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

STATE OF NEW YORK
APPELLATE DIVISION

SUPREME COURT
THIRD DEPARTMENT

IVEY WALTON, RAMONA 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.

REPLY BRIEF FOR APPELLANTS

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Dated: June 19, 2008

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PRELIMINARY STATEMENT

Appellants Ivey Walton, Ramona Austin, Joann Harris, Office of the Appellate Defender, and the New York State Defenders Association submit this reply memorandum of law in further support of their Appeal from the Supreme Court's December 14, 2007 dismissal of their Article 78 proceeding[1] seeking declaratory and compensatory relief from an unlawful tax, by responding briefly to the arguments made by Respondent New York State Department of Correctional Services ("DOCS") in its brief served upon Appellants on June 10, 2008.

RESTATEMENT OF THE CASE AND FACTS

Except to correct several factual errors in Respondent DOCS' brief, Appellants rely upon their statement of the case and relevant facts as presented in their opening Appeal Brief. (See Brief for Appellants, Walton, et al. v. New York State Department of Correctional Services, et al. (March 31, 2008) ("App. Br.") at 1-10) First, DOCS asserts repeatedly throughout its brief that the New York State Public Services Commission ("PSC") "authorized" or "approved" former co-respondent MCI's charging the 57.5% DOCS commission to recipients of inmate collect calls as part of the rate structure for such calls established by the 2003 amendments to MCI's 2001 contract with DOCS. (DOCS Br. at 14, 17, 22, 23) However, PSC never approved or authorized the DOCS commission portion of the 2003 rate. To the contrary, in its October 30, 2003 order, the PSC ruled that it lacked jurisdiction to even review the propriety of the tax. (R.

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[1] Appellants originally filed the present action as a combined Article 78/declaratory judgment proceeding. However, in its decision on Appellants' first appeal in this case, the Court of Appeals held that Appellants' claims are only subject to Article 78 review. (Walton v. New York State Dept. of Corr. Servs., 8 NY3d 186, 194 [2007]).

88-89) Moreover, Respondent acknowledges that the PSC also never reviewed the commission established under the original 2001 MCI-DOCS contract. (DOCS Br. at 7-8)[2]

ARGUMENT

I. APPELLANTS' CLAIMS ARE NOT BARRED BY THE FILED RATE DOCTRINE

Respondent's argument that the so-called "filed rate doctrine" bars Appellants' constitutional claims (DOCS Br. at 11-16) is little more than a distraction from the merits of this case. Respondent made this identical argument to the Court of Appeals on Appellants' first appeal in this case, and the Court of Appeals rejected it, remitting the case to the Supreme Court with clear instructions to determine whether Appellants' constitutional claims state a cause of action. (Walton, 8 NY3d at 197.) The Supreme Court then followed the Court of Appeals' directive, addressing the merits of Appellants' claims (R. 11-24) despite a renewed "filed rate doctrine" argument by Respondent. This Court should do the same.

The filed rate doctrine cannot apply here because the DOCS tax is not a "filed telephone rate." The filed rate doctrine only bars suits that challenge the reasonableness of utility rates approved by a governing regulatory agency. (See Arkansas Louisiana Gas Co. v. Hall, 453 US 571, 577 [1981]; Keogh v. Chicago & Northwestern Ky., 260 US 156, 163 [1922].) The parameters of the filed rate doctrine are quite clear: "any 'filed rate' – that is, one approved by the governing regulatory agency – is per se reasonable and unassailable in judicial proceedings

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[2] Respondent also inaccurately states that the federal district court in Byrd v. Goord, 2007 U.S. Dist. LEXIS 71279 [SDNY 2007], dismissed the action as moot because DOCS ceased collecting commissions on inmate collect calls "in accordance with the Governor's new policy." (DOCS Br. at 7). In actuality, it was the passage of Correction Law § 623, which went into effect on April 1, 2008, and permanently prohibited DOCS from reinstituting the commissions, that satisfied the district court the issue was moot. (Byrd, 2007 U.S. Dist. Lexis 71279 at * 11-12.)

brought by ratepayers." (Wegoland, Ltd. v. NYNEX Corp., 27 F3d 17, 18 [2d Cir 1994] (emphasis added).)

