

BRIEF OF *AMICI CURIAE* ASIAN AMERICANS ADVANCING
JUSTICE | AAJC, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, AND
THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE
IN SUPPORT OF RESPONDENTS

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

—————
CASE NOS. 13-1280, 13-1281, 13-1291, 13-1300, 14-1006
—————

SECURUS TECHNOLOGIES, INC., ET. AL.,

PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND THE UNITED STATES OF AMERICA

RESPONDENTS.
—————

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

- A. **Parties and Amici.** To the best of *Amici's* knowledge, except as noted below, all parties, intervenors, and *amici* appearing in this court are listed in the Brief for the Respondents. Asian Americans Advancing Justice | AAJC (“Advancing Justice | AAJC”), Lawyers’ Committee for Civil Rights Under Law (“Lawyers’ Committee”), and the National Association for the Advancement of Colored People (“NAACP”) are *amici curiae* in this appeal (collectively, “*Amici*”). *Amici* also understand that Verizon, Inc. (“Verizon”) intends to file an *amicus curiae* brief.
- B. **Rulings Under Review.** References to rulings at issue appear in the Brief for Respondents.
- C. **Related Cases.** References to related cases appear in the Brief for Respondents.

**STATEMENT REGARDING AUTHORSHIP AND MONETARY
CONTRIBUTIONS**

Pursuant to Federal Rules of Appellate Procedure Rule 29(c), *Amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amici* made a monetary contribution to its preparation or submission. Pursuant to D.C. Circuit Rule 29(d), *Amici* certify that no other brief of which they are aware presents the viewpoints of civil rights and public interest organizations or highlights the impact of Inmate Calling Service (“ICS”) rates and practices on marginalized and disadvantaged groups.

To the best of *Amici’s* knowledge, the only other *amicus curiae* briefs supporting Respondents will be filed by Verizon and Georgetown University, and these briefs will not overlap with the matters addressed herein. Given the different topics addressed and the importance of the issues, *Amici* certify that it is impractical to file joint briefs.

CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Circuit Rule 26.1 and Federal Rule of Appellate Procedure 26.1, *Amici* submit the following corporate disclosure statement:

Each of the *Amici* are tax-exempt nonprofit organizations. None of the *Amici* has any corporate parent. None of the *Amici* has any stock, and therefore no publicly held company owns 10% or more of the stock of any of the *Amici*.

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Anna Brown & Eileen Patten, Pew Research Center, *Statistical Portrait of the Foreign-Born Population in the United States, 2012*, *available at* <http://www.pewhispanic.org/2014/04/29/statistical-portrait-of-the-foreign-born-population-in-the-united-states-2012>, Table 34.....9

INTERESTS OF *AMICI*

Amici are public interest organizations that support and advocate for the civil rights of minorities, women, children, and other disadvantaged groups. *Amici* recognize that the prison and detention population is disproportionately composed of members of minority groups that are among the most economically and otherwise challenged groups in our Nation. Access to and affordability of communications and technology materially affect the ability of individuals and communities to achieve economic and social success. Each *Amicus*, thus, has a strong interest in ensuring that ICS rates are justly set and that the *Order* of the Federal Communications Commission (the “Commission”) is upheld.¹

Amicus curiae, Advancing Justice | AAJC, is a national nonprofit, nonpartisan organization whose goal is to advance the civil and human rights of Asian Americans. Through its programs in immigration and telecommunications, Advancing Justice | AAJC advocates for immigrants’ rights and reduced barriers to critical communications services.

Amicus curiae, Lawyers’ Committee, is a nonprofit, civil-rights organization founded in 1963, at the request of President John F. Kennedy, to mobilize the

¹ The *Order* is the Report and Order and Further Notice of Proposed Rulemaking, Rates for Interstate Calling Services, FCC 13-113, 28 FCC Rcd 14107 (2013).

private bar in vindicating the civil rights of racial minorities. Lawyers' Committee's *Criminal Justice Initiative* seeks to secure equal justice and an end to mass incarceration through impact litigation, public education, programming, and policy advocacy.

