COURT OF APPEALS
OF THE STATE OF NEW YORK

IVEY WALTON, et al., Appellants, - v - THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES, et al., Respondents.	x	Docket No. 98700/05 **NOTICE OF MOTION FOR LEAVE TO APPEAL**

PLEASE TAKE NOTICE that, upon the annexed Statement in Support of Motion for Leave to Appeal, upon the briefs and record filed in the Appellate Division, Third Department on the prior appeal in this action, and upon all papers and prior proceedings in this action, the Appellants, Walton et al., will move this Court at the courthouse of the Court of Appeals, 20 Eagle Street, Albany, New York, on Monday, May 15, 2006, for an order granting Appellants leave to appeal to the Court of Appeals from the order of the Appellate Division, Third Department dated January 19, 2006, affirming the order and judgment of the Supreme Court, Albany County, dismissing Appellants' petition / complaint in its entirety, and for such other and further relief as this Court finds just and proper.

Dated: May 4, 2006
New York, New York

Rachel Meeropol
Barbara Olshansky
CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6432

Juan Cartagena, General Counsel
Craig Acorn, Associate Counsel
COMMUNITY SERVICE SOCIETY
105 E. 22nd Street
New York, NY 10010
(212) 614-5323

Attorneys for Appellants

TO: Clerk of the Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

Victor Paladino
Eliot Spitzer
Attorney General of the State of New York
The Capitol
Albany, New York 12224-0341

Anthony C. Epstein
Steptoe & Johnson, LLP
1330 Connecticut Avenue, N.W.
Washington, D.C. 20036

William H. Reynolds
Tobin and Dempf, LLP
33 Elk Street
Albany, New York 12207-1801

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT IN SUPPORT OF MOTION FOR LEAVE TO APPEAL

I. STATEMENT OF PROCEDURAL HISTORY OF CASE

This action was commenced in the Supreme Court, Albany County, by Verified Petition and Complaint dated February 25, 2004, seeking relief from the imposition of an unlawful tax by the New York State Department of Correctional Services ("NYSDOCS" or "DOCS") and MCI WorldCom Telecommunications, Inc. ("MCI"). (See Record on Appeal Submitted to Appellate Division, Third Department, hereafter "R." 27 – 66.) In a decision and order entered October 22, 2004 the Honorable George B. Ceresia, Jr. granted Respondents NYSDOCS' and MCI's Motions to Dismiss the case in its entirety. (R. 8 – 15.) Appellants served their notice of appeal to the Appellate Division, Third Department on November 22, 2004. (R. 17.) The Appellate Division, Third Department affirmed the decision of the lower court by a Memorandum and Order entered on January 19, 2006 and a Notice of Entry was served by regular mail on January 20, 2006. (See Memorandum and Opinion of the Appellate Division, Third Department, with Notice of Entry, "Appellate Division Op." attached hereto as Exhibit A.) 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 petitioner-appellants' motion for leave to appeal was

served by regular mail on April 5, 2006. (See Notice of Entry and Decision and Order on Motion, attached hereto as Exhibit B.)

II. JURISDICTIONAL STATEMENT

Jurisdiction of the proposed appeal is in the Court of Appeals pursuant to CPLR 5602(a)(1)(i) on the ground that the Appellate Division's Memorandum and Order dismissing the case in its entirety is a final determination of the action. (See, Appellate Division Op. at 4 – 5.)

III. STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether, when a state agency and a private corporation act together to unlawfully impose a telephone surcharge tax on private telephone customers to fund the agency's general operations, each unlawful billing that includes the tax and is mailed by the private corporation, at the continued direction of the state agency, is a continuing violation of the telephone customers' constitutional, statutory and common law rights, such that a new cause of action accrues with each billing? The Supreme Court answered this question in the negative, and the Appellate Division affirmed. (R. 24; Appellate Division Op. at 4.)

2. Whether, when a state agency and a private corporation act together to unlawfully impose a telephone surcharge tax on private telephone customers to fund the agency's general operations, and that tax is unauthorized by the state legislature and violates the New York State Constitution and the General Business

Law, and the telephone customers seek: (a) a declaration that the tax is unlawful; (b) an order enjoining the continued collection of the tax; and (c) an order to return money unlawfully collected, each form of relief is available through an CPLR Article 78 proceeding? The Supreme Court answered this question in the affirmative, and the Appellate Division affirmed. (R. 23 – 24; Appellate Division Op. at 3.)

3. Whether, when a state agency and a private corporation act together to unlawfully impose a telephone surcharge tax on private telephone customers to fund the agency's general operations, and the telephone customers seek: (a) a declaration that the tax is unlawful; (b) an order enjoining the continued collection of the tax; and (c) an order to return money unlawfully collected, the customers' claims properly accrue on the date the comptroller approves a new rate which includes the tax, instead of the date the rate is approved by the Public Service Commission ("PSC") and charged to collect-call recipients? The Supreme Court held that the claims accrued on April 1, 2001, the date the contract was signed; and the Appellate Division answered this question in the affirmative. (R. 24 – 25; Appellate Division Op. at 3 – 4.)