The filed rate doctrine insulates from suit only those utility rates that "the PSC has previously determined to be just and reasonable." (Matter of Concord Assoc. v. Public Serv. Commn. of State of N.Y., 301 AD2d 828, 831 [3d Dep't 2003].) Here, because, as discussed above, the PSC unambiguously held that it lacked jurisdiction to determine that exact question with respect to the DOCS tax (R. 88-89), the tax cannot be insulated from judicial review by the filed rate doctrine. (Wegoland, Ltd., 27 F3d at 18.)

As Petitioners have pointed out throughout the course of this litigation, they agree with the PSC's Order with respect to its treatment of the DOCS tax. It is not a part of the just and reasonable rate for inmate collect calls. In this unique context, the cases cited by DOCS, including Bullard v. State of New York, 307 AD2d 676 [3d Dep't 2003], are irrelevant, as none involve an agency's own disavowal of jurisdiction over a challenged portion of a public utility rate. (See DOCS Br. at 12-14; Marcus v. AT &T Corp., 138 F3d 46, 61 [2d Cir. 1998]; City of New York v. Aetna Cas. & Sur. Co., 264 AD2d 304, 305 [1st Dep't 1999]; Valdez v. State of New Mexico, 54 P3d 71, 75 [Sup. Ct. N.M. 2002].)

Respondent quotes Porr v. NYNEX Corporation for the proposition that the filed rate doctrine bars suits challenging any "rate on file with a regulatory commission," presumably to imply that the doctrine protects anything written on a piece of paper and given to the PSC, even if it is not a telephone rate approved by the PSC. (DOCS Br. at 13 (quoting Porr v. NYNEX Corp., 230 AD2d 564, 568 [2d Dep't 1997]).) However, neither the filed rate doctrine nor the Porr decision itself requires such an absurd result.

As applied in New York, the filed rate doctrine is based on judicial recognition that the

PSC is the body specifically designated by New York's legislature to oversee telephone rates, and that only an entity with the PSC's expertise can determine the reasonableness of a telephone rate. (See Porr, 230 AD2d at 569-70 ("Where the legislature has conferred power upon an administrative agency to determine the reasonableness of a rate, the ratepayer can claim no rate as a legal right that is other than the filed rate.") (Internal citations omitted).) However, when the PSC performed its legislatively mandated function in the present case, it bifurcated the proposed collect call rate, finding only the MCI "jurisdictional" portion of the total charge just and reasonable but the DOCS commission portion to be outside its jurisdiction. (R. 87-90) Because the filed rate doctrine is predicated on deference to the administrative body's expertise, disavowal of expertise by the agency itself must end the inquiry.

In sum, since Petitioners seek relief related solely to the non-jurisdictional DOCS tax, the filed rate doctrine does not apply.[3]

II. THE DOCS COMMISSION IS AN UNLAWFUL TAX

A. The DOCS Surcharge is an Unlawful Tax and Not a Legitimate Business Expense

Respondent argues that the DOCS commission is not a tax but merely a "legitimate business expense" incurred by MCI (and passed on to Appellants and other recipients of inmate collect calls) for the privilege of accessing the prisons and providing telephone service. (DOCS Br. at 17-22). In making this argument, Respondent relies on irrelevant case law and regulatory decisions and faulty factual analogies, while largely ignoring the many cases cited by Appellants for the well-established proposition that any fee levied to raise revenue which exceeds a

[3] Finally, Respondent's argument that this Court lacks the power to order retroactive refunds to Appellants because the PSC lacks such power (DOCS Br. at 15-16) is a non-sequitur. In an Article 78 proceeding, the court reviewing the challenged actions of a state agency has the power to award restitution or damages that are incidental to the primary relief sought by the petitioner, which in this case is a declaration of unconstitutionality. (See CPLR § 7806; Matter of Gross v. Perales, 72 NY2d 231, 235 [1988]; Walton, 8 NY3d at 199 (Read, J. dissenting) (citing Gross).)

reasonable relationship to the costs of the service is a tax. (See App. Br. at 14-16) It is this latter precedent that must guide this Court's analysis of DOCS' actions.