Amicus curiae, NAACP, is the nation's oldest and largest civil rights organization, founded in 1909. The mission of the NAACP is to ensure the political, educational, social and economic equality of rights of all persons and to eliminate racial hatred and racial discrimination. The NAACP's long and distinguished history of fighting to defend the human rights of all citizens includes advocating on behalf of incarcerated individuals to eliminate the imposition of unfair practices that disproportionately impact disadvantaged communities.

Other civil rights, public interest, and minority and women's groups join Advancing Justice | AAJC, Lawyers' Committee, and NAACP on this brief and are listed on Appendix A.

SUMMARY OF THE ARGUMENT

In regulating interstate ICS rates, the Commission properly considered the needs of disadvantaged and marginalized individuals and communities. The Commission correctly took into account that unreasonably high rates weaken the ties between incarcerated individuals and their friends, families, and attorneys, and thus high rates harm inmates and detainees, as well as their communities, families, and children.

The Commission recognized that the deleterious effects of high ICS rates disproportionately impact marginalized and disadvantaged communities, including minority communities. High rates perpetuate the cycles of poverty and crime that sustain economic and social inequality within minority and other economically depressed communities. By weakening community connections, high ICS rates contribute to higher recidivism rates, which themselves perpetuate inequality and poverty in underprivileged and minority communities.

High rates also threaten incarcerated individuals' right to effective counsel. High rates burden the budgets of public defenders and others providing defense in the criminal context, diminishing the legal services available to economically disadvantaged defendants. High rates also materially increase the costs of defense in the immigration context, where there is no right to a government-funded

defense. High rates thus put many immigration detainees and their families to the Hobson's Choice between an effective defense and obtaining life's necessities.

The harmful effects of unreasonably high ICS rates are borne disproportionately by society's most marginalized and disadvantaged groups, including minorities. The Commission properly balanced the profit-based interests of providers and correctional facilities with the urgent needs of those who must bear the burden of the ICS rates. This Court thus should affirm the *Order*.

ARGUMENT

I. THE FCC PROPERLY CONSIDERED THE INTERESTS OF THOSE WHO BEAR THE BURDEN OF HIGH ICS RATES

The Communications Act created the Commission “[f]or the purpose of regulating interstate . . . communication . . . so as to make [it] available, so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national origin, or sex” 47 U.S.C. § 151. This statutory directive “require[s] FCC consideration of factors other than competition,” including “the proper allocation of the rate burden” and “the future needs of both users and carriers.” *Phonetele, Inc. v. AT&T*, 664 F.2d 716, 722 (9th Cir. 1981) (Kennedy, J.).

The Commission thus may take into account the burdens on the communities and individuals who disproportionately bear the brunt of the regulated rates, including the particular needs of disadvantaged and minority groups. For example,

in *In re FCC 11-161*, the Tenth Circuit recently held that, in carrying out its regulatory function, the Commission properly considered the unique challenges faced by Tribal communities in telecommunications deployment and connectivity, and it thus took regulatory steps “to ensure that Tribal communities are not left behind.” 753 F.3d 1015, 1101-02 (10th Cir. 2014) (internal quotation marks and brackets deleted).

The Commission acted well within the scope of its authority when it considered the disproportionate burden high ICS rates have on marginalized and disadvantaged communities, such as minorities and children.² Based on thousands of comments from individuals and public interest groups, the Commission concluded that excessive ICS rates: (1) discourage communication between inmates and their families; (2) negatively impact the millions of children with an incarcerated parent; (3) contribute to the high rate of recidivism; (4) restrict access to counsel; and (5) increase the costs of our justice system.³ The Commission thus concluded that “[j]ust, reasonable, and fair ICS rates provide benefits to society by helping to reduce recidivism,” leading to reduced incarceration rates and

² *Order* ¶¶ 42-44; *see also* ¶¶ 42-44, n.167-78 (citing various comments and studies in support).

