To be Argued by: Darius Charney
Time Requested: 30 Minutes

STATE OF NEW YORK
APPELLATE DIVISION

SUPREME COURT
THIRD DEPARTMENT

IVEY WALTON, RAMON AUSTIN, JOANN HARRIS, the OFFICE OF THE APPELLATE DEFENDER, and the NEW YORK STATE DEFENDERS ASSOCIATION

Appellants.

-against-

THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, AND MCI WORLDCOM COMMUNICATIONS, INC.

Respondents.

BRIEF FOR APPELLANTS

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QUESTIONS PRESENTED

1) Whether, when a court holds that a state agency erroneously failed to exercise jurisdiction over a telephone tariff, that finding is determinative of the tariff's legality under separation of powers and substantive due process.

2) Whether an agency may take money from the recipients of prisoner collect calls without providing the call recipients with any form of compensation.

3) Whether family, friends and lawyers' telephonic communications with prisoners implicate freedom of speech and association such that the speech is protected from arbitrary infringement by a state agency.

4) Whether a state agency may single out prisoner collect call recipients to fund general prison operations in a manner unrelated to any penological or security purpose.

NATURE OF THE CASE AND RELEVANT FACTS

Petitioners-Appellants (hereafter "Appellants") are the family members and advocates of prisoners incarcerated in various New York State correctional institutions. They bring this appeal from the Supreme Court's dismissal of their Article 78 proceeding seeking relief from the imposition of a fee by the New York State Department of Correctional Services (hereafter "Respondent" or "DOCS") by means of a declaration that the DOCS fee is:

(a) an illegal and unlegislated tax in violation of Articles I, III, and XVI of the New York State Constitution; (b) a taking of Appellants' property without due process of law in violation of Article I §§ 6 and 8 of the State Constitution; (c) a violation of Appellants' speech and association rights guaranteed by Article I § 8 of the State Constitution; and (d) a violation of Appellants' rights to equal protection guaranteed by Article I § 11 of the State Constitution (Record on Appeal ["R."] 54-60, at ¶¶ 77-111). Appellants also seek a refund of the taxes unlawfully collected between October 30, 2003 and March 31, 2007. Appellants style their challenge as a putative class action. (R. 29, at ¶ 2; R. 51-53, at ¶¶ 67-73)

Any New York State prisoner who wishes to speak to a loved one, friend, or lawyer must do so by placing a collect call from a telephone in his or her facility. (R. 45, at¶ 48) Under contracts signed by MCI and DOCS on April 1, 1996 and August 1, 2001, MCI was the exclusive provider of telephone services to the New York State Department of Correctional Services. (R. 31, at ¶¶ 5-6) The 2001 contract ran through March 31, 2006, with the option of two, one-year renewals. (R. 40, at ¶ 33) DOCS exercised this option and renewed the contract for two additional one-year terms.

Under the 2001 contract, DOCS demanded a "commission" of 57.5 percent of the gross annual revenue MCI garnered from its operation of the

prison telephone system. (R. 31, at ¶ 6) This practice ended on April 1, 2007. To finance the State's 57.5 percent fee, MCI charged recipients of prisoners' collect calls exorbitant rates. The arrangement was extremely lucrative for the State. For instance, in 2003 alone the State earned approximately $23.4 million from the commission payments. (R. 93-103) The millions of dollars collected from Appellants and other collect call recipients was tendered by MCI to the State, which deposited it into the general fund. (R. 44, at ¶ 45) The proceeds were then appropriated and earmarked for deposit into DOCS' "Family Benefit Fund." (R. 33, at ¶ 12) The monies deposited in the Fund were used to cover the costs of DOCS' operations wholly unrelated to the maintenance of the prison telephone system. (Id.) For example, the vast majority of the revenue generated in 2003 was spent on services, like medical care, that the State is required by law to provide for prisoners. (R. 93-103) The high cost of collect calls from New York State prisoners between 2003 and 2007 was a direct result of the DOCS tax, and placed a substantial financial burden on Appellants and putative class members, limiting the duration and number of calls that they could accept from prisoners. (R. 31, at ¶ 7; R. 35-38, at ¶¶ 18-24; R. 45-50, at ¶¶ 49-50, 52-63.)

The specific rate structure that is the subject of this challenge was established by an amendment to the 2001 contract effective July 25, 2003; and reflected in an amended tariff filing before the New York State Public Service Commission (hereafter "PSC"), the body authorized to regulate intrastate telephone charges. (R. 42-44, at ¶¶ 39-43; R. 65-92) Under the new structure, Appellants were charged a $3.00 flat fee and a set rate of $0.16/minute on all local and long distance calls from New York State prisoners. (R. 68-69) Of the profit garnered by MCI through this structure, 57.5 percent was remitted to DOCS, and placed in the Family Benefit Fund. (R. 33, at ¶ 12; R. 87) Upon information and belief, this rate structure remained in effect between October of 2003 and March 31, 2007.

The 57.5 percent DOCS tax challenged by Appellants was never authorized by the New York State legislature, nor approved as a legitimate component of MCI's filed telephone rate by the PSC. (R. 30-31, at ¶ 4; R. 34, at ¶14; R. 65-92) After MCI filed revised tariffs setting the new rate, family members, friends, lawyers, and other prisoner call recipients (including Appellants Austin and Office of the Appellate Defender and counsel for Appellants) filed comments on the proposed tariff amendments in a timely manner. (R. 42-43, at ¶¶ 39, 40; R. 125-55) In their comments, Appellants and putative class members requested a hearing on the entire

MCI rate, and directed the PSC's attention to the constitutional and legal infirmities of certain aspects of the prison telephone system. (R. 125-55)

By order effective October 30, 2003, the PSC held that it did not have jurisdiction over the 57.5 percent tax collected by DOCS from MCI. (R. 30, at ¶ 3; R. 43-44, at ¶¶ 41-42; R. 87-90) The PSC reasoned that because DOCS is not a telephone corporation subject to the Public Service Law, the PSC does not have jurisdiction over either the Department or the tax it charges. (R. 88) The PSC called the non-jurisdictional portion of the total charge the "DOCS commission," and referred to the other portion of the rate, the 42.5 percent retained by MCI, as the "jurisdictional rate." (Id.) The PSC reviewed the jurisdictional rate by comparing it to rates MCI charges for analogous services. (Id.) Based upon this comparison and other factors, the PSC approved the jurisdictional rate as "just and reasonable" under the Public Service Law. (R. 89) The PSC did not undertake any review of the reasonableness of the DOCS tax or of the entire combined rate. (R. 65-92) The PSC directed MCI to file a new tariff reflecting the two separate charges: the DOCS tax and MCI's filed rate. (R. 92) Between October 30, 2003 and March 31, 2007 MCI billed Appellants and putative class members for both charges: the 42.5 percent jurisdictional rate that the PSC approved

as a just and reasonable telephone rate, and the unapproved 57.5 percent "DOCS commission." (R. 2-3, at ¶ 4; R. 16-17, at ¶46.)