Citing to four FCC regulatory decisions, Respondent implies that because business expenses are often recognized by state and federal regulatory bodies, they are per se legitimate. (DOCS Br. at 17-18). But each of these cases only supports the position that a telephone corporation may charge customers a rate that includes within it a legitimate expense it incurs for the cost of providing service in a given locale. (Id.) These cases say nothing of the legality of a property owners' action in demanding a surcharge over and above a utility rate approved as just and reasonable by the Public Service Commission. Meanwhile, if the DOCS surcharge were actually a legitimate business expense, it would have been included and analyzed as part of the PSC's determination of the reasonableness of MCI's 2003 rate structure for inmate collect calls. (See Matter of General Tel. Co. of Upstate N.Y. v. Lundy, 17 NY2d 373, 377, 381-82 (1966).) Thus, because the PSC, in its expertise, did not treat the DOCS tax as a legitimate business expense, it is up to this Court to determine what it is, and treat it accordingly.[4]

Respondent also analogizes the DOCS commission to rents paid by private vendors to lease space in State government buildings and on State land in which to operate their business. (DOCS Br. at 18-19) However, as Respondent acknowledges, unlike the DOCS telephone surcharge, the charging of these rents is authorized by statute. (Id. at 19) Moreover, these rents are not related to the provision of a public utility like a prison telephone service whose costs may only include commissions that, as discussed above, a state regulatory body has determined are

[4] In addition, Respondent misstates the facts when it claims the PSC "observed, in its October 30, 2003 order, [that] the DOCS commission was no different from the commissions paid by pay-phone telephone companies to premises owners." (DOCS Br. at 17.) The PSC merely mentioned the existence of such payphone commissions in a footnote, but did not opine as to their legality or their relevance to the current case. (R. 89 n. 20.)

legitimate business expenses incurred for the cost of providing the service in a particular locale.

Much of the case law cited by Respondent is also too factually different from the case at bar to shed any light on the unlawful tax issue before this Court. First, the Lipscomb and Bredesen cases cited by Respondent (DOCS Br. at 21) involved, respectively, the leasing of state land and sale of state specialty license plates directly to private citizens for their own private use. In holding that the lease payments and license plate purchases were contractual rather than tax payments, the Fifth and Sixth Circuit Courts of Appeals focused on their completely voluntary nature. In Bredesen, the Sixth Circuit emphasized that "instead of using its sovereign power to coerce sales," the state of Tennessee "induces willing purchases [of the specialty license plates] as would any ordinary market participant," and "confers all the same driving privileges on people who forgo specialty plates to buy standard-issue plates." (441 F3d 370, 374 [6th Cir 2006].). In Lipscomb, the private citizen lessees of the state of Mississippi's land parcels entered into their property leases completely voluntarily and were in no way prevented from leasing land from private lessors. (269 F3d 494, 500 n.13 [5th Cir 2001]). By contrast, by virtue of the exclusive phone services contract between MCI and DOCS, Appellants and other New York residents were forced to pay the DOCS commissions in order to speak to their incarcerated loved ones by telephone. They were not free to use other telephone service providers that charge smaller or no commissions. Thus, the DOCS surcharge is not akin to a contractual payment by inmate call recipients.

The one case cited by Respondents which does address a similar surcharge scheme, Valdez v. State of New Mexico (DOCS Br. at 20), does not involve a surcharge over and apart from the collect call rate reviewed and approved by the state regulatory body and is thus thoroughly distinguishable. (54 P3d 71, 75 [2002].) Moreover, the opinion involves minimal

analysis and is not binding on this Court, and for this reason should not be followed.

Finally, Respondent cites several cases which actually support Appellants' argument why the DOCS surcharge is a tax. First, Respondent cites to the dissent in the denial of a rehearing en banc in Henderson v. Stadler, 434 F3d 352, 355 [5 Cir 2005], but the Fifth's Circuit's earlier decision for which an en banc hearing was denied actually applied the same tax-fee distinction that Appellants discuss in their opening brief before this Court. (See Henderson v. Stadler, 407 F3d 351, 356-58 [5th Cir 2005]; App. Br. at 14-16.) Similarly, the Courts in the three airport-user fee cases cited by Respondent (DOCS Br. at 21-22) based their decisions that the fees were not taxes on the fact that the fees went directly to maintenance of the very government-run airports that the fee payors, all airport-housed businesses, benefitted from using. (See A&E Parking v. Detroit Metro. Wayne Cty Airport Auth., 723 NW2d 223 [Mich. App. 2006]; Ace Rent-a-Car, Inc. v. Indianapolis Airport Auth., 612 NE2d 1104 (Ind. Ct. of App. 1993]; Jacksonville Port Auth. v. Alamo Rent-a-Car, Inc., 600 So2d 1159 [Fla. App. 1992].) [5]

