To be Argued by: Rachel Meeropol
Time Requested: 30 Minutes

COURT OF APPEALS **STATE OF NEW YORK**

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.

BRIEF FOR APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Other Authorities

I. STATEMENT OF JURISDICTION

The family members, friends, and lawyers of New York State prisoners commenced this action in the Supreme Court, Albany County, by Verified Petition and Complaint ("Complaint") dated February 25, 2004, after being charged exorbitant rates to speak to New York State prisoners pursuant to a revenue raising scheme created by the New York State Department of Correctional Services ("DOCS") (see Record on Appeal Submitted to the Court of Appeals, hereafter "R." 38 – 166). In a decision and order entered October 22, 2004 the Honorable George B. Ceresia, Jr. granted DOCS' and MCI's Motions to Dismiss the Complaint in its entirety (R. 451 – 459). Appellants filed a notice of appeal to the Appellate Division, Third Department on November 22, 2004 (R. 460). The Appellate Division, Third Department affirmed the decision of the lower court by a Memorandum and Order entered on January 19, 2006 (R. 462 – 466). Appellants served a motion to the Appellate Division for leave to appeal to the Court of Appeals on February 24, 2006. Notice of entry of the Appellate Division's order denying Appellants' motion for leave to appeal was served by regular mail on April 5, 2006 (R. 467 – 468). Appellants moved the Court of Appeals for leave to appeal on May 4, 2006. That motion was granted on July 5, 2006 (R. 469).

On February 20, 2007, the Court of Appeals reinstated Appellants' second through fifth cause of action and remitted the same to the Supreme Court, Albany

County (R. 470 – 495). In an opinion dated December 14, 2007, and entered on January 4, 2008 the Honorable Judge George B. Ceresia once again dismissed Appellants' case in its entirety, this time for failure to state a claim (R. 14 – 33). Appellants filed a notice of appeal to the Appellate Division, Third Department on February 5, 2008 (R. 12). The Appellate Division, Third Department affirmed the decision of the lower court by a Memorandum and Order dated and entered on December 18, 2008 (R. 6 – 11). Notice of entry was sent to Appellants by regular mail on December 19, 2008 (R. 5).

Appellants filed and served a Notice of Appeal to the Court of Appeals on January 16, 2009 (R. 3 – 4). Jurisdiction of the appeal is in the Court of Appeals pursuant to CPLR 5601[b][1] on the ground that the Appellate Division finally determined Appellants' action, and that action directly involves substantial constitutional questions (R. 6 – 11). Those substantial constitutional questions follow.

II. QUESTIONS PRESENTED

1) Whether, in the absence of legislative authorization, a state agency may raise revenue from recipients of prisoner collect calls by contracting with a telephone service provider to receive a commission based on a percentage of that provider's profit. The Supreme Court and Appellate Division answered this question in the affirmative (R. 8 – 10, 21 – 27).

2) Whether a state agency may take money to be used for general prison operations from the recipients of prisoner collect calls without providing them with compensation. The Supreme Court and Appellate Division answered this question in the affirmative (R. 11, 27 – 29).

3) Whether a state agency may single out prisoner collect call recipients to fund general prison operations in a manner completely unrelated to any penological or security purpose. The Supreme Court and Appellate Division answered this question in the affirmative (R. 11, 29 – 30).

4) Whether a state agency may place a surcharge on, and thus burden, individuals' telephonic communications with their loved ones, friends, and attorneys without any legitimate penological purpose. The Supreme Court and Appellate Division answered this question in the affirmative (R. 10 – 11, 30 – 32).

III. NATURE OF THE CASE AND RELEVANT FACTS

Appellants are the family members and advocates of prisoners incarcerated in various New York State correctional institutions. They bring this appeal from the Appellate Division's affirming of the Supreme Court's dismissal of their Article 78 proceeding seeking relief from the imposition of an unlawful tax by means of: (1) a refund of the taxes unlawfully collected from them between October 30, 2003 and March 31, 2007; and (2) a declaration that the DOCS charge 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' rights to equal protection guaranteed by Article I § 11 of the State Constitution; and (d) a violation of Appellants' speech and association rights guaranteed by Article I § 8 of the State Constitution (R. 63 – 69, Complaint at ¶¶ 77 – 111). Appellants style their challenge as a putative class action (R. 60 – 62, Complaint 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. 54, Complaint at ¶ 48). Pursuant to contracts between MCI and DOCS signed 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. 40, Complaint at ¶¶ 5, 6). The 2001 contract ran through March 31, 2006, with the option of two, one-year renewals (R. 49, Complaint at ¶ 33).

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. 40, Complaint at ¶ 6). This practice ended on April 1, 2007. To finance the State's 57.5 percent commission, MCI charged recipients of prisoners' collect calls exorbitant rates (R. 40, Complaint at ¶ 7).

This arrangement was extremely lucrative for the State. For instance, DOCS estimated it would receive $23.4 million in 2003 (R. 111). The millions of dollars collected from Appellants and other collect call recipients were tendered by MCI to the State, which deposited the money into the general fund (R. 53, Complaint at ¶ 45). The proceeds were then appropriated and earmarked for deposit into DOCS' "Family Benefit Fund" (R. 42, Complaint 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.; R. 103 – 107, 111). 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. 111).

