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January 16, 2018

Superior Court of New Jersey
Appellate Division
P.O. Box 006
Trenton, New Jersey 08608

Re: Securus Technologies, Inc. v. Christopher Christie, Governor of New Jersey, et al.
Docket No.: A-5465-16T3
Docket No. Below: MER-L-143-17

Honorable Judges of the Appellate Division:

Please accept this letter brief in lieu of a more formal submission from *amici curiae* the American Civil Liberties Union of New Jersey (ACLU-NJ); The Immigrant Rights Clinic (IRC) of Washington Square Legal Services, Inc.; New Jersey Advocates for Immigrant Detainees (NJAID); First Friends of New Jersey and New York (First Friends); and the Prison Policy Initiative (PPI). *Amici* oppose Plaintiff-Appellant Securus's request for injunctive and declaratory relief and urge this Court to affirm the trial court's dismissal of Securus's complaint in this matter.

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PRELIMINARY STATEMENT

In 2016, the New Jersey Legislature decided that an inmate's lifeline to friends and family on the outside should not be cost prohibitive. The State enacted the Rate Control Law (RCL), which places a cap on the exorbitant calling rates phone vendors were charging prison and jail inmates and prevents correctional facilities from receiving kickbacks from those vendors. The RCL is not retroactive and Securus, the vendor who brings this case, is neither obligated to bid on future contracts to which the RCL would apply nor assured of winning any such contracts. Yet, apparently aggrieved because it will enjoy less latitude to exploit incarcerated people should it bid on and then win a contract in an unspecified future contest, Securus asks this Court to set aside

the requirements of justiciability and serve as a guarantor of its profit margin.

Securus puts two contracts at issue. The first, with Cape May County, predates the RCL and runs through 2018. The RCL does not impact that contract and Securus's claims concerning it are unripe. The second, with Passaic County, is an expired contract, extended on a temporary and voluntary basis until the conclusion of a public bidding process. Passaic County has already rejected Securus's bid for renewal, making its claims concerning that contract moot.

Even if Securus's case did not suffer ripeness and mootness defects, Securus has no constitutional right to continue gouging a captive market in order to generate an outsized return on a hypothetical contract. Securus is not entitled to an expectation of untrammeled profits, especially in a highly regulated field. Moreover, phone vendors in other jurisdictions have realized enormous profits under more restrictive rate caps than the RCL imposes. Thus, taking Securus at its word that it would no longer be able to break even under the RCL would compel the conclusion that Securus is an inefficient operator. The Takings Clause of the United States Constitution and its New Jersey analogue protect neither exploitation nor inefficiency.

This Court should not permit Securus to cloak its greed in the costume of constitutional injury. It should instead affirm the

trial court by recognizing that the RCL makes crucial contributions to the public interest and invades no right Securus can claim.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

For purposes of this brief, *amici* adopt the Statement of Facts and Procedural History set forth by the State below.

ARGUMENT

I. THE TRIAL COURT CORRECTLY FOUND THAT SECURUS FAILED TO PLEAD AN ACTUAL CONTROVERSY.

Securus's claims are non-justiciable; the fact that Securus brings them under the Declaratory Judgment Act (DJA) does nothing to change this threshold matter. The DJA does not expand or confer standing nor create an independent cause of action. "A declaratory judgment act merely provides a procedural device to accelerate the resolution of a dispute; the procedural device does not alter the substance of the dispute." In re Envtl. Ins. Declaratory Judgment Actions, 149 N.J. 278, 302 (1997). A party "cannot avoid the proscription against litigating moot issues by bringing its action under the [DJA]." Stop & Shop Supermarket Co., LLC v. Cty. of Bergen, 450 N.J. Super. 286, 294 (App. Div. 2017). Likewise, the DJA "cannot be used to decide or declare rights or status of parties upon a state of facts which are future, contingent and uncertain." Lucky Calendar Co. v. Cohen, 20 N.J. 451, 454 (1956)

quoting Tanner v. Boynton Lumber Co., 98 N.J. Eq. 85 (Ch. 1925). The DJA may not be made a Trojan horse for moot or unripe claims.