B. The DOCS Tax Did Not Receive Legislative Approval

Respondent's assertion that the DOCS tax did receive legislative approval is also wholly without merit. First, as discussed above, Respondent's argument that the PSC approved the DOCS commission (DOCS Br. 22-23) is flatly contradicted by the factual record currently before this Court. (R. 88-89). Moreover, even if the Court adopts Respondent's tortured logic that the inclusion of the DOCS commission in the 2003 tariffs filed by MCI with the PSC amounts to the latter's approval of the commission, the numerous cases cited in Appellants' opening brief clearly show that under New York law, the legislature may not delegate the taxing

[5] Respondent also agrees with Appellants that whether the PSC had jurisdiction to review the DOCS commission portion of MCI 2003 inmate collect call rate is not determinative of whether or not the commission was a tax. (See App. Br. at 11-14; DOCS Br. at 23)

power to administrative agencies and may only delegate the power to collect taxes if it does so explicitly through enabling legislation. (See App. Br. 16-18.) New York's legislature has made no express delegation to the PSC.

Contrary to Respondent's argument, Arsberry v. Illinois, provides no support for DOCS' proposition that PSC "approval" satisfies New York State constitutional requirements. (DOCS Br. at 14, citing 244 F3d 558, 565 [7th Cir 2001].) Indeed, the case is more helpful to Petitioners' argument, as Judge Posner characterized the Illinois fee as a tax when analyzing the plaintiffs' impairment of contract and equal protection claims. (Arsberry, 244 F3d at 565 ("in any event a tax, which is what the allegedly exorbitant component of the questioned telephone rates functionally is, is not an impairment of contracts…").) Although recognizing that the telephone commission functions as a tax, the Arsberry court declined to consider the constitutional implications of that tax. (Id.) Instead, because the Illinois Commerce Commission (unlike the PSC) had reviewed and approved the telephone fee at issue, that court held that plaintiffs' equal protection claim fell within the agency's primary jurisdiction, and thus should be dismissed under the filed rate doctrine. (Id. at 561, 565.) While Judge Posner's recognition of the Illinois telephone charge as a "tax" is instructive for this Court, the outcome in that case was based on a different regulatory scheme and administrative determination, rendering it unpersuasive here.

Moreover, Respondent's argument that the New York State legislature's failure to prohibit the DOCS from collecting commissions on inmate collect calls between 1996 and 2007 amounted to legislative approval of such commissions (DOCS Br. at 23-25) has no support in law. For a state tax on a particular activity to survive constitutional challenge, the legislature must have levied it "by clear statutory mandate" and must have "set the rate" of the tax.

(Yonkers Racing Corp. v. State of New York, 131 AD2d 565, 566-67 [2d Dep't 1987].) Since the New York legislature never passed legislation expressly authorizing the DOCS tax or specifying the 57.5% rate of said tax, legislative approval was never provided. (Id.)

C. Appellants Did Not Pay the DOCS Tax Voluntarily

Finally, Respondent insists that even if the DOCS tax was unlawful, it may not be refunded because Petitioners have not claimed that it was paid under protest. (DOCS Br. at 25.) However, protest is not required in all circumstances; rather, payment under protest is simply one indication that money was not paid voluntarily. (Mercury Mach. Importing Corp. v. City of New York, 3 NY2d 418, 424 [1957].) "Protest is not necessary to dispel the implication of voluntariness in event of duress, where present liberty of person or immediate possession of needful goods is threatened by nonpayment of the money exacted." (Id.; Paramount Film Distrib. Corp. v. State of New York, 27 AD2d 420, 421 [3d Dept 1967].) As Petitioners cannot speak to their loved ones without paying the allegedly unlawful fees, such fees are clearly coerced. Moreover, the purpose of protest is to alert the individual or entity that it may have to refund money paid. (Corporate Prop. Invs. v. Bd. of Assessors of County of Nassau, 153 AD2d 656, 660 [2d Dept 1989].) For that reason, even if protest were required, Petitioners' continued complaints and efforts to litigate this issue suffice. (R. 40-42, 43; see Corporate Prop. Invs., 153 Ad2d at 660 (holding protest requirement is satisfied by the pendency of action for a declaratory judgment or other legal proceeding challenging the assessment at the time of payment).)

