site commission payments, which are fees paid by ICS providers to correctional facilities to win the exclusive right to become the sole phone service provider for a given prison. States may receive commissions ranging from as high as sixty to eighty percent from their prison phone service providers, in exchange for the state's exclusive guarantee of a high volume of expensive collect calls.[7] For example, in New York, the state Department of Corrections receives a commission from the prison phone service provider equal to 57.5% of the monthly gross revenue resulting from inmate phone calls.[8]

When selecting a company to grant an exclusive contract to, decision makers often place great weight on a company's ability to offer the largest commission. An example of this practice can be found in St. Louis County, Missouri. As part of its 100-point scoring system for awarding telephone service contracts, the county allotted 30 points to the company with the highest commission, while offering no more than 10 points to the company with the lowest cost to the public.[9] ICSolutions, a company that offered a commission of 73.1% —the highest commission rate out of all the bidders—received the contract.[10] ICS providers pay over $460 million in site commissions annually.[11]

The high commission rates are lucrative for correctional facilities. However, ICS providers must employ strategies to recover the substantial portion of revenue obligated by contract to return to the prisons. To offset these losses, ICS providers frequently introduce additional charges and extraneous fees that fall outside the commission agreement, serving as a significant source of profit for prison phone companies.[12] Consequently, families are compelled to bear inflated costs, which encompass a range of charges including, but not limited to, "call set up" fees, "account set up" charges, "payment service" fees, "convenience" charges, "one-time transaction" fees, and fees designed to recover remaining funds in prepayment accounts.

Furthermore, there is compelling evidence indicating a wide variance in inmate phone call rates. For instance, while some states like New Mexico charge an effective rate of $.043 per minute for a 15-minute intrastate call with no call set-up charges, others like Georgia charge $.89 per minute for the same call, accompanied by an additional call set-up charge as high as $3.95. This is a 23-fold difference between states.[13] These inconsistencies result in families and incarcerated individuals incurring costs as high as $17.30, $10.70, or $7.35 for a 15-minute call.[14] Often, neither families nor incarcerated individuals can afford such exorbitant calling rates.

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[5] *Id.* at 161.

[6] *Arsberry v. Illinois*, 244 F.3d 558, 564 (7th Cir. 2001) (rejecting plaintiffs' contention that state's prison phone contracting practices are motivated by "greed," on basis that "prisons are costly to build, maintain, and operate...."); *see also* Madeleine Severin, *Is There a Winning Argument Against Excessive Rates For Collect Calls From Prisoners?*, 25 CARDOZO L. REV. 1469, 1469 (2004).

[7] Madeleine Severin, *Is There a Winning Argument Against Excessive Rates For Collect Calls From Prisoners?*, 25 CARDOZO L. REV. 1469, 1469 (2004).

[8] *Id*.

[9] *Id.*

[10] Drew Kukorowski et al., *Please Deposit All of Your Money: Kickbacks, Rates, and Hidden Fees in the Jail Phone Industry*, PRISON POLICY INITIATIVE (May 8, 2013), available at https://www.prisonpolicy.org/phones/pleasedeposit.html.

[11] *Glob. Tel*Link*, 866 F.3d at 404.

[12] *Comments of Pay Tel Communications, Inc.*, at 16, In the Matter of Rates for Interstate Inmate Calling Services, Before the Federal Communications Commission, WC Docket No. 12-375 (Mar. 25, 2013), available at http://apps.fcc.gov/ecfs/document/view?id=7022134799.

[13] FCC, *supra* note 1, at ¶ 3.

[14] *Id*. at ¶ 35.

Awareness of the commission system's flaws is growing among the public. As a result, certain state legislatures have initiated bans on commissions calculated as a percentage of sales[15]; Nevertheless, these legislative measures often fail to close all the gaps.[16] While direct commissions are curtailed, other types of remuneration and incentives, such as "signing bonuses," "administrative fees," or the provision of technology like phones or computers, remain permissible and unregulated.[17] Some correctional facilities claim to avoid percentage-based commissions, yet the price of their calls can be just as high, if not higher, than those from facilities with contracts that include percentage-based commissions. This is exemplified by the practices of the Michigan Department of Corrections ("DOC"). Though the Michigan DOC has refused percentage-based commissions since 2008, in 2011 it raised its rates and started requiring its provider to pay money into a "Special Equipment Fund".[18] This fund has raised $11 million per year since 2018[19], which comes out to about a 57% commission. As a result, Michigan phone rates are more expensive than twenty-three other states that have traditional percentage-based commissions.[20]

To further complicate matters, many of these calls are collect calls, meaning that the recipient of the call must pay for the call. This can prove difficult in situations where family members live in poverty and oftentimes lack the financial resources to afford such pricey calls, despite the desire to remain in touch with friends or family members in prison or jail. For example, a fifteen-minute intrastate collect call can reach as high as $17.77.[21] If an individual lives in a place such as Santa Monica, California, MCI WorldCom (an ICS provider) will charge $4.50 for a 15-minute interstate call, whereas it would only cost $1.50 if the call were made from one private phone to another.[22] Moreover, MCI Worldcom charges $7.50 for a 15-minute intrastate call in Santa Monica, which is a 67% jump solely based on the fact that the call is intrastate compared to interstate.[23] Debit calls, on the other hand, refer to a billing arrangement where inmates make phone calls using funds they have deposited into a prepaid account. Instead of traditional billing to a recipient's phone number or a collect call system, the incarcerated individual uses the money available in their account to cover the cost of the call. Debit call systems provide inmates with the ability to make calls even if the recipient does not have a landline or accepts collect calls. Inmates or their families fund the account, and the charges for each call are deducted from this balance.