Two of the groups who filed comments before the PSC, the Public Utilities Law Project and Outside Connections, sought rehearing of the PSC's October 30, 2003 order. (See Ordinary Tariff Filing of MCI WorldCom Communications to Change Maximum Security Rate Plan for New York State Department of Corrections from a Mileage-Sensitive Structure for IntraLATA and InterLATA to a Flat Rate Structure, 03-C-1058, New York Public Service Commission, 2005 N.Y. PUC LEXIS 20, [January 14, 2005]) The petition was denied, and the PSC reaffirmed its determination that it lacked jurisdiction over the DOCS charge. (Id. at *15.)

The DOCS tax served no penological purpose (R. 50-51, at ¶¶ 64-66); rather, it allowed the state to alleviate the burden of funding the state prison system by shifting a disproportionate and punitive share of that cost to the family members and friends of New York State Prisoners. (R. 93-103) Respondent can offer no legitimate justification for requiring recipients of prisoner collect calls to fund general operations of the New York State Prisons. The resulting high telephone rates limited Appellants' ability to speak to their loved ones despite serious public safety and policy consequences – as it is well established that maintaining family and

community ties limits recidivism after release. (R. 45-50, at ¶¶ 50-63.) In response, Appellants filed this action in the Supreme Court, Albany County, in February of 2004 against the New York State Department of Correctional Services and MCI.

Respondents moved to dismiss the case on the ground that it was time barred, and failed to state a claim. On October 22, 2004, the Honorable Justice George B. Ceresia, Jr., granted DOCS' and MCI's Motions to Dismiss as untimely Counts II through VII of the Complaint. (R. 447-49) The court also dismissed Count I, seeking to enforce the PSC Order, on the merits. (R. 449) Appellants filed a timely appeal of the Supreme Court's order. (R. 451) By Decision and Order decided and entered on January 19, 2006, the Appellate Division, Third Department affirmed the decision of the court below. (R. 453-57) Appeal was taken by permission to the Court of Appeals. In February of 2006, the Court of Appeals found each of Appellants' constitutional claims timely, because each was filed within four months of the PSC's October 30, 2003 order. (Walton v. New York State Department of Correctional Services, 8 NY3d 186, 196-97 [2007].) Although Respondents urged the Court of Appeals to affirm dismissal of Appellants' constitutional claims on the alternate theory that the claims were bared by the filed rate doctrine, the Court did not refer to that theory, and

instead remanded to the Supreme Court to "determine the question whether petitioners' constitutional claims state a cause of action." (Id.) In a concurring opinion, Judge Smith joined with the majority to "avoid the constitutional problems" presented should Appellants' "quite substantial" constitutional claims be time-barred only four months after the 2001 MCI-DOCS contract. (Id. at 197-98.)[1]

Upon remand, Respondent once again moved to dismiss the petition for failure to state a claim, and based on the filed rate and primary jurisdiction doctrines. By decision/order/judgment dated December 14, 2007, and entered on January 4, 2008 (R. 5-24), the Supreme Court dismissed each of Appellants' constitutional claims for failure to state a claim.

In granting Respondent's Motion to Dismiss the Petition, the court below erred in four fundamental ways. First, and most importantly, the court held that the PSC misinterpreted the Public Service Law in its October 30, 2003 order, and should have exercised jurisdiction to review the DOCS charge along with the MCI "jurisdictional rate." (R. 12-17) Based on this determination, the court concluded that the DOCS charge is a telephone

[1] As the Court of Appeals affirmed the lower court's dismissal of Count I, enforcement of the PSC decision, the only count against MCI, MCI is no longer a party to the case.

tariff, not an unlawful tax. (R. 18) Appellants will show that PSC's jurisdiction, or lack thereof, over the DOCS charge is not determinative of Count II. The DOCS fee is an unlawful fee that violates separation of powers and substantive due process whether or not it is subject to PSC review. Moreover, if this Court disagrees, Count II should still be reinstated under the alternate argument that the lower court erred in failing to defer to the PSC's reasonable interpretation of the Public Service Law.

Second, the lower court erred by dismissing Appellants' takings claim without analysis. (R. 19) Appellants have pled a taking of their property by DOCS without just compensation, and thus Count III must be reinstated.

Third, the lower court erred by holding that limitations on telephone communication between prisoners and their families, friends, and lawyers do not implicate freedom of speech or association unless all other avenues of communication are foreclosed. (R. 22-23). The law is clear that telephone communication is protected by the New York State Constitution, and Respondent has violated these rights by limiting their enjoyment through imposition of an arbitrary financial burden.

Finally, the court erred by dismissing Appellants' equal protection claim without engaging in any level of scrutiny of Respondent's unlawful classification, but instead holding that Appellants, by virtue of accepting

calls from New York State prisoners, are not similarly situated to any other group. (R. 20-21) Appellants will show that they are similarly situated to non-collect call recipients because the charge they complain of is not related to penological or security needs. Under either rational basis or strict scrutiny review, DOCS' actions here violated Appellants' equal protection rights.

ARGUMENT

I. THE COURT BELOW ERRED IN DISMISSING APPELLANTS' UNLAWFUL TAX CLAIM

The Appellate Court should reverse the Supreme Court and reinstate Appellants' separation of powers and due process challenge to the DOCS tax. Rather than engaging in any constitutional analysis as to the legitimacy of the DOCS charge, the Court below rested after finding the tariff subject to the PSC's review, and coming to the irrelevant conclusion that the PSC's failure to undertake that review "did not operate to transmute the tariff into a tax." (R. at 17) However, Appellants' claim has never relied on PSC action or inaction: a fee or tariff is invalid as an unlawful tax if it operates in violation of the law, whether or not it is subject to review and approval by a regulatory body. The DOCS charge is a tax not because the PSC's refusal to review it somehow made it so, but rather because it fits the judicial definition of a tax: a fee levied to raise revenue that exceeds a reasonable

relationship to the cost of its service. As a tax, it violates separation of powers and substantive due process.