This instruction is particularly salient in cases raising constitutional challenges. See Matter of Ass'n of Trial Lawyers of Am., 228 N.J. Super. 180, 184 (App. Div. 1988). "The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity." Parker v. Los Angeles Cty., 338 U.S. 327, 333 (1949). Accordingly, "The party who invokes the power (to annul legislation on grounds of its unconstitutionality) must be able to show not only that the statute is invalid, but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement." Poe v. Ullman, 367 U.S. 497, 504–05 (1961) (quoting Massachusetts v. Mellon, 262 U.S. 447, 488, (1923)). Contrary to Securus's assertion that "declaratory relief is broadly available" to determine constitutional validity, PA Br. at 18-19,[1] "the judiciary does not have a roving commission to seek and destroy unconstitutionality," Ass'n of Trial Lawyers of Am., 228 N.J. Super. at 185. The plaintiff's burden of establishing that its claims are justiciable is at its heaviest where those claims are constitutional.

[1] PA Br. refers to Plaintiff Securus's Revised Appellate Brief dated November 15, 2017.

A. Securus's Claims Are Not Ripe for Judicial Review.

Where, as here, a statute has not actually injured or will not imminently injure a party, the party's challenge to the statute is unripe. The ripeness doctrine is aimed at preventing courts from adjudicating disputes prematurely and becoming entangled in abstract disagreements. See Abbott Labs. v. Gardner, 387 U.S. 136, 148 (1967), overruled on other grounds by Califano v. Sanders, 430 U.S. 99 (1977). New Jersey courts examine two factors in determining ripeness: (1) the fitness of issues for judicial review and (2) the hardship to the parties if judicial review is withheld. Comm. to Recall Robert Menendez From the Office of U.S. Senator v. Wells, 204 N.J. 79, 99 (2010); K. Hovnanian Cos. of N. Cent. Jersey, Inc. v. N.J. Dep't of Envtl. Prot., 379 N.J. Super. 1, 9-10 (App. Div. 2005).

In evaluating the fitness prong, courts look to whether judicial review would benefit from further factual development. See Trombetta v. Mayor & Comm'rs of City of Atl. City, 181 N.J. Super. 203, 223 (Law. Div. 1981), aff'd sub nom. Trombetta v. Mayor & Commissioners of the City of Atl. City, 187 N.J. Super. 351 (App. Div. 1982). A declaratory case is fit for review if the "issues in dispute are purely legal," Menendez, 204 N.J. at 99, such as where resolution is a matter of statutory interpretation. By contrast, a declaratory judgment claim is not ripe for adjudication if the rights or status of the parties depends on a conjectural "excursion

into the future." Borough of Rockleigh, Bergen Cty. v. Astral Indus., 29 N.J. Super. 154, 164 (App. Div. 1953).

Analyzing the second prong, courts look to whether there is a "real and immediate threat" that the challenged law will harm the plaintiff. 966 Video, Inc. v. Mayor & Twp. Comm. of Hazlet Twp., 299 N.J. Super. 501, 517 (Law. Div. 1995). This prong may be satisfied if "actual enforcement has taken place or the practical impact" of the statute has been "clarified by experience." Trombetta, 181 N.J. Super. at 223.

Securus's claims fail under both prongs of the ripeness test. First, the claims rest on a set of facts that are hypothetical, speculative, and indeterminate. Securus's contract with the Cape May County Correctional Center is unaffected by the RCL and runs through 2018. Pa at 21-59.[2] The potential for renewal is far too remote and uncertain to sustain a justiciable controversy. Claims tied to Securus's contract with the Passaic County Jail are similarly attenuated: the original contract expired, Pa at 61-71, Passaic County issued a request for new bids, Ps at 73-75, and Passaic County rejected Securus's bid for reasons unrelated to the RCL, Pa at 79. Although Securus has agreed to continue providing services to Passaic County on a temporary basis in compliance with the RCL until the (imminent) conclusion of the public bidding

[2] Pa refers to the appendix of Plaintiff Securus's Revised Appellate Brief dated November 15, 2017.

process, Securus does not, and cannot, argue that any deprivation it suffers as a result of this voluntary and short-term arrangement establishes grounds sufficient to carry its takings challenge.