As a result of the difficulties which arise due to the exorbitant rate which ICS providers charge to make phone calls within the prison system, inmates are faced with a barrier to remaining in close contact with friends and relatives. This hurts the general welfare of society since family contact during incarceration has been proven to lower recidivism rates.[24] Maintaining communication with family members in prison is beneficial for families and the millions of children who have a parent in the correctional system.[25] In addition, studies have shown that the lack of regular communication with incarcerated parents has been linked to "truancy, homelessness, depression, aggression, and poor classroom performance in children."[26] Barriers to communication due to costly inmate calling rates interferes with inmates' ability to consult with their attorneys, impedes family contact that can increase the safety of jails and prisons, and fosters recidivism.[27]

Within the current monopolistic state of the prison phone system, the authority of choice and control is withheld from those who depend on these services. In a typical market scenario, consumers have the flexibility to opt for their preferred phone service provider

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[15] Alexi Jones & Peter Wagner, *On kickbacks and commissions in the prison and jail phone market*, PRISON POLICY INITIATIVE (Feb. 11, 2019), https://www.prisonpolicy.org/blog/2019/02/11/kickbacks-and-commissions/#fn:2.
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*
[21] Iddings, *supra* note 4.
[22] Iddings, *supra* note 4; *see also* Celeste Fremon, *Crime Pays*, L.A. WEEKLY (June 20, 2001), https://www.laweekly.com/crime-pays/ ("Inmate calls. . . are administered exclusively by the vendors who've won contracts with the state-currently, MCI WorldCom and Verizon. The collect calls they administer under their present contract are among the most expensive phone calls in the world.").
[23] Fremon, supra note 22.
[24] Nancy G. La Vigne et al., *Examining the Effect of Incarceration and In-Prison Family Contact on Prisoners' Family Relationships*, 21 J. OF CONTEMP. CRIM. JUSTICE 314, 316 (2005); *accord* Letter from Roy "Lynn" McCallum, Jail Commander, Elmore County Sheriff's Office, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 12-375 at 1 (filed Apr. 22, 2013) ("We recognize the value of retaining family contact during incarceration. The reduction in recidivism is well documented."); see also Amy L. Solomon, et al., *Putting Public Safety First: 13 Parole Supervision Strategies to Enhance Reentry Outcomes*, THE URBAN INSTITUTE (2008) at 29-31, available at https://www.urban.org/sites/default/files/publication/32156/411791-Putting-Public-Safety-First--Parole-Supervision-Strategies-to-Enhance-Reentry-Outcomes-Paper-.PDF (last visited Oct. 21, 2023).
[25] FCC, *supra* note 13, at 67956 (citing The Phone Justice Commenters 2013 Reply at 4-5 for the proposition that "[m]aintaining relationships with their incarcerated parents can reduce children's risks of homelessness and of involvement in the child welfare system."); *see also* FCC, *supra* note 1, at ¶ 2 ("A child that stays in touch with an incarcerated mother or father is less likely to drop out of school or be suspended.").
[26] *Id.*
[27] *Glob. Tel*Link*, 866 F.3d at 405.

based on factors such as pricing, service offerings, and quality. However, within the confines of the prison phone system, inmates and their families find themselves excluded from participating in negotiations between the government and its contracted ICS provider and are unable to explore alternative options. As a result, families are faced with the agonizing decision of whether to forgo their next meal in order to stay in touch with their incarcerated loved ones.

The FCC has exercised its jurisdiction to impose certain caps and restrictions on interstate inmate communication service call rates but lacks the jurisdiction to do so for intrastate inmate communications services. Furthermore, the FCC mandates that ICS providers collect location data to determine if a call is within state lines. Should this location data be ambiguous, the call falls under the purview of the FCC.[28] Nonetheless, the existing structure of the prison and jail phone system creates a barrier to consumer choice and competition. Families of inmates are often burdened with disproportionately high communication costs and are deprived of the benefits of a competitive and open market, where they would otherwise have more choices and a voice in selecting the services that best suit their needs. To address these issues, it's crucial to step back and understand the regulatory framework governing inmate calling services, particularly the role of the FCC and the relevant legislation, including the Communications Act of 1934 ("Communications Act") and the Telecommunications Act of 1996. These legal foundations have a significant impact on the regulation of inmate call rates, both at the interstate and intrastate levels.

III. FCC Regulatory Authority Timeline – Legislation

The FCC's regulatory authority can be found in the Communications Act, which primarily deals with interstate telecommunications services. It gives the FCC authority over communications that cross state lines, thus giving the FCC authority over interstate phone calls within correctional facilities. Intrastate matters, on the other hand, are generally left to the states to regulate. The FCC's regulatory authority under the Communications Act is rooted in several key provisions.

First, Section 201(b) of the Act empowers the FCC to oversee "charges, practices, classifications, and regulations for and in connection with" interstate telecommunications services.[29] While Section 201(b) does not mention inmate call rates explicitly, it gives the FCC the power to ensure that charges for telecommunications services are just and reasonable. Moreover, Section 254 of the Communications Act authorizes the FCC to establish universal service principles. These principles are designed to ensure that affordable telecommunications services are accessible to all Americans, regardless of their geographic location or income level. In the context of inmate call rates, this provision carries significant weight, emphasizing the need to make these services affordable and available to all, including individuals with limited financial means.

A few decades later, the Telecommunications Act of 1996 ("Telecommunications Act") was enacted to promote competition and deregulate the telecommunications industry. This Act amended the Communications Act and established Section 276, which grants the FCC the responsibility to ensure that payphone services, which include inmate calling services, are provided in a manner that is both "just and reasonable" while fostering competition in their provision.

The timeline from the Communications Act to the Telecommunications Act reflects a transition from a regulated and monopolistic telecommunications industry to a more competitive and deregulated environment. The Communications Act served as the foundational regulatory framework, while the Telecommunications Act addressed the changing landscape of telecommunications, including the emergence of new technologies and services. The Telecommunications Act sought to stimulate competition, universal service, and greater consumer choice, and it had a significant impact on the industry's development and the role of the FCC in regulating it. It is essential to grasp the broader implications of these Acts, which have collectively empowered the FCC to oversee and set regulations for interstate inmate call rates. At the same time, they have left the authority to determine intrastate inmate call rates to individual states, allowing each state to make its own decisions in this regard.

IV. FCC's Preemptive Authority

While the Acts leave the authority to determine intrastate inmate call rates within the province of the states, there are many situations where there seems to be an overlap of interstate and intrastate elements in play, thus creating a gray area as to whether the FCC has the authority to regulate, or whether the states have the authority to regulate. When the FCC exercises jurisdiction over intrastate matters, it is effectively preempting state jurisdiction. The FCC may exercise its preemptive authority in certain situations depending on the circumstances.

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[28] *FCC Matters*, SECURUSTECHNOLOGIES (Mar. 3, 2022), https://securustech.net/fcc-fact-sheet/index.html.

[29] Federal Communications Commission, *Fourth Report and Order and Sixth Further Notice of Proposed Rule Making*, at 30, In Re Rates for Interstate Inmate Calling Services FCCCIRC 2209-02, WC Docket 12-375 (Sep. 29, 2022) [hereinafter "Fourth R&O and Sixth Further NPRM"].