In support of this claim, Appellants allege that (a) MCI remitted to DOCS a "commission" of 57.5 percent of its gross annual revenue from operating the prison telephone system (R. 31, at ¶ 6); (b) to finance this "commission," MCI charged recipients of prisoners' collect calls a surcharge of $3.00 for every call accepted (R. 31-32, at ¶ 7); (c) the surcharge was paid by Appellants to MCI, tendered by MCI to the State, and deposited by the State into the general fund (R. 44, at ¶ 45); (d) these funds were then earmarked and appropriated to DOCS for its "Family Benefit Fund" (R. 33, at ¶ 12); (e) the Family Benefit Fund monies were used to cover the costs of DOCS' operations wholly unrelated to the maintenance of the prison telephone system (R. 44, at ¶ 45); and (f) the DOCS telephone tax was neither authorized by the State Legislature nor approved as a legitimate component of MCI's filed telephone rate by the PSC. (R. 30-31, at ¶4; R. 34, at ¶ 14). Appellants have thus adequately pled the imposition of an unlawful tax.

A. PSC Jurisdiction is not Determinative of Whether the DOCS Surcharge is an Unlawful Tax.

The lower court erred in failing to undertake any analysis of the DOCS charge under established New York precedent distinguishing lawful

fees from unlawful taxes. Rather, the court relied in full on the largely peripheral question of the PSC's jurisdiction over the DOCS surcharge, and dismissed Appellants' claims by reliance on the unsupported assumption that a telephone tariff cannot operate as an unlawful tax. The PSC's inaction is relevant to the case at hand,[2] but it is not determinative of the legality or identity of the DOCS' surcharge, as PSC review and approval cannot insulate a fee from judicial review.

As explained above, in October of 2003 the PSC determined that it lacked jurisdiction over DOCS, and by extension, the DOCS charge, and thus only reviewed and approved the 42.5% "jurisdictional rate" charged and retained by MCI. (R. 43, at ¶ 41; R. 92) Without prompting by either party, the Supreme Court reviewed the PSC's interpretation of Public Service Law § 97 and found to the contrary, that the "PSC possessed full authority to review the proposed rates to be paid to MCI." (R. 17) The court below concluded that "[t]he PSC's failure to fulfill its statutory responsibilities under the Public Service Law did not operate to transform the DOCS commission into a tax" and thus Appellants failed to state a claim for relief.

[2] The PSC has expertise to recognize and review telephone rates. For this reason, its determination that that the DOCS' charge is not a lawful telephone rate supports Appellants' claim.

The lower court's analysis lacks merit because it ignores the relevant legal issue. New York State courts have never distinguished lawful fees from unlawful taxes by virtue of agency power of review. Agency jurisdiction may affect the timing or sequence of judicial review, but it does not magically transform a fee to a tax or a tax to a fee, nor does it insulate a tariff from constitutional challenge. (Cf. Capital Tel. Co. v. Pattersonville Tel. Co., 56 NY2d 11, 18 [1982] ("The fact that the charges made by NYT and Pattersonville are based upon tariffs filed by those public utilities does not protect the utilities or others acting in combination with them from antitrust liability.")).

In Watergate II Apartments v. Buffalo Sewer Authority, 46 NY2d 52, 55 [1978], for example, the Court of Appeals examined sewer fees charged to a redevelopment company by a city agency. There was no question as to the agency's authorization of the fee: the agency had power under Pub. Auth. Law § 1180 to establish a schedule of rates, rentals or charges, to be called "sewer rents," which had to be based upon either the amount of consumption of water on the premises or the number of persons served by the facilities on those premises. (Id. at 56.) Yet still, the court undertook an analysis of whether the charge in question bore "a direct relationship to the broader reality of the services and benefits actually rendered to property

owners as a whole and thus may properly be regarded as rents rather than taxes." (Id. at 61.)

Here, Appellants challenge a charge levied by the Department of Correctional Services as an unlawful tax. Whether or not the PSC had [and failed to use] the power to review the charge and determine if it is just and reasonable does not define the fee as a lawful charge or unlawful tax, nor should it prevent the judiciary from engaging in this analysis. To hold otherwise would work a profound injustice, as Appellants, through no fault of their own, would be barred from any judicial review of the DOCS charge. (Cf. Belt Line R. Corp. v. Newton, 273 F 272, 275 [SDNY 1921] affd sub nomine, Banton v. Belt Line R. Corp., 268 US 413 [1925] (court must review claims of a confiscatory rate where the Public Service Commission "by reason of neglect or refusal" has failed to render a decision on the issue)).

B. The DOCS Surcharge is a Tax

Whether or not the PSC had jurisdiction over the DOCS tax is irrelevant to Appellants' claim—any fee which is levied to raise revenue and exceeds a reasonable relationship to the cost of its service is a tax. (See American Ins. Assn. v. Lewis, 50 NY2d 617, 622-23 [1980] (holding "capping provision" a tax, rather than a fee, when it bears no relation to the

cost to the State of administering the program); Matter of Torsoe Bros. Constr. Corp. v. Board of Trustees of Inc. Vil. of Monroe, 49 AD2d 461, 465 [2d Dept 1975] ("To the extent that fees charged are exacted for revenue purposes or to offset the cost of general governmental functions they are invalid as an unauthorized tax"); New York Tel. Co. v. City of Amsterdam, 200 AD2d 315, 318 [3d Dept 1994] (holding that an excavation permit "fee" which is disproportionate to associated costs and utilized as a revenue-generating measure is an unlawful tax)).

Valid fees, as distinguished from taxes, are intended to defray the costs of the services to which they are attached. (Jewish Reconstructionist Synagogue of N. Shore v. Incorporated Vil. of Roslyn Harbor, 40 NY2d 158, 163 [1976] (User fees must be "reasonably necessary to the accomplishment" of the authorized service and "assessed or estimated on the basis of reliable factual studies or statistics"); Suffolk County Bldrs. Assn. v. County of Suffolk, 46 NY2d 613 [1979]). In addition to the required connection between a user fee and the actual cost of the service provided, user fees must -- by definition -- represent "a visitation of the costs of special services upon the one who derives a benefit from them," (Jewish Reconstructionist Synagogue of N. Shore, 40 NY2d at 162) and must be used to finance the same service to which they are pegged, not merely any

service that might indirectly benefit the fee-payers. (Id. at 164 – 165; American Ins. Assn., 50 NY2d at 623.)

The DOCS tax fails each of these requirements. DOCS used as little as 1.5 percent of the revenue it received from the surcharge to cover the costs of operating the prison telephone system. (R. 102) While a miniscule portion of the Family Benefit Fund was used for the direct benefit of Appellants and others who receive collect calls from prisoners, almost all of the money collected through the DOCS tax paid for unrelated services that would otherwise have to be paid for out of the State's or DOCS' general budget. (R. 93-103) As Respondent has explained, "while [the DOCS tax monies spent on medical care] are certainly legitimate state expenditures, the fact they are made from the [Family Benefit Fund] reduces the taxpayers' burden." (R. 102) Because the DOCS surcharge was not at all related to the necessary costs to DOCS of providing prison telephone service, and the monies Appellants paid funded unrelated programs that are beneficial to all New Yorkers, the surcharge is an unlawful tax.