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. 40, 44 – 46, 54 – 59, Complaint at ¶¶ 7, 18 – 22, 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 1, 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. 51 – 53, Complaint at ¶¶ 39 – 43; R. 236). 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 they received from New York State prisoners (R. 239). Of the profit garnered by MCI through this structure, 57.5 percent was remitted to DOCS, and placed in the Family Benefit Fund (R. 96). Upon information and belief, this rate structure remained in effect between October of 2003 and March 31, 2007.

The 57.5 percent DOCS charge 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. 39, 43, Complaint at ¶¶ 4, 14; R. 98 – 99). 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. 52, Complaint at ¶ 40; R. 135 – 164). 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 (id.).

By order effective October 30, 2003, the PSC held that it did not have jurisdiction over the 57.5 percent charge collected by DOCS from MCI (R. 97). 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 (id.). 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" (R. 98). The PSC reviewed the jurisdictional rate by comparing it to rates MCI charges for analogous services (R. 97). Based upon this comparison and other factors, the PSC approved the jurisdictional rate as "just and reasonable" under the Public Service Law (R. 97 – 98). The PSC did not undertake any review of the reasonableness of the DOCS tax or of the entire combined rate (R. 95 – 100).

The PSC directed MCI to file a new tariff reflecting the two separate charges: the DOCS tax and MCI's filed rate (R. 98, 101). 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. 39, Complaint at ¶ 4).

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 (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. 49, 59 – 60, Complaint at ¶¶ 27 – 29, 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. 103 – 112). Respondent can offer no legitimate justification for requiring recipients of prisoner collect calls to fund general operations of the New York State Prisons. To the contrary, the cost of the DOCS tax 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 (R. 54 – 59, Complaint at ¶¶ 50 – 63).

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 (R. 38 – 72). 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. 458). The court dismissed Count I, seeking to enforce the PSC Order, on the merits (R. 458). The Appellate

Division affirmed this dismissal (R. 466), and appeal was taken by permission to the Court of Appeals (R. 469 – 494).

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 (R. 480, Walton v New York State Dept. of Correctional Servs., 8 NY3d 186, 197 [2007]). Although Respondents urged the Court of Appeals to affirm dismissal of Appellants' constitutional claims on the alternative 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 (R. 482 – 484).[1]

Upon remand, Respondent once again moved to dismiss the Complaint for failure to state a claim, and based on the filed rate and primary jurisdiction doctrines. On December 14, 2007 the Supreme Court dismissed each of Appellants' constitutional claims for failure to state a claim (R. 21 – 33). The

[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 (R. 480 – 481).

Court did not address Respondent's points regarding the filed rate and primary jurisdiction doctrines (id.). On September 8, 2008 the Appellate Division, Third Department held that the filed rate doctrine did not bar Appellants' claims (R. 8), but nevertheless affirmed the decision of the lower court dismissing Appellants' four constitutional claims for failure to state a claim (R. 8 – 11).[2]

In affirming the Supreme Court's dismissal, the court below erred in four fundamental ways. First, and most importantly, the Appellate Division erred by holding that the DOCS tax is a legitimate business expense MCI incurs for the privilege of doing business with the State, that may be passed on to recipients of prisoner collect calls (R. 9). The DOCS surcharge is unauthorized, and unrelated to the cost to DOCS of providing telephone services, for this reason is must be struck down as an unlawful tax.

Second, the Appellate Division erred by dismissing Appellants' takings claim on the reasoning that Appellants voluntarily accept collect calls, and thus cannot complain of a taking (R. 11). Appellants can only speak to their loved ones through accepting their calls; thus their actions are not voluntary, but made under duress and Count III must be reinstated.

Third, the Appellate Division erred by dismissing Appellants' equal protection claim without engaging in any level of scrutiny of Respondent's

[2] DOCS abandoned its argument regarding primary jurisdiction on appeal.

unlawful classification (R. 11). 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.

Finally, the Appellate Division erred by holding that the DOCS tax is merely a "loss of cost advantage" that imposes no burden on Appellants' freedom of speech and association (R. 10). The law is clear that telephone communication is protected under freedom of speech and association, and Respondent cannot limit the enjoyment of these rights through imposition of an arbitrary financial burden without any legitimate penological purpose.

IV. ARGUMENT

A. THE APPELLATE DIVISION ERRED IN DISMISSING APPELLANTS' UNLAWFUL TAX CLAIM

Absent explicit and detailed statutory authorization, State agencies lack the power to raise revenue. Yet for years, DOCS did just that: it contracted with MCI to extract from family, friends, and lawyers of prisoners millions of dollars a year above the cost of providing secure correctional telephone service. Over two decades, hundreds of millions of dollars raised in this manner were deposited into the State's general fund and used to defray the cost to taxpayers of funding the correctional system as a whole. DOCS and the lower courts defend this arrangement by reference to the legality of the instruments of the extraction:

DOCS has the right to contract for services; MCI has the right to pass on to customers the cost of doing business with the State. This ignores the fundamental question at the heart of this case: can those who wish to speak to their loves ones be coerced into shouldering a disproportionate burden of the cost of corrections in the State of New York? The answer under New York law is no.