The extent to which the FCC is permitted to preempt state and local laws is dependent on the scope of its regulatory jurisdiction, and express statutory provisions.[30] The FCC may only preempt state laws if it has the statutory authority to regulate. In addition, the Supreme Court has noted that the FCC's jurisdictional authority stems from (1) its primary jurisdiction and (2) its ancillary jurisdiction.[31] The FCC's primary jurisdiction is rooted in the Communications Act's express grant of authority to the FCC over "certain technologies."[32] On the other hand, for the FCC to utilize its ancillary jurisdiction, two conditions must be satisfied: (1) the regulation must fall under the FCC's general jurisdictional authority under the Communications Act, and (2) the regulation must be reasonably ancillary to the effective performance of the FCC's primary jurisdictional responsibilities.[33]

The Supreme Court has stated that Section 2(b) of the Communications Act does not limit the FCC's regulatory authority where the Act expressly applies, but carves out intrastate matters from the FCC's ancillary jurisdiction.[34] Nonetheless, legal precedent also indicates that Section 2(b) of the Act does not prevent the FCC from preempting state law where (1) the issue has both interstate and intrastate aspects, (2) preemption is necessary to protect a valid federal regulatory objective, and (3) state regulation would negate the exercise by the FCC of its own lawful authority because regulation of the interstate aspects of the matter are intertwined with regulation of the intrastate aspects.[35] In addition, Congress gave the FCC the authority in Section 706(a) of the Telecommunications Act to preempt state law in order to remove barriers to infrastructure and promote competition in the local telecommunications market.[36] If the FCC determines that telecommunications are not being deployed to all Americans in a reasonable fashion, Congress empowers the FCC to take immediate action to remove any barriers and promote competition in the telecommunications market.[37]

However, the FCC's preemptive authority has its limits. Courts have often said that the FCC may only preempt state laws governing telecommunications services if it is acting within its congressionally delegated authority.[38] Thus, the biggest obstacle facing

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[30] *Stepping in: The FCC's Authority to Preempt State Laws Under the Communications Act*, Congressional Research Service Report No. R46736, at 2 (updated Sep. 20, 2021), available at https://crsreports.congress.gov/product/pdf/R/R46736.

[31] *Id*. at 4.

[32] *Id*.

[33] *Id*.

[34] *Id*.; *see also AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 379–82 (1999) (rejecting the argument that Section 2(b) prevents the FCC from issuing rules implementing Title II's local competition provisions on the ground that Section 201(b) gives the FCC authority to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of the Act," but noting that "[i]nsofar as Congress has remained silent, . . ., § 152(b) continues to function" and the FCC could not "regulate any aspect of intrastate communication . . . on the theory that it had an ancillary effect on matters within the Commission's primary jurisdiction.").

[35] Federal Communications Commission, *Report and Order on Remand and Fourth Further Notice of Proposed Rulemaking*, at ¶ 30, In Re Rates for Interstate Inmate Calling Services, WC Docket 12-375 (Aug. 7, 2020), available at https://docs.fcc.gov/public/attachments/FCC-20-111A1.pdf [hereinafter "Report and Order on Remand"]; *see also Mozilla Corp. v. Fed. Commc'ns Comm'n*, 940 F.3d 1, 77–78 (D.C. Cir. 2019); *see also People of State of Cal. v. F.C.C.*, 905 F.2d 1217, 1243 (9th Cir. 1990) ("[This provision] is a limited one. The FCC may not justify a preemption order merely by showing that some of the preempted state regulation would, if not preempted, frustrate FCC regulatory goals. Rather, the FCC bears the burden of justifying its entire preemption order by demonstrating that the order is narrowly tailored to preempt only such state regulations as would negate valid FCC regulatory goals."); *see also Minnesota Pub. Utilities Comm'n v. F.C.C.*, 483 F.3d 570, 578 (8th Cir. 2007) (This provision "allows the FCC to preempt state regulation of a service if (1) it is not possible to separate the interstate and intrastate aspects of the service, and (2) federal regulation is necessary to further a valid federal regulatory objective, i.e., state regulation would conflict with federal regulatory policies.") (citing *Qwest Corp. v. Scott*, 380 F.3d 367, 372 (8th Cir. 2004)).

[36] *Tenn. v. Fed. Commc'ns Comm'n*, 832 F.3d 597, 613 (6th Cir. 2016), NOS 15-3291 & 15-3555, Brief for the Federal Communications Commission at 13 (filed Nov. 5, 2015), available at https://docs.fcc.gov/public/attachments/DOC-336270A1.pdf; *see also Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 700 (1984) (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979) (stating that when the FCC preempted state regulation of the cable industry that was contrary to FCC policy, the Supreme Court found that the FCC's authority over cable video programming extends to "all regulatory actions necessary to ensure the achievement" of the FCC's statutory responsibilities, including the preemption of otherwise valid state laws.).

[37] *Tenn.*, 832 F.3d at 613 (6th Cir. 2016), NOS 15-3291 & 15-3555, Brief for the Federal Communications Commission at 13 (filed Nov. 5, 2015), available at https://docs.fcc.gov/public/attachments/DOC-336270A1.pdf; *see also Capital Cities Cable, Inc.*, 467 U.S. at 700 (1984) (quoting *FCC v. Midwest Video Corp.*, 440 U.S. 689, 706 (1979) (stating that when the FCC preempted state regulation of the cable industry that was contrary to FCC policy, the Supreme Court found that the FCC's authority over cable video programming extends to "all regulatory actions necessary to ensure the achievement" of the FCC's statutory responsibilities, including the preemption of otherwise valid state laws.).