C. The DOCS Taxis Also Unlawful Because it was Levied Without Legislative Authorization.

As a tax, the DOCS surcharge violates the New York State Constitution because it was never authorized by the legislature. In New York "the exclusive power of taxation is lodged in the State Legislature."

(Castle Oil Corp. v. City of New York, 89 NY2d 334, 338 [1996] (citing N.Y. Const., Art. XVI, §1)). While the taxing power may be delegated to "legislative bodies of municipalities and quasi-municipal corporations . . . [t]he power to tax may not . . . be delegated to administrative agencies or other governmental departments." (Greater Poughkeepsie Lib. Dist. v. Town of Poughkeepsie, 81 NY2d 574, 580 [1993] (internal citations omitted, emphasis added)). "Only after the Legislature has, by clear statutory mandate, levied a tax on a particular activity, and has set the rate of that tax, may it delegate the power to assess and collect the tax to an agency." (Yonkers Racing Corp. v. State of New York, 131 AD2d 565, 566 [2d Dept 1987]). DOCS can neither point to a law delegating to it general taxing authority nor show that the Legislature has provided it with specific authority to levy taxes upon prisoners' families as a means of raising revenue for the State's general operations. Therefore, its taxing activities here are *ultra vires* and an unconstitutional usurpation of legislative authority under Article XVI, §1. (Yonkers Racing Corp., 131 AD2d at 567).

Even if Respondent could point to legislation granting DOCS the authority to impose this tax upon Appellants, in the absence of specific legislative guidelines designating the property to be taxed and delineating the tax rate as well as the proportionate share of the tax to be raised from

different groups, any exercise of such authority by DOCS would still be unconstitutional. Given that the prison telephone tax is wholly unauthorized, it follows that there is not now – nor has there ever been – any delineation of the appropriate tax rate or any guidelines governing the parameters of any tax to be levied. The courts have consistently concluded that such schemes violate due process requirements. (See Yonkers Racing Corp., 131 AD2d at 566 (holding that any tax imposed pursuant to a limited agency delegation, "must be accompanied by proper guidelines set by the legislature"); Matter of Rego Prop. Corp. v. Finance Admin. of City of New York, 102 Misc 2d 641, 647 [Sup Ct Queens Co 1980] ("Delegating to an administrative agency the power to fix the ratio of assessment, without formulating a definite and intelligible standard to guide the agency in making its determination, constitutes an unconstitutional delegation of legislative power.") (internal quotation omitted)).

The record before this Court shows clearly that DOCS unlawfully exercised taxation power. In 2001, DOCS signed a new contract that altered the DOCS surcharge, changing the fees levied upon individuals from 60% to 57.5%, without legislative authorization. (R. 31, at ¶¶ 5-6 & n.1.) In 2004, DOCS and MCI changed the rate structure, shifting the burden of funding the commissions from one group of prison call recipients to another.

(R. 68-69) Upon information and belief, DOCS ceased collection of the tax all together on April 1, 2007. Each of these alterations in taxation rates was made without legislative authorization or debate.

D. **The DOCS' Tax Violates Due Process.**

Beyond DOCS' *ultra vires* exercise of taxation power and its unfounded claim to the power to levy taxes in any amount it sees fit, it has also violated the well-established substantive due process principle that "assessments for public improvements laid upon [specific individuals] are ordinarily constitutional only if based on benefits received by them." (HBP Assocs. v. Marsh, 893 F Supp 271, 278-279 [SDNY 1995]; see also Norwood v. Baker, 172 US 269, 279 [1898]; Matter of Aldens, Inc. v. Tully, 49 NY2d 525, 534 [1980] ("In determining whether a state tax falls within the confines of the due process clause ... the 'simple but controlling question is whether the State has given anything for which it can ask return")(quoting Wisconsin v. J.C. Penney Co., 311 US 435, 444 [1940]); Board of Ed. of Cent. School Dist. No. 2 v. Village of Alexander, 197 Misc 814, 820 [Sup Ct Genesee Co 1949] (a special assessment is based upon the theory that it represents a payment for special benefits accruing to the property as a result of the local improvement and, unless a benefit can be found, no special assessment may be sustained).)

The tax monies Appellants paid under DOCS' scheme were added to the general State fund to cover DOCS' overall operating costs, compensating for what otherwise must be funded by general tax dollars or would result in a budgetary shortfall. (R. 33-34, at ¶12; R. 93-103) Appellants received no commensurate benefit from the operations of the State Correctional System funded by the tax; they merely benefited as did all State residents. Therefore, the distinction drawn by the tax scheme between Appellants and other State taxpayers for the purpose of serving the Department's general revenue raising objective was unconstitutionally baseless and irrational. (See Foss v. City of Rochester, 65 NY2d 247, 256-257 [1985] (Holding unconstitutional a property tax scheme to tax properties differently based on geography, without justification).)

The Department's revenue raising scheme also violates the prohibition against double taxation by imposing a tax on Appellants in addition to the state taxes they already pay that are apportioned through the budgetary process to DOCS. "Double taxation is prohibited unless specifically authorized by the legislature." (Radio Common Carriers of N.Y. v. State of New York, 158 Misc 2d 695, 701 [Sup Ct NY Co 1993] (citing Sage Realty Corp. v. O'Cleireacain, 185 AD2d 188 [1992])). As the Supreme Court observed in Tennessee v. Whitworth, (117 US 129, 137 [1886]):

> Justice requires the burdens of government shall as far as practicable be laid equally on all, and, if property is taxed once in one way, it would ordinarily be wrong to tax it again in another way, when the burden of both taxes falls on the same person. Sometimes tax laws have that effect; but if they do, it is because the legislation was unmistakably so enacted. All presumptions are against such an imposition.

As Appellants have properly alleged that the DOCS tax is unlawful, *ultra vires*, and violates due process, this Court must reverse the Supreme Court and reinstate Count II of the Petition.

E. The PSC's Determination is Entitled to Deference by the Courts.

As explained above, this Court need not review the PSC's jurisdictional determination to properly analyze Appellants' claim. However, even if the Court disagrees, and affirms the lower court's holding that a tariff subject to PSC review cannot violate the New York State Constitution as an unlegislated tax, the lower court's decision must still be reversed on the alternative ground that the Supreme Court erred in failing to defer to the PSC's well-reasoned determination of its own jurisdiction.