To credit the notion that the RCL renders Securus unable to realize a reasonable return on its upfront investments requires not one but two "excursions into the future." One must first assume that Securus will choose to bid on, and then, in a competitive selection process, win a future contract to which the RCL applies. One must then project, without the aid of concrete evidence, that the future contract will actually strip Securus of any opportunity to make a profit. This double-contingency makes Securus's claims unfit for judicial review.

For the same reason, Securus's claims do not satisfy the hardship prong. Securus has not made a sufficient showing of harm because any such harm is future and contingent. Additionally, the harm of which Securus complains – the potential inability to recoup upfront investments - is endemic to its business model. Securus is never guaranteed that its contracts will be renewed – its rejected renewal bid in Passaic County demonstrates as much. If Securus cannot recover its costs in the lifespan of a contract – for example, the expired Passaic County contract and the ongoing Cape May County contract, neither of which were impacted by the RCL – it bears the risk that it will never recover its costs because it will not go on to win renewal. In other words, Securus is never

entitled to future contracts and routinely accepts the possibility that it will fail to recoup its investments. The introduction of the RCL does not suddenly inoculate Securus against unprofitability. Securus cannot show that it will suffer "real and immediate" hardship if the court declines review.

B. Securus's Claims Based on the Passaic County Contract Are Moot.

Like ripeness, mootness is a threshold justiciability determination. "It is firmly established that controversies which have become moot or academic prior to judicial resolution ordinarily will be dismissed." Cinque v. New Jersey Dep't of Corr., 261 N.J. Super. 242, 243 (App. Div. 1993). An issue is "moot" when the underlying controversy ceases to exist and a court's ruling can have no practical effect on it. Greenfield v. N.J. Dep't of Corr., 382 N.J. Super. 254, 257-58 (App. Div. 2006). In such instances, where "a party's rights lack concreteness from the outset or lose it by reason of developments subsequent to the filing of suit, the perceived need to test the validity of the underlying claim of right in anticipation of future situations is, by itself, no reason to continue the process." JUA Funding Corp. v. CNA Ins./Cont'l Cas. Co., 322 N.J.Super. 282, 288(App. Div. 1999).

Securus finds itself in this situation with respect to its Passaic County contract. When its contract with Passaic County

expired, Passaic County issued a call for bids on a new contract, Securus responded with a bid, and Passaic County rejected that bid based on Securus's failure to submit a proper stockholder disclosure statement. See Pa at 79. In short, Securus no longer has so much as an expectancy in Passaic County that RCL could conceivably impact.

While it is true that Securus has agreed to a month-to-month extension of its original Passaic County contract under the terms of the RCL until the County awards a new contract to one of the remaining bidders, Securus does not and cannot attempt to use this temporary circumstance to bootstrap its takings claim. Rather, Securus's takings claim is based on its theory – flawed though it is – that the RCL will prevent it from recouping investment costs by operating on an undefined number of future contracts. Indeed, Securus criticizes the trial court for "narrowly focusing on Securus' present contracts." PA Br. at 25. The month-to-month contract in Passaic County does not give rise to the injury of which Securus complains and the remaining (speculative) facts Securus pleads pertain to controversies that are unripe or moot.

II. EVEN IF ITS CLAIMS WERE JUSTICIABLE, SECURUS HAS NO PROTECTED PROPERTY RIGHT IN PROFITS IT PURPORTS IT WOULD EARN IF NOT FOR THE RCL.

A takings claim is analyzed in two steps: the court first decides whether a plaintiff has a cognizable property right in the subject of the alleged taking and then, if it has found in

the affirmative, the court determines whether the government action at issue involves a taking of that property. Mohlen v. United States, 74 Fed. Cl. 656, 660–61 (2006). The Takings Clause of the Fifth Amendment of the United States Constitution provides that "private property shall not be taken for public use without just compensation." U.S. Const. amend. V, ¶ 4. Article One, paragraph 20 of the New Jersey State Constitution reads identically and is considered co-extensive with protection under the Fifth and Fourteenth Amendments of the United States Constitution. Mansoldo v. State, 187 N.J. 50, 58 (2006). Courts in this State consider federal jurisprudence compelling authority. DeCamp, Inc. v. New Jersey Transit, 396 N.J. Super. 151, 161 (Law. Div. 2007).