[38] *La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986) ("[A] federal agency may preempt state law only when and if it is acting within the scope of its congressionally delegated authority."); *see also Mozilla Corp. v. Fed. Commc'ns Comm'n*, 940 F.3d 1,

the FCC in tackling the issue of regulating intrastate phone calls rates is the argument that the FCC may not preempt state laws that set forth how various organs of government are to operate in the absence of a "clear statement" from Congress authorizing preemption.[39]

V. FCC Actions Thus Far

The issue of inmate call rates was brought before the FCC through what has come to be known as the Wright Petition. In 2000, Martha Wright, along with a group of plaintiffs, filed a class action lawsuit against the Corrections Corporation of America ("CCA") and several prison phone companies, alleging in part that their agreements violated federal anti-trust law, communications law, and several Washington D.C. laws.[40] Moreover, the plaintiffs alleged that such arrangements violated their right to foster and maintain family relations under the First and Fourteenth Amendments to the United States Constitution, as well as their due process and equal protection rights under the Fifth and Fourteenth Amendments.[41] CCA operates over 80 prisons and jails in over 25 states and enters into exclusive agreements with telephone companies which allow both the CCA and the prison phone companies to unjustly enrich themselves. [42]

In 2001 the case was referred to the FCC by the Washington D.C. District Court. After failed mediation discussions for two years, the plaintiffs in the case filed a petition with the FCC to introduce competition into the prison phone market.[43]After continued slow movement, the plaintiffs filed an alternative rulemaking proposal in 2007 to request that the FCC cap rates for interstate inmate calling to $0.20 per minute for debit calling and $0.25 per minute for collect calling.[44] In 2013, over six years later, the FCC cited its authority to regulate interstate calls according to 47 USCS § 201(b) and finally approved the new rules capping prison phone rates, but the Report and Order issued by the FCC only implemented these rate caps for interstate inmate, and not for in-state, local, or international calls.[45]

The Second Report and Order, adopted on October 22, 2015, attempted to regulate interstate and intrastate ICS provider rates through tiered rate caps for debit, prepaid, and collect calls.[46] The order sought to lower the cap for intrastate and interstate calls to $.11 per minute for prisons, while providing tiered rates for jails due to higher costs ICS providers face in serving jails.[47] The order also called for a prohibition on ancillary fees– billing and collection services–that it did not explicitly permit. [48] Permitted fees include: applicable taxes and regulatory fees capped at the rate paid by the provider with no markup, automated payment fees capped at $3.00, live agent fees capped at $5.95, paper statement/bill fees capped at $2.00 (no fees permitted for electronic bills/statements), prepaid account minimum and maximum fees, and third-party financial transaction fees (i.e., Western Union, MoneyGram, credit card processing fees) capped at the rate paid by the provider with no markup.[49] In order to address the issues faced by inmates with communications disabilities such as deafness, the order required that the per-minute rates charged for Text Telephone ("TTY") -to-TTY calls be no more than twenty-five percent of the rates the providers charge for traditional inmate calling services.[50] It also required that no provider shall levy or collect any charge or fee for Telecommunications Relay Services ("TRS") -to-voice or voice-to-TTY calls.[51] Lastly, the order proposed a ban on flat-rate calling, to prohibit ICS providers from imposing a flat rate for a call up to fifteen minutes regardless of the actual call duration.[52] In establishing these rates, the Commission used a methodology based on industry-average cost data that excluded site commissions as a cost.[53]

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75 (D.C. Cir. 2019) ("[I]n any area where the Commission lacks the authority to regulate, it equally lacks the power to preempt state law.").

[39] *Stepping In*, *supra* note 30, at 8 (stating that even when the FCC has jurisdictional authority, its preemption must be consistent with any express preemption provisions in the Communications Act).

[40] *Martha Wright v. Corrections Corporation of Americ*a, CENTER FOR CONSTITUTIONAL RIGHTS (Oct. 31, 2003), https://ccrjustice.org/home/what-we-do/our-cases/martha-wright-v-corrections-corporation-america-fcc-petition.

[41] *Id*.

[42] *Id*.

[43] *Id*.

[44] Drew Kukorowski, Peter Wagner & Leah Sakala, *Please Deposit All of Your Money: Kickbacks, Rates, and Hidden Fees in the Jail Phone Industry*, at 3, (Prison Policy Initiative, 2013), available at https://www.prisonpolicy.org/blog/2013/05/08/please-deposit-all-of-your-money-kickbacks-rates-and-hidden-fees-in-the-jail-phone-industry/.

[45] FCC, *supra* note 1, at ¶ 2.

[46] Federal Communications Commission, *Second Report and Order and Third Further Notice of Proposed Rulemaking*, at ¶ 9, Rates for Interstate Inmate Calling, FCC 15-136, WC Docket 12-375 (released Nov. 5, 2015), available at https://docs.fcc.gov/public/attachments/FCC-15-136A1.pdf [hereinafter "Second R&O and Third NPRM"].

[47] Mark Wigfield, *FCC Takes Next Big Steps In Reducing Inmate Calling Rates* (Oct. 22, 2015), available at https://docs.fcc.gov/public/attachments/DOC-335984A1.pdf.

[48] *Stepping In*, supra note 30, at 4.

[49] Second R&O and Third NPRM, *supra* note 46, at ¶ 9.

[50] *Id.*

[51] *Id.*

[52] Wigfield, *supra* note 47, at 2.

[53] *Id.*

Two years after the adoption of the Second Report and Order, the U.S. Court of Appeals for the D.C. Circuit issued a ruling which held that the FCC's caps on intrastate rates exceeded its statutory authority.[54] In *Global Tel Link v. FCC,* the court held that the FCC is "generally forbidden from entering the field of intrastate communication service, which remains the province of the states."[55] This ruling thus nullified the intrastate rate caps that the FCC issued in its Second Report and Order. As a result, the rates for out-of-state calls tend to be just a fraction of those for in-state calls; however, in-state calls still account for about 80% of all prison calls.[56]

The Third Report and Order, adopted May 20, 2021, set lower interim rate caps for interstate calls and, for the first time, rate caps for international calls.[57] Under the Third Report and Order, the FCC emphasized the importance of ensuring that incarcerated individuals are provided with financially reasonable calling rates, especially in consideration of the fact that many correctional facilities had eliminated in-person visitation in response to the COVID-19 pandemic.[58] Specifically, the FCC: (1) lowered the interstate interim rate caps to new interim caps of $0.12 per minute for prisons and $0.14 per minute for jails with populations of 1,000 or more;[59] (2) reformed the then treatment of site commission payments, allowing a $0.02 additional allowance for negotiated site commission payments to prisons and jails;[60] (3) eliminated the separate interstate collect calling rate cap, lowering rates in all facilities; (4) capped international calling rates; (5) reformed the ancillary service charge rules for third-party financial transaction fees; (6) adopted a new mandatory data collection to gather data to set permanent rates; and (7) reaffirmed providers' obligations regarding access for incarcerated people with disabilities.[61] To accompany the Third Report and Order, the FCC issued a Fifth Further Notice of Proposed Rulemaking proposing to expand access to all eligible relay services for incarcerated individuals with communication disabilities, among other things.[62]