³ *Id.* ¶¶ 42-44, 46.

diminishing the impact of detention and incarceration on the Nation's most vulnerable communities.⁴

As discussed below, the facts and the record strongly support the Commission's conclusions regarding the impact of unreasonably high rates on minority and other disadvantaged communities.

II. EXCESSIVE ICS RATES ADVERSELY AND DISPROPORTIONATELY AFFECT DISADVANTAGED GROUPS AND INCREASE RECIDIVISM

A. The Majority of Immigration Detainees and Inmates Are From Disadvantaged Groups

The Commission correctly found that the interstate ICS rates it considered were excessively high, and particularly burdened disadvantaged communities. Although ICS rates vary wildly, in some jurisdictions the cost of an ICS call can be as high as \$0.89 per minute, with an additional per-call charge as high as \$3.95.⁵ Indeed, many families of inmates spend between 26 to 36 percent of their income to pay ICS rates.⁶ In a survey of 153 women visitors at a large state prison in

⁴ *Id.* ¶ 43.

⁵ *Order* ¶ 3, n.9.

⁶ Olga Grinstead, Bonnie Faigeles, Carrie Bancroft, & Barry Zack, *The Financial Cost of Maintaining Relationships with Incarcerated African American Men: A Survey of Women Prison Visitors*, 6 J. Afr. Am. Men 59, 65 (2001), available at <http://link.springer.com/content/pdf/10.1007%2Fs12111-001-1014-2.pdf>; see also *Order* ¶ 42, 168.

California, women reported spending an average of \$85 per month on phone calls to their incarcerated partners.⁷ As the Commission recognized, a single 15-minute call with an incarcerated spouse often can cost more than a “basic monthly phone service.”⁸

Excessive ICS rates are used not only to profit providers, but a portion of the profits also subsidize the correctional facilities.⁹ Yet the burden of high ICS rates are borne disproportionately by the Nation’s most marginalized and disadvantaged groups. Statistics in both the criminal and immigration contexts support the Commission in this conclusion.

Minorities constitute the majority of individuals in state and federal prisons. “More than 60 percent of those in prison today are people of color.”¹⁰ African Americans and Hispanics are over-represented at every stage of the criminal justice process, from arrest to charging, conviction, and sentencing. African American men are approximately six times more likely to be incarcerated than Caucasian

⁷ Grinstead et al., *supra*, at 64 (2001).

⁸ *Order* ¶ 42.

⁹ *Order* ¶ 3, n.13.

¹⁰ The Sentencing Project, *Fact Sheet: Trends in U.S. Corrections*, at 5, available at http://sentencingproject.org/doc/publications/inc_Trends_in_Corrections_Fact_sheet.pdf.

men, and Hispanic men are approximately three times more likely to be incarcerated than Caucasian men.¹¹

The overrepresentation of African Americans and Hispanics in prison has contributed to a cycle of poverty in, and segregation of, minority populations. African American and Hispanic communities have lower income and education levels, a disparity made worse because of high recidivism rates.¹² The National Research Council has explained that “prison admission and return have become commonplace in minority neighborhoods characterized by high levels of crime, poverty, family instability, poor health, and residential segregation. Racial disparities in incarceration have tended to differentiate the life chances and civic participation of blacks, in particular, from those of most other Americans.”¹³

Disadvantaged, minority groups also make up the vast majority of immigration detainees. In 2011, individuals from Mexico, El Salvador, Guatemala, and Honduras constituted approximately 88 percent of immigrant

¹¹ *Id.*

¹² See American Psychological Association, *Ethnic and Racial Minorities & Socioeconomic Status*, available at <http://www.apa.org/pi/ses/resources/publications/factsheet-erm.aspx>.