It is "well settled that the construction given statutes and regulations by the agency responsible for their administration, if not irrational or unreasonable, should be upheld." (Matter of Bernstein v. Toia, 43 NY2d 437, 448 [1977] (quoting Matter of Howard v Wyman, 28 NY2d 434, 438

[1971])); People v. County Tansp. Co. Inc., 278 App Div 472, 474 [3d Dept 1951] ("Unless the statute clearly prohibits, it, the interpretation uniformly adopted and enforced by the agency charged with the administration thereof, should be sustained.")). The PSC's determination that it lacked jurisdiction over the DOCS charge was neither irrational nor unreasonable, and should be accorded deference by State courts. (See e.g. Matter of New York State Cable Tel. Assn. v. Public Serv. Commn., 87 AD2d 288, 289 [3d Dept 1982] (conducting rational basis review of determination by PSC that it lacked jurisdiction to regulate rates charged by private company); Powell v. Colorado Public Utilities Commn., 956 P2d 608, 614-15 [Sup Ct Colo. 1998] (court should defer to PUC's finding that it lacked jurisdiction over Colorado Department of Corrections' collection of surcharge for inmate calls)).

In finding that the PSC has jurisdiction over the DOCS charge, the court relied primarily on what it called the "essence" of Public Service Law § 97(1) – that the PSC

> shall...determine the just and reasonable rates to be thereafter observed and in force as the maximum to be charged ...notwithstanding that a higher or lower rate, charge or rental has been theretofore prescribed by ...by [sic] general or special statute, contract, grant, franchise condition consent or other agreement.

(R. 12-13 (quoting Public Service Law § 97(1)). This "distillation" however, obscures the jurisdictional limit of § 97[1]: by its terms the law only applies to "rates, charges, tolls or rentals demanded, exacted, charged or collected by any ... *telephone corporation subject to its jurisdiction...*" (Public Service Law § 97(1), emphasis added.) The PSC's jurisdiction, in turn, applies to "persons or corporations owning, leasing, or operating any ... telephone line" wholly or partly within the State of New York." (Public Service Law § 5(1)(d)).

The court cited no precedent and undertook no analysis to counter the PSC's determination that "DOCS is not providing telephone service pursuant to the Public Service Law" and is thus not a "telephone corporation" subject to the jurisdiction of the PSC. The PSC's jurisdictional determination, on the other hand, is consistent with precedent in New York and other states. (See Matter of New York State Cable Tel. Assn., 87 AD2d at 290-91 (holding that Empire City Subway Company's contract to provide space in its conduits to a telephone corporation does not make it a "telephone corporation" subject to PSC jurisdiction, and thus the PSC cannot regulate the rates Empire charges for that space); see also Powell, 956 P2d at 614 (affirming determination by Public Utilities Commission that Colorado Department of Corrections is not a "telephone corporation," does not

provide "telecommunications service" and thus is not subject to commission jurisdiction); Alexander v. Cottey, 801 NE2d 651, 660 [Ct App Ind. 2004] (holding the court, rather than the Indiana Utility Regulatory Commission, was the appropriate body to review contract between Sheriff and utility regarding inmate telephone program.))

Ignoring the PSC's reasoning and relevant precedent, the lower court relied on several New York State cases clearly distinguishable from the case at hand. The court cited Matter of General Telephone Company of Upstate New York v. Lundy, 17 NY2d 373 [1966], for the proposition that the PSC may review and disallow "contractual" overcharges (R. 14-15), but Lundy says nothing as to the PSC's jurisdiction over the DOCS fee. Rather, in Lundy the Court of Appeals recognized the PSC's authority to review a utility's "operating expenses" after it determined that the utility was being overcharged for telephone equipment supplied by its affiliates. (Lundy, 17 NY2d at 377, 379-380, 381-82). In contrast, MCI and DOCS have an arms length relationship, and neither MCI nor DOCS has claimed that the DOCS commission is a legitimate operating expense. The PSC, in its expertise, declined to treat the DOCS charge as an "operating expense"—a logical choice, given that the fee is completely unrelated to the cost to MCI of

providing telephone service. This logical choice is entitled to deference by the Court.

New York Telephone Company v. State of NY, Division of State Police (85 AD2d 803 [3d Dept 1981]), also relied upon by the lower court (R. 16-17), is equally unavailing. That case involved a contract for the New York Telephone Company to provide telecommunications services to the State Police at rates approved by the Public Service Commission. (Id. at 803.) The PSC had clear jurisdiction to examine rates charged by New York Telephone for the provision of telephone service (see Public Service Law 97(1)); and as the State Police charged no separate fee, nor provided any telephone service, the PSC had no call to consider its power to review their actions.

Finally, the Supreme Court found further support for its jurisdictional analysis through an illogical misreading of the Court of Appeals decision reinstating Appellants' constitutional claims as timely. (R. 16-17). To determine when Appellants' claims accrued, the Court of Appeals was called upon to determine the time at which Appellants' administrative remedies were exhausted. (Walton, 8 NY3d at 194-96.) The Court found a "pragmatic" approach necessary, and refused to rely on hindsight: Appellants could not have know prior to seeking relief from the PSC that the

PSC would deny jurisdiction, thus their administrative remedies were not exhausted prior to the PSC's disavowal of jurisdiction. (Id. at 196.) In coming to this conclusion, the Court explained that "[w]hile the PSC concluded that it did not have jurisdiction over DOCS, *it could have determined* that MCI's call rate and surcharge as a whole were 'unjust ... and ordered them to be lowered." (Id. (emphasis added)). The lower court treated this statement as a legal determination that the PSC erred in disavowing jurisdiction over the DOCS surcharge—it is clearly nothing of the sort. The Court of Appeals' reasoning appears in a discussion of accrual, not jurisdiction, and is merely an acknowledgment that Appellants could not have known ahead of time which way the PSC would rule.

In conclusion, the Public Service Commission exercised its expertise in determining that DOCS is not a "telephone corporation" subject to PSC regulation, and thus the commission lacked jurisdiction to review the DOCS charge. This finding is a reasonable interpretation of the Public Service Law, in accordance with New York State precedent, and should not be set aside by the court. Moreover, the Supreme Court erred by focusing on the non-determinative question of the PSC's jurisdiction over the DOCS charge without conducting any analysis of the legality of that charge. For either of these reasons, Count Two of the petition should be reinstated.

II. THE COURT BELOW ERRED IN DISMISSING APPELLANTS' TAKINGS CLAIM

By Count III of the Petition, Appellants seek a declaration that the DOCS tax worked an unlawful taking of their property. (R. 56-57, at ¶¶ 90 – 94.) The takings clause of Article I, § 7(a) of the New York State Constitution prohibits confiscation of private property for public use without just compensation. Specifically, Appellants allege that the prison telephone tax: (1) worked a taking of their property – the money they pay to cover the DOCS tax (R. 31-32, at ¶¶ 7; R. 35-37, at ¶¶ 18-22); (2) for a public purpose – funding a portion of the Department's general operating costs (R. 44, at ¶45; R. 93-103); and (3) without any compensation.