The Fourth Report and Order adopted by the FCC on September 29, 2022 helped to expand protections for inmates with hearing and communications disabilities.[63] The Fourth Report and Order requires all ICS providers to provide access to all relay services eligible for TRS Fund support in any and every correctional facility where broadband is available and where the average incarcerated population is equal to 50 or more individuals.[64] The order requires that ICS providers must allow American Sign Language direct, or point-to-point, video communication as well.[65] The order also clarifies and expands the scope of the restrictions on ICS providers' authority to assess charges for TRS calls.[66] Lastly, it expands the scope of ICS providers' annual reporting requirements to include additional accessibility data, such as information related to the provision of all forms of TRS, and modifies TRS user registration requirements to facilitate the use of relay services by eligible incarcerated persons.[67]

In addition, the Fourth Report and Order adopts rules for the treatment of balances in inactive calling services accounts by requiring that funds left in each payment account remain the account holder's property unless disposed of in accordance with a controlling judicial or administrative standard.[68] In order to address ancillary fees, the order lowers the caps for third-party fees that ICS providers may pass on to consumers for both single-call services and third-party financial transactions. The previous maximum for both fees was $6.95 and has been lowered to a maximum of $3.00 when paid through an automated payment system, and $5.95 when the fee is paid through live agent.[69]

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[54] *Glob. Tel*Link*, 866 F.3d at 409.
[55] *Id.* at 403 (quoting *New England Pub. Commc'ns Council, Inc. v. FCC*, 334 F.3d 69, 75 (D.C. Cir. 2003) (citing 47 U.S.C. § 152(b)).
[56] John Reid, FCC to Cut Some Prison Call Costs, But Most Are beyond Its Reach, BLOOMBERG LAW (May 20, 2021, 5:01 AM), https://news.bloomberglaw.com/tech-and-telecom-law/fcc-to-cut-some-prison-call-costs-but-most-are-beyond-its-reach.
[57] Federal Communications Commission, *Third Report and Order, Order on Reconsideration, and Fifth Further Notice of Proposed Rulemaking*, at ¶ 3, In Re Rates for Interstate Inmate Calling Services, FCCCIRC 2105-01, WC Docket 12-375 (May 20, 2021), available at https://docs.fcc.gov/public/attachments/FCC-21-60A1.pdf.
[58] *Id*. at ¶ 231.
[59] *Id*. at ¶ 28.
[60] *Id.* at ¶ 100.
[61] *Id*. at ¶ 3.
[62] *Id*. at ¶ 5.
[63] Fourth R&O and Sixth Further NPRM, *supra* note 29, at ¶ 1(emphasizing that while unreasonable rates, charges, and practices associated with calling services create immense barriers to all incarcerated individuals, the obstacles are much greater for those who are deaf, hard of hearing, deaf-blind, or who have a speech disability).
[64] *Id*. at ¶ 3.
[65] *Id*. at 80.
[66] *Id*. at ¶ 3.
[67] *Id*.
[68] *Id.* at ¶ 71.
[69] *Id.* at ¶ 81.

Finally, the definition of "jail" and "prison" were amended to include every type of facility where a person may be incarcerated or detained.[70] The FCC also issued its Sixth Further Notice of Proposed Rule Making seeking comment on further reforms to expand TRS to incarcerated people with communications disabilities and comment on other reforms, including how best to use the data submitted in response to the Commission's Third Mandatory Data Collection to establish just and reasonable permanent rate caps for interstate and international calling services.[71]

Most recently, on January 5, 2023, President Biden signed The Martha Wright-Reed Just and Reasonable Communications Act of 2022 ("Martha Act") into law.[72] This notable act is the latest Congressional win on behalf of inmates. The bipartisan Act was named in honor of Martha Wright-Reed, the grandmother who, along with other petitioners, began the crusade for prison-calling regulations back in 2000.[73] Although Mrs. Wright-Reed passed away in 2015, her work spearheaded a movement for justice that will affect the lives of millions of inmates and their families.

The Martha Act amends Section 276 of the Communications Act to require the FCC to ensure just and reasonable charges for "any audio or video communications service used by inmates for the purpose of communicating with individuals outside the correctional institution where the inmate is held, regardless of technology used."[74] In addition, the Martha Act expands the FCC's authority over services in correctional facilities to include "advanced communications services"[75]— which existing law requires to be accessible to and usable by individuals with disabilities, unless that is not achievable. Importantly, the Martha Act amends Section 2(b) of the Communications Act to elucidate the fact that the FCC's jurisdiction extends to intrastate as well as interstate and international communication services utilized by incarcerated individuals.[76] As such, the FCC is set to gain the ability to cap intrastate call rates made from prisons and jails, giving the federal regulator more power to tackle excessive rates.

On April 7, 2023, a Notice of Proposed Rulemaking and Order was issued by the FCC to address the implications of the Martha Act going forward.[77] Specifically, the FCC is currently seeking comment on the Martha Act's effect on the FCC's existing jurisdiction and the D.C. Circuit's interpretation of the FCC's jurisdiction in *GTL v. FCC.*[78] The FCC stated that it interprets the modified statute as expanding its existing jurisdiction over communication services for incarcerated individuals to encompass intrastate telecommunication services as well[79]. Specifically, the FCC seeks comment on its reading of the Martha Act, in the context of *GTL*, as effectively removing any limitations on the FCC's jurisdiction over intrastate audio and video communication services for incarcerated individuals.[80] The FCC is also seeking comment on how the amended Communications Act requiring just and reasonable communication service rates should affect treatment of site commission payments.[81] Lastly, the Notice of Proposed Rulemaking seeks comment on the safety and security costs required for incarcerated individuals' communications services, and the FCC's ability to ensure that communication services within correctional facilities are accessible to individuals with communication disabilities.[82]

While it is not clear when exactly the FCC will begin to regulate based on the new legislation, the Martha Act requires the FCC to promulgate rules "not earlier than 18 months and not later than 24 months after the date of enactment of this Act".[83] FCC