¹³ National Academies National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*, 5 (2014), available at <http://www.vtlex.com/wp-content/uploads/2014/06/18613.pdf>.

detainees.¹⁴ Nationally, Hispanic immigrants have lower median income rates compared to the rest of the population.¹⁵ These immigrants also have higher limited English proficiency.¹⁶

Asians represent 1.3 million out of 11 million undocumented immigrants in the United States.¹⁷ Asian Americans are more likely than any other group to be foreign-born, and certain Asian subgroups face significant socio-economic challenges.¹⁸ For example, Southeast Asian Americans, including Vietnamese, Cambodians, Laotians, and Hmong, are particularly vulnerable because these

¹⁴ Nick Miroff, *Controversial Quota Drives Immigration Detention Boom*, Washington Post (October 13, 2013), available at http://www.washingtonpost.com/world/controversial-quota-drives-immigration-detention-boom/2013/10/13/09bb689e-214c-11e3-ad1a-1a919f2ed890_story.html.

¹⁵ Anna Brown & Eileen Patten, Pew Research Center, *Statistical Portrait of the Foreign-Born Population in the United States, 2012*, available at <http://www.pewhispanic.org/2014/04/29/statistical-portrait-of-the-foreign-born-population-in-the-united-states-2012>, Table 34.

¹⁶ *Id.* at Table 21.

¹⁷ Sudip Bhattacharya, *Caught In The Middle: Asian Immigrants Struggle To Stay in America*, CNN (April 8, 2013, 4:23 PM), available at <http://www.cnn.com/2013/04/08/politics/asian-american-immigration/index.html>.

¹⁸ See generally Asian Pacific American Legal Ctr. & Asian American Justice Ctr., *A Community of Contrasts: Asian Americans in the United States: 2011* (2011), available at <http://napca.org/wp-content/uploads/2012/11/AAJC-Community-of-Contrast.pdf>.

communities have lower income and education levels, and higher limited English proficiency rates compared to both overall U.S. and Asian American rates.¹⁹

It is in this context that the Commission considered the role of high ICS rates on marginalized and disadvantaged communities.

B. Excessive ICS Rates Disproportionately Harm Marginalized and Disadvantaged Families and Communities

The decreased regular contact with incarcerated parents as a result of high ICS rates detrimentally affects families in marginalized communities, and especially children.²⁰ Chairwoman Mignon Clyburn noted: “Too often, families are forced to choose between spending scarce resources to stay in touch with their

¹⁹ SEARAC, *Southeast Asian Americans At A Glance (2011)*, available at <http://www.searac.org/sites/default/files/STATISTICAL%20PROFILE%20010.pdf>; SEARAC, *Southeast Asian Americans and Deportation Policy (2013)*, available at http://www.searac.org/sites/default/files/Southeast%20Asian%20Americans%20and%20Deportation%20Policy_8.8.2013.pdf.

²⁰ See Letter from the Minority Media and Telecommunications Council to Marlene H. Dortch, Secretary, Federal Communications Commission (March 25, 2013); Mindy Herman-Stahl, Marni L. Kan, & Tasseli McKay, *Incarceration and the Family: A Review of Research and Promising Approaches for Serving Fathers and Families*, U.S. Department of Health and Human Services (Sept. 2008), available at <http://aspe.hhs.gov/hsp/08/mfs-ip/incarceration&family/report.pdf>; Jeremy Travis, Elizabeth C. McBride, & Amy L. Solomon, *Families Left Behind: The Hidden Costs of Incarceration and Reentry* (The Urban Institute: Justice Policy Center Oct. 2003 (Rev. Jun. 2005), available at http://www.urban.org/UploadedPDF/310882_families_left_behind.pdf.

loved one or covering life's basic necessities."²¹ This Hobson's Choice of choosing between contact with a loved one in prison or detention and purchasing life's necessities is particularly hard-felt in minority communities.