Crucially, not all economic interests constitute "property" falling within the protective coverage of these constitutional provisions. United States v. Willow River Power Co., 324 U.S. 499, 502 (1945). To so qualify, "the economic interest in question cannot simply be something desired by, or even necessary to, the claimant." DeCamp, 396 N.J. Super. at 162. Instead, "the claimant must show that he or she has a legitimate claim of entitlement under the law to the interest or that the law recognizes his or her interest as property." Id. (citation omitted). Only then will courts step in to prevent interference with the interest or require compensation. Willow River Power Co., 324 U.S. at 502. Securus has

no legally recognized property rights in the profits it claims it would collect absent the impact of the RCL. As such, it has not suffered a taking.

A. Securus Has No Protected Property Right in Profits that are Future, Contingent, and Generated from Business in a Highly Regulated Field.

It is well-established that "loss of future profits – unaccompanied by any physical property restriction - provides a slender reed upon which to rest a takings claim." Andrus v. Allard, 444 U.S. 51, 66 (1979). This is so because "[p]rediction of profitability is essentially a matter of reasoned speculation that courts are not especially competent to perform." Id. Loss of future profits is all the more dubious a basis for a takings claim when those profits are generated from business in a highly regulated field. "[A] participant in a highly regulated industry must anticipate that its profit levels can be capped or even reduced by changes in government regulation." State Farm Mut. Auto. Ins. Co. v. State, 124 N.J. 32, 50 (1991). Relatedly, a takings claim will rarely stand where the subject future profits are contingent upon the government extending to the plaintiff a privilege to conduct business, such as by granting a license or permit. See Kafka v. Montana Dep't of Fish, Wildlife & Parks, 348 Mont. 80, 102–03 (2008).

All three conditions were present in Allied–General Nuclear Services. v. United States, 839 F.2d 1572 (Fed. Cir. 1988). There, despite the government actively inducing a private company to invest $200 million dollars into the construction of a nuclear power plant, the company had no takings claim when, upon the plant's completion, the government declined to issue the expected permit to operate the plant, thereby sinking the company's investment. Allied-General, 839 F.2d at 1577. The government based its decision on national security concerns. The expectation of profiting in a highly regulated field, the court determined, was not a protected property interest. Id.

Similarly, In Mitchell Arms, Inc. v. United States, the Federal Circuit Court of Appeals found that an arms dealer had no property right in an expectation of selling assault rifles because that right was dependent on the government granting him a license. 7 F.3d 212, 217 (Fed. Cir. 1993). The government did not take the dealer's property, the court reasoned; all it "took" was "the ability to realize an expectation in the ultimate market disposition" of that property. Id. Likewise, when the government federalized airport screening, a private screening company could not hitch a takings claim to "its right to engage in the screening business — a right that [the company] never possessed because its contracts with the airlines were always subject to the security regulations the government imposed on the airlines," even if the

takeover was unpredictable. Huntleigh USA Corp. v. United States, 75 Fed. Cl. 642, 645 (2007), aff'd, 525 F.3d 1370 (Fed. Cir. 2008).

The profits Securus claims the State "takes" through the RCL have all three hallmarks of an unprotected expectancy: they are future, contingent on winning a contract from the government, and arise from business in a highly regulated arena. First, Securus has not even begun to estimate the money it suggests it stands to lose under the RCL, nor could it do so reliably given the premature status of its petition (discussed at length in Section I, infra). This Court is likewise ill-positioned to speculate about the impact of the RCL, if any, for the purposes of a takings analysis. Securus's expectation of profitability is too slender a reed to support its claim.

Second, the bidding process to which Securus must submit its contract proposals has an analogous function to the licensing and permitting schemes in Allied-General and Mitchell Arms. The government has complete discretion and authority to select the vendors who conduct business in its jails and prisons. Before the RCL as after, it would be the State's unequivocal prerogative to deny all future bids from Securus. Securus has no right to profits that may lie beyond a gate kept by the government.