III. THE DOCS TAX IS AN UNLAWFUL TAKING

Respondent fails to respond to any of the Appellants' arguments in favor of reinstating their takings claim (App. Br. at 27-28), and instead relies exclusively on the proposition that voluntary payments cannot work a taking. (DOCS Br. at 32-33) To support this proposition,

Respondent cites only one case, McGuire v. Ameritech Services, Inc., 253 F Supp 2d 988, 1004 [SD Ohio 2003]. (DOCS Br. at 18) However, the McGuire court's holding comes in the context of a procedural due process claim – the plaintiff claimed his money was taken without sufficient notice and hearing. (253 F Supp 2d at 1003-1004.) Because Petitioners make no procedural due process claim but argue instead that their property was taken without just compensation, McGuire is irrelevant. Thus, for the reasons set forth in Appellants' opening brief, their unlawful takings claims should be reinstated.

IV. THE DOCS TAX VIOLATES APPELLANTS' RIGHT TO EQUAL PROTECTION UNDER THE LAW

A. Appellants are Similarly Situated to Other New York Residents

Contrary to Respondent's cursory analysis (DOCS Br. at 33-35), Appellants are indeed similarly situated to recipients of non-inmate collect calls. Without citing references, Respondent alleges that Appellants received a "direct and special benefit" from the Inmate Call Home Program and the Family Benefit Fund through the telephone service tax revenue. (DOCS Br. at 35) Although the proceeds were deposited into DOCS' Family Benefit Fund, the vast majority of the revenue generated in 2003 was spent on services such as medical care that the State is legally required to provide for prisoners. (R. 93-103.) Specifically, 98.5% of the DOCS tax imposed upon Appellants was used to fund programs unrelated to the prison telephone system or security needs associated with that system. (R. 93-103) All citizens—recipients of inmate collect calls like Appellants and recipients of non-inmate collect calls—benefit from these programs. Without a relationship between the DOCS tax and the security or functioning needs of the prison telephone system, no rational justification exists to place the burden of the

surcharge solely on the individuals accepting collect calls from prisoners. (Byrd v. Goord, No. 00 Civ 2135, 2005 US Dist LEXIS 18544, at *31-32 [SDNY Aug. 29, 2005].)

B. Fundamental Rights Are Implicated, Demanding Strict Scrutiny Review

Respondent does not even address Appellants' argument in their opening brief why their equal protection claim must be reviewed under a strict scrutiny rather than rational basis standard. (See App. Br. at 40-41). Accordingly, this Court should apply strict scrutiny in reviewing the merits of Appellants' equal protection claim.

V. THE DOCS TAX VIOLATES APPELLANTS' RIGHT TO FREE SPEECH AND ASSOCIATION

Respondent incorrectly asserts that the DOCS's telephone system does not implicate Appellants' right to free speech and association. (DOCS Br. at 25) The DOCS tax violates the free speech and associational rights of 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 a legitimate penological purpose. (R. 33-34, at ¶ 12; R. 46-51, at ¶¶ 52-64)

A. The DOCS Tax Infringes on Constitutionally Protected Activity

Respondent seriously mischaracterizes the claims set forth by Appellants. Appellants do not argue, as Respondent would have the Court believe, that there is a unilateral right to telephone use (DOCS Br. at 30). Rather, Appellants argue that telephone communication is a means of exercising First Amendment rights; as such, it is constitutionally-protected activity and therefore cannot be infringed arbitrarily.