1. The DOCS Surcharge is An Invalid Tax

Precedent in New York is clear: a 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); New York Tel. Co. v City of Amsterdam, 200 AD2d 315, 318 [1994] (holding that an excavation permit "fee" which is disproportionate to associated costs and utilized as a revenue-generating measure is an unlawful tax); Matter of Torsoe Bros. Constr. Corp. v Board of Trustees of Inc. Vil. of Monroe, 49 AD2d 461, 465 [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.")).

Myriad revenue raising devices have been struck down outside of New York through a similar analysis (e.g. State v Medeiros, 89 Haw 361, 367, 973 P2d 736, 742 [1999] (city cannot raise revenue to support administrative costs and general

law enforcement needs by levying a fee on those convicted of a criminal offense); State v City of Port Orange, 650 So2d 1, 3 [Fla 1994] (city cannot raise revenue to support maintenance and development of local road system by levying a fee on owners and occupants of developed property); Daniels v Borough of Point Pleasant, 23 NJ 357, 362 [1957] (borough cannot raise revenue to support the district's schools by levying a fee on building permits)).

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," (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 – 65; 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. 111). 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 (id.). Appellants benefit from the provision of a functioning state prison system, but they do so no differently than does each resident of this State (cf. United States v Maine, 524 F Supp 1056, 1059 – 60 [D Me 1981] (fees used to fund State Bureau of Consumer Protection provide some incidental benefit to the federal credit unions challenging them, but such benefits are "merely an incidental by-product of a program designed for the central purpose of protecting consumers and the public at large"); Greater Franklin Developers Assn. Inc. v Town of Franklin, 49 Mass. App. Ct. 500, 503 [2000] (school impact fee assessed on new development is unlawful tax because benefit of new school facilities will be shared equally by residents in new housing and those who already live in town)).

Finally, the single most important consideration in distinguishing a fee from a tax is whether it is levied to raise revenue. As DOCS itself 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. 111; see also Gasparo v City of New York, 16 F Supp 2d

198, 218 [EDNY 1998] ("the heart of the inquiry centers on function, requiring an analysis of the purpose and ultimate use of the assessment") (quoting Collins Holding Corp. v Jasper County, 123 F3d 797, 800 [4th Cir 1997]); Resolution Trust Corp. v Lanzaro, 140 NJ 244, 259 [1995] ("Where the disproportion between the charge and the cost of the service is excessive ... the conclusion is inescapable that the charge imposed is intended primarily to raise revenue)). 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.

A very close analogy to the case at hand can be found in Gross v Ocean, 92 NJ 539 [1983] revg on dissent 184 NJ Super 144 [1982], in which the Supreme Court of New Jersey struck down a indirect revenue raising device as an illegal tax. In Gross, the court examined a township's invitation to towing companies to bid for the privilege of towing illegally parked vehicles according to a set rate schedule (184 NJ Super at 148). Two companies submitted bids; the winning bidder paid the town $13,751 for the year-long contract, and recouped that money by charging vehicle owners significantly higher towing rates than it had the previous year (id. at 148, 158 – 59).

The New Jersey appellate court defended the conduct in terms reminiscent of the Appellate Division's decision in this case: "the township did not 'tax'

[anyone] for the advantage of being called by the township police department to perform towing services for the township; it simply granted the privilege to the highest bidder" (id. at 150 – 51). But the New Jersey Supreme Court reversed on the reasoning of the dissent at the appellate level (92 NJ at 541), in which Judge Antell noted "regardless of whether the bidder's payment is characterized as a license fee, a tax, or a franchise fee, in every realistic sense its primary purpose is to nourish the municipal treasury" (184 NJ Super at 157).

The New Jersey Supreme Court recognized that the township has a public safety obligation to tow vehicles and thus has the right to contract for towing services; however, it held that the township has no right to receive any financial benefit beyond that required to meet related administrative expenses (id.). The court was struck that "whatever regulatory responsibilities" defendants have, "their costs have not been shown and it is not pretended that they are even colorably related to the amount of the successful bid" but rather "governed exclusively by the bidder's expectation of profit and this has nothing to do with the township's administrative duties" (id.). The Court concluded:

> The township is doing more than just passing on the charge to the motorist; it is enriching itself through the inflation of that charge by an amount equal to the contractor's bid. Although this method is profitable to the contractor and the municipality it is legally flawed by the fact that there is no statutory authority for the municipality to raise revenue in this manner. This is all that is involved.

(id. at 159). The surcharge at issue here is an equally unauthorized revenue raising device, and must be struck down.

2. The DOCS Surcharge Cannot be Explained Away As a "Legitimate Business Expense."

The Appellate Division did not analyze the DOCS charge under the tests distinguishing taxes and fees described above. Instead, the Court erroneously held the DOCS surcharge is a "legitimate business expense" MCI pays to DOCS for the benefit of doing business with the State, and may lawfully pass on to its customers.