A 2005 report found that 93 percent of the 1.4 million adults incarcerated in state and federal prisons are male, and 55 percent of them have minor children.²² According to the U.S. Department of Health and Human Services, 61 percent of incarcerated fathers were employed full-time at the time of their arrest and were the primary source of financial support for their families.²³ As discussed above, families of incarcerated men commonly spend more than one-third of their household incomes to pay rates that exceed many times over the rates that they spend on their own basic monthly phone services.²⁴

Thus, the non-incarcerated family members – who already face severe economic challenges – often cannot afford to communicate regularly with the inmate. Moreover, reliance on telecommunications is particularly pronounced, because, as the Commission noted, inmates are incarcerated on average as much as

²¹ See *Order* at Appendix D (Statement of Acting Chairwoman Mignon Clyburn).

²² Travis et al., *supra*, at 1.

²³ Herman-Stahl, et al., *supra*, at 3-5.

²⁴ See *supra* at n. 6.

160 miles from their last home.²⁵ Because these financial burdens disproportionately affect people in economically and otherwise disadvantaged communities, they perpetuate a cycle of poverty in highly vulnerable, and often minority, communities.

Further, the Commission correctly noted that the most vulnerable members of a family – children – suffer the most significant harm. There are approximately 2.7 million children with incarcerated parents, the majority of whom are in marginalized and disadvantaged communities.²⁶ For these children, “[l]ack of regular contact with incarcerated parents has been linked to truancy, homelessness, depression, aggression, and poor classroom performance”²⁷ Over half of these minor children are under the age of ten, and losing a parent due to incarceration can threaten their developmental well-being.²⁸

C. High ICS Rates Contribute To Recidivism In Disadvantaged Groups

The Commission correctly concluded that excessive ICS rates increase recidivism among disadvantaged communities. The Commission relied on multiple studies that establish that “family contact during incarceration is

²⁵ *Order* ¶ 42, n.171.

²⁶ *Order* ¶ 2, n.5.

²⁷ *Id.*

²⁸ Travis et al., *supra*, at 2.

associated with lower recidivism rates.”²⁹ For example, the Commission noted a Congressional Black Caucus report that cited “a powerful correlation between regular communication between inmates and their families and measurable decreases in prisoner recidivism rates.”³⁰ The Commission’s conclusions are well-supported by studies dating back over forty years.

A bellwether 1972 study found a “strong and consistent positive relationship that exists between parole success and maintaining strong family ties while in prison.”³¹ Similarly, a Vera Institute Study published in October 2012 found that “[i]ncarcerated men and women who maintain contact with supportive family members are more likely to succeed after their release”³²

Inmates from minority communities are particularly reliant on inexpensive phone access and thus are particularly affected by high ICS rates. Therefore, high ICS rates contribute not only to individual recidivism, but perpetuate the cycle of re-incarceration that has dire consequences for minority communities.

²⁹ *Order* ¶ 3, n.3; *see also* ¶ 24, n.172-74.

³⁰ *Id.* at 24, n.174.

³¹ Norman Holt and Donald Miller, *Explorations in Inmate-Family Relationships*, (Family & Corrections Network, Research Report No. 46 1972), *available at* <http://www.fcnetwork.org/reading/holt-miller/holt-millersum.html>.

³² Ryan Shanahan and Sandra Villalobos Agudelo, *The Family and Recidivism*, (The Vera Institute Oct. 2012) at 17, *available at* <http://www.vera.org/files/the-family-and-recidivism.pdf>.

III. REASONABLE ICS RATES IMPROVE LEGAL REPRESENTATION FOR INMATES AND DETAINEES

The Commission also correctly concluded that reasonable ICS rates “provid[es] the justice system with cost savings and improve[s] [legal] representation for inmates.”³³ The Commission recognized that high ICS rates adversely affect inmates by limiting access to public defenders and other counsel. The Commission noted that, because of the currently excessive ICS rate, “[s]ome public defenders and court-appointed lawyers limit the number of collect calls they accept because the cost of calls from correctional facilities has become overly expensive.”³⁴

The Commission’s conclusions were well supported. The American Bar Association, for instance, noted that the “high cost of prisoner phone calls makes it difficult or impossible for many prisoners’ lawyers to accept their calls This has serious implications given the constitutional protections surrounding the prisoner’s ability to communicate with counsel.”³⁵

The effect of excessive ICS rates is at least as significant for immigrant detainees. Because immigrant detainees do not have the right to government-

³³ *Order* ¶ 44.