The court dismissed Appellants' taking claim without citation to a single New York case. Rather, the court relied on two out of state challenges to similar prison telephone systems, neither of which cited a single case before dismissing the claim out of hand. (R. 19; McGuire v. Ameritech Services, Inc., 253 FSupp2d 988 1004 [SD Ohio 2003]; Arsberry v. State of Illinois, 244 F3d 558, 565 [7th Cir 2001]).

Appellants' claim is worthy of more serious consideration. The takings clause of the New York State Constitution applies to monetary interests, (Alliance of Am. Insurers v. Chu, 77 NY2d 573, 584-585 [1991];

see also Webb's Fabulous Pharms. v. Beckwith, 449 US 155, 160 [1980]), that cannot be taken for public purpose without just compensation. In Webb, for example, the Supreme Court considered a Florida statue the allowed the county clerk to retain interest made off an interpleader fund deposited with the clerk. (Id. at 155). A separate statute required depositors to pay a fee for the clerk's services in receiving the fund into the registry. (Id. at 155-56). After finding that the depositor had a property interest in the money generated from the account, that Court invalidated the statue as "a forced contribution to general governmental revenues... not reasonably related to the costs of using the courts." (Id. at 163). The Supreme Court explained that the "Fifth Amendment's guarantee ... was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be born by the public as a whole. (Id. (quoting Armstrong v. United States, 364 US 40, 49 [1960])).

Like the depositor in Webb, Appellants received nothing of proportional value in compensation for DOCS' taking of their property for the public good. For this reason, Appellants' takings claim should be reinstated.

III. THE COURT BELOW ERRED IN DISMISSING APPELLANTS' CLAIM THAT THE DOCS TAX VIOLATES APPELLANTS' RIGHT TO FREE SPEECH AND ASSOCIATION.

In Count V of the Petition, Appellants allege that the DOCS tax violates the free speech and associational rights secured by the New York State Constitution, Article I, §8 because it: (1) imposed a fee on Appellants' expressive and associational activity that bore no relationship to related regulatory costs (R. 33-34, at ¶ 12), and (2) burdened their ability to maintain contact with incarcerated family members, friends and clients without legitimate penological purpose. (R. 33-34, at ¶ 12; R. 46-51, at ¶¶ 52-64) The lower court erred in dismissing this claim.

A. Respondent's Actions Infringe on Constitutionally Protected Activity

Though the United States Supreme Court has long recognized the rights of prisoners and free people to communicate with one another, the court below concluded that limiting telephone access does not implicate freedom of speech, because Appellants have not alleged "any specific curtailment of the full spectrum of methods of communication available between inmates and their family, friends, and attorneys." (R. 23) First, as a factual matter, this is incorrect (See e.g. R. 46, at ¶ 52 (alleging Ms. Walton is not able to visit her son and nephew more than once a month because of

the long distance (over 350 miles) between her home and their prison, her physical disability, and her economic circumstances); R. 48-49, at ¶ 58 (alleging Joann Harris in unable to visit her cousin, incarcerated seven hours away, due to time and expense)). Each Appellant alleges that telephone communication is their *primary* means of communication, and that Respondent's charge has severely limited that means (R. 46-50, at ¶¶ 52-63). There are no facts in the record to suggest that other potential avenues of communication could substitute for real-time conversation, and it is inappropriate to assume the existence of such avenues upon a motion to dismiss.

Moreover, restriction on Appellants' telephone access implicates freedom of speech regardless of the availability of other avenues of communication. As the Supreme Court explained in Kleindienst v Mandel, that communication is available through other mediums may play a part in free speech balancing, but "the existence of other alternatives [does not] extinguish[] altogether any constitutional interest on the part of the [plaintiffs] in this particular form of access." (408 US 753, 765 [1972] (rejecting government's argument that limitations on face-to-face communication did not implicate the First Amendment when book, speeches, telephone and tapes provided other means of communication)).

In declining to engage in any First Amendment balancing whatsoever, the court below sought support from several lawsuits, none of which are binding on this court. For example, the court below relied heavily on Valdez v Rosenbaum (302 F3d 1039 [9th Cir 2002]), claiming that the case had close similarities to the one at bar. But that is not an accurate portrayal. In Valdez, the plaintiff was suspected of being the organizer of a large-scale drug-smuggling conspiracy. (302 F3d at 1042.) His telephone access was temporarily restricted for four months in order to prevent him from tipping off his co-conspirators about recently-issued indictments, and thereby ensure the safety of the law enforcement personnel who would be seeking to serve the arrest warrants. (Id.) The Ninth Circuit upheld summary judgment against the prisoner after balancing the state's legitimate interest against the narrow restrictions imposed. (Id. at 1049.) In Perez v. Federal Bureau of Prisons (229 Fed. Appx. 55, 57-58 [3rd Cir 2007]) and Benzel v. Grammar (869 F2d 1105, 1108 [8th Cir 1989] cert denied, 493 U.S. 895), the courts utilized a similar balancing analysis to evaluate the limitations imposed in each respective case, weighing the legitimate security interests of the penological institution against the use of a telephone for communication with relatives and friends. Here, Appellants have alleged the DOCS

surcharge served absolutely no legitimate government interest whatsoever, and yet the lower court neglected to conduct any balancing test at all.[3]

The court below curiously cites Lopez v. Reyes (692 F2d 15, 17 [5th Cir 1982]) to buttress its opinion. In Lopez, the plaintiff was transferred to the local jail to serve as a witness in a criminal case. (692 F2d at 17.) He had been classified as a high-escape risk with a history of violent propensities. (Id.) While detained at the jail, he asserted that he had been denied the right to telephone his attorney. (Id.) The court stated that a prisoner in maximum security has no right to *unlimited* telephone use, and did not credit plaintiff's factual allegations that he was actually denied access to counsel by telephone. (Id.)

The lower court's reliance on Fillmore v Ordonez (829 F Supp 1544, 1563-64 [D Kan 1993], affd 17 F3d 1436 [10th Cir 1994]), is equally misplaced, as the case addresses a pretrial detainees' Sixth Amendment and access to court challenge to telephone restrictions and monitoring. There is no mention or analysis of his First Amendment right to free speech.

Likewise, the court below looked to United States v Footman (215 F3d 145 [1st Cir 2000]), which deals with a wholly distinguishable set of

[3]In Illies v Maricopa County, 2007 US Dist LEXIS 35945 [D AZ 2007], the Court relied entirely on Valdez to dismiss the *pro se* plaintiffs' complaint without analysis. (2007 US Dist LEXIS 35945 at *5.)

circumstances. In Footman, the court considered whether a criminal defendant's consent to interception of his calls under Title III was coerced or voluntary (215 F3d at 155). There was no freedom of speech claim raised or addressed in that action. Roy v Stanley (110 Fed Appx 139, 141 [1st Cir 2004]) simply cites Footman to justify its holding in a case involving an inmate's attempts to use the telephone to conduct a business from inside prison. The court in Roy specifically distinguished prisoner allegations regarding telephone communication with family and friends. (Id.)