First, the regulatory cases relied on by the Appellate Division are irrelevant to Appellants' claim (R. 9, Walton, 57 AD3d at 1183, citing Matter of AT&T's Private Payphone Commn. Plan, 3 FCC Rcd. 5834, 5836 [1988] and International Telecharge, Inc. v AT&T Co., 8 FCC Rcd. 7304, 7306 [1993])). The Appellate Division cites these cases for the proposition that commissions paid by payphone operators to premise owners have been treated as "legitimate business expenses paid to gain access to telephone users" (id.). But both cases revolve around the narrower question of whether AT&T's commission payments violate specific provisions of the Communications Act (3 FCC Rcd. at 5834; 8 FCC Rcd. at 7304). In both cases the FCC referred to the small commissions at issue as "business expense[s]," but since neither case involved a challenge to the reasonableness or justness of the telephone rates, the legitimacy of those "business expense[s]" was not examined (3 FCC Rcd. at 5836; 8 FCC Rcd. at 7307).

Indeed, identifying something as a "business expense" in the regulatory context simply indicates that it is "above the line" for accounting purposes, and will presumably be borne by rate-payers rather than shareholders.[3] If a business expense is legitimate, the regulatory body will consider it when setting a just and reasonable rate (see Matter of Natl. Telephone Servs., Inc., 8 FCC Rcd 654, 656 n 12 [1993] ("No allegation has been made in the instant proceeding that the rates or amounts of AT&T's commission payments are excessive or otherwise unreasonable and thus should be disallowed as an operating expense.")). If the claimed business expense is not legitimate, the regulatory body will not allow it to be passed on to rate-payers (e.g. Matter of General Tel. Co. of Upstate N.Y. v Lundy, 17 NY2d 373, 378 – 380 [1966] (PSC review of utility operating expenses is necessary in light of the "danger that the utility will be charged exorbitant prices which will, by inclusion in its operating costs, become the predicate for excessive rates"); Matter of Accounting for Judgments and Other Costs Associated with Litigation, 12 FCC Rcd 5112, 5125 n 62 [1997] (collecting cases; "illegal, duplicative, or unnecessary costs must be disallowed")).

A commission is only a legitimate business expense if it represents the fair value of renting given premises (see Matter of AT&T's Private Payphone Commn.

[3] See Matter of Accounting for Judgments and Other Costs Associated with Litigation, 12 FCC Rcd. 5112, 5116 [1997], for an explanation of the distinction between "above the line" and "below the line" expenses.

Plan, 3 FCC Rcd at 5836 (commissions to premise owners allowed under FCC accounting system as compensation for occupancy privileges, light, heat, etc.)).[4] There has been no analysis here by any commission, court or regulatory body as to whether the DOCS surcharge at issue is a legitimate business expense. And Appellants cannot imagine how such an argument could be made.

Certainly, DOCS cannot justify the commission as fair compensation for the cost of providing MCI with the market it seeks, for MCI, rather than DOCS, set the commission rate through its bid. And it is beyond improbable that DOCS pays millions per year in heat, lighting, and other overhead that can be attributed to the space occupied by prison payphones.[5] Indeed, if the commissions equaled the fair

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[4] Significantly, in the payphone context, the FCC has only allowed commission payments where callers are not prevented from using another carrier to make a call (Letter to Marlowe, 10 FCC Rcd 10945, 10946 [1995]). As the FCC explained in Matter of Billed Party Preference for InterLATA C+ Calls, 13 FCC Rcd 6122, 6127 ([998], operator service providers (or OSPs) compete with each other to receive certain payphone traffic by offering commissions to payphone or premise owners on all such calls. In exchange, the owners designate the OSP as the "presubscribed" or default provider. The commissions are high, and when passed on to customers, result in "exceptionally high rates." (Id. at 6127 – 28.) For that reason, many customers placing calls from payphones dial around the default provider by using personal access codes or 800 numbers (id. at 6128). Recipients of prisoner collect calls, of course, lack this option.

[5] This begs the question, why didn't the PSC prohibit MCI from passing on the DOCS charge to its customers? The answer lies in the PSC's holding that it lacks jurisdiction over DOCS, and thus has no expertise to determine whether any commission payment is reasonable in the correctional context (R. 97; see also Ordinary Tariff Filing of MCI WorldCom Communications to Change Maximum Security Rate Plan for New York State Department of Corrections from a Mileage-

cost to DOCS of making the prison telephone market available to MCI, then Appellants would have no quarrel with the charge—as it would pass the tax versus fee test laid out above. But in reality, the DOCS charge cannot be explained based on any cost to DOCS, and there is thus no measure to judge it against: MCI's "expense" of doing business with DOCS and DOCS' expense in providing MCI access to prisoners are both whatever MCI and DOCS write in their contract.

This Court has previously been confronted with analogous utility attempts to pass on unbounded payments to rate-payers. In Matter of Cahill v Public Service Commission, 76 NY2d 102, 108 – 109 [1990], this Court considered the constitutionality of a PSC policy allowing utility companies to pass on the cost of charitable contributions to rate-payers as "operating expenses." The Court struck down the agency's actions on First Amendment grounds but Judge Titone, concurring, found the fee to be an unlawful tax (id. at 118). Judge Titone analyzed the PSC policy as the transfer of wealth from individuals to social projects—something the government may "unquestionably do directly" but when done indirectly, results in a delegation to a private concern of the State power to tax (id. at 117).

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, *15 – 20, January 14, 2005). Moreover, the fact that the PSC, in its expertise, did not review the reasonableness of the DOCS surcharge lends support to Appellants' argument that the charge cannot be considered a "legitimate business expense" (cf. Lundy, 17 NY2d at 378 – 80).