4. Whether, when the Public Service Commission disavows jurisdiction over the portion of a telephone rate filed by a private company that is attributable to a state agency's demand for a tax to fund its general operations and that portion of

the rate is charged to private telephone customers, telephone customers can seek relief from the continued collection and retention of the tax by the state agency and the private company or whether only the explicit directives of the PSC Order are subject to judicial review and enforcement? The Supreme Court answered this question in the negative, and the Appellate Division affirmed. (R. 24 – 25; Appellate Division Op. at 4.)

5. Whether, when a state agency and a private corporation act together to unlawfully impose a telephone surcharge tax on private telephone customers to fund the agency's general operations, and that tax is unauthorized by the state legislature, burdens Appellants' ability to speak to and remain in close communication with their loves ones and / or clients, and is arbitrarily imposed on Appellants without penological purpose, the tax violates Appellants' due process, freedom of speech and association, and equal protection rights? The Supreme Court did not reach this question because it dismissed each claim on statute of limitations grounds, and the Appellate Division affirmed. (R. 24; Appellate Division Op. at 4 – 5.)

6. Whether, when a state agency and a private corporation act together to unlawfully impose a telephone surcharge tax on private telephone customers to fund the agency's general operations, the state's actions can be challenged as deceptive business practices under the General Business Law? The Supreme Court

did not reach this question because it dismissed the claim on statute of limitations grounds; the Appellate Division affirmed. (R. 24; Appellate Division Op. at 4.)

IV. ARGUMENT FOR REVIEW

In moving for permission to appeal in this proceeding, Appellants seek to confirm settled law and correct serious errors made by the Appellate Division resulting in the continuation of a profound injustice. This injustice affects not only the individual Appellants in this case, but the tens of thousands of friends, family members, and service providers who have been and continue to be unlawfully taxed for the privilege of communicating with New York State Prisoners. In erroneously dismissing the majority of Appellants' claims as untimely, the Appellate Division has created significant confusion as to when an individual may sue for a violation of his or her rights. But even more disturbing, the Court has wrongly insulated the illegal actions of the NYSDOCS and MCI from judicial review for years to come. Appellants' underlying claims – that their Constitutional right to due process, freedom of speech and association, and equal protection under the law are violated by a discriminatory and burdensome tax levied by the NYSDOCS each month without legislative authorization – are timely, are of statewide importance, and merit review by this Court.[1]

[1] Appellants' constitutional claims are stated in paragraphs 77 through 111 of the Verified Petition and Complaint. (R. 56 – 62.) The Supreme Court did not consider the merits of these claims however, because it dismissed each Count on statute of limitations grounds. (R. 24.)

A. Summary of the Relevant Facts and the Opinion of the Appellate Division, Third Department.

Appellants Ivey Walton, Ramona Austin, Joann Harris, Office of the Appellate Defender, and the New York State Defenders Association are the family members and advocates of prisoners incarcerated in various New York State correctional institutions. They seek to appeal the Appellate Division's dismissal of their combined Article 78/declaratory judgment proceeding seeking relief from the imposition of an unlawful tax by means of: (1) an order that MCI and DOCS cease assessing and collecting the unlawful tax; (2) a refund of the taxes unlawfully collected from them; and (3) a declaration that the DOCS tax 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 Plaintiffs' property without due process of law in violation of Article I §§ 6 and 8 of the State Constitution; (c) a violation of Plaintiffs' rights to equal protection guaranteed by Article I § 11 of the State Constitution; (d) a violation of Plaintiffs' speech and association rights guaranteed by Article I § 8 of the State Constitution; and (e) a deceptive act or practice in violation of General Business Law § 349. (R. 55 – 65.)

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.

These claims were properly presented to the Appellate Division. (See Brief for Plaintiffs-Appellants, Aug. 15, 2005 at 30 – 44.)

(R. 47.) Pursuant to a contract between MCI and DOCS signed on August 1, 2001, MCI is the exclusive provider of telephone services to the New York State Department of Correctional Services. (R. 33; 220 – 431). This contract will run through March 31, 2006, with the option of two, one-year renewals. (R. 228.)[2] Under the Contract, MCI remits to DOCS a "commission" of 57.5 percent of the gross annual revenue garnered from its operation of the telephone system. (R. 33.) To finance the State's 57.5 percent tax, MCI charges recipients of prisoners' collect calls exorbitant rates. The current rate structure charged to call recipients, which includes a $3.00 flat surcharge and a set rate of $0.16/minute on all local and long distance calls, was established by an amendment to the contract effective July 25, 2003 (R. 220 – 224) and approved by the PSC by order effective October 30, 2003. (R. 67 – 92.)