³⁴ *Id.*

³⁵ *Id.* at Appendix C.

funded counsel, they must pay for lawyers out of their own pockets.³⁶ Yet, high ICS rates make it difficult for these detained immigrants to talk to their lawyers.³⁷ The situation may be even worse for immigrant detainees who cannot afford lawyers and often must rely on family members to carry out research.³⁸

High rates also can cripple a detainee's defense. For example, lawful permanent residents may be eligible for cancellation of removal, a discretionary form of relief from deportation that requires a determination of the immigrant's good moral character and the hardship their deportation would cause to a family. 8 U.S.C. § 1229(b). High rates can undercut a detainee's ability to support his cancellation-of-removal application because it can threaten the detainee's ability to obtain needed documentation available only by contact with family, friends,

³⁶ 8 U.S.C. § 1229a(b)(4)(A) (“the alien shall have the privilege of being represented, at no expense to the Government, by counsel of the alien’s choosing who is authorized to practice in such proceedings”); *see also* Letter from Am. Immigration Lawyers Assoc. at 2, *available at* <http://apps.fcc.gov/ecfs/comment/view?id=6017169668> (noting that 84 percent of immigrant detainees cannot afford to hire an attorney).

³⁷ Letter from Christina Fialho & Christina Mansfield, Exec. Directors, CIVIC, to Marlene H. Dortch, Secretary, Federal Communications Commission (March 21, 2013), *available at* http://nationinside.org/images/pdf/CIVIC_Comments_FCC-1.pdf.

³⁸ Letter from New Jersey Advocates for Immigrant Detainees & NYU School of Law Immigrant Rights Clinic to Marlene H. Dortch, Secretary, Federal Communications Commission (March 25, 2013), *available at* http://www.njphonejustice.org/wp-content/uploads/2013/03/NJAID_NYUIRC_Comments-to-FCC_March-25-2013.pdf.

employers, and schools. High ICS rates also block immigrant detainees from other critical aspects of the justice system. For example, in the child custody context, high ICS rates impede the ability of immigrant detainees to maintain contact with child services, which may result in loss of custody for detained parents.³⁹

CONCLUSION

For the reasons stated above, *Amici* respectfully request that the Court affirm the *Order* in its entirety.

Respectfully submitted,

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³⁹ *Id.*

APPENDIX A**COMPLETE LIST OF ENTITIES JOINING *AMICUS CURIAE* BRIEF**

1. Asian Americans Advancing Justice | Asian Law Caucus
(Advancing Justice | ALC)
2. Asian Americans Advancing Justice | Los Angeles (Advancing Justice | LA)
3. Community Initiatives for Visiting Immigrants in Confinement (CIVIC)
4. Correctional Association of New York (the CA)
5. LatinoJustice PRLDEF
6. Minority Media and Telecommunications Council (MMTC)
7. National Asian Pacific American Families Against Substance Abuse
(NAPAFSA)
8. National Coalition for Asian Pacific American Community Development
(National CAPACD)
9. National Council of La Raza (NCLR)
10. National Urban League (NUL)
11. National Organization for Women (NOW) Foundation
12. New Jersey Advocates for Immigrant Detainees (NJAID)
13. Public Knowledge
14. The Sentencing Project
15. South Asian Americans Leading Together (SAALT)
16. Southeast Asia Resource Action Center (SEARAC)

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CERTIFICATE OF SERVICE

I, MARK PACKMAN, hereby certify that on July 28, 2014, I electronically filed the foregoing *AMICI CURIAE* BRIEF with the Clerk of the Court of the United States Court of Appeals for the D.C. Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. Others, marked with an asterisk, will receive service by mail unless another attorney for the same party is receiving service through CM/ECF:

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