Judge Titone's criticism of the pass-along is directly applicable to the DOCS surcharge:

> The analogy between the typically governmental function of taxation and the utilities' government-approved "pass-along" policy exists because the latter entails the imposition on ratepayers of a levy that is then used to support activities aimed at advancing the interests of the community at large, as distinguished from the interests of the utilities' shareholders and employees. In a democratic society, such a levy is permissible, if implemented directly by the government, because the government is ultimately accountable to the taxed citizens through the established political mechanisms for the expression of the majority's will. These mechanisms are circumvented, however, when the decisions as to whether and how much to "tax" are delegated to a private corporation, which is not accountable through any of these mechanisms

(id. at 118; see also Davenport Water Co. v Iowa State Commerce Commn., 190 NW2d 583, 608 [Iowa 1971] ("If charitable contributions are allowed as an operating expense of a monopoly, it amounts to an involuntary levy on the rate payers.")(citation omitted)). The only difference in the two situations is the agency acting: in Cahill the PSC levied a tax through its authorization of the utilities' contributions; here, DOCS has levied a tax through its demand for utility commissions. Neither levy is lawful.

The Appellate Division cites three cases for the proposition that MCI can lawfully pass on the DOCS charge as a "legitimate business expense" to its customers, without "transform[ing]" the expense into a tax (R. 9 – 10, Walton, 57 AD3d at 1183, citing Valdez v State, 132 NM 667, 673, 54 P3d 71, 77 [2002]; Lipscomb v Columbus Mun. Separate School Dist., 269 F3d 494, 500 n 13 [5th Cir

2001]; and A&E Parking v Detroit Metro. Wayne County Airport Auth., 271 Mich App 641, 643 – 47 [2006]).[6] Valdez is the only case of the three addressing a prison telephone scheme. In that case, the court dismissed an unlawful tax claim with minimal analysis, based solely on plaintiffs' "voluntary" acceptance of prisoners' collect calls (132 NM at 673). As explained below, Appellants' payments are not voluntary, but made under duress.

A&E Parking provides no support for the legality of the DOCS tax. In A&E Parking the Court of Appeals of Michigan examined access fees imposed by the Detroit Metropolitan Wayne County Airport on hotels, parking and limousine companies who used airport roads to pick up customers (271 Mich App at 642). The money raised by the fees was used to fund the airport as a whole (id. at 648.) The court reasoned that the companies receive a benefit not just from airport roads but from the airport as a whole—the airport's existence provides their marketplace—thus revenue from fees may lawfully be used to fund airport maintenance and construction as a whole (id. at 646, 648).

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[6] A&E Parking is not a challenge by airport users; thus it is of questionable relevance regarding the legality of passing on a business expense, the issue for which the Appellate Division cites it. Despite this, the case is distinguished in detail below. Lipscomb, however, is of minimal relevance. In that case, the Fifth Circuit stated in a footnote that private leases of Mississippi land held by the Mississippi school board are not "taxes" under the Tax Injunction Act (id. at 500 n 13). The leases were the creature of a contract between one land owner and one land user; there was no question in that case of any expenses passed on to a third party (id.).

A&E Parking and the other airport cases it relies on differ from the regulatory analysis of legitimate business expenses explained above in that those courts authorize fees based on the amount of benefit market access affords to a service provider, rather than the cost to the premise owner of providing that access. New York has not adopted this type of benefit analysis when examining regulatory, access or user fees (e.g. American Ins. Assn. v Lewis, 50 NY2d 617, 622 – 23 [1980]; Suffolk County Bldrs. Assn. v County of Suffolk, 46 NY2d 613, 619 [1979]). Instead, under New York law a payment to secure the privilege of carrying on a business in a specific location is a franchise fee (e.g. Matter of the New York & Queens Elec. Light & Power Co. v Delaney, 229 NY 184, 190 [1920] (regarding fee paid by realtor for opportunity to construct bridge between Manhattan and Queens)).

A franchise may not be created by contract; it requires legislative authorization (Milhau v Sharp, 27 NY 611, 619 [1863]). In A&E Parking, the airport had explicit statutory authorization to levy fees on airport users (271 Mich App at 648; see also Enterprise Leasing Co. v Metro. Airports Commn., 250 F3d 1215, 1218 [8th Cir 2001]) (relied on by A&E parking)). But the New York Correction Law allows DOCS to raise revenue by two specific provisions only: the establishment of a commissary (Correction Law § 26) and the leasing of state institutions to cities or counties (id. at § 79). DOCS has no general authority to

raise revenue, nor specific authorization to create a franchise. If the DOCS surcharge is properly analyzed as a franchise fee, it is unauthorized, and thus unlawful.

Moreover, even if this Court were to extend the applicability of the airport cases to levies imposed without statutory authorization, those cases still do not justify the DOCS charge. As the Eighth Circuit explained in Enterprise Leasing, "the common denominator in these cases is the idea that airport maintenance and construction is undertaken for airline passengers, who in turn are customers for all rental car companies" (250 F3d at 1220-21). Thus companies that draw business from airport users benefit from the airport as whole; and pass on the fees charged by the airport to those users, who also benefit from the airport as a whole. This is in marked contrast to Appellants, who receive no special benefit from the existence of the prison system as a whole distinct from that enjoyed by the public at large.