Finally, Securus has no right to future contracts under terms that it desires but that the government does not. Securus, if it seeks future government contracts, must abide by government

regulations, including the RCL. Securus operates in a highly regulated field and has always been subject to the conditions the government imposes on prison vendors. Like the safety regulations at issue in Allied-General, Mitchell Arms, and Huntleigh, the RCL represents a valid exercise of the State's power to legislate to promote the security and wellbeing of the public. Abundant research demonstrates that family contact can mitigate the negative impact of parental incarceration on children, increase the likelihood of post-incarceration family reunification, improve the mental health of ex-offenders and their families, and reduce recidivism. See, e.g., Linda G. Bell and Connie S. Cromwell, Evaluation of a Family Wellness Course for Persons in Prison, 45, 46 (2015). Furthermore, Securus recognizes that the State has the power to impose regulations that affect its bottom line. For example, Securus's complaint notes that it must spend money tailoring its installations to various security protocols. Compl. ¶ 13. The RCL no more enacts a taking than do these protocols.

B. Securus Has No Protected Property Right in Profits Derived From Harmful and Exploitative Practices.

Where an entity has staked its profitability on exploitation, it cannot complain of a taking when the government pursues measures to curb that exploitation. "[A] State does not effectuate a taking without due process and need not provide compensation when it diminishes or destroys the value of property by stopping illegal

or harmful activity. . . .” Bernardsville Quarry, Inc. v. Borough of Bernardsville, 129 N.J. 221, 236 (1992). This is because “as against reasonable state regulation, no one has a legally protected right to use property in a manner that is injurious to the safety of the general public.” Allied-General, 839 F.2d at 1576; See also Mugler v. Kansas, 123 U.S. 623, 668 (1887) (“A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking for public use without compensation.”).

The RCL restricts usurious phone rates and Securus has no protected property right to profits it might have realized from charges above the RCL’s cap. Whereas, until the 1990s, inmates could place and receive calls at rates comparable to those charged by ordinary commercial providers, prison and jail phone vending now represents a $1.2 billion-a-year industry dominated by a handful of private companies like Securus – the second largest - that set rates and fees far in excess of the commercial baseline. See Timothy Williams, The High Cost of Calling the Imprisoned, N.Y. Times, Mar. 30, 2015. “A brief 15-minute phone call from a prison or jail often costs more than $17 — a disturbing anomaly in the era of unlimited long-distance plans for only $52.99 a month.” Drew Kukorowski et al., Please Deposit All of Your Money: Kickbacks, Rates, and Hidden Fees in the Jail Phone Industry,

Prison Policy Initiative, May 2013, at 2, available at https://static.prisonpolicy.org/phones/please_deposit.pdf.

At least three deliberate factors contribute to these exorbitant prices. First, each prison or jail facility enters into an exclusive contract with a telephone vendor, conferring a monopoly on that vendor. Id. Actual consumers have no input or market influence. Drew Kukorowski, The Price to Call Home: State-Sanctioned Monopolization in the Prison Phone Industry, Prison Policy Initiative, September 11, 2012, at 1, available at https://static.prisonpolicy.org/phones/price_to_call_home.pdf. Second, prisons and jails typically require vendors to pass along a substantial percentage of revenue to the facility in the form of kickbacks known as "commissions." Facilities thus have an incentive not to select the vendor that offers the lowest rates, but rather the one that provides the highest commission. Notably, the RCL prohibits such commissions but Securus cites them in justifying its calling rates. N.J.S.A. 30:4-8.12(b); PA Br. at 5-6.

Finally, vendors add a dizzying array of hidden fees that can nearly double the price of a call. Kukorowski, Please Deposit All of Your Money, supra at 2, 10. When the FCC prohibited per-call connection fees and flat-rate charges, Securus brazenly rebranded them as "first-minute rates" and began charging even more. Aleks Kajstura, Advocates ask FCC to block sale of Securus, investigate

prison phone giant's disregard for regulations, Prison Policy Institute (June 21, 2017), https://www.prisonpolicy.org/blog/2017/06/21/securus-sale. Many other fees carry misleading names to disguise them as taxes but most are not actually required by the government and none are required to be passed on to consumers. Kukorowski, Please Deposit All of Your Money, supra at 10. Again, justifying its calling rates, Securus's admissions are revealing: "Securus passes along certain mandatory federal and state calling charges as part of its typical telecommunications plans. . . and, where applicable, other similar fees and charges." PA Br. at 5. Of course, "no company outside of the monopoly context would tell consumers that simply complying with the law carries an extra charge." Kukorowski, Pleease Deposit All of Your Money, supra at 10. The conclusion is inescapable: Securus charges excessive calling rates because it can, not because it must.