The Contract between MCI and DOCS is extremely lucrative for the State. For instance, between April 1, 1996 and March 31, 2001, prisoners' telephone calls paid for by Appellants and putative class members provided the State with revenues totaling approximately $109 million. (R. 46.) The 57.5 percent DOCS tax is paid by the putative class and tendered by MCI to the State, which deposits it into the general fund. (R. 46.) The proceeds are then appropriated and earmarked for deposit into DOCS' "Family Benefit Fund." (R. 35.) The monies deposited in

[2] Upon information and belief, NYSDOCS has exercised this option and renewed the contract.

the Fund are used to cover the costs of Departmental operations wholly unrelated to the maintenance of the prison telephone system. (R. 35.) For example, the vast majority of these monies are spent on services, like medical care, that the State is required by law to provide for prisoners. (R. 46.) The high cost of collect calls from New York State prisoners is a direct result of the DOCS tax. (R. 33.) The DOCS tax places a substantial financial burden on Appellants and putative class members and limits the duration and numbers of calls that they can accept from prisoners. (R. 48 – 53.)

The DOCS tax has not been authorized by the New York State legislature, nor has it been approved as a legitimate component of MCI's filed telephone rate by the PSC. (R. 36.) On August 15, 2003, MCI filed revised tariffs setting out the new rate to be charged to the recipients of prisoners' collect calls beginning on September 14, 2003. (R. 44.) Family members, friends, lawyers, and other recipients of prisoner collect calls (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. 45, 124 – 153.) In their comments, Appellants and putative class members requested a hearing on the entire MCI rate, and directed the PSC's attention to the constitutional and legal infirmities of certain aspects of the prison telephone system. (R. 124 – 153.)

By order effective October 30, 2003, the PSC held that it did not have jurisdiction over the DOCS tax. (R. 88.) The PSC reasoned that because DOCS is not a telephone corporation subject to the Public Service Law, it does not have jurisdiction over either the Department or the tax charged by it. (R. 88.) The PSC called the non-jurisdictional portion of the total charge the "DOCS commission," and referred to the other portion of the rate, the 42.5 percent retained by MCI, as the "jurisdictional rate." (R. 88.) The PSC reviewed the jurisdictional portion of the MCI rate by comparing it to rates MCI charges for analogous services. (R. 88.) Based upon this comparison and other factors, the PSC approved the jurisdictional rate as "just and reasonable" under the Public Utilities Law. (R. 89.) The PSC did not undertake *any* review of the reasonableness of the DOCS tax or of the entire combined rate. (R. 89.) The PSC directed MCI to file a new tariff reflecting the two separate charges: the DOCS tax and MCI's filed rate. (R. 89, 432 – 434.) Since the October 30, 2003 PSC Order, MCI has continued to bill Plaintiffs and putative class members for both charges: the 42.5 percent of the total that the PSC approved as a just and reasonable telephone rate, and the unapproved 57.5 percent DOCS tax.

The DOCS commission does not serve any penological purpose; rather, it is a way for the state to alleviate the burden of funding the state prison system by shifting a disproportionate share of that cost to the family members and friends of

New York State Prisoners. (R. 35, 52 – 53.) Respondents can offer no legitimate justification for requiring recipients of prisoner collect calls to fund general operations of the New York State Prisons. The resulting high telephone rates limit Appellants' ability to speak to their loved ones despite serious public safety and policy consequences – as it is well established that maintaining family and community ties limits recidivism after release. (R. 47 – 52).

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. 24.) The court also dismissed Count I, seeking to enforce the PSC Order, on the merits. (R. 24 – 25). Appellants filed a timely appeal of the Supreme Court's order. (R. 3; Brief for Plaintiffs-Appellants, Aug. 15, 2005.) By Decision and Order decided and entered on January 19, 2006, the Appellate Division, Third Department affirmed the decision of the court below. (Appellate Division Op. at 5.) Appellants now move this Court pursuant to CPLR § 5602 for leave to appeal the Appellate Divisions' Order to the New York State Court of Appeals.

In affirming the lower court's dismissal of Appellants' statutory and constitutional claims, the Appellate Division held that (1) the petition / complaint primarily seeks relief available by an article 78 proceeding, and is thus subject to a four-month statute of limitations; (2) the balance of Appellants' claims accrued on

July 25, 2003, when the contract amendment was approved by the Comptroller; and (3) that the continuing violation doctrine does not apply. (Appellate Division Op. at 2 – 4.) These erroneous determinations upset settled statute of limitations law, misinterpret Court of Appeals' jurisprudence, and unfairly insulate from judicial review unconstitutional State actions affecting tens of thousands of individuals.

B. Court of Appeals' Review is Essential to Correct Confusion and Serious Injustice Caused by the Appellate Divisions' Unwarranted Narrowing of the Continuing Violation Doctrine.

While the Appellate Division erred in several significant ways, the most obvious and far-reaching error stems from its misstatement of the law with respect to the continuing violation doctrine. The Court held that the continuing violation doctrine does not apply to the continuous billing by NYSDOCS and MCI of the DOCS tax, because each billing was merely the continuing effect of the NYSDOCS – MCI contract, rather than a continuing unlawful act. (Appellate Division Op. at 4, citing Bullard v. State, 307 AD2d 676, 678 [2003].) Without correction, this misstatement could cause significant confusion for litigants seeking to challenge continuous illegal action by public and private entities, and will irrevocably damage the rights of *all* recipients of collect calls from New York State prisoners. The lower courts' flawed reasoning is apparent in the profound injustice of the result: under the holding below an individual whose loved one entered the

New York State Prison System after November of 2003 will be forced to pay the unlawful DOCS tax for over four and a half years with no opportunity for judicial review. Thousands of bill-payers will be forced to wait until the current contract and the two one-year extensions expire in spring of 2008 to challenge their monthly billings.