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[70] *Id*. at ¶ 4.
[71] *Id*. at ¶ 87.
[72] Federal Communications Commission, *Congress Enacts Martha Wright-Reed Just and Reasonable Communications Act of 2022*, FCC (Jan. 9, 2023), https://www.fcc.gov/congress-enacts-martha-wright-reed-just-and-reasonable-communications-act-2022-updated-link.
[73] Duckworth-Portman's Bipartisan Martha Wright-Reed Just And Reasonable Communications Passes House And Senate, Awaiting President Biden's Signature (Dec, 22, 2022), https://www.duckworth.senate.gov/news/press-releases/duckworth-portmans-bipartisan-martha-wright-reed-just-and-reasonable-communications-passes-house-and-senate-awaiting-president-bidens-signature.
[74] Federal Communications Commission, *Incarcerated People's Communications Services; Implementation of the Martha Wright-Reed Act*, at ¶ 12, In Re Rates for Interstate Inmate Calling Services, (released March 30, 2023), available at https://www.federalregister.gov/documents/2023/03/30/2023-06508/incarcerated-peoples-communications-services-implementation-of-the-martha-wright-reed-act-rates-for#:~:text=The%20Martha%20Wright%2DReed%20Act%20directs%20the%20Commission%20to%20promulgate,data%20in%20promulgating%20implementing%20regulations.
[75] *Id*. at ¶¶ 4,9.
[76] Federal Communications Commission, *Incarcerated People's Communication Services; Implementation of the Martha Wright-Reed Act*, at ¶ 4, In Re Rates for Interstate Inmate Calling Services, 47 CFR Part 64, 88 Fed. Reg. 67 (Apr. 7, 2023), available at https://www.govinfo.gov/content/pkg/FR-2023-04-07/pdf/2023-07068.pdf.
[77] *Id*.
[78] *Id*. at ¶ 17.
[79] *Id*.
[80] *Id*.
[81] *Id*. at ¶ 27.
[82] *Id*. at ¶¶ 2, 61.
[83] Martha Wright-Reed Just and Reasonable Communications Act of 2022, Pub. L. No. 117-338, 136 Stat. 6156 (2022).

Chairwoman Jessica Rosenworcel stated in her statement about the Martha Act that she plans to work with her colleagues to "expeditiously move new rules forward" to fix the problems relating to inmate calling rates.[84]

To summarize the current situation, the FCC holds the power to manage interstate inmate call rates and other interstate telecommunication services, and it is progressing towards gaining the power to oversee intrastate inmate phone calls as well. Nonetheless, even in the absence of explicit authority granted by the Martha Act for the FCC to regulate intrastate call rates, there remains a case to argue that the FCC can override state laws concerning intrastate call rates due to its existing interstate regulatory mandate. Understanding this argument requires a thorough examination of the historical breadth of the Commerce Clause.

VI. Commerce Clause

The Commerce Clause of the United States Constitution, found in Article I, Section 8, has played a central role in shaping the nation's legal and constitutional landscape. Throughout U.S. history, the interpretation and application of the Commerce Clause have evolved, often in response to changing societal and economic dynamics.

At its inception, the primary role ascribed to the Commerce Clause was the facilitation of the movement of goods and commodities across state boundaries. It was seen as a critical mechanism to ensure the unimpeded flow of commerce and trade throughout the nation. This interpretation served a crucial purpose by safeguarding against individual states implementing protectionist trade policies that might hinder economic unity and cohesion across the young nation. During this early era, the Commerce Clause was chiefly regarded as a tool for promoting interstate trade and preventing states from adopting isolationist trade practices that could potentially disrupt the national harmony and cooperative economic development. This limited understanding would, however, undergo significant transformation in the years that followed, reshaping the scope and impact of the Commerce Clause as the Supreme Court began to recognize that the Commerce Clause encompassed not only the regulation of physical goods but also economic activities that had a substantial impact on interstate commerce.

The transformative shift in the interpretation of the Commerce Clause occurred during the New Deal era in the 1930s, when the Court expanded federal regulatory authority under the Commerce Clause. Cases like *Wickard v. Filburn* and *NLRB v. Jones & Laughlin Steel Corp*. exemplified this shift, as the Court began considering the economic impact of various activities on interstate commerce.[85] In *Wickard v. Filburn*, the Court ruled that even an activity as seemingly local as a farmer's decision to grow wheat for personal consumption could be subject to federal regulation under the Commerce Clause.[86] This decision expanded the scope of federal regulatory power by recognizing that activities with minimal direct connection to interstate commerce could have a substantial cumulative impact on the national economy. *NLRB v. Jones & Laughlin Steel Corp.* reinforced this shift by upholding the authority of the National Labor Relations Board to regulate labor relations in an industry engaged in interstate commerce.[87]

The intersection of the Commerce Clause with civil rights in the mid-20th century was particularly momentous. During this period, the federal government invoked the Commerce Clause to confront racial discrimination, particularly in areas such as public accommodations and employment. The landmark legislation in this context was the Civil Rights Act of 1964.
That Act and related laws aimed to eliminate racial discrimination in public accommodations and employment, using the Commerce Clause's authority. Following the enactment of the Civil Rights Act of 1964, a series of pivotal court cases served to extend and refine the scope of the Commerce Clause, which in turn furthered the advancement of civil rights amidst racial discrimination challenges.

VII. Supreme Court Cases in the Wake of the Civil Rights Act of 1964

Heart of Atlanta Motel v. United States and *Katzenbach v. McClung* are significant Supreme Court cases that arose in the aftermath of the Civil Rights Act of 1964. These cases played a critical role in advancing the Act's goals of dismantling racial discrimination and segregation. Both cases employed the rational basis standard of review to assess the constitutionality of federal regulations implemented under the Civil Rights Act. This standard allowed the Court to examine whether there was a rational connection between the government's actions and the legitimate government interest in eradicating racial discrimination in public accommodations.

A. *Heart of Atlanta Motel v. United States*

[84] Paloma Perez, *Chairwoman Rosenworcel Statement on the New Law Addressing Egregious Prison Phone Rates*, (Dec. 22, 2022), available at https://docs.fcc.gov/public/attachments/DOC-390396A1.pdf.
[85] *See generally Wickard v. Filburn*, 317 U.S. 111 (1942); *See generally NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1 (1937).
[86] *Wickard*, 317 U.S. at 127.
[87] *Id*. at 111.

Heart of Atlanta Motel is a significant landmark Supreme Court case that played a crucial role in interpreting the Commerce Clause of the United States Constitution.[88] Decided in 1964, this case had a profound impact on the application of federal authority in regulating businesses, particularly in the context of civil rights and racial desegregation.