While some of the Appellants have visited or written letters to inmates, *each* Appellant has alleged that telephone communication is his or her *primary* means of communication and that the DOCS's surcharge severely limited that means. (R. 46-50, at ¶¶ 52-63) There are no facts in the record—in fact, there has not even been an opportunity for either side to develop a record—to suggest that other alternative forms of communication could substitute for real-time conversation through telephone, which remains the most direct and quickest way to communicate available for inmates and family, friends, and attorneys. Although inmates receive a weekly free postage allowance, this amount would still be insufficient to cover expedited mailings necessary to communicate time-sensitive matters with their attorneys. (7 NYCRR § 721.3(a)(3)(ii).)

Further, Respondent misstates the holding of Byrd v. Goord and attempts to misguide this Court with regards to the reasoning behind the case. (DOCS Br. at 28, 35) Appellants need not allege that the DOCS surcharge prevented them from communicating at all. (Byrd, 2005 US Dist LEXIS 18544, at *26 n 9.) In fact, the court in Byrd referred to allegations by the mother of a prisoner, who limited the duration of her son's calls to reduce the phone bill, as the types of fact that if proven, would establish a freedom of speech claim. (Id.) Thus, although Appellant Ivey Walton "accepted a total of seven collect calls from her son and nephew in a given month," these seven calls lasted a total of 66 minutes, costing $54.30. (R. 47 at ¶ 55) Due to the cost of the calls, Ms. Walton's son saves up his calls in order to get in touch with his mother only when there is an emergency. (R. 46-47 at ¶ 53)

Respondent also mistakenly asserts that the Ninth Circuit has repudiated its position in Johnson v. California, in which it held that inmates have a First Amendment right to reasonable telephone access. (207 F3d 650, 656 [9th Cir 2000]; DOCS BR. at 27).) Respondent claims

that, in Valdez v. Rosenbaum, the Ninth Circuit found the "genesis of [the] purported constitutional right to use a telephone is 'obscure'...and [its] 'pronouncements of its existence have been conclusory and unnecessary to the decisions.'" (302 F3d 1039, 1048 [9th Cir 2002].) However, this statement was taken out of context as the Valdez court was actually referring to Halvorsen v. Baird, 146 F3d 680, 688 [9th Cir 1998], where the defendant was denied access to a telephone during his post-arrest detention—a distinguishable situation emphasizing due process concerns rather than First Amendment rights.

Besides infringement on telephone access, Appellants have encountered significant barriers to other methods of communication, like the tremendous expense and time required for face-to-face visits, which are especially problematic because Appellants suffer from physical disabilities and/or are of limited economic means. (See, e.g., R. 46, at ¶ 52; R. 48-59, at ¶ 58)

Moreover, as the United States Supreme Court explained in Kleindienst v. Mandel, communication 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 other means of communication were also available).)

B. The DOCS Tax Does Not Serve a Legitimate Governmental Interest

Respondent is correct that prison regulations may lawfully infringe on freedom of speech and association when the regulations are "reasonably related to legitimate penological interests." (See Turner v. Safley, 482 US 78, 89 [1987]; DOCS Br. at 31) However, no valid penological purpose exists to justify the DOCS tax. (R. 32 at ¶¶ 8-9, R. 33-34, at ¶ 12, R. 50-51, at ¶¶ 64-66; Byrd, 2005 U.S. Dist. LEXIS 18544, at *26, 31.)

Under the Turner test, the Court must explore: (1) whether there is a rational connection between the regulation and the legitimate governmental interest set forth to justify it; (2) whether inmates have alternative means of exercising the right infringed upon; (3) the impact that recognition and accommodation of the asserted right will have on corrections officers, other inmates and the general allocation of prison resources; and (4) whether "ready alternatives" to the regulation exist. (Turner, 482 US at 89-90.) While courts must balance the importance of the right being infringed against any institutional objectives intended to be served by the regulation, (see Rivera v. Smith, 63 NY2d 501, 511 [1984]), this Court need not engage in extensive analysis or balancing because the DOCS tax does not serve *any* legitimate penological purpose.

First, there is no rational connection between the regulation and any legitimate government interest. Examining the same tax at issue here, the Byrd court explained that:

> It does not involve matters of security or safety, which have traditionally been held to the Turner standard. Receiving an alleged "kickback" from an additional fee added to the reasonable rate for collect calls made by inmates to family members and those individuals providing counseling and professional services, is neither a rule nor regulation related to the functioning of a prison.