Moreover, in denying the applicability of the continuing violation doctrine to Appellants' claims, the Appellate Division has introduced significant confusion into a previously settled area of the law. The basic contours of the continuing violation doctrine are clear: under New York law, a cause of action ordinarily accrues at the time of the wrongful act. However, "certain wrongs are considered to be continuous wrongs, and the statute of limitations, therefore, runs from the commission of the last wrongful act." (Neufeld v. Neufeld, 910 F Supp 977, 982 [SDNY 1996] (citations omitted).) If the wrongful acts do not cease, a cause of action for a continuing harm continuously accrues. (Davis v. Rosenblatt, 159 AD2d 163, 168 [1990], citing 1 Weinstein-Korn-Miller, NY Civ. Prac., Para 213.04.)

The Appellate Division declined to apply the continuing violation doctrine to the current case in reliance upon its decision in Bullard v. State (307 AD2d at 678), involving a Court of Claims challenge to an earlier incarnation of the same taxation scheme. Taken together, the Bullard and Walton decisions erroneously

eliminate application of the continuing violation doctrine in the context of repeated unlawful acts that can be attributed to a single triggering event by mischaracterizing such acts as "continuing effects" rather than continuing unlawful conduct. (Bullard, 307 AD2d at 678.)

Specifically, the Bullard Court found the continuing violation doctrine inapplicable to claimants' challenge to the telephone rates charged to them as recipients of prisoners' collect calls, on the theory that claimants were really challenging the "continuing effects of the April 1, 1996 Worldcom contract" creating the commission structure. (Id.) In reaching this conclusion, the Appellate Division relied upon Commack Self-Service Kosher Meats, Inc. v. State, (270 AD2d 687, 688 [2000]) and Selkirk v. New York, (249 AD2d 818, 819 [1998]). Commack and Selkirk support the well-established proposition that the continuing violation doctrine requires continuing unlawful acts, not just the continuing effect of earlier unlawful conduct. (See Commack Self-Service Kosher Meats, 704 270 at 688; Selkirk, 249 AD2d at 819.) However, these cases decidedly do not support the Appellate Division's erroneous classification of repeated unlawful acts – the billing and collection of an unlawful and discriminatory tax – caused by an identifiable triggering event, as a mere continuing effect.

In Commack, the Department of Agriculture and Markets cited a kosher meats business with violation of an Agriculture and Market Law provision

regarding the sale and preparation of kosher foods, causing injury to their reputation. (704 AD2d at 687.) In defending against a statute of limitations argument, claimants attempted to characterize the ongoing damage to their reputation as a continuing injury that caused their claim to accrue on a daily basis. (Id. at 688.) The Appellate Division found against claimants because "the Department's unlawful conduct, if any, occurred five years before the claim was filed." (Id.) In short, claimants' injury emanated from one harmful act on the part of the agency, and that act occurred outside the statute of limitations period. (Id.)

Selkirk involved a similar challenge to a single, discrete wrongful act -- the state's wrongful seizure of claimant's assets -- that caused continuing damage to claimant's credit and financial reputation. (249 AD2d at 818.) Once again, the Appellate Division refused to apply the continuing violation doctrine because claimant challenged "the continuing effects of earlier unlawful conduct" rather than "continuing unlawful acts." (Id. at 819.)

The Appellate Division erred in extending the exception established in these cases without analysis, and in ignoring significant precedent to the contrary. Selkirk and Commack each involved a single and discrete wrongful act by defendants which resulted in ongoing economic harm to claimants. Bullard and Walton, in contrast, involve a continuing serious of unlawful acts by Respondents flowing from one identifiable cause – the decision to make a contract. The

Appellate Division's re-classification of continuous unlawful billings as the continuing effect of prior action rather than independent acts constituting continuing violations stands in direct contradiction to the substantial weight of precedent and introduces serious confusion into the case law.

The Appellate Division's holding creates a conflict within New York State jurisprudence because New York courts, including the Court of Appeals, have consistently applied the continuing violation doctrine to repeated unlawful acts, like underpayment or unlawful billings, even when those acts flow from a single triggering action, such as a contract or an agency decision. In Grossman v. Rankin, (43 NY2d 493 [1977]), for example, the Court of Appeals considered a challenge to New York City's determination to classify 100 attorney positions in Corporation Counsel's Office as exempt from the competitive examination requirements. The Court of Appeals found error in the lower court's limitation of review of the classifications to only those positions filled within four months of the commencement of the lawsuit. (Id. at 506.) Because Respondents allegedly continued to violate the State Constitution by continuously employing the attorneys in question, a challenge to all the classifications was timely. (Id.) The Court in Grossman applied the continuing violation doctrine. However, under the Appellate Division's Bullard / Walton analysis, continued employment would be characterized as the mere effect of one earlier unlawful classification.