Arsberry v State of Illinois (244 F3d 558 [7th Cir 2001]), also cited by the court below, is equally unavailing. In Arsberry, Judge Posner held that, while telephone communication in general may implicate the First Amendment, it would be "extremely rare for inmates and their callers to use the telephone for this purpose." (Id. at 564). Judge Posner cites no authority to distinguish between the protected communications of free people and the undeserving communications of prisoners and their loved ones. Nor does the Arsberry court address associational rights. There is nothing in New York precedent to support such a discriminatory analysis.

Despite canvassing these largely irrelevant and poorly reasoned opinions, the court below wholly ignored the Southern District of New York's recent analysis of an identical freedom of speech claim. In Byrd v

Goord (2005 US Dist LEXIS 18544 [SDNY 2005]), the court did not require plaintiffs to allege that the DOCS surcharge kept them from communicating at all. Indeed, in upholding First Amendment claims identical to those advanced in this case, the court cited allegations by the mother of a prisoner who kept her phone bills down by "limiting the duration of [her son's] calls" as the type of facts that, if proven, would establish a freedom of speech claim (Byrd, 2005 US Dist LEXIS 18544, at *26 n 9; see also, Johnson v California, 207 F3d 650, 656 [9th Cir 2000]) (prisoners have First Amendment right to reasonable telephone access.)

In conclusion, Appellants have made sufficient allegations describing the burden the DOCS tax places on their speech to survive a motion to dismiss. (R. 46-50, at ¶¶ 52-63). Any dispute as to the veracity of this burden presents a question of fact not properly determined by the lower court at this early stage.

B. Respondent's Charge Imposes an Unconstitutional Burden on Appellants' Speech and Association

Because the lower court erroneously held that Respondent's charge did not implicate Appellants' freedom of speech and association, it did not consider whether Appellants have adequately alleged a constitutional violation. They have, and thus this Court should reverse.

First, the DOCS tax violated Appellants' speech and association rights by placing an arbitrary financial burden on protected speech. The state's power to impose burdens and limitations on a citizen's free speech and association rights is limited, "not by mere rationality of purpose but by a more stringent requirement of real necessity." (People v Taub, 37 NY2d 530, 532 [1975] (citing Cox v Louisiana, 379 US 536, 550-558 [1965])). Therefore, while government may assess a fee to recoup the costs incurred in regulating expressive activity (Cox v New Hampshire, 312 US 569, 577 [1941]), it may not impose a fee that bears no relationship to those regulatory costs. (See Murdock v Pennsylvania, 319 US 105 [1943]; cf. Matter of Steinbeck v Gerosa, 4 NY2d 302, 315 [1958] (holding privilege tax applied to novelist did not violate freedom of speech or press as the author made no allegations that "the amount levied was arbitrary or harsh in nature, or oppressive or confiscatory, or that his freedom to write or disseminate his writings had been actually curtailed by the tax"); see also Matter of Children of Bedford v Petromelis, 77 NY2d 713, 725 [1991])).

Thus, in Murdock, the United States Supreme Court struck down a licensing fee for distributing literature because it was not "imposed as a regulatory measure to defray the expenses of policing the activities in question," but rather served as "a flat license tax levied and collected as a

condition to the pursuit of activities whose enjoyment is guaranteed by the First Amendment." (319 US at 113-14). Since Murdock, courts have consistently applied its simple rule -- defraying cost is permissible, taxing speech is not -- in striking down similar measures.[4] Here, the record is clear that the DOCS surcharge imposed on inmate collect calls bore minimal relationship to the regulatory costs DOCS incurred in providing the prison telephone service (R. 33-34, at ¶ 12). Therefore, it is an impermissible "flat tax imposed on the exercise of [free speech rights]" (Murdock, 319 US at 113).

The DOCS tax also burdened Appellants' rights to familial and marital association, protected by the New York Constitution, by restricting Appellants' ability to communicate with family members in prison. (See e.g. Sinhogar v Parry, 53 NY2d 424, 443 [1981]). Because "[i]t is through the family that we inculcate and pass down many of our most cherished values"

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[4] (See e.g. E. Conn. Citizens Action Group v Powers, 723 F2d 1050, 1056 [2d Cir 1983] (invalidating fee charged to hold demonstration on abandoned railway because state agency had offered no evidence that fee was necessary to defray "cost incurred or to be incurred . . . for processing plaintiffs' request to use the property"); Sentinel Commc'ns Co. v Watts, 936 F2d 1189, 1205 [11th Cir 1991] (holding that "[t]he government may not profit by imposing licensing or permit fees on the exercise of first amendment rights ... and is prohibited from raising revenue under the guise of defraying its administrative costs"); Fernandes v Limmer, 663 F2d 619, 633 [5th Cir 1981] (striking down license fee for literature distribution at airport, in part because defendants failed to show that fee matched regulatory costs incurred); Baldwin v Redwood City, 540 F2d 1360, 1371 [9th Cir 1976] (striking down fees on postering in part because "[t]he absence of apportionment suggests that the fee is not in fact reimbursement for the cost of inspection but an unconstitutional tax upon the exercise of First Amendment rights").)

(Moore v City of East Cleveland, 431 US 494, 503-504 [1977]), the states are required to protect the "[i]ntegrity of the family unit." (Stanley v Illinois, 405 US 645, 651 [1972].) Appellants' right to familial association survives the incarceration of their loved ones, because attributes of the family relationship – expressions of emotional support, decision-making regarding family obligations and child-rearing, and expectations of the prisoner's reintegration into the family – exist despite the fact of imprisonment. (Turner v Safley, 482 US 78, 95-97 [1987].)

For the above reasons, Appellants have adequately pled a violation of their right to free speech and association, and Count V should be reinstated.

IV. THE COURT BELOW ERRED IN DISMISSING APPELLANTS' CLAIM THAT THE DOCS TAX VIOLATES APPELLANTS' RIGHT TO EQUAL PROTECTION UNDER THE LAW.

In Count IV, Appellants allege that Respondent's arbitrary imposition of the DOCS tax upon them alone violates their right to equal protection under the law. (See Matter of K.L., 1 NY3d 362, 486 [2004]; Matter of Huckaby v New York State Div. of Tax Appeals, Tax Appeals Trib., 4 NY3d 427, 439 [2005] (in the taxation context, the equal protection clause forbids distinctions that are not based on plausible policy goals or are so attenuated from their goal "as to render the distinction arbitrary or irrational") (citing Norlinger v Hahn, 505 US 1, 1 [1992])).