The central issue in the case was whether the owner of the Heart of Atlanta Motel, a motel in Atlanta, Georgia, could refuse to provide accommodations to African American guests.[89] The owner argued that as a private business, it should have the right to choose its guests. However, the Civil Rights Act of 1964, specifically Title II, prohibited racial discrimination in public accommodations, including hotels.[90] The owner of the motel challenged the constitutionality of this provision, asserting that it exceeded Congress's authority under the Commerce Clause by regulating his private business's policies and decisions regarding guest accommodations and also violating his rights as a property owner.[91]

The significance of the case lies in the Supreme Court's ultimate ruling. The Court held that the Commerce Clause granted Congress the authority to regulate the activities of privately owned businesses, such as hotels and motels, that substantially affect interstate commerce. In this case, the Heart of Atlanta Motel, which catered to interstate travelers, was deemed to have a substantial impact on interstate commerce.[92] An activity is considered to substantially affect interstate commerce if it has a real and rational connection to interstate commerce, even if it is purely local in nature.[93] As such, the federal government had the right to regulate its operations under the Commerce Clause.

This decision broadened the interpretation of the Commerce Clause's reach and underscored the federal government's power to legislate and enforce civil rights laws in businesses that engaged in or significantly impacted interstate commerce. As a result, *Heart of Atlanta Motel* was a landmark case in the broader civil rights movement and had far-reaching implications for combating racial discrimination and segregation in various public accommodations. It established a legal precedent that continues to influence the interpretation of the Commerce Clause, particularly concerning federal regulatory authority over businesses that have an impact on interstate commerce. The case highlighted the role of the Commerce Clause as a key constitutional basis for the federal government's intervention in ensuring civil rights and equality in the United States.

B. ***Katzenbach v. Mclung***

Katzenbach, often considered the companion case to *Heart of Atlanta Motel*, is another pivotal legal landmark that forms a critical part of the broader discussion surrounding the Commerce Clause of the United States Constitution.[94] Both cases were decided by the Supreme Court in 1964 and share the common theme of assessing the scope of federal regulatory authority over local businesses under the Commerce Clause. Specifically, *Katzenbach* interpreted and applied the Commerce Clause to address issues relating to racial discrimination, segregation, and the reach of federal authority over seemingly local enterprises. [95]

The heart of the matter in *Katzenbach* was the question of how far-reaching the Commerce Clause's regulatory power extended, particularly when it came to local businesses. The central issue revolved around the interstate commerce activities of a seemingly local establishment: Ollie's Barbecue in Birmingham, Alabama.[96] The restaurant had been discriminating against African American patrons, refusing to serve them, and argued that it was, in essence, a purely local business beyond the reach of federal regulations, particularly those pertaining to civil rights.[97] However, the Supreme Court's verdict in this case had far-reaching implications. It affirmed that the Commerce Clause was not confined solely to the regulation of transactions explicitly crossing state lines but also encompassed activities with a substantial impact on interstate commerce.[98] In the case of Ollie's Barbecue, the Court found that although the restaurant was seemingly local, it had significant connections to interstate commerce.[99] Ollie's Barbecue purchased substantial amounts of meat from out-of-state suppliers and catered to travelers, including those from other states.[100]

By acknowledging this connection to interstate commerce, the Court held that Ollie's Barbecue could be subject to federal regulations under the Commerce Clause. This decision was a pivotal moment in American jurisprudence, emphasizing that the Commerce Clause could be applied to businesses that, even if predominantly local in character, had a substantial impact on interstate

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[88] *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964).
[89] *Heart of Atlanta*, 379 U.S. at 256, 285.
[90] *Id.* at 248.
[91] *Id.* at 270.
[92] *Id.* at 241.
[93] *Id*. at 255.
[94] *Katzenbach v. Mclung*, 379 U.S. 294 (1964).
[95] *Id*. at 301.
[96] *Id*. at 296.
[97] *Id*. at 297.
[98] *Id*. at 302.
[99] *Id*.
[100] *Id*. at 296-97.

commerce. *Katzenbach* clarified and expanded the scope of the Commerce Clause, providing the federal government with the authority to address racial discrimination in businesses that affected interstate commerce, making it a significant legal precedent within the broader civil rights movement.

VIII. Application to Inmate Telephony

While the primary authority of the FCC is focused on regulating interstate communications, there is an argument to be made for the FCC to have the jurisdictional authority to regulate intrastate inmate phone call rates as well. This is largely due to recent developments and the interconnected nature of modern telecommunications, as even intrastate calls may involve the use of interstate infrastructure and interconnected networks. The coming months will be very telling since the FCC is required to promulgate the rules under the Martha Act "not earlier than 18 months and not later than 24 months after the date of enactment" of the Martha Act, as mentioned previously.[101] If read in the manner proposed by the FCC in its most recent Notice of Proposed Rulemaking and Order, Congress has effectively delegated to the FCC authority to regulate intrastate phone call rates at correctional facilities.

However, even if the Martha Act is not interpreted as delegating such authority to the FCC, the FCC could invoke the expansive reach of the Commerce Clause to justify its effective authority to supersede state laws and regulate intrastate inmate phone call rates insofar as they contain interstate qualities. The FCC may contend that its jurisdiction over interstate communications extends to certain intrastate calls that have an interstate nexus, especially when the distinction between the two is increasingly blurred. Intrastate inmate calls, despite being confined within state borders, can have indirect and far-reaching effects on interstate commerce. This influence is rooted in several interconnected factors.

A. Interstate/Intrastate Factors

First, telecommunications are inherently interstate in nature due to the transmission of digital data across state lines, a phenomenon that reflects the borderless nature of modern communication networks.[102] Digital data, such as voices in a phone call, is converted into a digital signal which is thereafter routed through a network of servers and cables. Thus, when individuals make phone calls, send emails, or stream videos, the data often travels through an intricate web of servers and cables that crisscross various states and regions, defying geographical boundaries.[103] The infrastructure that supports this data transmission, including fiber optic cables and cell towers, is likewise not confined to a single state, further entrenching telecommunications as an interstate activity.[104] As such, it can be very difficult to separate intrastate and interstate traffic, indicating that the traffic is therefore mixed and considered interstate in nature.[105] Attempting to segregate intrastate from interstate telecommunications traffic is practically and economically infeasible due to the integrated and shared nature of the communication networks. Local communications may inadvertently traverse interstate networks, thus blurring the lines between intrastate and interstate traffic.

Moreover, exorbitant intrastate phone call rates have a direct impact on the economic well-being of inmates, which is a crucial factor in their ability to reintegrate into society upon release. As discussed previously, research shows that maintaining strong family ties and support systems is crucial for reducing recidivism.[106] The ability to communicate with loved ones can help preserve family relationships, which are often key to providing the support necessary for successful reintegration.[107] Exorbitant intrastate call rates can hinder these connections, potentially contributing to higher rates of repeat offenses, which, in the long term, affect both the broader economy and the burden on social services. Since the consequences of high intrastate phone rates—such as increased recidivism and greater burdens on social services—extend beyond state lines, there could be grounds for federal oversight on an interstate commerce basis.