Moreover, the marketplace theory endorsed in the airport cases requires analysis by the airport of the value that market provides to the companies who operate there (Enterprise, 250 F3d at 1221 (airport authority does not have "carte blanche to levy fees that are unreasonable. Even if the entire airport is the benchmark for assessing value, we assume a reasoned approach includes some inquiry into the specific value off-Airport rental car companies derive from the Airport market."). In fact, from a business perspective, the airport charges must be

reasonably related to the value to the company the airport provides as a market—otherwise, the company would simply chose to get its customers elsewhere. And because airport customers are free to take public transportation, or pay for a ride to an unconnected rental car agency, both the airport authority and the rental agencies have incentives to ensure the fees passed on to customers are not so excessive as to be uncompetitive.

In contrast, the DOCS surcharge is not set by DOCS after any consideration of the value to MCI the prison market provides; rather it is set by MCI in seeking to win the contract. The higher the commission a telephone company bids, the more likely it is they will be awarded the contract (R. 302). Neither MCI nor DOCS has any reason to consider the impact of the surcharge on the consumer—the family, friends, and lawyers of prisoners. Appellants will pay the surcharge no matter how outrageous it is—they have no other options if they want to speak to their loved ones. Given these incentives, it is unsurprising that the charge at issue here, 57.5% of MCI's revenue, is far higher than the 8.5% fee at issue in Enterprise (250 F3d at 1215).

For all of these reasons, the cases cited by the Appellate Division do not support the holding that the DOCS commission is a legitimate business expense that may be passed on to Appellants. Nor does any precedent explain the relevance of the Appellate Division's statement that the DOCS tax is not a charge

for which Appellants are "legally liable" to the State. MCI is legally liable for paying the commissions to the State, and Appellants are legally liable to MCI. That legal liability here runs to MCI directly, and to Appellants indirectly, does not make the DOCS charge any less a tax (see Gross, 92 NJ at 539; 184 NJ Super at 148) (in which court struck down an unlawful tax despite fact that towing company customers had no legal liability to pay township)). Sales tax, for example, is a tax on the income of a store. That the store passes or chooses not to pass the tax on to the customer makes no difference in its function.

3. Appellants are Entitled to a Refund.

Finally, the Appellate Division held that even if the DOCS surcharge is an unlawful tax, Appellants did not pay their bills to MCI under protest, and thus are not entitled to a refund (R. 10). The Appellate Division's reasoning is flawed for two reasons.

First, there can be no doubt that the pendancy of a legal challenge is an adequate substitute for express protest (People ex rel. Wessell, Nickel & Gross v Craig, 236 NY 100, 105 [1923]; ("The realtor's continued purpose to challenge the assessment is indicated by the fact that when the payments were made there was pending a certiori proceeding.... The pendency of such a proceeding is at least the equivalent of protest."); In the Matter of Bowery Sav. Bank v Board of Assessors of County of Nassau, 80 NY2d 961 [1992]). Thus at the very least, Appellants are

entitled to refunds of the DOCS tax paid from the time this action was brought, on February 25, 2004 (R. 72).

But that is not all to which Appellants are entitled, as they made their intention to challenge the DOCS tax clear long before the commencement of the instant action (R. 49 – 50, 52, Complaint at ¶¶ 34 – 36, 40). The function of protest is to notify the municipality that it may be obligated to refund the taxes, so it can prepare to meet that contingency (Video Aid Corp. v Town of Wallkill, 85 NY2d 663, 667 [1995]). Appellants' continuous complaints and decades-long effort to litigate this issue assures that the State was well aware of the possibility of a refund. Appellants are thus entitled to refund of all taxes they have paid since the PSC's October 30, 2003 decision.

Finally, even if Appellants' litigation and complaints were not adequate protest, protest here is not required because the payments were made under duress. Payment under protest is simply one indication that money was not paid voluntarily. "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" (Mercury Mach. Importing Corp. v City of New York, 3 NY2d 418, 424 [1957]). Thus, in Five Boro Electrical Contractors Assoc., Inc., v City of New York, 12 NY2d 146, 149 [1962], this Court held that electricians seeking refund of unconstitutional license

fees were excused from the requirement of formal protest, "in view of the compulsory nature of the payment of the[]exorbitant license fees." In so holding, this Court examined the bind the electricians were in: they could not operate without licenses, and they could not renew their licenses without payment of the excessive fees. They had no other options. (Id.) Similarly, Appellants could not speak to their loved ones without paying the allegedly unlawful charge (R. 54, Complaint at ¶¶ 48 – 49). Thus the DOCS charge was coerced, and must be refunded.

B. THE APPELLATE DIVISION ERRED IN DISMISSING APPELLANTS' TAKINGS CLAIM

By Count III of the Complaint, Appellants seek a declaration that the DOCS tax worked an unlawful taking of their property (R. 65 – 66, Complaint 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 worked a taking of their property: the money they pay to cover the DOCS tax (R. 40, 44 – 46, Complaint at ¶¶ 7; 18 – 22); for a public purpose: funding a portion of DOCS' general operating costs (R. 53, Complaint at ¶45; R. 103 – 112); without any compensation.