The court below held that the imposition of the DOCS tax did not constitute an improper classification, and thus dismissed Appellants' claim without applying either rational basis review or strict scrutiny. This was in error. First, the lower court erred by blindly relying on non-binding precedent disregarding the existence of similarly situated groups without analyzing how Appellants are differently situated, or considering favorable precedent. Second, as explained above, Appellants have alleged violations of their fundamental rights to freedom of speech and association (see Section III, supra), thus the classification here must be subjected to strict scrutiny. Finally, Appellants' claim survives even under rational basis review.

First, the Supreme Court below erroneously determined that Appellants have not adequately alleged an equal protection violation because Appellants alone receive collect calls from prisoners and therefore they are not similarly situated to individuals who do not receive collect calls. (R. 20-21) However, the lower court did not undertake any examination of how Appellants' need to speak with New York State prisoners situates them differently from other New York State residents with respect to funding and operation of New York State prison programs wholly separate from the telephone system. Only 1.5% of the tax revenue was used to operate the inmate phone system. (R. 93-103) As such, the tax levied on Appellants

bears virtually no relation to the benefit they receive through operation of the prison telephone system, or to the security needs of that system. (Id.)

Indeed, in Byrd v Goord, (No. 00 Civ. 2135, 2005 US Dist LEXIS 18544, at *31-33 [SDNY Aug. 29, 2005]), the Southern District of New York upheld an identical claim against the State's motion to dismiss after finding that plaintiffs were similarly situated to non-prisoner collect call recipients. As the Byrd court recognized, the DOCS tax had no relationship to security or functioning of the institution. (Id. at *31.) Because 98.5% of the DOCS tax was used to fund programs unconnected to the prison telephone system or the security needs of that system, there is no rational basis to justify placing the burden of the surcharge on individuals who accept collect calls from prisoners. (See id. at * 31-32).

Along with failing to undertake any analysis, the Supreme Court ignored Byrd completely. Instead, it relied on non-binding precedent involving challenges to prison telephone systems in other states. This reliance was misplaced. In Daleure v Kentucky, (119 FSupp 2d 683, 691 [WD Ky 2000]), the Western District of Kentucky differentiated between prisoner collect call recipients and other collect call recipients on the assumption that that the telephone surcharge at issue implicated security concerns: "[i]f security precautions affect the telephone services that are

available to inmates, this will inevitably impact the inmate call recipients." Both McGuire v Ameritech Servs., Inc., (253 FSupp 2d 988, 1000-1001 [SD Ohio 2003]) and Gilmore v County of Douglas, (406 F3d 935 [8th Cir 2005]) simply rely on the reasoning of Daleure. Here, Appellants have alleged that the DOCS tax was completely unrelated to security needs (R. 32-34, at ¶¶ 8, 12; R. 50-51, at ¶¶ 64-66). This allegation is supported by the undisputed fact that DOCS spent as little as 1.5% of the revenue it raised on maintenance of the telephone system (R. at 93-103), and moreover, must be taken as true upon a motion to dismiss. (Byrd v Goord, No. 00 Civ 2135, 2005 US Dist LEXIS 18544, at *26 [SDNY Aug. 29, 2005].) Because the DOCS tax was completely unrelated to security concerns, such concerns cannot justify a holding that Appellants are differently situated than other collect-call recipients.

As Appellants have adequately alleged a similarly situated group, this court must determine whether Respondent's classification violates equal protection. When a governmental classification that burdens fundamental rights is challenged on equal protection grounds, "it must withstand strict scrutiny and is void unless necessary to promote a compelling State interest and narrowly tailored to achieve that purpose." (Golden v Clark, 76 NY2d 618, 623 [1990].) Here, as fully explained above (see Sections I-D and III,

supra), the telephone tax violates Appellants' right to due process and unreasonably burdened their ability to freely speak and associate with their loved ones and clients. This Court has recognized that free speech and association are among the fundamental rights that, when burdened by a governmental act, trigger strict scrutiny of that act. (Golden, 76 NY2d at 627-628). New York courts also recognize that "the creation and sustenance of a family" is a constitutionally protected associational right. (People v Rodriguez, 159 Misc 2d 1065, 1070 [1993] (citing series of U.S. Supreme Court cases); Sinhogar v Parry, 53 NY2d 424, 443 [1981]). For this reason, DOCS' discriminatory treatment of Appellants must be subjected to strict scrutiny.

Moreover, because 98.5% of the DOCS tax was used to fund programs unrelated to telephone calls, or the security needs of the telephone system, imposition of the DOCS tax on Appellants was completely arbitrary, and cannot even pass rational basis review, much less strict scrutiny. (See Byrd, 2005 U.S. Dist. LEXIS 18544, at *31); see also Allegheny Pittsburgh Coal Co. v County Comm'r, 488 US 336, 345 [1989] (re-valuing property for purposes of setting tax assessment at the time of recent sales violated equal protection because there was no justification for not also re-valuing similar property); Corvetti v Town of Lake Pleasant, 227 AD2d 821, 823 [3d

Dept 1996] (equal protection violated when property taxes of new residents arbitrarily increased subject to "welcome neighbor" policy); Matter of Chasalow v Board of Assessors of County of Nassau, 202 AD2d 499, 501 [2d Dept 1994] ("gross disparities" in taxation can violate equal protection)). Here, DOCS arbitrarily imposed a tax upon Appellants that it did not impose on other taxpayers. This tax was unauthorized by the Legislature, and cannot be justified by any legitimate state interest.

Even though the DOCS tax appears to have been used for legitimate correctional programs, the method DOCS employed to fund those programs is improper and unrelated to any legitimate State interest. (See Metropolitan Life Ins. Co. v Ward, 470 US 869, 881 [1985] (state law which sought to promote domestic business by discriminating against nonresident competitors could not be said to advance a legitimate state purpose). The burden of supporting a general public welfare program cannot be imposed disproportionately on particular individuals. (See Manocherian v Lenox Hill Hosp., 84 NY2d 385, 396-97 [1994]; 19th St. Assoc. v State of New York, 79 NY2d 434, 443 [1992]).

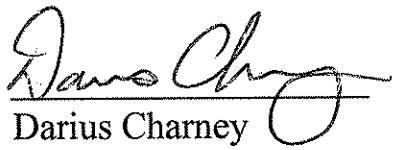
For the foregoing reasons, Appellants have adequately pled an equal protection violation and Count IV should be reinstated.

CONCLUSION

For all of the foregoing reasons, the Supreme Court erred in dismissing Counts II through V of Plaintiffs' Complaint. We therefore respectfully request that this Court reverse the judgment of the Supreme Court and direct that trial be held as promptly as possible.

Dated: March 31, 2008
New York, NY

Respectfully Submitted,



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