The argument for FCC intervention could be based on the interstate nature of the economic and social impacts of these high rates. By demonstrating that high intrastate call rates have broader societal and economic implications that cross state boundaries, advocates could argue for a reevaluation of the FCC's authority in this domain, potentially invoking the Commerce Clause as a basis for federal regulatory action. The FCC, by capping intrastate rates, could reduce these costs and support the economic well-being of the broader

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[101] Martha Wright-Reed Just and Reasonable Communications Act, *supra* note 83.
[102] *TechFreedom Releases First Comprehensive Analysis of Federalism Obstacles to State Net Neutrality Regulations*, TECHFREEDOM (Oct. 31, 2018), https://techfreedom.org/techfreedom-releases-first-comprehensive-analysis-federalism-obstacles-state-net-neutrality-regulations/#:~:text=The%20RIFO%20reiterated%20the%202015,of%20Internet%20communications%2C%20any.
[103] Maris Fessenden, *This is the First Detailed Public Map of the U.S. Internet Infrastructure*, SMITHSONIAN MAGAZINE (Sep. 23, 2015), https://www.smithsonianmag.com/smart-news/first-detailed-public-map-us-internet-infrastructure-180956701/ (revealing a public map released by the University of Wisconsin indicating that fiber-optic cables carry Internet data across the United States).
[104] COMPUTER SCIENCE AND TELECOMMUNICATIONS BOARD & NATIONAL RESEARCH COUNCIL, THE CHANGING NATURE OF TELECOMMUNICATIONS/INFORMATION INFRASTRUCTURE 2 (National Academies Press, 1995).
[105] *Notes: FCC Jurisdiction*, CYBERTELECOM, https://www.cybertelecom.org/notes/jurisdiction.htm#mix (last visited Nov. 7, 2023).
[106] Report and Order on Remand, *supra* note 35.
[107] Rates for Interstate Inmate Calling Services; Second Further Notice of Proposed Rulemaking, 79 Fed. Reg. 26922 (Nov. 21, 2014) at ¶ 2.

community, which could be argued as an interstate concern. The FCC could further argue that because the impacts of recidivism and the associated economic strains do not respect state boundaries, there is a compelling interstate aspect to this issue, thus providing the FCC with a rationale to regulate intrastate phone call rates as part of its mandate to address matters that affect interstate commerce.

B. Analysis

Considering the multifaceted nature of intrastate inmate phone calls, it is evident that these calls invariably possess an interstate component. This is underpinned by the Supreme Court's interpretation in the *Heart of Atlanta* case, which asserts that Congress, through the Commerce Clause, has the authority to regulate private business activities that substantially influence interstate commerce. The "substantial effect" standard applies if there is a tangible and logical nexus to interstate commerce, irrespective of the activity's local characteristics.[108] Consequently, intrastate inmate phone calls, while local, manifest a palpable connection to interstate commerce.

Given the Commerce Clause's inclusive scope over intrastate activities that significantly affect interstate commerce, the FCC can cogently contend that it possesses the necessary authority to regulate intrastate phone call rates. This assertion is further supported by the provisions of the Communications Act, which do not hinder the FCC's ability to supersede state legislation when: (1) the subject matter straddles both interstate and intrastate lines; (2) such preemption is vital to safeguard a legitimate federal regulatory goal; and (3) state regulations could thwart the FCC's legitimate authority due to the intertwined nature of interstate and intrastate aspects of the matter. Here, the FCC can assert that since intrastate phone calls travel across both interstate and intrastate lines, such preemption is vital to safeguard its goals as set forth in the Telecommunications Act, and state regulation over such phone calls impedes the FCC's ability to do so.

Furthermore, the Telecommunications Act grants the FCC with explicit authority under Section 706(a) to preempt state law in order to remove barriers to infrastructure and promote competition in the local telecommunications market.[109] Congress has thereby empowered the FCC to act decisively to eliminate any obstacles and foster competition, should it deem that telecommunications deployment to all Americans is not proceeding reasonably.[110] While the FCC's preemptive authority is not boundless and hinges on a "clear statement" from Congress endorsing such preemption[111], a robust argument emphasizing the interstate characteristics of intrastate phone calls could leverage the FCC's established authority over interstate telecommunication services. This would enable the FCC to affirm its jurisdiction over intrastate calls, in alignment with its mandate to oversee and regulate interstate telecommunications.[112]

IX. Recommendations/Conclusion

Going forward, the FCC should utilize the regulatory powers conferred by the Martha Act to set caps on intrastate calling rates within correctional facilities. This action would reflect the interstate nature of digital telecommunications and ensure that the rates are commensurate with actual costs. Additionally, legislative support should be sought to affirm the FCC's authority, preempting state laws that may impede the regulation of intrastate inmate calling rates in more explicit ways. Furthermore, it is imperative to conduct and support research to understand the impact of communication costs on recidivism, thereby fostering informed policy reforms. These steps are critical in aligning the operational necessities of correctional facilities with the essential goal of maintaining equitable communication costs.

In conclusion, the complex landscape of inmate telephony underscores the need for reform in intrastate calling rates within correctional facilities. The evolution of the Commerce Clause and its historically broad application over intrastate matters highlights the potential for the FCC to acquire additional jurisdictional authority to ensure just and reasonable communication costs at the local level. This is crucial for maintaining the social and familial connections that significantly impact recidivism rates and, by extension, the wider society. The future steps of the FCC and the promulgation of the newly created rules, particularly in light of the Martha Act, will be pivotal in addressing the current inequities and fostering a fairer telecommunications environment for incarcerated individuals, their families and friends

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[108] *Heart of Atlanta*, *supra* note 88, at 255.
[109] *Tennessee v. FCC*, 832 F.3d at 613.
[110] *Id.*
[111] *Id*.; *North Carolina v. FCC*, WASHINGTON LEGAL FOUNDATION (Sep. 25, 2015), https://www.wlf.org/case/tennessee-v-fcc-north-carolina-v-fcc/; *see also Stepping In*, supra note 30, at 8 (noting that even when the FCC has jurisdictional authority, its preemption must be consistent with any express preemption provisions in the Communications Act).
[112] *Stepping In*, supra note 30, at 8 (stating that Section 201(b) of the Act empowers the FCC to oversee "charges, practices, classifications, and regulations for and in connection with" interstate telecommunications services.).