(2005 US Dist. LEXIS 18544, at *31.) While raising revenues from prisoners can sometimes be a legitimate penological objective (see Allen v. Cuomo, 100 F3d 253, 261 [2d Cir 1996]), raising revenue from their families and other outsiders, who have not been found guilty of any crime, is not. And while the revenue derived from the surcharge was earmarked for the Family Benefit Fund, this money was spent on correctional programs unrelated to the prison telephone system. (R. 33-34, at ¶12; R. 93-103.) Most troubling, however, is that the immediate effect of the surcharge was to deter the families and friends of inmates from communicating with them—a

goal contrary to the rehabilitative justification asserted by DOCS. (R. 45 at ¶¶ 49-50; R. 85.)[6] In attempting to derive authority from the FCC, Respondent fails to mention that the FCC also acknowledged that the incentives may result in an "upward spiral of...increasing inmate calling rates, to the detriment of ... the friends and families of inmates who ultimately bear the cost of the calls." (17 FCC Rcd. 3248, 2002 F.C.C. LEXIS 889, at **76 [2002].)

Second, as discussed above, Appellants, especially those who are elderly, impoverished, and/or disabled, have limited access to other alternative avenues of communication, such as written correspondence and in-person visitation. (R. 46 at ¶ 52; R. 48, at ¶ 58; see also Allen v. Coughlin, 64 F3d 77, 80 [2d Cir 1995].) Further, Respondent has been able to provide the same security measures under the current phone system without charging the DOCS tax[7], or could use a debit card system like that utilized by the Federal Bureau of Prisons, that also meets the security concerns allegedly addressed by the current system. (R. 50-51, at ¶¶ 64-65.)

Finally, accommodating the Appellants' constitutional rights would have no deleterious "ripple effect" on the prison administration, making these alternative measures easily attainable. (Turner, 482 US at 90-91)

Accordingly, Appellants have adequately pled a violation of their right to free speech and association.

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[6] According to DOCS, the "DOCS' Phone Home Program is essential to maintaining communication between the state's nearly 63,000 inmates and their families and loved ones. The program represents a key component in strengthening the support system critical to inmates' success both while in prison and after their release." Press Release, DOCS, Inmate Collect Call Phone Rates Reduced Again (Dec. 13, 2007), http://www.docs.state.ny.us/PressRel/phoneratereduction.html.)

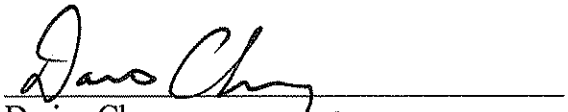
[7] Indeed, as of April 1, 2007, Respondent ceased collecting the DOCS tax, and appellants are unaware of any other changes made to the prison telephone system or any security concerns raised by the discontinuance of the tax. (See Press Release, DOCS, Inmate Collect Call Phone Rates Reduced Again, supra, footnote 6)

CONCLUSION

For all of the foregoing reasons, Appellants respectfully request that this Court reverse the judgment of the Supreme Court and direct that a trial be held as soon as possible.

Dated: June 19, 2008
New York, NY

Respectfully Submitted,



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Appellants-Plaintiffs,	:
THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES; and MCI WORLDCOM COMMUNICATIONS, INC.,	:
Respondent-Defendants.	:

AFFIDAVIT OF SERVICE BY MAIL

Darius Charney, being duly sworn, says: I am not a party to the action, am over 18 years of age and reside at 122 Ashland Place, Brooklyn, New York. On the 19th day of June, 2008, I served two copies of Appellants' Reply Brief on Respondent-Defendant New York State Department of Correctional Services by mailing the same in a sealed envelope, with postage prepaid thereon, by Federal Express, addressed to the last known address as indicated below:

Victor Paladino
Assistant Solicitor General
State of New York
Office of the Attorney General
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Albany, New York 12224-0341

Darius Charney

Sworn to before me this
19th day of June, 2008

Notary Public

KARL FRANKLIN
Notary Public, State of New York
No.02FR6036779
Qualified in Kings County
Commission Expires February 7, 20