The Appellate Division dismissed Appellants' taking claim without citation to a single New York case. Rather, the court relied on an out-of-state challenge to

a similar prison telephone system for the proposition that a collect call recipient is in "complete control over whether ... to accept the call and thereby relinquish [his or] her money to pay for it[,] [t]here is no taking of which to speak" (R. 11, Walton, 57 AD3d at 1185, quoting McGuire v Ameritech Services, Inc., 253 FSupp2d 988, 1004 [SD Ohio 2003]).

The Appellate Division erred by characterizing Appellants' acceptance of collect calls as purely voluntary; they have no other way to speak to their loved ones. Thus there is an element of duress in their acceptance of each call (see section A(3) supra). When the government exerts duress or compulsion upon a citizen, it can transform an otherwise voluntary action into a taking requiring just compensation (Dore v United States, 119 Ct Cl 560, 577 & 580 [1951] (compelled sale of rice to government during period of mandatory set-asides was a taking requiring just compensation)).

Money, like other property, cannot be taken for public purpose without just compensation (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]). In Webb, for example, the Supreme Court considered a Florida statue that 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 "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.

C. THE APPELLATE DIVISION ERRED IN DISMISSING APPELLANTS' EQUAL PROTECTION CLAIM

In Count IV, Appellants allege that Respondent's arbitrary imposition of the DOCS tax upon them violates their right to equal protection under the law (R. 66 – 67, 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, 11 [1992])).

The court below held that Appellants failed to "demonstrate[] either that their fundamental rights have been infringed or that they were treated differently from any persons who are similarly situated" (R. 11, Walton, 57 AD3d at 1185). This was in error. First, Appellants are similarly situated to other citizens who are not singled out to fund the correctional system, as the charge at issue serves no security nor other legitimate penological purpose. Second, as explained in Section IV.D below, Appellants have alleged violations of their fundamental right to freedom of speech and association, thus the classification here must be subjected to strict scrutiny. However, Appellants' claim survives even under rational basis review.

The Appellate 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. 111). 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).

The Appellate Division ignored Byrd completely. Instead, it relied on Daleure v Kentucky, 119 F Supp 2d 683, 691 [WD Ky 2000], in which the Western District of Kentucky differentiated between prisoner collect call recipients and other collect call recipients on the assumption that the telephone surcharge at issue implicated security concerns (R. 11). Here, Appellants have alleged that the DOCS tax was completely unrelated to security needs (R. 41 – 42, 59 – 60, Complaint at ¶¶ 8, 12, 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. 103 – 107, 111), and moreover, must be taken as true upon a motion to dismiss (Byrd at *26). 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 below, the telephone tax violates Appellants' right to 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 (id. 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] (collecting 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 (Byrd, at *31; see also Allegheny Pittsburgh Coal Co. v County Commr., 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 [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 [1994] ("gross disparities" in taxation violate equal protection)).

Here, DOCS acted without legislative authorization to arbitrarily impose upon Appellants a tax that it did not impose on other taxpayers. While 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 (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.

D. THE APPELLATE DIVISION ERRED IN DISMISSING APPELLANTS' FREEDOM OF SPEECH & ASSOCIATION CLAIM

In Count V 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 imposes a charge on Appellants' expressive and associational activity that bears no relationship to related regulatory costs and burdens Appellants' ability to maintain contact with incarcerated family members without a legitimate penological purpose (R. 67 – 69, Complaint at ¶¶ 102 – 111). The Appellate Division made two errors in dismissing this claim: First, it mischaracterized both Appellants' allegations and the nature of right at issue; second, the court failed to inquire whether the DOCS tax has a legitimate penological purpose (R. 10). Each of these errors is discussed in detail below.

1. The DOCS Tax Burdens Appellants' Freedom of Speech and Association.

On a motion to dismiss pleadings are to be afforded a liberal construction—the court must accept as true all facts alleged in the Complaint and accord plaintiffs the benefit of every possible favorable inference (Leon v Martinez, 84 NY2d 83, 87 [1994]). The Appellate Division failed to follow this direction. Appellants clearly alleged the DOCS tax interfered with their ability to communicate with incarcerated friends and relatives over the telephone, and their ability to represent their clients. Ms. Walton, for example, alleged that she is unable to speak to her

son or nephew on a regular basis because of the high cost of their calls (R. 44 – 45, Complaint at ¶ 18). Some months, she cannot speak to her son at all (R. 55 – 56, Complaint at ¶ 53; see also R. 59, Complaint at ¶ 63 (cost of DOCS surcharge forced Appellant New York State Defender's Association to stop accepting collect calls from potential clients)).

Appellants also alleged that other avenues of communication do not provide an adequate substitute for telephone calls (e.g. R. 55, Complaint at ¶ 52 (alleging Ms. Walton is unable 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. 57, Complaint at ¶ 58 (alleging Joann Harris in unable to visit her cousin, incarcerated seven hours away, due to time and expense)).

According to the Appellate Division, Appellants failed to "allege[] that the charged rates are so exorbitant that they have been denied the ability to communicate with their incarcerated friends and relatives over the telephone or otherwise" (R. at 10, Walton, 57 AD3d at 1184). But freedom of speech and association may be unlawfully infringed without being completely cut-off. As the Supreme Court explained in Kleindiest v Mandel, that communication is available through other mediums may play a part in free speech balancing, but that does not mean that "the existence of other alternatives extinguishes 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).