The Appellate Division's holdings in Bullard and Walton also conflict with earlier decisions within the Third Department. In Cahill v. Public Service Commission, (113 AD2d 603 [1986]), for example, a customer of New York Telephone Company and Central Hudson Gas & Electric filed an Article 78 proceeding seeking an order directing defendants to cease passing along the cost of charitable contributions to customers. (Id. at 604.) The petitioner claimed that a PSC policy, established in 1970, permitted utilities to pass along these costs to ratepayers, in violation of ratepayers' First Amendment rights. (Id. at 605.) Although the claim was not commenced until 1984, fourteen years after creation of the challenged policy, the Appellate Division held that the Article 78 proceeding was timely because the petitioner sought relief to address a continuing violation of his constitutional rights. (Id. at 606.)

Similarly, in Davis v. Rosenblatt, former and current City Court Judges from Syracuse, Rochester, Buffalo, and Niagara Falls challenged a disparity between their wages and the wages paid to Yonkers judges. (159 AD2d 163, 166-67 [1990].) The State conceded and the Appellate Division held that the judges were challenging a continuing violation of law, for which a claim continuously accrues for statute of limitations purposes. (Id. at 168.) Although the salary differential was created by statute (as the DOCS "commission" at issue in this case was created by contract) the Appellate Division did not consider the date of that statute

in its statute of limitations discussion. (Id.) Rather, the Third Department found that the claims were timely for all judges who had received the allegedly unlawful pay rate within the operative six-year statute of limitations. (Id. at 169.) In other words, the claim accrued upon each pay period until the allegedly discriminatory pay differential ceased. (Id. at 168-69; accord Nelson v. Lippman, 271 AD2d 902, 905 [2000], revd on other grounds, 95 NY2d 952 [2000]; see also Merine v. Prudential-Bache Utility Fund, Inc., 859 F Supp 715, 725 [SDNY 1994] (applying the continuing violation doctrine to excessive fees continuously charged under a Distribution Plan approved outside the statute of limitations period)).

In this case, Appellants' challenge to the continuing imposition of an illegal and discriminatory tax is indistinguishable from the ratepayer's challenge to the continuous passing through of charitable contributions in Cahill, the Judges' challenges to continuing unequal pay in Davis, and the shareholders' challenge to continuing excessive fees in Merine. In each case, the petitioners or claimants challenged continuing wrongful acts triggered by a policy or law created outside the operative statute of limitations period.[3] And in each case the court held that the challenge was timely. Under Bullard and Walton, however, the continuing

[3] The 2001 contract only falls outside the statute of limitations period if the Appellate Division was correct in applying the four month statute of limitations appropriate for Article 78 proceedings. Appellants argue that the appropriate statute of limitations in this case is actually six years. (See Section C, below). If the Court of Appeals grants review of Appellants claims and agrees that the continuing violation doctrine applies, however, than the appropriate statute of limitations is only relevant to determine how many years of damages Appellants may seek, not the timeliness of their claims.

underpayment, excessive fees, and charitable contributions of the earlier cases would be re-classified as the continuing effects of a single statute, a single development plan, and a single agency policy, respectively.

Without a definitive statement by this Court of the law in the context of continuous unlawful acts flowing from a single unlawful trigger, potential litigants will have no way to predict the timeliness of their claims. Court of Appeals review to settle this question is essential given the numerous and disparate contexts in which the continuing violation doctrine is been applied.[4] Litigants challenging employment discrimination, sexual discrimination, trespass, nuisance, breach of contract, and improper billings of all kinds could face application of the Bullard / Walton exception to the continuing violation doctrine in future challenges. Moreover, without review by this Court, Appellants and ten of thousands of other New York State residents who wish to communicate with New York State prisoners will have no avenue for judicial review of the unlawful DOCS commission for at least the next two years. Logic dictates that this group includes

[4] The New York Courts have applied the doctrine in the context of actions for money unlawfully withheld, (Barash v. Estate of Sperlin, 271 AD2d 558, 559 [2000]; Butler v. Gibbons, 173 AD2d 352, 352 [1991]; Subin v. City of New York, 132 Misc 426, 428 [1928]); continuing violation of a constitutional right, (Cash v. Bates, 301 NY 258, 261 [1950]; Amerada Hess Corp. v. Acampora, 109 AD2d 719, 722 [1985]); continuing trespass, (Town of Saranac v. Town of Plattsburgh, 218 AD2d 866, 868 [1995]; Cranesville Block Co. v. Niagara Mohawk Power Corp., 175 AD2d 444, 446 [1991]); continuing breach of a contract or continuing obligation, (Bulova Watch Co. v. Celotex Corp., 46 NY2d 606, 611 [1979]; Orville v. Newski, 155 AD2d 799 [1989]); continuing exposure to a harmful substance, (Bikowicz v. Nedco Pharmacy, Inc., 130 AD2d 89, 92 [1987]); and continuing sexual harassment, (Town of Lumberland v. New York State Div. of Human Rights, 229 AD2d 631, 634 [1996].)

many individuals who did not have a loved on in prison within four months of the latest contract amendment (July, 2003) and thus never had a chance to challenge the DOCS commission.