These excessive rates have ripple effects that do profound damage to society. To begin, low-income communities that tend to have higher incarceration rates experience a regressive tax. Kukorowski, The Price to Call Home, supra at 3. The unreasonable rates also contribute to the mounting problem of contraband cell phones in prisons and jails. Kukorowski, Pleease Deposit All of Your Money, supra at 3. Most troublingly, these rates put barriers in the way of communication between inmates and their children and

families. Communication has been shown to diminish negative incidents in prisons and jails and thereby lead to reduced sentences. Id. at 2. Communication also decreases the likelihood that inmates will reoffend and increases inmates' involvement with their children following release. Id. at 3. In sum, exploitative calling rates fuel mass incarceration and destabilize communities.

C. Securus Has No Protected Property Right in Profiting While Operating Inefficiently.

A taking occurs only if a regulation denies an efficient operator all opportunity to obtain a just and reasonable return. Hutton Park Gardens v. Town Council of Town of W. Orange, 68 N.J. 543, 568 (1975). "[T]he reasonableness of price limitations is measured by the performance of skilled and efficient businesses, not of those that are inept or even unlucky." State Farm Mut. Auto. Ins. Co. v. State, 124 N.J. 32, 49 (1991). In turn, price limitations are "not objectionable merely because they fix returns at a lower scale for inefficient operators, do not reward persons who have paid excessive or inflated purchase prices for their property, or may otherwise work hardships . . . in atypical situations." Id. (quoting Hutton Park Gardens, 68 N.J. at 570). There is no protected right to profit as an inefficient operator.

To believe Securus's assertion that the RCL would render it incapable of breaking even is to conclude that Securus is an inefficient operator. More stringent regulations in other states

and the federal system have served the public interest without preventing phone vendors from realizing sizable profits. Phone rates charged in New York facilities, for example, cast doubt on Securus's claim that its rates must exceed the RCL cap in order to cover costs associated with providing secure telephone services. New York law bans commissions and requires that "the lowest possible cost to the user shall be emphasized." N.Y. Corr. Law § 623. Global Tel*Link charges incarcerated persons and their families about $0.05 per minute, local and long-distance, in the New York prison system. Kukorowski, The Price to Call Home, supra at 2. Under the RCL, Securus may charge more than double this rate: $0.11 per minute for domestic calls and $.25 per minute for international calls. N.J.S.A. 30:4-8.12(a), (c).

The federal prison system similarly illustrates that companies can generate substantial revenue at rates much lower than the $0.33 per minute Securus claims it must charge in order to break even.[3] See PA Br. at 7. At $0.06 per minute for local calls and $0.23 per minute for long-distance, the Federal Bureau of Prisons covered costs and earned $34 million in profit in 2010.

[3]To the extent Securus argues that its $0.33 per minute estimate incorporates recouping past site commissions (of the type now prohibited under the RCL), it bears recalling that price limitations are "not objectionable merely because they . . . do not reward persons who have paid excessive or inflated purchase prices for their property." Hutton Park Gardens, 68 N.J. at 570. Site commissions are analogous to "excessive or inflated purchase prices."

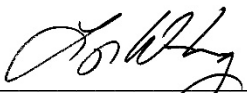
See U.S. Government Accountability Office, Improved Evaluations and Increased Coordination Could Improve Phone Detection (2011), available at http://www.gao.gov/assets/330/322805.pdf.

Securus has two options: it can acknowledge that it stands to continue profiting under the RCL or it can explain why its structure, technology, or operations make it uniquely incapable of generating profit at rates higher than those charged in New York and federal facilities. In neither scenario can it maintain a valid takings claim.

CONCLUSION

For the foregoing reasons, this Court should affirm the dismissal of Plaintiff-Appellant's complaint.

Respectfully Submitted,



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