Thus, Appellants' free speech and association claim does not require this Court to recognize any absolute "right to communicate by telephone." Rather, all this Court need hold is that Appellants use the telephone to speak and associate with their loved ones, friends, and clients inside prison, and that speech and association may not be burdened without reason.

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 Children of Bedford, Inc. v Petromelis, 77 NY2d 713, 725 [1991]).

In Murdock, the 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—to strike down similar measures.[7] 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

[7] E.g. Eastern 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 Communications 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").

telephone service (R. 42, Complaint at ¶ 12; R. 103 – 107, 111). Therefore, it is an impermissible "flat tax imposed on 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 Sinhogar, 53 NY2d at 443). Because "[i]t is through the family that we inculcate and pass down many of our most cherished values" (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 (Turner v Safley, 482 US 78, 95 – 97 [1987]), because attributes of the family relationship – expressions of emotional support, decision-making regarding family obligations and child-rearing, and expectations of the prisoner's reentry into the family – exist despite the fact of imprisonment (id. at 95 – 96).

2. Appellants' Freedom of Speech and Association May Not be Burdened Without Legitimate Penological Purpose.

The court below reasoned that "inmates are not entitled to pay a particular rate for their calls inasmuch as 'the loss of cost advantages does not fundamentally implicate free speech values.'" (R at 10, Walton, 57 AD3d at 1184, quoting Matter of Montgomery v Coughlin, 194 AD2d 264, 267 [1993].) This language comes

from judicial opinions regarding prison mail regulations, specifically publishers-only rules and prohibitions on receipt of bulk-postage mail (id.; Jones v N.C. Prisoners' Labor Union, Inc., 433 US 119, 130 – 31 [1977]). Such prison regulations, which make speech more expensive, are lawful when evidence supports the existence of a legitimate penological interest (e.g. Jones, 433 US at 131 n 8 (relying on affidavit by Prison director regarding security concerns raised by bulk mail); Ward v Washtenaw County, 881 F2d 325, 329 [6th Cir. 1989] (relying on affidavit by Sheriff regarding security concerns posed by smuggling contraband in magazines)).

Such a finding is not automatic; it requires inquiry into the regulation's purpose (Hurd v Williams, 755 F2d 306, 308 [3rd Cir 1985] (Supreme Court's approval of publishers-only rule cannot be "automatically extended" to cover paperbound books)). The State cannot burden speech by making it more expensive (no more than they can burden it by any other means) without some legitimate penological purpose. Thus in Prison Legal News v Cook, 238 F3d 1145, 1149 – 50 [9th Cir 2001], for example, the Ninth Circuit struck down a prison regulation prohibiting receipt of standard-rate mail because the rule was not reasonably related to any legitimate penological interest. In so doing, the court noted its rejection of "[o]fficials' argument that the regulation banning standard mail does not implicate Publisher's and Prisoners' First Amendment rights because

it results only in the loss of cost advantages" (id. at 1149; see also Hurd, 755 F2d at 309 (expressing concern over publishers-only policy, and leaving open the possibility that the record in another case might raise sufficient question that the security risk in such materials has been exaggerated as to require a trial on the matter)).

The cases cited by the Appellate Division are not to the contrary. Harrison v Federal Bureau of Prisons, 464 F Supp2d 552, 554 [ED Va 2006], was a *pro se* challenge to a three-cent increase in long distance telephone rates at federal prisons. The court dismissed, explaining that the prisoner's first amendment rights, including any right to telephone access, "is subject to rational limitation based upon legitimate security and administrative interests of the penal institution" (id. at 555). Carter v O'Sullivan, 924 F Supp 903, 906 [C D Ill 1996] was another *pro se* case, in which prisoners challenged various features of the collect call system at their facility. The court dismissed their claims upon the department of correctional services' articulation of legitimate security reasons for each feature (id. at 909; see also Johnson v California, 207 F3d 650, 656 [9th Cir. 2000] (holding prisoners have a First Amendment right to telephone access subject to reasonable limitations arising from the legitimate penological and administrative interests of the prison system)).

The Appellate Division would disallow Appellants the opportunity for this inquiry by dismissing their claim without requiring DOCS to identify any legitimate penological interest in the DOCS surcharge, much less engaging in a balance of the interests involved. This holding is all the more erroneous as the record in this case demonstrates that the surcharge is entirely unrelated to any penological or security purpose: it was levied to raise revenue, nothing less and nothing more (see Byrd v Goord, 2005 US Dist LEXIS 18544, *26 [SDNY 2005] (holding earlier incarnation of the DOCS commission has "no obvious penological interest," and thus declining to dismiss plaintiffs' first amendment challenge).

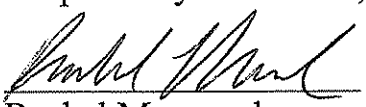
For these reasons, Count V of the Complaint must be reinstated.

V. CONCLUSION

For all of the foregoing reasons, the lower courts erred in dismissing Counts II through V of Appellants' Complaint. We therefore respectfully request that this Court reverse the judgment of the Appellate Division and hold that Appellants have properly stated a claim for violation of their rights under the Constitution of the State of New York, and direct that trial be held as promptly as possible.

Dated: May 26, 2009
New York, NY

Respectfully Submitted,



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