C. Court of Appeals' Review is Essential to Reconcile Application of the Court's Holdings in Solnick v. Whalen and Progeny.

Courts of Appeals review is also essential in this case to clarify the proper reach of Article 78 review. Appellants argued in the Supreme Court and in the Appellate Division that their claims are subject to the six year catch-all statute of limitations applicable to actions for a declaratory judgment. (See Brief for Plaintiffs-Appellants, Aug. 15, 2005 at 9 – 21; Reply Brief for Plaintiffs-Appellants, Oct. 22, 2005 at 3 – 7.) The Court below rejected that position and instead held that each count of the Petition / Complaint, excepting count one,[5] can

[5] The Supreme Court recognized that Count One, by which Appellants seek an order barring Respondents from continuing to collect the DOCS tax on the basis that it was not approved as a telephone rate by the PSC, is timely. (R. 6.) However, the Court dismissed the claim on its merits, on the grounds that Respondents had already complied with the PSC's order and the Appellate Division affirmed. (R. 6 – 7; Appellate Division Op. at 4.) Court of Appeals review in this case is also important because the Appellate Division failed to adequately review the one claim it considered on the merits. Pursuant to New York Public Service Law § 97(2), "[I]t shall be the duty of every...telephone corporation...to obey each and every such order so served upon it and to do everything necessary or proper in order to secure compliance with and observance of every such order...according to its true intent and meaning." (emphasis added). Because the PSC found that it had no authority over the DOCS tax, MCI is only authorized to bill for the "jurisdictional portion" of the rate held to be "just and reasonable" by the PSC. In dismissing the claim, the Appellate Division failed to properly construe and enforce the New York Public Service Law. This Court should grant Appellants' Motion and take the opportunity to properly construe and enforce the law.

be resolved through Article 78 review, and is thus subject to Article 78's four-month statute of limitations. (R. 4 – 6; Appellate Division Op. at 3.)

The Appellate Divisions' holding represents a profound misunderstanding of this Court's decisions in Lakeland Water District v. Onondaga County Water Authority, (24 NY2d 400 [1969]) Solnick v. Whalen, (49 NY2d 224 [1980]) and New York Health and Hospitals Corporation v. McBarnette, (84 NY2d 194 [1995]). Court of Appeals review is necessary to clarify the intersection of these three important decisions.

In Lakeland Water District, this Court considered rate-setting by the Onondaga County Water Authority. (24 NY2d at 405.) The Court explained that Article 78 certiorari review is appropriate for a challenge to agency rates set pursuant to a statute requiring notice and a hearing. (Id. at 407.) When the agency's decision is made without notice and hearing, that quasi-legislative action is instead open to judicial review by an action for a declaratory judgment. (Id. at 408.) Specifically, such review allows for the Court to consider whether the agency acted "in disregard of statutory standards, in excess of its grant of authority, in violation of due process, or in a discriminatory manner." (Id.)

The Court subsequently used a procedural due process challenge to a Medicaid reimbursement rate determination as an opportunity to further distinguish the two types of actions. (See Solnick, 49 NY2d at 230 – 32.) The Court of

Appeals explained that the existence or non-existence of constitutional questions is irrelevant to determining the proper form of the action. (Id. at 231.) Rather, the relevant difference is between a truly "administrative" determination, like the *ad hoc* determination of an individual party's right of reimbursement, and a "legislative" decision such as an across-the-board rate increase, ordinance or law of general applicability. (Id. at 231 – 32.) The former must be challenged under Article 78; the latter by an action for a declaratory judgment. (Id.)

In New York City Health and Hospitals Corporation v. McBarnette, the Court affirmed the Solnick principle that generally applicable quasi-legislative actions by administrative bodies, especially those made without notice and hearing, are not subject to Article 78 review but recognized an exception for those cases in which "even a nonindividualized, generally applicable quasi-legislative act such as a regulation or an across-the-board rate-computation ruling can be challenged as being 'affected by error of law,' 'arbitrary and capricious' or lacking a rational basis." (84 NY2d at 204 – 5.)

In Walton, the Appellate Division interpreted the Courts' holding in McBarnette that *certain* quasi-legislative decisions may be susceptible to review under Article 78 as a mandate that *all* such decisions are subject to Article 78 review. (Appellate Division Op. at 3.) This cannot be what the Court intended. Unlike the McBarnette Petitioners, who challenged an agency rule affecting

hospital reimbursement rates as representing "an irrational construction of the governing statutes," the billing and collection of the DOCS surcharge is not the type of "administrative determination" that can be analyzed as to whether it is "affected by error of law" or "arbitrary and capricious," because it is not a valid administrative act. (84 NY2d at 205.)

Administrative acts are those which are "necessary to carry out legislative policies and purposes already declared by the legislative body or such as are devolved upon it by the organic law of its existence." (BLACK'S LAW DICTIONARY 45 [6th ed. 1990].) The DOCS surcharge, however, is without any basis in law. There is no statute to interpret, nor any legislative policies against which a court could measure Respondents' actions. Rather, Appellants challenge the DOCS surcharge as an *ultra vires* legislative act, by which the agency is unlawfully usurping the role of the legislature. (R. 56.) Such a claim may only be brought in an action for a declaratory judgment seeking a determination as to the constitutionality of the agency's action. (See e.g. Save the Pine Bush v. City of Albany, 70 NY2d 193, 203 [1987] (constitutional challenge to ordinance as vague and overbroad delegation of authority cannot be maintained in an Article 78 proceeding); Watergate II Apartments v. Buffalo Sewer Authority, 46 NY2d 52, 58 [1978] (challenge to charges by Sewer Authority as a discriminatory tax beyond the power of the authority to impose was properly brought as a declaratory

judgment not subject to the exhaustion requirement of Article 78); Hull v. Town of Warrensburg, 207 Ad2d 37, 39 [1994] (constitutional challenge to Town's power to assess a sewer rent properly brought as declaratory judgment action, rather than an Article 78 proceeding).) Because the relief Appellants seek is unavailable in any other action, the six-year catchall statute of limitations for declaratory judgments must be applied.

Court of Appeals review on this issue is both appropriate and necessary to rectify the Appellate Division's misunderstanding of a complicated doctrine that has repeatedly required intervention and elucidation by this Court.

D. Court of Appeals' Review is Necessary Because the Appellate Division Created an Incentive for Litigants to Forego Presenting their Claims to the Appropriate Regulatory Body.

Court of Appeals review of Walton is also important because, in misidentifying the date Appellants' claims accrued, the Court below created a perverse incentive for litigants seeking to challenge agency action to turn immediately to the state courts, without first bringing their complaints before the appropriate regulatory body.

As explained above, the Appellate Division determined that Appellant's claims were properly brought under Article 78. (Appellate Division Op. at 3.) It went on to find that these claims accrued when the contract amendment setting out the current rates was approved by the Comptroller, on July 25, 2003. (Id.) This

holding however, relies on the PSC's October 2003 order stating it lacked jurisdiction over the DOCS commission -- a decision that had not yet occurred at the time the Appellate Division would hold the claims to have accrued. (R. 67 – 92.) Had the PSC asserted jurisdiction over the DOCS commission, reviewed and approved the rate, Appellants would have had to challenge that approval within four months of the PSC determination.

Appellants are in a "catch-22." The rates challenged in Walton were created by contract amendment approved by the Comptroller in July of 2003. Upon learning of the rate change, Appellants did what the Public Service Law instructs them to do – they brought their challenge to the new rate scheme before the body that regulates intrastate telephone rates. It was only *after* the PSC disavowed jurisdiction over the DOCS tax that Appellants then, in a timely manner, turned to the Supreme Court for relief. The Appellate Division's holding - that Appellants should have gone directly to the Supreme Court in 2003, without first bringing their claims before the PSC - conflicts with the Public Service Law and settled decisional authority on the primary role of regulatory bodies to review rates set by administrative agencies. (See Van Dussen-Storto Motor Inn, Inc. v. Rochester Tel. Corp., 42 AD2d 400, 402 [1973].) Had Appellants gone directly to the Supreme Court, the PSC would not have had the opportunity to disavow jurisdiction over the DOCS Commission portion of the rate. Given that the PSC

did review the entire rate, and found it just and reasonable in 1998, the Court would likely have assumed that the PSC had jurisdiction over the entire rate and the case could easily have been dismissed on the basis of primary jurisdiction. (See Ordinary Tariff Filing of MCI Telecommunications Corporation to Introduce a General Service Description and Rates for MCI's Maximum Security Rate Plan for the New York Department of Correction, No. 98-C-1765, 1998 N.Y. PUC LEXIS 693 [Dec. 16, 1998].)

Explaining why it rejected Appellants' argument that their claims, (if indeed properly reviewable under Article 78) could not have accrued prior to the PSC's October 2003 determination, the Appellate Division pointed to Appellants' decision not to challenge the PSC determination. (Appellate Division Op. at 4 n. 1.) But Appellants, of course, could not be expected to know whether or not they would need to challenge the PSC determination until *after* that determination was made. Had the PSC continued to assert jurisdiction over the entire rate charged to recipients of prisoners' collect calls and approved that rate as just and reasonable, Appellants could, of course, have challenged that determination through a timely Article 78 proceeding. When the PSC instead disavowed jurisdiction over the DOCS portion of the rate, Appellants became legally entitled to challenge the continuing collection of the unlawful tax in the State Courts.

E. Court of Appeals' Review is Essential Because Walton presents issues of Statewide Importance.

Beyond correcting a conflict within the State regarding the continuing violation doctrine and correcting the Appellate Division's misunderstanding of this Court's prior holdings, Court of Appeals review is also warranted in this case given the seriousness of Appellants' constitutional claims and the profound public interest in and importance of these issues.

The Appellate Division failed to review the merits of Appellants' claims because it misapplied and warped settled statute of limitations law. Not only does its decision upset well-developed precedent, but it insulates important constitutional issues from judicial review. For this reason, Appellants seek the opportunity to present this Court with their serious and properly preserved claims that the DOCS tax violates the New York State Constitution in the following three ways: (1) as a discriminatory tax levied against Appellants by a state agency, without legislative authorization or guidance, it violates Appellants' due process rights (Greater Poughkeepsie Library Dist. v. Town of Poughkeepsie, 81 NY2d 574, 579-80 [1993]); (2) as a practical burden on Appellants' ability to speak to and associate with their family, friends, and clients imposed without any penological purpose, is violates Appellants' freedom of speech and association (Murdock v. Pennsylvania, 319 US 105, 113-14 [1943]); and finally, (3) as it requires Appellants to shoulder a disproportionate share of the burden of funding

the New York State Prison System, it violates their rights to Equal Protection under the law.[6] (Corvetti v. Town of Lake Pleasant, 227 AD2d 821, 823 [1996].)

These claims merit Court of Appeals' review not only because of the serious issues of separation of powers and individual rights involved, but because of the profound public impact of the system Appellants seek to challenge. Public outrage over the continuing harm caused by Respondents' actions is documented in the considerable press coverage garnered by this issue.[7] Moreover, Appellants' continued frustration in securing judicial review of the merits of their claims leads to a clear and perceived absence of even the *appearance* of fairness among the affected community. This situation cries out for relief from this Court.

---

[6] Each claim is explained in more detail in the briefs submitted to the Appellate Division. (See Brief for Petitioners-Appellants, Aug. 15, 2005 at 30 – 44; Reply Brief for Plaintiffs-Appellants, Oct. 22, 2005 at 15 – 22.)

[7] For a few examples of this coverage see, *Albany: Prisoners To Protest Telephone Rates*, N.Y.TIMES, Jan. 25, 2006, at B6; Anthony Cardinale, *Inmate Phone Boycott Alleges Price Gouging,* THE BUFFALO NEWS, Jan. 24, 2006 at B2; Editorial, *Keeping in Touch With a Parent in Prison,* N.Y.TIMES, Jan. 14, 2006 at A14; Annette Dickerson, Op-Ed, *MCI: Cruel & Unusual Punishment,* THE BLACK STAR NEWS, Dec. 8-14, 2005, at 1; Jose Acosta, *Denuncian Monopolio Telefonico,* EL DIARIO, Nov. 17, 2005, available at http://www.eldiariony.com/noticias/detail_archive.aspx?section=17&desc=&id=1278018&Day=17&Month=11&Year=2005, last visited May 2, 2006;Reginald Patrick, *Convicts' Calls Sentence Families to Huge Phone Bills,* STATEN ISLAND ADVANCE, Nov. 17, 2005 at A1; Scott Boyer, *Bound by Prison Phone Bills,* THE POST-STANDARD, Oct. 30, 2005 at A22; *Families Get the Bill*, ROCHESTER DEMOCRAT AND CHRONICLE, Sept. 5, 2005 at 14A; Editorial, *Phone Calls from Prison,* EL DIARIO, June 27, 2005, available at http://www.eldiariony.com/noticias/detail_archive.aspx?section=25&desc=&id=1180701&Day=27&Month=6&Year=2005, last visited May 2, 2006; Eduardo Sunol, *Buscan Abaratar Llamadas de Presos,* EL DIARIO, May 26, 2005, available at http://www.eldiariony.com/noticias/detail_archive.aspx?section=17&desc=&id=1154885&Day=26&Month=5&Year+2005, last visited May 2, 2006; Ana Ledo, *Llamadas Presas,* EL DIARIO, Dec. 21, 2004, at 3; Chloe Mister, *Prisoners' Families Want Break on Phone Charges,* THE LEGISLATIVE GAZETTE, Oct. 18, 2004 at 2.

V. CONCLUSION

The NYSDOCS has been unlawfully taxing Appellants and other collect-call recipients for over a decade. Each year millions of dollars is unlawfully collected from tens of thousands of families, friends and advocates of New York State Prisoners. These populations can ill-afford the burden of subsidizing operation of the New York State Prison System. In the end, communities disproportionately affected by incarceration rates pay a double penalty: loved ones and service providers of prisoners are discriminatorily burdened with funding the prison system; and those ex-prisoners who eventually return to the community do so without the rehabilitative benefit of consistent communication with family and friends outside the prison walls. The resultant higher recidivism rates harm us all. It is long past time for judicial review of the merits of this unconstitutional and unjust scheme.

For all the reasons stated above, Appellants request that this Court grant Appellants' Motion for Permission to Appeal to the Court of Appeals.

Dated: May 4, 2006
New York, New York

Rachel Meeropol
Barbara Olshansky
CENTER FOR
CONSTITUTIONAL RIGHTS
666 Broadway, 7th Floor
New York, NY 10012
(212) 614-6432

Juan Cartagena, General Counsel
Craig Acorn, Associate Counsel
COMMUNITY SERVICE SOCIETY
105 E. 22nd Street
New York, NY 10010
(212) 614-5323

Attorneys for Appellants